THE

FEDERAL CASES

COMPRISING

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

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

BOOK 15

Case No. 8125 — Case No. 8734

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LAVINIA—McCREADY

Case No. 8,125—Case No. 8,734

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FEDERAL CASES.

BOOK 15.

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

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

Case No. 8,125.

The LAVINIA v. BARCLAY.

[1 Wash. C. C. 49.] [1]

Circuit Court, D. Pennsylvania. April Term, 1803.

SHIPPING — BOTTOMRY BOND — NECESSITY FOR FUNDS — RESIDENCE OF OWNER WHERE BOND MADE — ADVANCE OF FREIGHT BY CONSIGNEE — MARINE INTEREST.

1. To make a hypothecation bond, executed by the master of a vessel, valid; the necessity of raising the funds advanced upon it, by such means, must be shown.

2. If one of the owners of the vessel reside at the port where the bond is given, it is not good.

3. The consignee of a vessel is bound to advance the freight, for the supply of the necessities of the voyage, to be so applied by the master.

4. While the freight is in the hands of the consignee, he cannot advance money to the master on marine interest, unless he has been directed by the consignor to appropriate the freight to another purpose.

This was an appeal from a sentence of the district court, in favour of the appellees, the obligees, in a bottomry bond against the ship Lavinia; the property of the assignees of Peter Blight, a bankrupt.

WASHINGTON, Circuit Justice. The material facts in this case appear to be as follows: The Lavinia, commanded by Captain Vicaray, sailed from Philadelphia to London, about the 10th day of January, 1800, with a cargo consigned to H. H. Fentham, the correspondent of Peter Blight. Both ship and cargo belonged to Blight, although to protect them against his creditors in England, he made a feigned sale of the ship to Mr. Reid, one of his clerks, some time previous to her sailing; and the cargo, by the bill of lading, was to be delivered to the order of Reid, upon his paying freight, as per charter party. The whole was a contrivance: there was in reality no charter party; the sale to Reid was a mere pretence to cover the ship from attachments by Blight's creditors; and the cargo was the property of Blight. The nature of this transaction is fully disclosed in a confidential letter from Blight to Fentham, of the 1st of January, 1800. But to give a colour to this plan of deception, a letter was written on the same 1st of January, by Blight, to Fentham, informing him of the interest of Reid in the cargo, and introducing him to Fentham. This was accompanied by another letter from Reid to Fentham, giving directions respecting the disposition of the cargo.

Captain Vicaray was compelled to put into Plymouth, from whence he went by land to London; and on the 8th of February, he delivered to Fentham, (who had previously been declared a bankrupt,) the letters of the 1st of January from Blight and Reid. The contents of these letters were not at that time made known by Fentham to the appellees, (his assignees) but he informed them that the cargo should be delivered to them, which being at first refused, a messenger was despatched by the commissioners to take possession of the ship and cargo, which was done. Finally, the captain consented to deliver the cargo to the assignees, upon certain terms stipulated in an agreement signed by the captain and the assignees, (the libellants,) on the 10th of February. These terms were; that the libellants should apply the nett proceeds of the cargo, after paying freight, commission, expenses of taking and keeping possession, and delivering the said cargo, duties, and all other charges and expenses relating to the said cargo; towards

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

satisfaction of bills or other engagements accepted, contracted, or made by Fentham, on account of Peter Blight. The latter part of this agreement seems to have been intended to conform to the directions of Mr. Blight, contained in his letters to Mr. Fentham, in which he orders the proceeds of the cargo to be applied to the discharge of Fentham's engagements on his (Blight's) account.

Captain Vicaray having, between the time of entering into this agreement and the 19th of May, incurred debts to the amount of £1420. 2s. 6d. for repairs made to the Lavinia, for the outfits of her return voyage, for repairs made at Plymouth previous to her proceeding to London, for the wages and support of his mariners and other incidental expenses; applied to the appellees for money to discharge those debts, who consented to advance for this purpose the above sum of money, upon receiving security for the repayment of the same, by way of hypothecatur of the vessel and freight. A bottomry bond was accordingly executed on the 21st of May by Captain Vicaray, differing from the usual form of similar instruments in no other respect than in its recital, which states "that the captain had incurred sundry expenses, and had delivered the cargo to the assignees of H. H. Fentham, without being able to recover any part of the proceeds of the said cargo, or any freight for the same, and that the obligees had advanced him money for defraying those expenses," &c. On the same day an agreement was signed by the solicitor for the appellees, referring to the bottomry bond, by which he agreed on the part of the appellees, that in case a less sum than that mentioned in the bottomry bond should be paid to the appellees, in London, at any time within six months from the date thereof, that the same should be accepted in lieu of the said bottomry debt. The Lavinia arrived safe at Philadelphia, the port mentioned in the bottomry bond, and after the day of payment stipulated in the bond had passed; but within the six months mentioned in the agreement, this libel was filed, to have satisfaction of the debt due by the bond.

The first point made in the cause was, that the libel was prematurely filed, as the owner of the ship had six months to discharge the ship from the lien created by the bottomry bond, upon paying a smaller sum. Considering the agreement in the light of a defeasance to the bond, I intimated to the bar an opinion in support of this objection, but as the success of this objection could only operate to delay the libellants, I recommended it to the parties to make some accommodation as to this point, which has been done upon terms, so that the objection is waived. The defence upon the merits, raised by the answer, and which has been much pressed in the argument is, that the appellees ought to have advanced from the proceeds of the cargo, the sum necessary for discharging the debts incurred by the captain on account of the ship; or at any rate, so much as the freight of the cargo would have amounted to, if the ship and cargo had belonged to different persons. On the other side it was contended, that the appellees have performed every article stipulated by them in the agreement of the 10th of February. That they have paid all the duties and expenses attending the delivery of the cargo, and have applied the residue of the nett proceeds of the cargo to the discharge of Fentham's engagements for Blight, and that as the ship and cargo belonged to the same person, no freight was due, and consequently nothing on that account could have been demanded by the captain.

The question is, have the appellees a right to recover the debt secured by the bottomry bond, under all the circumstances of this case? The right of a captain to hypothecate his ship for advances made in a foreign port, to enable him to prosecute his voyage, is essential to commerce. But to give validity to such a contract as against the ship, the necessity of raising money in this way, and for the purposes of the voyage, should be made clearly to appear. If therefore one of the owners reside at the port where the expense is incurred, the power of the captain to raise money in this way is not permitted, inasmuch as the necessity does not exist. In like manner the consignee of the cargo at the port of delivery, is bound to advance to the ship owner, (whose agent the captain is,) the freight due on the cargo; which the captain can employ in defraying the expenses necessary for prosecuting his voyage; and therefore the consignee cannot, whilst possessed of this fund, retain the same, and burthen the owner with a new debt at marine interest. This rule as to the consignee may admit of exceptions, and the present case seems to furnish one, independent of the special agreement of the 10th of February. If Fentham had not failed, and the cargo had been received by him, he might fairly have applied the whole proceeds of the cargo to the discharge of his own engagements, entered into on account of Blight, and have justified such an appropriation under the positive and unqualified instructions of Blight, contained in his letters of November and December, directing him so to apply the proceeds of the cargo. I do not say that Fentham was so absolutely bound by these instructions, that he might not have applied a part of those funds to the discharge of the expenses incurred in repairing and refitting the ship, for her return voyage; but I am of opinion that he was under no obligation to do so; and consequently he might have applied the whole proceeds as directed by Blight, and have advanced his own money for the expenses on the security of the ship.

The assignees of Fentham having obtained possession of the cargo under a special agreement with the captain, the question as to them must depend upon the import and fair construction of that agreement. If that agreement left in the hands of the appellees sufficient funds to cover their advances to the captain, they had no right to advance other money upon marine interest. It is not disputed but that the proceeds of the cargo have been disposed of in the manner stipulated in the agreement, except the freight, which it is contended ought to have been applied to the discharge of the expenses for which this bond was given. It is admitted by the appellant's counsel, that no freight is due where the owner of the ship is also owner of the cargo; but it is insisted that the fair meaning of this contract was to pay the same sum, under the name of freight, as the ship would have earned, if in truth different persons had owned ship and cargo. With respect to the facts, important in this part of the case, there is considerable obscurity. It is certain that the appellees had at one time reason to believe that Blight was owner of the ship; because it is proved by Fentham, that they had received all Blight's letters to him dated in November and December, 1799, and had pursuant to instructions contained in one of them, effected an insurance on the ship in the name of Blight. It also appears, that previous to the 10th of February, 1800, the appellees were informed by Fentham, that the cargo, though stated in the bill of lading to belong to Reid, was in fact the property of Blight. These circumstances seem strongly to show, that when the appellees agreed on the 10th of February to except the freight out of the payments on account of Fentham's engagements for Blight, they knew that, strictly and technically speaking, no freight could be due, and that the only way to discharge them from a meditated deception upon the captain, is to construe the contract as contended for by the appellant's counsel; falsity appearing upon the face of the bill of lading in stipulating for freight according to charter party; thus holding out the idea, that whoever the real owner of the cargo might be, he was answerable to some other person as ship owner for the carriage of the cargo.

The mystery in which these transactions are enveloped, will not permit me to say with confidence, that the appellees either did or did not know the real truth of the case. If they were acquainted with it, they were attempting to practise a deception upon the captain, for which they ought not to derive an advantage. But as fraud is not to be presumed, I am not prepared to decide that any was meditated in this case. A disclosure of the confidential letter from Blight, of the 1st of January, would at once have cleared up all the doubts which hung upon this transaction; but the contents of that letter were not communicated to the appellees until after the agreement of the 10th of February, and prior to the advances made by them to the captain. It would seem that this discovery produced an explanation of the agreement of the 10th of February, and that the captain, abandoning his claim to freight, where in reality none was due, consented to raise the money he required, by hypothecating the ship. Whether the captain knew, on the 10th of February, that the ship and cargo both belonged to Blight, is not certain, though it is strongly to be inferred. If he did not, it would seem from the recital in the bottomry bond, that after discovering this to be the fact, he was satisfied that the obligation of the appellees to pay freight was at an end. The recital does not state that the appellees had refused to pay the freight, but that the captain was unable to recover it; implying thereby a want of right to recover it, since it does not appear that any attempt had been made to coerce the payment.

It is contended by the counsel for the appellant, that the costs of the repairs made at Plymouth, and of the seamen's wages and provisions, ought at any rate to be deducted from this bond, because they were the expenses of delivering the cargo, which the appellees were bound to pay. It by no means appears that the cost of the repairs made at Plymouth is to be considered as an expense attending the delivery of the cargo, because it is not pretended even in the answer to the libel that they were necessary to enable the ship to proceed from Plymouth to London; as the captain was directed by Blight to have the ship repaired before her return, it is more probable that those put upon her at that port were done in execution of those instructions, and with a view to the return voyage. As to the seamen's wages and provisions, the way to understand whether they were intended to be included under expenses of delivering the cargo, let it be supposed that the freight had been paid—it would then be clear that seamen's wages and provisions could not have been claimed; because the answer would have been conclusive, that those expenses were chargeable to the freight and to be paid out of it. These expressions were only intended to comprehend wharfage, lighterage, and such petty charges. Sentence affirmed.

LAVINIA, The (HOWLAND v.). See Case No. 6,797.

Case No. 8,126.

Ex parte LAW.

[35 Ga. 285; 6 Am. Law Reg. (N. S.) 410, note.]

District Court, S. D. Georgia. May 31, 1866.

AMNESTY — ATTORNEY ADMITTED BEFORE WAR — PARDON BY PRESIDENT — ACT JUNE, 1865.

An attorney and counselor, duly admitted to practice in a court of the United States, and

practicing therein, prior to the late Civil War, and who has received and accepted a full pardon from the president, and taken the oath of amnesty, may resume his practice in said court without taking the oath prescribed by the act of congress of January 24, 1865 [13 Stat. 424]. Said act, in its application to such a person, is unconstitutional and void.

[In the matter of William Law, involving the subject of the oath to be taken by attorneys and counselors of the national courts, under the act of congress of January 24, 1865 (13 Stat. 424).]

ERSKINE, District Judge. William Law, Esq., produced in court satisfactory proof that, in the year 1817, he was, by the circuit and district courts of the United States for the district of Georgia, duly admitted to practice as an attorney, proctor, solicitor, advocate, and counselor at the bar of said courts, respectively; that he has been since the year of Finigan v. The Parliament, a cause now depending on the admiralty side of this court; that he has taken the oath of amnesty; that upon the promulgation by the president of the United States of the proclamation of May 29, 1865 [13 Stat. 758], he found himself within its thirteenth exception; that he applied to the president for pardon and amnesty under this proclamation, and that he received a grant of pardon and amnesty, and accepted the same, and has filed in the office of the clerk of this court an authenticated copy of said acceptance. Upon these proofs, Mr. Law asked to appear and be heard in behalf of his clients in said cause, without being first required to take and subscribe the oath prescribed by the act of congress approved January 24, 1865 [13 Stat. 424]. The petitioner was informed by the court that this law of congress was imperative, and could not be pretermitted. Thereupon he submitted to the court that the statute was repugnant to the constitution of the United States, and requested permission to show cause against it. This was granted, and during the early part of this term the case was fully and ably argued by the petitioner, propria persona, by Ex-Gov. Joseph E. Brown, of the Northern district, and Thomas E. Lloyd, Esq., of Savannah. The reply on behalf of the government by Henry S. Fitch, Esq., United States attorney, to the arguments of these learned counsel, was replete with legal scholarship.

Prefatory to entering upon the examination of the various questions regularly discussed, so much of the original act of congress of July 2, 1862 [12 Stat. 502], and its supplement of January 24, 1865, as is thought essential to an easier comprehending of the grave and important inquiries now before the court, may be cited. The original act is entitled "An act to prescribe an oath of office, and for other purposes." It declares that "hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the president of the United States, shall, before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation: I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

And the supplementary act provides: "That no person after the date of this act shall be admitted to the bar of the supreme court of the United States, or at any time after the fourth of March next, shall be admitted to the bar of any circuit or district court of the United States, or the court of claims, as an attorney or counselor of such court, or shall be allowed to appear and be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in 'An act to prescribe an oath of office and for other purposes, approved July 2, 1862,' according to the form and in the manner in said act provided," etc.

The point having been made whether an attorney, or counselor at law, as such, holds a public office or place, or is to be regarded as a mere officer of the court,—and there being a diversity of opinion among learned judges on this point,—it is proper that the views of this court should be expressed.

In Lord Coke's time, and prior thereto, an attorney—but not so a counselor—was, it seems, considered a public officer, for he says: "That, in an action of debt by an attorney for his fees, the defendant shall not wage his law, because he is compellable to be his attorney." Co. Litt. 295a. Afterwards, however, Lord Holt (1 Salk. 87) held that he was not compellable to appear for any one unless he takes his fee, or backs the warrant; and so the law has continued in England to this day. In the following cases: In re Wood, Hopk. Ch. 7; Seymour v. Ellison, 2 Cow. 13; Merritt v. Lambert, 10 Paige, 352; Ray v. Birdseye, 5 Denio, 619; and Waters v.

Whittemore, 22 Barb. 593,—practitioners of the law are said to be public officers; but in the first-mentioned case only was the question up for decision. In Byrne's Admr's v. Stewart's Admr's, 3 Desaus. Eq. 466; Leigh's Case, 1 Mumf. 468; In re Oaths to be Taken by Attorneys and Counselors, 20 Johns. 492; Richardson v. Brooklyn City & N. R., 22 How. Pr. 368; and Cohen v. Wright, 22 Cal. 293,—they are held not to be public officers. And it was remarked by Platt, J., in 20 Johns. 493: "As attorneys and counselors they perform no public duties on behalf of the government; they execute no public trust."

Having collated and well considered these state authorities, I am of the opinion that the law is with the negative of the question. Nor, do I think that congress—and it is the intention of the national legislature, as found in the statute, that guides this court—considered them public officers. In article 1, § 6, cl. 2, of the constitution, it is declared that "no person holding any office under the United States shall be a member of either house during his continuance in office." Has it ever been seriously questioned that practicing as an attorney or counselor in the federal courts is inconsistent with holding, at the same time, the office of senator or representative in congress? Neither was there any statutory prohibition to practicing in any of the federal courts until the passage of the act of congress approved March 3, 1863, and the inhibition is confined to the court of claims. 12 Stat. 765. See amendment to rule 2 or supreme court United States, 2 Wall. [69 U. S.] vii.

Two questions—each of importance in the investigation of this case—spring from the preceding conclusion: Whether this court, in admitting Mr. Law to its bar, acted judicially or ministerially; and whether, if his admission was a judicial act, it gave him a property in his profession or office of attorney and counselor.

The constitution ordains that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress may from time to time ordain and establish." Article 3, § 1. Accordingly, at the first session of congress, an act was passed "to establish the judicial courts of the United States." The additional courts established by it are the circuit and district courts; and, notwithstanding these courts are denominated "inferior courts," they are not so considered in the technical use of that term. [Turner v. Bank of North America] 4 Dall. [4 U. S.] 11; [U. S. v. Peters] 5 Cranch [9 U. S.] 135; [Kennedy v. Bank of Georgia] 8 How. [49 U. S.] 586. The district courts of the United States, under their own proper powers, are courts of law and admiralty. The distinctive grades in the legal profession which prevail in England, and to a limited extent in some of the courts of this country, have no substantial recognition in the circuit or district courts of the United States. In these the offices of attorney, proctor, advocate, and counselors are usually combined in one person. The thirty-fifth section of the judiciary act of 1789 [1 Stat. 92] declares "that, in all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law, as by the rules of said courts, respectively, shall be permitted to manage and conduct causes therein."

Directly bearing upon the first of these questions is the case of Com. v. Judges of Court of Common Pleas, 1 Serg. & R. 187. A motion was made for a mandamus to be directed to the judges of that court, commanding them to proceed to the examination of the relator, and, if found competent, to admit him to practice in that court, as an attorney, etc. Tilghman, C. J., said: "If it becomes a question whether the rules have been complied with, the court must decide. Can this be a ministerial act? or, rather, can anything be more decidedly judicial? The right of Mr. Breckenridge has been judicially decided; and, if he is left without remedy by appeal, he is put in the situation of many other persons who have important interests decided in the court of common pleas; for many points of great importance are decided on motion, in which neither appeal nor writ of error lies." And on page 195, Yeates, J., says: "In the admission of an attorney, the court acts judicially, not ministerially." The mandamus was denied. The case of Com. v. Judges of District Court, 5 Watts & S. 272, was a motion for a rule to show cause why a mandamus should not issue to the district court, commanding it to restore the relator. Rogers, J., announcing the opinion of the court, said: "It is ruled in Com. v. Judges of Court of Common Pleas, 1 Serg. & R. 187, that the admission of an attorney by a court of common pleas is a judicial, and not a ministerial, act, and for that reason not the subject of a mandamus. That case is an authority directly adverse to the present application; in principle, there is no conceivable distinction between them. If the admission of an attorney to the bar be a judicial act, "by parity of reasoning, his dismission must be judicial also." In Re Cooper, 8 Smith [22 N. Y.] 67, the first head note is in these words: "In the admission of attorneys and counselors the supreme court acts judicially. The function is not of an executive character." Seldon, J., in delivering the opinion of the court, referring to Ex parte Secombe, 19 How. [60 U. S.] 13, and to other cases, said: "If the removal or suspension of an attorney be, as was held in these cases, a judicial act, it is difficult to see how the admission of an attorney is any the less so; especially where, as here, the court in the act of admission is required to pass, not only upon the sufficiency of the evidence of certain facts, but upon the constitutionality and validity of a statute, and thus to exercise the

highest judicial functions ever entrusted to a court." The case of Secombe was briefly as follows: The supreme court of the territory of Minnesota was empowered by a territorial statute to remove any attorney for willful misconduct. Under this law, Mr. Secombe was removed, and the order for removal set forth the cause. He presented a petition to the justices of the supreme court of he United States, praying a mandamus to the supreme court of the territory, commanding it to vacate the order. The prayer was denied. And Chief Justice Taney, in giving the unanimous opinion of the court, said: "The removal of the relator, therefore, for the cause above mentioned, was the act of the court done in the exercise of a judicial discretion, which the law authorized and required it to exercise." And on page 15 he remarks: "The court, it seems, were of opinion that no notice was necessary, and proceeded without it; and, whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject-matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding." See, also, Ex parte Burr, 9 Wheat. [22 U. S.].

The authorities from which these quotations are taken are in themselves sufficient and conclusive to show, not only that the admission of an attorney or counselor, but likewise his suspension or disbarment, is a judicial act or judgment. The admission of an attorney or counselor, where no fraud has been practiced on the court, gives him the office for life. This privilege, franchise, or right to practice in the court has annexed to it the condition that his character shall continue fair, and that he will not abuse his office by criminal or immoral conduct. As an attorney or counselor, in my judgment, does not hold a public office or place, there is no forfeiture for nonuser; for, if he chooses to practice his profession, he may do so; if not, not. He may withdraw from the practice and resume it at pleasure. He may be raised to the bench, as was the petitioner himself,—and where, from 1829 to 1835, in our highest state judicial tribunal, he presided with great learning and honor,—and return to the bar again. Vide Dormenon's Case, 1 Mart. (La.) 129; Carth. 473.

The second question is whether the petitioner, by virtue of his admission to the bar of this court, has a property in his profession or office. The case of Byrne's Adm'rs v. Stewart's Adm'rs arose on a statute which inhibited persons holding certain offices under the state from practicing in the courts. The chancellor, in his opinion, remarked: "But the objection of most weight is that this act, as it affects the defendant, will deprive him of a right which may fairly be considered a species of property. It cannot be denied that a man's trade or profession is his property, and if any law should be passed avowedly for the purpose of restraining any member of the bar, who is not a public officer, from exercising his profession, I should declare such law void." In 20 Johns. 492, the court say that attorneys and counselors "exercise a privilege or franchise." And Ormond, J., in the case of Dorsey, supra [7 Port. (Ala.) 382], in speaking of the right to practice law, asked: "Can it be seriously contended that it is not a valuable right, and as deserving of protection as property?"

In Re Baxter [Case No. 1,118], decided at the May term, 1865, of the circuit court of the United States for the Eastern district of Tennessee, Trigg, J., construing the act of congress of January 24, 1865, said: "For, if he" (the attorney) "neglects or refuses to take the prescribed oath, he is as effectually deprived of his office, and the fees and emoluments thereof, as he could be by a forfeiture of the same upon regular trial and conviction, by due process of law, for the offenses mentioned. These fees and emoluments," continues the judge, "are as much the property of the attorney as any choses in action can, in law, be the property of any other citizen; and, being property, the law in question, to the extent mentioned, punishes the attorney by a forfeiture of his property." Opinion of the Honorable Connally F. Trigg, Pamph. p. 10 (Memphis, Tenn., 1865). This case and Cohen v. Wright are the only reported cases that I have seen in which this question came regularly before a court. In Cohen v. Wright, the court, Crocker, J., delivering the opinion, in which Norton, J., specially concurred, said: "The right to practice law is valuable to the possessor only. It cannot descend or be inherited, bought or sold, conveyed or transferred, can be divested and destroyed by mere order of the court, is subject to forfeiture by mere loss of moral character on the part of the possessor, and cannot, therefore, in any proper sense, be deemed 'property,' or amount 'to a contract,' in the constitutional meaning of those terms." But the court, in approaching this conclusion, say: "If the right of the attorney to practice law is property, within the clear intent and meaning of the constitution, there is much force in the position that the statute, by depriving him of the right, without a judicial investigation, such as is usual in cases of that kind, violates this provision. Still it is not so clear as to be beyond a doubt, for it can hardly be said that he is deprived of anything when the law leaves it open to him to resume his privileges at any time by taking the oath, a failure to do which is his own fault." In another part of this opinion this oath will be transcribed and referred to.

Comparing the ruling of the United States circuit court on this point with that of the supreme court of California, it will be seen that the views of these courts are opposed; at least, there is some diversity of opinion. The former court shows that an illegal re-

sult follows, by reason of the act of congress depriving the attorney of his office. In other words, if the attorney will not, or cannot, take the oath, the statute itself deprives him of the fees and emoluments becoming due to him while in possession of his office under the sanction of the court. The latter court—if my interpretation is not erroneous—holds that no unlawful consequence follows, because the attorney has no property in his office, in the constitutional sense of that term. That an attorney or counselor has a property in his fees and emoluments by the common law, or by contract, expressed or implied, with his client, and legal modes of recovering the same, is well established. 1 Bac. Abr. "Attorney" (F); 2 Greenl. Ev. § 139; 14 Ga. 87. The first division of the last clause of the fifth article of the amendment to the constitution of the United States ordains that no person shall "be deprived of life, liberty or property without due process of law." This declaration exhibits a summary of all the antecedent precautions contained in this article, and it places property in the same category with the more exalted blessings of life and liberty. Where property is possessed or owned by a person under existing laws, or where he has secured to him, by judicial authority (as in the case of an attorney or counselor), the right or privilege to acquire and own property by his professional skill and industry (supposing this right or privilege of future acquisition and ownership is, under the provision of the constitution, property, and therefore equally protected with property over which the owner has prehensible power), then he cannot be deprived of the property, nor can the right, privilege, or franchise mentioned be extinguished, by the declaration of congress per se. And, if he has forfeited either, the facts must be ascertained by due process of law, before the judicial tribunals of the country. Vide Murray v. Hoboken Land & Imp. Co., 18 How. [59 U. S.] 272.

Whether, when an attorney or counselor is, by the court, regularly licensed and admitted to practice law, this bestows upon him a property in his profession or office, is a question so interwoven with nice distinctions that it is far from being easily resolved; but the present inclination of my mind is that it is not "property," in the sense and import of that word or term as used in the constitution; still, it is a right, privilege, or species of franchise under the immediate sanction and protection of the court. I do not, however, entertain the remotest doubt of the power of congress, acting within the limits of its constitutional authority, to prescribe by law who may be attorneys or counselors of the national courts, their qualifications, mode of admission, suspension, and disbarment.

Seldon, J., in Wynehamer v. People, 3 Kern. [13 N. Y.] 433, gave the following definition of property: "Property is the right of any person to possess, use, enjoy, and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights in relation to it (Bouv. Law Dict.; 1 Bl. Comm. 138; Webst. Dict.)." And, indeed, after a most careful examination of all the authorities within my reach, I have failed to discover a definition of "property" stripped of the attributes of enjoyment and alienation. Grotius, bk. 2, c. 6, § 1, says: "The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself."

The petitioner having brought into court a charter of full pardon and amnesty, granted to him by the president of the United States, and filed with the clerk an authenticated copy of his acceptance of the same, urged that this act of executive clemency relieves him from being required, before he can appear and be heard as an attorney or counselor in this court, to take and subscribe the oath prescribed by the act of January 23, 1865, because, as he says, this pardon and amnesty has restored him to all the rights subject to forfeiture by reason of his having "voluntarily participated in the Rebellion." The constitution (article 2, § 2, cl. 1) affirmatively vests in the president of the United States the sole power to grant reprieves and pardons, except in cases of impeachment. And the very nature and necessity of such an authority in every government arises from the infirmities incident to the administration of human justice. In Ex parte Wells, 18 How. [59 U. S.] 307, Mr. Justice Wayne, in delivering the opinion of the supreme court of the United States, made use of the following language: "Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in the attributes of Deity, whose judgments are always tempered with mercy." Mr. Speed, attorney general of the United States, in his opinion of May 1, 1865, elucidates in a masterly manner the constitutional power of the president to grant "pardon" and "amnesty." And in defining these terms he says: "A 'pardon' is a remission of guilt; an 'amnesty' is an act of oblivion or forgetfulness. They are acts of sovereign mercy and grace, flowing from the appropriate organ of the government. There can be no pardon where there is no actual or imputed guilt. The acceptance of a pardon is the confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow." In a subsequent part of the opinion he remarks: "After a pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits." Afterwards he says: "Persons who have been constantly engaged in rebellion should know distinctly what they are to do, when and how they are to do it, to free

themselves from punishment, in whole or in part, or to reinstate themselves as before the rebellion." In 12 Mod. 119, it is held that, "where a crime is pardoned all the effects and consequences thereof are also discharged."

I will not venture to illustrate or expand these citations, or to discuss this subject at length, but will bring my remarks to a close in a very few words. The language of the act is explicit; and, although it applies to a single order of persons only, it is gratuitous to say that it was the intention of congress to limit the oath to any particular individual or class of this order. The plain words of the act are that it shall comprehend every attorney or counselor upon his admission to the bar of a national court, or who had been admitted previous to the 4th of March, 1865. Yet the effect of the statute is that, while of force, neither pardon nor amnesty avail the petitioner, so as to make him a "new man." 4 Bl. Comm. 402. Was this result—this impossibility—foreknown to congress? Admit that this statute is of the character contemplated by Sir William Blackstone. "But where," says that author, "some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are, in decency, to conclude that this consequence was not foreseen by the parliament, and, therefore, they are at liberty to expound the statute by equity, and only quoad hoc disregard it." 1 Bl. Comm. 91. What is said by the commentator relates to the British constitution; but whether such reason alone, for setting aside a statute, or any portion of it, would obtain in this country, is very questionable. See Iredell, J., in Calder v. Bull, 3 Dall. [3 U. S.] 386; Cochran v. Van Surlay, 20 Wend. 381; City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Parker v. Com., 6 Barr [6 Pa. St.] 507. But vide Ross' Case, 2 Pick. 165; remarks of Parker, C. J. Chancellor Kent (1 Comm. 448): "If there be no constitutional objections to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government." Here we have a written constitution, forming the paramount and fundamental law of the nation, wherein is designated the powers and duties of the national legislature, as well as of the other departments of the government. Therefore it must follow, as a consequence, that none of the co-ordinate branches can infringe the power of any of the others; each division, legislative, executive, and judicial, must remain confined within its own constitutional limits. It was ingeniously argued by one of the learned counsel, ex-Gov. Joseph E. Brown, that this act imposes a penalty which cannot be remitted, and inflicts a punishment beyond the reach of executive clemency. Whether this statute really passes the constitutional boundary, and is subversive of the pardoning power of the president, is a question of so nice and delicate a nature that the solution of it would demand profound consideration; but, as the case before the court does not absolutely require this question to be resolved, it will not be attempted. See Story, Const. § 1498.

On the part of the petitioner it was contended that the act of January 24, 1865 (in which the oath of office of July 2, 1862, may be, by relation, considered as embodied), is in the nature of a bill of attainder. Bills of attainder are statutes enacted by the supreme legislative power, pro re nata, inflicting capital penalties, ex post facto, without conviction, in the regular course of administration through courts of justice. But it has been contended in argument that the person or persons to be affected must be named in the bill; otherwise it is not a statute of this character. Dr. Wooddeson, in his Vinerian Lectures (13 Law Lib. 510), lends a general substantiation to this position. He says: "It has been usual in times of domestic rebellion to pass acts of parliament inflicting the penalties of attainder on those by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed." Acts of attainder were generally framed in accordance with the foregoing extract, but not always so; for there are in the statute books, both of England and of Ireland, many statutes of attainder wherein whole classes of people, in bulk, were attained, adjudged, and convicted of high treason, without being named or otherwise legally designated, and without being called, arraigned, or tried. But a distant allusion above to these bills of attainder—and which, in several material respects, differ from those mentioned by Wooddeson and other writers—is not sufficient to an understanding of the grave question under immediate examination; therefore so much of such of them as may direct to a legitimate legal conclusion, may not inaptly, I think, be transcribed. At a parliament held at Westminster, the statute of 26 Hen. VIII. c. 25 (3 St. of the Realm, 529), was passed. It is entitled "An act concerning the attainder of Thomas Fittzgaralde, Erle of Kildare." It attaints, first, the earl of high treason, and deprives him of his estate, title, etc. Section 2 declares "that all such persons, which be or heretofore have been comforters, partakers, abettors, confederates, and adherents unto the said erle in his said false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged and convicted of high treason." By section 3 it is provided "that the same attainder, judgment, and conviction against the said comforters, partakers, abettors, confederates and adherents, shall be as strong and effectual in law against them, and every of them, as though they and every of them, had be (sic) specially, singularly and particularly named by their proper names and surnames

in this said act." Section 4 enacts, that as well the said earl, as other his said comforters, abettors, etc., "shall have and suffer execution of death for the same accordingly." Section 7 provides that the attainder is not to be "hurtful or prejudicial," if they submit by a presignified day to the king or his lieutenant. This boon is denied in the next bill of attainder against Kildare, his uncles, and adherents. It will therefore be cited to show the terrible severity of some of the attainders. Some two years subsequent to the enactment of the preceding, the 28 Hen. VIII. c. 18, Id. 694, was passed. This statute is entitled "An act concerning the attainder of Thomas Fittzgaralde, and of his v. uncles." First reciting the 26 Hen. VIII. c. 25, it declares that "the said Thomas, late erle of Gyldare, by whatsoever name or names he be called: James Fittzgaralde, Knight; John Fittzgaralde; Richard (Fittzgaralde); Olyver Fittzgaralde; and Walter Fittzgaralde, be attainted, adjudged and convicted of high treason; * * * and that the said Thomas shall loose his title, dignity and estate of earl of Gyldare." Section 2, as in the preceding act, attaints "all such persons which be or heretofore have been comforters, abettors, partakers, confederates or adherents unto said James Fittzgaralde, late erle, or unto his said uncles, and every of them." Section 3: "And be it further enacted, by the authority aforesaid, that the same attainder, judgment and conviction against the comforters, abettors, partakers, confederates and adherents, shall be as strong and effectual in law against them, and every of them, as though they and every of them, had been specially, singularly and particularly named by their proper names and surnames in (the) said act." Section 4: "And be it further enacted by the authority aforesaid, that as well the said Thomas, late Erle, James Fittzgaralde, Knight; John Fittzgaralde; Richard Fittzgaralde; Olyver Fittzgaralde; and Walter Fittzgaralde, now being in the Tower of London, for their said treason, and every of them, as the said comforters, abettors, partakers, confederates and adherents, and every of them, shall have and suffer execution of death for the same accordingly; * * * and shall forfeit their estates," etc. "And that they and every of them, for their said false and traitorous offences, shall loose the benefit, liveration, and privilege of all sanctuaries." Shortly after the passing of this attainder,—and without any trial whatever,—the young Kildare and his five rebel uncles were hanged at Tyburn. Herb. Life & Reign of Hen. VIII. (Ed. 1682) p. 491.

In 1 Bishop Burnet's History of the Reformation (Ed. 1825), pt. 2, p. 243, is printed at length Parliamentary Roll, Act 60, anno regni tricesino secundo, Henry VIII.; and this statute enacts, inter alia, that Thomas, late earl of Essex, "shall be and stand by authority of this present parliament, attainted and convicted of heresy and high treason, and shall be adjudged an abominable and detestable traitor, and shall have and suffer the pains of death." He was executed without more ado. 24 Eliz. c. 1 (Ir. St. at Large, 391), attainted and convicted James Eustace, late Viscount Baltinglas, and his brothers, Edmund, Thomas, Walter, and Richard, of high treason; and, by section 2, prescribed as follows: "That as well the said James, and all others the said offenders and persons before named, as such others who by actual rebellion, and other traitorous practices have committed like abominable and detestable treason and rebellion, and have died and been slain in their said actual rebellion and treasons, or otherwise been, by martial law, executed for the same, and every of them, for said abominable and detestable treasons, by them and every of them, most abominably and traitorously committed, perpetrated and done against your highness," etc., "shall be, by authority of this present parliament, convicted and attainted of high treason. And that as many of the said offenders and persons before named, as be yet in life, shall and may, at your highness' will and pleasure suffer the pains of death as in cases of high treason," etc. Here the living and the dead alike were attainted and convicted. Many other acts might be cited, in which deceased persons were attainted. Let one (and it is the last of the kind, I believe) suffice: 12 Car. II. c. 30, attainted the remains of the great Lord Protector Cromwell, and others who had sat in judgment on Charles the First; and by order of the parliament they were taken out of their graves and hanged in their shrouds. 1 Pepys' Diary (Ed. 1854) 149.

The foregoing citations are amply sufficient to show (among other matters pertinent to this subject) that, to constitute a statute of attainder, it was not necessary to name the persons accused, nor to call upon them to appear and defend before judgment. Other occasional acts of parliament of a kindred nature to bills of attainder,—but which inflict a punishment milder than death,—known as "Bills of Pains and Penalties," will be noticed. Treason itself has, in some instances, been punished by these statutes, as in the case of Lord Monson, Sir Arthur Haselrig, and others, who had been members of the high court of justice. 12 Car. II. c. 11, §§ 38, 39. 19 Car. II. c. 10, adjudged the earl of Clarendon a banished man for life, if he did not return to England within a certain period, and surrender himself for trial. 9 Geo. I. c. 18 (5 St. 477), ordered Bishop Atterbury to depart the realm on or before a fixed day; sentenced him to perpetual exile, and made it felony in him to return; and deprived him of all his offices, dignities, etc. This bill was passed on what was, at the time, a bare supposition that he was conspiring to bring in

the Pretender. Of the nature of bills of pains and penalties, and also closely allied to more than one of the acts of attainder quoted, are those statutes which despoiled certain portions of the people—and in one memorable instance a whole community in gross—of their civil rights, without denominating by name, or other legal special manner, the persons to be affected, or summoning them to appear and defend. 22 Geo. III. c. 31, disfranchised all the electors of Crickdale below a certain yearly rental. By 1 & 2 Geo. IV. c. 47, 8 St. (U. K.) 358, the entire body of voters of Grampound were deprived of their electoral privileges.

In England a distinction is taken between bills of attainder, and bills of pain and penalties; but when carefully noted and compared they will be found akin, and in close fellowship, and the following extract will prove the nearness of their identity. While the bill to inflict pains and penalties upon John Plunkett was pending before the house of lords, it was ordered by that house that the opinion of the judges be asked "whether if John Plunkett shall, after the passing of this bill, be indicted for the treasons of which he stands charged in this bill, he can plead this act in bar of such indictment?" And the judges, through the chief justice, answered "that, if the said bill should pass into a law, he may plead the same in bar of such indictment." 16 State Tr. 365. If the act of congress of January 24, 1865, or any part of it, be in the nature of a bill of attainder, and as such would affect the petitioner, it cannot be deemed any the less so because he is not named in it. And like reason would hold good, if it be technically or in the nature of a bill of pains and penalties. Duer, Const. Juris. Lect. 11. Mr. Justice Story says: "But, in the sense of the constitution, it seems that bills of attainder include bills of pains and penalties; for the supreme court have said: 'A bill of attainder may affect the life of an individual, or confiscate his property, or may do both.'" Story, Const. § 1338, citing Fletcher v. Peck, 6 Cranch [10 U. S.] 138, and 1 Kent, Lect. 19.

Whether the act of January 24, 1865, is in the nature of a bill of attainder, was a point in judgment in the Case of John Gill Shorter and other attorneys, for leave to practice in the circuit and district courts of the United States for the district of Alabama, without first complying with the requirements of said statute, and Busteed, J., in an opinion marked by precision and force, said: "Does it not in fact disfranchise the class of men known as 'lawyers,' under the pain of not taking the oath it prescribes? Is not this the logical and necessary consequence of their refusal? Does it not disfranchise them when it requires them to take the prescribed oath, before they can exercise their vocation? Is it not an assumption by the legislature of judicial magistracy? Is it not 'pronouncing upon the guilt of the party without any of the common forms and guards of trial?'" Decision of the Honorable Richard Busteed. Mobile Register and Advertiser, December 17, 1865 (In re Shorter [Case No. 12,811]).

Bestowing upon this particular question the utmost care and solicitude,—and with unfeigned regret of my inability to discuss it in a manner answerable to its gravity,—I cannot regard the retrospective part of this oath otherwise than as a bill of pains and penalties, possessing the characteristic attributes of a bill of attainder, except the death penalty. In the arbitrary, technical sense, it may not be so called; but when it is so plainly observable that by its own inherent force it effectuates the destruction of the rights of a large order of persons, and is substantially and in effect a bill of pains and penalties, I know no other term in our language adequate to express it. By operation of the legislative will alone, the petitioner is already adjudged,—adjudged without due process of law; and, although forthcoming, not called to trial, according to the general laws of the land; the statute affecting his person as directly and accurately as though he were named in its body,—disenabling him from appearing or being heard as an attorney or counselor, at the bar of this court, and thereby depriving him of the right to acquire and own property, by his professional skill and labor.

But if the conclusion at which I have arrived is erroneous, and the retroactive clauses of the oath do not contravene any portion of the constitution of the United States, still he is encompassed by an impassable barrier during the remainder of his days, or until these supposed obnoxious clauses of the oath are modified or repealed by congress.

The following additional objections were presented: First, that the act of congress of January 24, 1865, is a penal law. This may be disposed of at once. After a careful analysis of this statute, and perceiving, as I apprehend, the manner in which it necessarily affects the party now before this court, it seems clear, on principle and on authority, that the several retrospective divisions of the oath are highly penal. The following cases are referred to in support of this expression: Leigh's Case [supra]; Dorsey's Case [supra]; In re Shorter [Case No. 12,811]; In re Baxter [Id. 1,118]. Agreeing with these authorities, this question may be considered settled, so far as this court is concerned, until such time as the supreme court of the United States shall have decided it otherwise.

The second objection taken was that the act is in violation of so much of the ninth section of the first article of the constitution as declares that no "ex post facto law shall be passed"; and also that it contravenes that clause of the fifth section of the

first article of the amendment to the constitution which prohibits any person from being compelled, in any criminal case, to be a witness against himself, or being deprived of life, liberty, and property without due process of law. In the Case of Leigh, supra, Mr. Leigh applied to the supreme court of appeals of Virginia for admission to its bar. But he was met by a statute of that state requiring "every person who shall be appointed to any office or place, civil or military, under the commonwealth, shall, in addition to the oath now prescribed, take the following oath," to wit: "That he hath not been engaged in a duel by sending or accepting a challenge to fight a duel, or by fighting a duel, or in any other manner in violation of the act entitled 'An act to suppress duelling,' since the passage thereof;" and, further, that he will not be concerned, directly or indirectly, in such duel, during his continuance in office. The point for judgment in this case was whether practitioners of the law were public officers. Tucker, J., was of opinion that they were. But Roane, J., and Fleming, C. J., decided otherwise. Mr. Leigh was admitted without taking the additional oath. The majority of the court, in their opinions, animadverted upon the statute in very expressive terms. Roane, J., said: "It is unusually penal, if not tyrannical, in compelling a party to stipulate upon oath, by the third section, not only in relation to his past conduct and present resolution, but also for the future state of his mind." And the chief justice, after remarking that it was an "oath unknown to the laws of the state, or of the United States," adds: "I cannot but consider it a penal statute, and as such must give it a strict interpretation." Dorsey's Case, supra. On the seventh of January, 1826, the legislature of Alabama passed an act, commanding all public officers, and attorneys and counselors at law, before entering upon the duties of their offices or stations, to take the following oath, to wit: "I do solemnly swear that I have neither directly or indirectly given, accepted, or knowingly carried a challenge in writing or otherwise, to any person or persons (being a citizen of this state) to fight in single combat, or otherwise, with any deadly weapon, either in, or out of the state, or aided or abetted in the same, since the first day of January, 1826;" and that he will not hereafter give, accept, or knowingly carry a challenge, etc. "And any attorney or counselor at law, failing or refusing to take the said oath, shall not be permitted to practice, as such, in any court of this state." The validity of this act came regularly before the court, and a majority of the members decided the retroactive portion of the oath to be unconstitutional and void. Collier, C. J., dissented. Goldthwaite, J., in delivering the opinion, said: "I have given the subject the consideration demanded by its importance as a constitutional question, and am convinced that one part of the oath imposed by the general assembly, usually called the 'Duelling Act,' is inhibited by the constitution. As the oath is not divisible, and is, in fact, unwarranted by the fundamental law, in my opinion, we ought not to require it to be administered." Ormond, J., said: "This is a highly penal law. It excludes, unless its terms are complied with, all persons from practicing as attorneys and counselors at law in the courts of this state." On page 380 he says: "The tenth section of the bill of rights, among other things, provides that no one 'shall be compelled to give evidence against himself, nor shall he be deprived of his life, liberty, or property, but by due course of law.' After a patient and mature examination of the matter, I am of opinion that the requisitions of the 'expurgatory oath, exacted by this law, offend against this portion of the bill of rights."

The case of Cohen v. Wright, supra, arose on an act passed April 25, 1863 [St. Cal. 1863, p. 566], by the legislature of California, entitled "An act to exclude traitors and alien enemies from the courts of justice in civil cases." The third section of the act reads: "No attorney at law shall be permitted to practice in any court in this state until he shall have taken, and filed in the office of the county clerk of the county in which the attorney shall reside, the oath prescribed in this act; and for every violation of the provisions of this section, the attorney so offending shall be considered guilty of a misdemeanor, and on conviction shall be fined in the sum of one thousand dollars." The following is the form of oath to be taken by plaintiffs, defendants, and attorneys, to wit: "I (here insert the name of the plaintiff) do solemnly swear that I will support the constitution of the United States, and the constitution of the state of California; that I will bear true faith and allegiance to the government of the United States, any ordinance, resolution, or law of any state, or territory, or of any convention or legislature thereof, to the contrary notwithstanding; that I have not, since the (here insert the date of the passage of this act) knowingly aided, encouraged, countenanced, or assisted, nor will I hereafter, in any manner, aid, encourage, countenance or assist the so-called Confederate States, or any of them, in their rebellion against the lawful government of the United States; and this I do without any qualification or mental reservation whatsoever." The first and second clauses of the oath state, in plain terms, that the affiant will support the constitution of the United States, and the constitution of the state of California. "The next clause," says Mr. Justice Crocker, in delivering the opinion of the court, "that the party has not, since the passage of the act, and will not aid, encourage, countenance, or assist those now in rebellion against the United States, is a

solemn declaration or pledge,—a declaration that the party has not committed since the passage of the law, and a pledge that he will not commit any treasonable act against the national government. So far as it is a pledge of future good conduct, it is but expressing, in another form, that he will support the constitution, and bear true allegiance to the United States, and to that extent clearly is not opposed to this section," article 2, § 3, "of our state constitution. So far as it is a declaration of past conduct, it seems to go beyond the strict letter of the constitutional oath, and we have, therefore, had a doubt of its validity. It does, however, but carry out the object, design, and spirit of the constitutional oath; and as it is not an unreasonable requirement, being confined to acts since the passage of the law, and does not clearly violate the constitution, we are unwilling to declare it void on a mere doubt." "The act," say the court, towards the close of this branch of the case, "is not retrospective, as it merely requires the party to swear that he has not committed any treasonable act since its passage. It does not relate to any act done before that time."

In Re Baxter, supra, Trigg, J., said: "Now, assuming that Mr. Baxter has been guilty of some one or more of the acts enumerated in the prescribed oath, or rather in the law we are considering (for the oath, as before stated, must be considered as incorporated in the body of the act), the question then arises: Does this law of congress render the act committed punishable in a manner in which it was not punishable when it was committed? Does it affect him, by way of punishment of the act, either in his person or his estate, differently from what it would have done before the passage of the law, and at the time the act was committed? If it does, then, under the authorities before cited, it is an ex post facto law, and, being repugnant to the constitution, is void." And in the next paragraph the judge says: "But this law extends the punishment of the attorney, by virtually depriving him of his office in the courts, and thereby forfeiting whatever of the emoluments of his profession he may be entitled to upon contracts with his clients for services to be rendered, or which have been in part performed and not yet completed. * * * And the effect of the law being thus penal in its consequences, and punishing the attorney for the acts mentioned in the oath, in a manner in which they were not punishable, when committed, then, tested by the principles laid down in the cases of Calder v. Bull [3 Dall. (3 U. S.) 386], and Fletcher v. Peck [6 Cranch (10 U. S.) 138], I am constrained to declare that the act in question is opposed to the constitution of the United States, is ex post facto in its operations, and therefore not a valid law." Phamp. 10.

Busteed, J., in Re Shorter, supra, declared the act to be "highly penal in its general effect." The judge also determined it to be ex post facto, and gave the following cogent illustration in support of his decision on this point: "One of the clauses in the act of congress of the 2d of July, 1862, and which is embraced in the oath required by the act of January 24, 1865, is as follows: 'That I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United States.' This abjuration is not confined to any period. It covers the lifetime of the affirmant. Before the 24th of January, 1865, a British subject could be admitted to all the rights of citizenship in the United States by the oaths of naturalization. Without being naturalized, he might be admitted to the bar of this court upon complying with the rules of the court. But if, during the period of war between the United States and Great Britain, half a century ago, he had held office in the kingdom of which he was a native and was then a subject, he could not comply with the requisitions of this statute, and could no longer exercise his privilege as a member of the bar of this court. The right acquired by his naturalization, and by the rules and orders of the court, would be annulled by a law ex post facto, and for an act innocent, or even praiseworthy, when it was done."

It was likewise the opinion of the court that the statute compelled the party to be a witness against himself. "It is unworthy of the great question," observed the judge, "to say that a man is not obliged to put himself in the supposed dilemma; that all he has to do is not to attempt the practice of his profession in the national courts, and he will not run the risk of testifying to his own guilt. This is the merest and the shallowest sophistry. If he keep silence, he is thereby deprived of a constitutional right; if he speak, he becomes 'a witness against himself.' Judgment of condemnation instantly follows the coerced acknowledgment of guilt, and an act of the legislature is thus made to take the place and exercise the functions of the judicial office. Now, if congress may bring about such a result to a man, is it not doing, by indirection, what it is expressly prohibited from doing directly?" Concurring in the decision of the United States circuit court in the Baxter Case [supra], and that of the United States district court in Re Shorter [supra]; it might seem unnecessary to offer further or other argument on subjects which have already been so satisfactorily treated; but, as the same questions which arose before those tribunals were also discussed here, it is due to counsel that the views of this court be signified. Little, however, can be added.

In Fletcher v. Peck, 6 Cranch [10 U. S.] 138, it was said by the supreme court of the United States that an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. "This definition," says Kent, "is distinguished for its comprehensive brevity

and precision, and it extends to laws passed after the act, and affecting a person by way of punishment of that act, either in his person or estate." 1 Kent, Comm. 409. And the supreme judicial court of Massachusetts, in Ross' Case, say: "Adding a new punishment, or increasing the old one for the same offense, would be ex post facto." 2 Pick. 165. "Ex post facto laws relate to penal and criminal proceedings." 1 Kent, 409. Carefully observing the foregoing definitions, it may be said that an ex post facto law is a retroactive penal or criminal law, and no other.

The design and object of a law is to regulate conduct; to prescribe and fix a rule or guide for it; and, therefore, a law attempting to regulate past conduct undoes itself, and involves an inconsistency, a contradiction, and an absurdity. The attaching of a new or cumulative consequence to a past transaction does not regulate it, for a bygone act is beyond the reach of regulation. Sir William Blackstone says that all laws should be made "to commence in futuro, and be notified before their commencement, which is implied in the term 'prescribed.'" There are several clauses or divisions, in the retrospective portion of the oath. The first is as follows: "I do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof." If a citizen of the United States, or an alien while he or his family and effects are under the protection of the government, voluntarily bears arms against the United States, it is a levying of war against them; and this is treason, the heaviest and most atrocious offense known to the law. It is the sum of all crimes, for it is committed against the duty of allegiance. By observing this clause, it cannot but be noticed that, although it is couched in negative language, it nevertheless implies, affirmatively, that the party taking the oath may have borne arms against the United States within the period during which he has been a citizen. He does not swear positively that he has not borne arms against the United States since he has been a citizen thereof; but, on the contrary, his oath is pregnant with the admission that he has; and so, by implication, he inculpates himself, and at the same moment exculpates himself by testifying that he did not commit it voluntarily; and thus, the facts and the law being blended, he swears to matter of law, or rather to a conclusion of law. It is a well-settled rule, and knows no exception, that an act done from compulsion or necessity is not a crime; but the degree of necessity that will excuse is often, however, a nice matter to decide. Respublica v. McCarty 2 Dall. [2 U. S.] 86; U. S. v. Vigol, Id. 346; 1 Russ. Crimes, 664, 665; 1 Bish. Cr. Law, §§ 441–448; Allison, Cr. Law, 627, 673; 1 Hume, Cr. Law, 50, 51; The Argo [Case No. 516]; The New York, 3 Wheat. [16 U. S.] 59.

It is in evidence, as has been seen, that Mr. Law, the petitioner, fell within the thirteenth exception of the proclamation of May 29, 1865, and that he received and accepted a grant of pardon and amnesty from the president of the United States. This grant was inspected by the court, and declared to be a valid act, and that the recipient ought to have the full legal benefit of it.

Now, if this pardon, in addition to absolving the offence, also restores to him property, not judicially condemned to the United States, by parity of principle, it likewise restores to him his property, or right of property, in the fees and other emoluments accruing to him for professional services as an attorney, proctor, etc. Suppose a member of the bar were indicted for treason, because of his having levied war against the United States, and he brings into the circuit court before which he stands charged a pardon for the offense, and he pleads it in bar, or by other proper mode presents it for judgment on arraignment or during trial; or after verdict, in arrest of judgment; or after judgment, in bar of execution; and his plea or motion is allowed, and he goes without day, —is not this the end? By this, are not all the effects and consequences of the crime discharged, and the party become a "new man"? But, notwithstanding the accused has the benefit of the pardon adjudged to him by the court, yet he cannot be permitted to appear and be heard in any federal court, unless he shall have taken and subscribed an oath (which oath is already quoted). The first clause, as already mentioned, is, in substance, that he has never voluntarily borne arms against the nation since he has been a citizen thereof. In this clause, as is perceived, is inclosed the fact that he did not voluntarily commit the very offense for which he stood indicted, or was arraigned, or tried, or adjudged, and which particular offense he himself, in open court, by his plea, confessed he had committed voluntarily. Surely the exacting of this oath is a punishment. It effectually disenables all who have done any of the acts mentioned in the oath, though they have received and accepted a full pardon and amnesty for the offenses. It is not a mere temporary suspension from the practice, but a disbarment,— a perpetual exclusion from the national courts. The act punishes the party in a manner in which he was not punishable when the act was committed, and in a manner not conformable to the fundamental law of the land. The requirement of this oath brings its retrospective clauses directly within the ruling in Ross' Case. "Adding a new punishment," said the court, "or increasing an old one for the same offense, would be ex post facto."

Applying the principles advanced in the case supposed to this of the petitioner, the same results would be obtained. In these remarks I have touched upon the first clause only,—giving but one example,—but, on examination of the others, it will be found

that the same peculiarities pervade them as are inherent in the first, and that like results flow from them. It may not be wholly foreign to notice the fact that, if the party required to take oath be a native citizen of the United States, every word of the retrospective part of the oath would affect every hour of his past life. 2 Kent, Comm. 258, note; 4 Bl. Comm. 23; Boyd v. Banta, Coxe [1 N. J. Law] 266; 1 Russ. Crimes, 1-10; 1 Bish. Cr. Law (3d Ed.) §§ 460, 461. Recurring briefly to the cases of Leigh and Dorsey and Cohen v. Wright, it will be seen that in Leigh's Case the law only required the attorney to swear that he had not transgressed the statute since "the passage thereof." Notwithstanding this oath may, perhaps, on strict construction, be deemed prospective, yet it was censured in strong language by a majority of the court. In Dorsey's Case, the oath to be taken was, not that the party had not violated the provisions of the statute since its enactment, but from a period thereto. As already observed, a majority of the court decided the retroactive portion of this oath to be unconstitutional and void. In Cohen v. Wright, the court expressed some doubt as to the validity of the oath (quoted in full in the former part of this opinion), "so far as it was a declaration of past conduct." But it remarked: "The act is not retrospective, as it merely requires the party to swear that he has not committed any treasonable act since its passage." And near the close of the opinion it was said: "The law warned him what the result would be, and, although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society."

To require a person, under any circumstances, to take an oath of innocence of crime, even when he had warning by a preordained law,—and warning, it is said, is the end of punishment,—is a rigid exaction. Yet it was cautiously observed by the court, in the case last cited, in speaking of the oath before it, that "it seemed to go beyond the strict letter of the constitutional oath. * * * It, however, does but carry out the object, design, and spirit of the constitutional oath; and as it is not an unreasonable requirement, being confined to act since the passage of the law, and does not clearly violate the constitution, we are unwilling to declare it void on a mere doubt." But the particular question now before this court is of still greater importance, because the oath of expurgation required by the act of congress approved January 24, 1865, goes back and searches the conscience of the petitioner, who is a native citizen, born in 1791, during the whole course of his life, retroacting upon him for a period little less than three-quarters of a century anterior to its passage by congress. That the imposing of the retrospective portions of this is virtually compulsory, and effectually punitive, cannot, in my judgment, be denied. It makes the party swear to a life-long innocence, and to testify against himself; and herein it is also an infraction of the fundamental law of the land. And, while preparing this opinion, I have not been unmindful of the magnitude, nay, awfulness, of the responsibility which devolves upon a court in pronouncing against even a part of a solemn act of the congress of the United States.

Judgment. Upon argument had on said motion of the petitioner, Mr. Law, and after full consideration of the matter of fact and of law involved, it is ordered and adjudged by the court that the act of congress approved January twenty-fourth, eighteen hundred and sixty-five,—so far as it was intended to apply to this case,—is repugnant to the constitution of the United States. Motion granted.

Case No. 8,127.

LAW v. EWELL.

[2 Cranch, C. C. 144.] [1]

Circuit Court, District of Columbia. Dec. Term, 1817.

ATTORNEY AND CLIENT—ACTION FOR FEES—FEES OF COUNSEL—FEES OF ATTORNEY.

1. A counsellor of this court cannot support an action at law against his client for his fee as counsel, although he prove an express promise to pay it.

2. An attorney may recover his legal fee upon assumpsit.

Assumpsit for professional services rendered by the plaintiff [John Law], who was an attorney and counsellor of this court. Besides his legal fees as attorney, amounting to $70, the plaintiff proved an express promise by the defendant [Thomas Ewell] to pay the plaintiff $100 if the defendant should obtain a new trial in the case of Stull and others against him, which was obtained.

Mr. Taney and Mr. Wiley, for defendant, contended that the plaintiff could not recover, in an action at law, his fees, either as attorney or counsel. Not as attorney, because the Maryland acts of 1715, c. 48, par. 10, and 1779, c. 25, par. 17, give a summary remedy by distress and sale; not as counsellor, because, by the common law of England, in force in Maryland, on the 27th February, 1801, the fees of counsel were merely honorary, like those of a physician. In the case of Chorley v. Bolcot, 4 Term R. 317, it was taken for granted (without any question) by the court and counsel that counsellors at law can maintain no action for their fees, either at law or in equity; and this is expressly stated by Blackstone (3 Comm. 28), who refers to the case of Moor v. Row, 1 Rep. Ch. 38, where "the plaintiff, being a counsellor at law, brought his bill for fees

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

due to him from the defendant, being a solicitor, and was to account with him at the end of every term. The defendant demurred. This court allowed the demurrer nisi causa. Demurrer affirmed and the bill dismissed." Blackstone says that the fees of counsel are given, not as locatio vel conductio, but as quiddam honorarium; not as a salary or hire, but as a mere gratuity which a counsellor cannot demand without doing wrong to his reputation (Peake, N. P. 122); and therefore counsellors are never required to give receipt for their fees.

Mr. Key and Mr. Law, contra.

Although a summary remedy is given for the legal fees of an attorney, yet that does not deprive him of his remedy by action at common law. Attorney's fees in England may be recovered in assumpsit. And in 1 Harris, Entries, 117, is a declaration in assumpsit by an attorney at law for the taxable fees. The law, as laid down by Blackstone, respecting counsellor's fees, has never been adopted in Maryland; certainly never as to the services of a physician; and in England they rest on the same ground,—a quiddam honorarium. Whenever there is a moral obligation, and an express promise to pay, the cause of action is complete, and upon the general principles of the common law the action ought to be sustained. This court has decided that an attorney at law is not bound to argue a cause before the jury, as counsel, for the legal attorney's fee.

THE COURT (MORSELL, Circuit Judge, contra) was of opinion that the fee as counsellor could not be recovered at law; and (THRUSTON, Circuit Judge, contra) that the legal attorney's fee could be recovered in assumpsit.

Verdict for plaintiff for $70, the amount of his taxable fees as attorney for the defendant in several suits.

LAW (FOYLES v.). See Case No. 5,024.

Case No. 8,128.

LAW v. LAW.

[3 Cranch, C. C. 324.] [1]

Circuit Court, District of Columbia. May Term, 1828.

EQUITABLE ASSETS—LAND PARTIALLY PAID FOR—JUDGMENT LIEN.

The proceeds of the sale of an equitable title to land, are equitable, not legal assets.

[Cited in Sawyer v. Morte, Case No. 12,401.]

In equity. The case was submitted to the court upon the following statement. Mr. John Law, in his lifetime, bought a lot on Pennsylvania avenue, in Washington, at public sale, to be paid for by instalments. Some were paid, but not all; and although he built upon the lot, and lived in the house, he never received a deed for it; but his assigns will receive one as soon as the last instalment is paid. The question was whether the proceeds of the sale of the lot in the hands of the trustee, under a decree of this court upon a creditor's bill, were legal or equitable assets; and consequently whether the judgment creditors were to be paid before those by simple contract or specialty. See 2 Fonbl. Eq. 401, in notes, and Sharpe v. Earl of Scarborough, 4 Ves. 538.

CRANCH, Chief Judge. We are of opinion that the proceeds of the sale of Mr. J. Law's equitable interest in the lot of land, in the hands of the trustee who made the sale, are equitable, not legal assets, inasmuch as the legal estate never was in him; and therefore it is not like the case of a mortgagor who has an equity of redemption; and who, upon the mortgage-money being paid, is reinvested with the legal estate without any reconveyance from the mortgagee. It is said that a judgment creditor has a right to redeem the mortgage, and by paying the mortgage-money, the legal estate reverts to the mortgagor, so that the judgment is a legal lien upon the lands, subject to the mortgage, as in the case of Sharpe v. Earl of Scarborough, cited above.

THRUSTON, Circuit Judge, absent.

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

LAW (RAY v.). See Cases Nos. 11,591 and 11,592.

Case No. 8,129.

LAW v. SCOTT.

[3 Cranch, C. C. 295.] [1]

Circuit Court, District of Columbia. May Term, 1828.

INSOLVENCY—LIABILITY FOR COSTS IN SUIT PENDING AT TIME OF INSOLVENCY.

An insolvent debtor who has been discharged under the insolvent act [2 Stat. 237], is not liable for the costs of a suit pending at the time of his discharge.

[This was an action at law by the administrator of John Law against Alexander Scott.] The defendant was brought in upon a ca. sa. for costs in a suit which was pending at the time of his discharge under the insolvent act.

THE COURT (THRUSTON, Circuit Judge, doubting) ordered the defendant to be discharged under the tenth section of the act for the relief of insolvent debtors within the District of Columbia.

[See Case No. 12,537.]

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

LAW (SCOTT v.). See Case No. 12,537.

LAW (SLOO v.). See Cases Nos. 12,956-12,958.

Case No. 8,130.

LAW v. STEWART et al.

[3 Cranch, C. C. 411.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

PROMISSORY NOTE—ACCOMMODATION INDORSEMENT—CO-SURETIES—DISTRESS FOR RENT—CONVEYANCE OF GOODS IN TRUST BY TENANT.

1. The maker and indorser of a promissory note made and indorsed to be discounted for the accommodation of a third person, are not in the usual course of mercantile transactions co-sureties; and the indorser is not bound to contribute with the maker in paying the note, unless there was some previous agreement to that effect.

2. Goods conveyed in trust to indemnify the landlord and his indorser against their responsibility upon a note made by the landlord, and indorsed by a third person, for the accommodation of the tenant, and left upon the premises by the consent of the landlord, are not liable to his distress for rent accruing after the deed of trust while the third person remains liable as indorser of the note.

Bill in equity, to charge, with the rent due from Robert Bailey to Mr. Law, the funds in the hands of Mr. Ingle, arising from the sale of goods conveyed in trust by Mr. Bailey to Mr. Ingle, to indemnify Mr. Law (the plaintiff) and General Stewart (the defendant) for any loss they might sustain by reason of certain notes made by Mr. Law, indorsed by General Stewart, and discounted for the use of Bailey. The goods, at the date of the deed of trust, were in the possession of Bailey in Mr. Law's house, of which Bailey was tenant; no rent being then due. After the notes were protested, Mr. Law ordered Mr. Ingle, who was his general agent, to distrain those goods for rent; which he did, and sold them, either under the distress or the deed of trust. General Stewart forbade him to pay the proceeds to Mr. Law on account of the rent, contending that the deed of trust was a prior lien, and the goods were upon the premises with the permission of Mr. Law, for the security of himself and General Stewart against the notes. The proceeds of the sales of the goods were not sufficient to pay either the rent or the notes, much less to pay both. Mr. Law, in his bill, also claims of General Stewart one half of what he, Mr. Law, has been compelled to pay upon the notes; averring that, upon Bailey's request, he, Mr. Law, and the defendant, Stewart, "did consent so to aid the said Bailey," that is, by indorsing Bailey's note. The bank, however, would not discount a note with Bailey's name upon it; but offered to discount a note made either by Mr. Law, or General Stewart, and indorsed by the other. Whereupon a note for $2,000 was made by Mr. Law, payable to and indorsed by General Stewart, and discounted at the Patriotic Bank for the use of Bailey; afterwards a like note for $1,000 was made and indorsed, and discounted at the Bank of Washington, also for the use of Bailey, who made a deed of trust of the goods in the house to Mr. Ingle; which recites, that "whereas the said Thomas Law has become principal in a certain note, for the use of the said Bailey, and Philip Stewart has indorsed, as surety of the said Thomas Law, according to the usual mode of carrying on business at the Patriotic Bank." "And whereas the said Bailey is desirous of indemnifying and saving harmless the said Thomas Law and Philip Stewart against all suits, damages," &c., "in consequence of their becoming principal and indorser, as aforesaid," &c. &c. And the trust is "to pay and indemnify the said Thomas Law and Philip Stewart, the drawer and indorser of the said note," the money, damages, and costs, &c., which they may have paid or suffered, &c., "by reason of drawing and indorsing said note." The answer of Stewart denies that there was any agreement or understanding between him and Mr. Law, to contribute by moieties, or in any other way, in any loss that might be sustained. The answer of Mr. John P. Ingle, which was admitted as evidence, says, that he "cannot say, of his own knowledge, that it was understood between the parties, that the drawer and indorser should be equally responsible for the payment of the notes," but that such was his belief from all that had passed; and that "he always regarded them as joint securities for the debt of Bailey." This is the whole evidence in the cause upon this point.

CRANCH, Chief Judge. The court is clearly of opinion that, under the circumstances stated in the bill and answer, Mr. Law has no equitable claim to have his rent first satisfied out of the trust fund. The deed of trust created a prior lien; and the goods were upon the premises with Mr. Law's consent, for the purposes of the trust. As the trust fund has proved insufficient to pay the notes, the question arises, whether General Stewart is liable to contribute to make up the balance due upon them. According to the usual course of mercantile transactions he is not. In order to make him so, there must have been an agreement, or an understanding amounting to an agreement, to that effect. The bill does not aver any such agreement or understanding, although it prays relief to that extent. The answer denies any such agreement or understanding. This denial is strongly corroborated by the terms of the deed of trust, and by the facts stated by General Stewart, in answer to an allegation in the bill, that, upon one of the renewals of the note, the defendant, Stewart, became the drawer, and Mr. Law the indorser. Throughout the whole deed of

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

trust, the distinct character of drawer and indorser, and of principal and surety, is kept in view. We think, therefore, that General Stewart is not liable to contribution, and that, on both points, the bill must be dismissed, with costs.

Case No. 8,131.

LAW v. UNITED STATES.

[Hempst. 338.] [1]

District Court, D. Arkansas. May 8, 1848.

LAND GRANTS—GRANT TO JOHN LAW—TREATY WITH FRANCE—LOUISIANA PURCHASE.

History of the claim, by James H. Piper, acting commissioner of the general land office:

This was a French claim for four leagues square of land, Paris measure, lying on the Arkansas river, in the present state of Arkansas. The petitioner [Jacques Alexandre Bernard Law, Marquis of Lauriston] represents himself as a subject of the king of the French, resident in the city of Paris, France, and as grandson and heir of John Law, "formerly director-general of the Company of the Indies, and controller-general of the finances of the king of France;" that in A. D. 1718, the Company of the Indies, "to whom the former colony of Louisiana, including that which is now the state of Arkansas, belonged, in full property conceded and granted, to the ancestor of the petitioner, the aforesaid John Law, a tract of land of four leagues square, Paris measure, lying on the river Arkansas, in the now state of Arkansas," &c.; that it was granted allodially, "upon certain terms, and conditions therein expressed, the whole of which terms and conditions," the petitioner avers was performed by said law, "in good faith; and if any part of the same was not by him so performed and observed," which is not admitted by petitioner, he avers that the said Law "was prevented from performing the same by the acts, orders, and interference of the king of France, or regent of the said kingdom, or his or their officers or agents," and relieved, etc. "from any further performance of the same;" that from various accidents, &c., "many of the records and documents of the said company of the Indies have been lost and destroyed, so that the original of the grant or concession aforesaid cannot now be found or produced;" that the papers of Law "have also been dispersed and destroyed;" that "petitioner has caused diligent search to be made for the record of the said grant or concession to the said John Law, in various places, namely, in the archives of the Marine, in France, where the records of the colony of Louisiana were kept, and in the land-offices of the states and of the United States, at New Orleans, and in divers other places where it was natural to expect the same might possibly be found, but without success." The petitioner further avers that, "there was such a grant or concession, that the same was duly and lawfully made," &c., and that he will "prove the nature, contents, and effect of the same, whereof mention is made in the histories of Charlevoix" and others; that Law, in 1719 and 1720, "took possession of the said tract of land by his agents, and settled thereon, fifteen hundred settlers, or other large number, and sent out from France and Germany numbers of others, who died on their passage, and was preparing to send out from L'Orient or some other port or ports in France, a large number of German families, when the same were countermanded and sent back, by order of the regent of France or his officers and agents acting under his authority." The petitioner further avers that the claim, right, and title to which he has succeeded, "is protected and secured by the treaty between the United States and the French republic for the cession of Louisiana; and might have been perfected, and completed, and held good and valid, had the said province of Louisiana continued under the government of France;" that the United States "have sold or otherwise disposed of the whole, or a large part of the said land to various persons," unknown to petitioner, against whom he seeks no relief, "being content to take scrip for the land so disposed of," &c.; that "his claim for the said land has not been submitted to and reported by any of the tribunals constituted by the laws of the United States to decide or report upon land claims, and he prays that the validity of his claim may be inquired into and decided," &c.

In glancing at the history of the events immediately preceding, and about the period of the alleged origin of this claim, we find, that by royal letters patent, dated 14th September, 1712, Louis XIV. granted to Crozat the exclusive commerce of Louisiana with mining privileges (see extract from grant to Crozat, appendix to Clarke's Compilation of Land Laws, p. 944); that in 1717, Crozat's grant was surrendered to the crown (see note to said extract, and Marbois' Louisiana, p. 110); that in August, 1717, during the regency of the Duke of Orleans, in the minority of Louis XV. (Louis XIV. having died in 1715), the Company of the West was created by royal letters patent, in the form of an edict or proclamation, a translation of which is to be found in 1 White, Recep. pp. 641 to 652, inclusive; that by the 5th article of that edict there were granted to said company, "all the lands, coasts, ports, havens, and islands, which compose the province of Louisiana, in the same way and extent as we have granted them to M. Crozat, by our letters patent of 14th September, 1712," &c. It will be observed, that by the 3d article of the said grant to Crozat, mines abandoned three years reverted to the crown; although the 8th article of the edict of 1717

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

appears to have conferred on the Company of the West the power also to grant land in freehold. It appears further, that the private bank which John Law had established in Paris, in 1716, under the auspices of the regent, was supplanted in 1718, by the establishment of the Royal Bank (20 Chambers, Gen. Biog. Dict. p. 88; 7 Enc. Am. p. 453); at the head of the affairs of which, Martin states that the "original projector continued," and "availing himself of the thirst for speculation, which its success excited, formed the scheme of a large commercial company, to which it was intended to transfer all the privileges, possessions, and effects of the foreign trading companies that had been incorporated in France." "The Royal Bank was to be attached to it. The regent gave it letters patent, under the style of the Western Company. From the mighty stream that traverses Louisiana, Law's undertaking was called the Mississippi Scheme. The exclusive trade to China and all the East Indies was afterwards granted to the company now called the India Company." 1 Mart. (La.) 234. By a royal edict, in May, 1719, the privileges of the East India and China Company were merged in the Company of the West, and the latter thereafter required to be designated as the Company of the Indies. "Compagnie des Indes." See Receuil des Edicts, &c., Paris, 1720; also, 1 White, Recep. pp. 655, 657. It appears, then, that the "Compagnie D'Occident," in 1717, succeeded to the rights of Crozat, with extended privileges; that it was connected with the Royal Bank; that in 1719 the India China Company was blended with the Compagnie D'Occident, and the latter took the name, in virtue of the royal edict, of Company of the Indies, and that during its existence this claim is alleged to have had its origin. We find it mentioned by Dupratz, who came on to Louisiana with the colony sent in 1718 by the Western Company. In the History of Louisiana (translation published in London, 1774), after referring to the scarcity produced from "the arrival of several grantees all at once," it is stated as follows: "The grants were those of M. Law, who was to have fifteen hundred men, consisting of Germans, provencals, &c., to form the settlement. His land being marked out at the Arkansas, consisted of four leagues square, and was erected into a duchy, with accoutrements for a company of dragoons, and merchandise for more than a million of livres. M. Levans, who was trustee of it, had his chaise to visit the different posts of the grant. But M. Law soon after becoming bankrupt, the company seized on all the effects and merchandise, and but a few of those who engaged in the service of that grant remained at the Arkansas; they were afterwards all dispersed and set at liberty. The Germans, almost to a man, settled eight leagues above, and to the west of the capital. This grant ruined near a thousand persons at L'Orient, before their embarkation, and above two hundred at Biloxi, not to mention those who came out at the same time with me in 1718," &c. Charlevoix the Jesuit, in his "Journal Historique d'un Voyage de l'Amerique" (3d vol. 4to. p. 411), published in Paris in 1744, after referring to the "Kappas," says, in 1721: "Vis-à-vis de leur village on voit les tristes débris de la concession de M. Law, dont la compagnie est restée proprietaire." Law's scheme had failed, and the grant had been entirely neglected. Mart. (La.) p. 248; also, pages 205, 230, 234, 250, 253. The melancholy wreck of the settlement on Law's grant was seen, according to Charlevoix, in 1721, and he then referred to the company as the proprietor of it. Marbois, in his Louisiana, p. 112, expressly informs us, that "the grant was transferred to the company;" and again, in a note on page 120, it is stated that "on the 11th August, 1728, the company surrendered to the king all its rights against John and William Law," that "this proceeding was founded on a judgment in its favor for twenty millions, the value of which had only been furnished in part," and that "the king accepted the surrender the 3d of September following." More than one hundred and twenty-six years have elapsed since the grant had its origin, and no evidence is found that it was ever before officially brought to the notice of our government through any of its tribunals. Indeed the petition declares that the "claim for the said land has not been submitted to and reported by any of the tribunals constituted by the laws of the United States to decide or report upon land claims."

It is averred, however, that the claim, right, and title to which the petitioner succeeded "might have been perfected and completed, and held good and valid, had the said province of Louisiana continued under the government of France." But it will be recollected that France ceded the colony of Louisiana to Spain by a special act, at Fontainebleau, on the 3d November, 1762, the order for delivery given by the king on the 21st of April, 1764 (appendix to L. L. p. 976), the administration remaining in the hands of the French for some time afterwards (Marbois, 137). It may be suggested, then, that if ever it was designed to revive or perfect the claim in question under the French government, there was ample time for it, when it is considered that the sovereignty of the colony continued in the French government between forty and fifty years after the date of the claim. We hear nothing of this claim during the long continuance in Louisiana of the sovereignty of Spain, who parted with her title to the colony by the St. Ildefonso treaty of 1800, ceding it to the French republic, from whom we acquired it by the treaty of 1803. History, then, which tells us of the origin of the grant, informs us also of the failure of

the enterprise of the grantee; of the disastrous events connected with it; of the transfer of the property to the company, whose rights in the premises, and also its privileges, it seems, were surrendered eventually to the king, whose title to Louisiana, in virtue of successive treaties, finally passed to the United States.

The United States, by S. H. Hempstead, district attorney, answered, denying the matters and things alleged in the petition, and demanding full proof; and the petition was dismissed by the court on the 8th day of May, 1848, for want of prosecution.

Richard Henry Wilde, for petitioners.

Case No. 8,132.

LAW v. WILGEES.

[5 Biss. 13.] [1]

Circuit Court, D. Wisconsin. March, 1851.

WASTE — BILL IN EQUITY TO RESTRAIN — HOLDER OF CERTIFICATE OF SALE—LAND SALES UPON EXECUTION.

1. In Wisconsin, under the Revised Statutes of 1849, the holder of a certificate of sale of land on execution cannot maintain a bill to restrain waste. He has neither title nor right of possession until his deed is issued.

2. The laws for the sale of lands upon execution contain the whole system, and the court cannot supply any supposed deficiencies.

[This was a bill in equity by George W. Law against Samuel Wilgees.]

(1) The chancery jurisdiction to restrain waste has grown up in England, while the statute of Gloucester, 6 Edw. I. c. 13, provides another remedy. 1 Fonbl. Eq. 31, and note; 3 Bl. Comm. 225. (2) Complainant has as good a right to this remedy as a mortgagee, and that they are entitled thereto. Farrant v. Lovel, 3 Atk. 723; Brady v. Waldron, 2 Johns. Ch. 148. (3) The power is discretionary with the court, and it is exercised in cases of waste, when no action at law would lie. Kane v. Vanderburgh, 1 Johns. Ch. 11; Eden, Inj. 201, 202. (4) The statute creates the right, even if it did not exist at common law, and this court may enforce it, if agreeable to general principles of equity. Equity does not get its jurisdiction from statutes; if they give a right it will administer it. Lorman v. Clarke [Case No. 8,516]; Bodley v. Taylor, 5 Cranch [9 U. S.] 191. (5) Courts issue injunctions ex equo et bono where a party is entitled to relief. Authority for their issuance does not proceed from statutes.

Isaac N. Stoddard, for plaintiff. Finch & Lynde, for defendant.

MILLER, District Judge. The plaintiff alleges that he obtained judgment against this defendant, Samuel Wilgees, in the district court of the United States, and thereupon issued an execution and levied on certain lands in his bill described, which he purchased at the sale of the marshal made by virtue of said writ, for the sum of $4,000, and that the said marshal gave him a certificate of sale according to law; that the said lands are pine-timbered lands, and that much of its value consists in the timber; and that he believes that if the pine and other trees should be felled, or cut down, or taken off of said lands, the said lands would not be worth as much by at least $2,000 as if left thereon, but if allowed to stand and remain on said lands under and pursuant to said certificate of sale, the same would be worth the said $4,000 and lawful interest from the time of said sale. The bill then charges the defendant with cutting a large amount of pine timber off these lands and thereby committing waste.

Samuel Wilgees, the principal defendant, in his answer, denies that he is engaged in cutting timber, further than that previous to the day of the sale he had entered into a contract to deliver logs at the saw-mill, and that the timber now being cut is in pursuance of such contract; and he declines to give copies of such contract or explain the consideration thereof; that the lands and premises are worth $10,000 and would be worth that sum if the pine timber were cut off; and that he is using the property in the same manner he did before the sale; and that he is furnishing the logs, etc., for the purpose of raising money to redeem the lands.

The first point to be determined is as to the jurisdiction of the chancery side of this court. There is no doubt of the decisions in the state of New York in favor of the injunction to stay waste at the instance of a purchaser in pursuance of the statute. Boyd v. Hoyt, 5 Paige, 65; Bank of Utica v. Messereau, 7 Paige, 517; Talbot v. Chamberlain, 3 Paige, 219. The statute of that state expressly authorizes an order for that purpose, which may issue in the form of an injunction.

How is it in Wisconsin? By section 100, c. 102, of "Judgments and Executions," Rev. St. 547, "the right and title of the person against whom the execution was issued, to any real estate which shall be sold thereby, shall not be divested by such sale until the expiration of twenty-seven months from the time of sale; and if such real estate shall not have been redeemed as herein provided, and a deed shall be executed in pursuance of a sale, the grantee in such deed shall be deemed vested with the legal estate from the time of the sale on such execution, for the purpose of maintaining an action for any injury to such real estate." It is very clear that the defendant is allowed, by this section, to retain the title and the possession of his lands sold upon execution for the term of twenty-seven months, and also, until the expiration of this term, the purchaser obtains neither the title, the possession, nor the right of possession. But if the property should not be redeemed by the payment of the amount bid and interest, then the purcha-

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

er may obtain a deed, and consequently the right of possession; and by virtue of said deed he may be deemed vested with the legal estate from the time of the sale on the execution for the purpose of maintaining an action for any injury to such real estate. There is no authority given here to the purchaser to maintain a suit for waste until he acquires title, when he may sue for all damages committed from the day of sale.

Section 8, c. 109, of "Waste," p. 582, allows an order against a defendant in an execution or attachment levied on land, restraining him from committing waste on lands so levied upon or attached, at the instance of the plaintiff in such process. By section 9: "Whenever any lands shall be sold on an execution, the person to whom a certificate of sale may be executed by the sheriff, pursuant to such sale, may maintain an action on the case for waste against any person, for any waste committed by such person on the premises after such sale." Before the sale of these premises this complainant could obtain an order as plaintiff in the judgment and execution, restraining the defendant from committing waste; but after the sale he ceased to be such plaintiff and became the person to whom the certificate of sale is given as the purchaser, in pursuance of section 9. This section does not authorize the order, but merely permits an action on the case. The damages recoverable by virtue of this section are in the nature of a penalty. Why the legislature made the distinction in the two sections I cannot imagine, for the holder of the certificate should be as much entitled to an order to restrain waste as the plaintiff in the judgment or execution, but we must take the law as it is. Without this section 9, the purchaser could not proceed at law for waste or injury to the freehold until he obtained his deed. This section allows him some redress in the meantime. The two laws are not inconsistent, but are cumulative of the remedies such as they are.

In the absence of statutory authority can the holder of the certificate of sale put in motion the chancery side of this court? It is contended that section 17 of chapter 100, of "Waste," confers this power. That section provides that "the circuit court for each county shall have equity jurisdiction of all matters concerning waste in which there is not a plain, adequate, and complete remedy at law; and may grant injunction to stay and prevent waste." This section confers upon the circuit court the jurisdiction of a court of equity in all matters concerning waste, in which there is not a plain, adequate and complete remedy at law; but it does not say who may claim this authority of the court. It does not expressly authorize either a judgment creditor or attaching creditor, or the holder of a certificate of purchase of lands at sheriff's sale. Then we must see who are entitled to put this side of the court in motion. In the absence of legislative authority, the complainant in the bill for injunction to restrain waste ought to show a good title to the land, and he must either have the possession, or the undisputed right to possession. Storm v. Mann, 4 Johns. Ch. 21; Hough v. Martin, 2 Dev. & B. Eq. 379, 385; Loudon v. Warfield, 5 J. J. Marsh. 196; 1 Fonbl. Eq. 31, note p. Now it is well settled that a judgment creditor or attaching creditor has no title to the land. Neither has the holder of a certificate of purchase any title or right to the possession of land until he obtains his deed, after the expiration of the time for redemption. They do not stand in the light of either mortgagees or mortgagors. A mortgagee is in the nature of a purchaser, and the waste lessens his security, and the mortgagor is the legal owner of the land. The land described in a mortgage is specially appropriated by the voluntary act of the parties as security for a certain debt, which equity will preserve and protect, while a judgment or attaching creditor is pursuing the lands adversely to the defendant, and the purchaser is considered a mere volunteer, without the request or contract of the defendant, and equity leaves both to their legal rights and remedies. The laws for the sale of land upon execution must contain the whole system within themselves, and the court cannot legislate to supply any supposed defects therein. Where relief in equity cannot be granted upon principles controlling and regulating the exercise of equity jurisdiction, the section referred to does not vest jurisdiction in the circuit courts. As the statutes have not authorized this proceeding, either at law or in equity, the injunction is not allowed.

NOTE. For the present statute concerning waste, which has taken the place of the one upon which this decision was founded, though following most of its provisions, see 2 Tayl. St. Wis. (1871) 1695, § 9. For the present statute, as to redemption from sales of lands under execution, consult same volume, page 1557 et seq. For a full discussion of the subject of injunctions to stay waste, with numerous citations of authorities, consult High, Inj. c. 9.

LAW, The GEORGE. See Cases Nos. 5,336 and 5,337.

LAWHEAD (UNITED STATES v.). See Case No. 15,570.

LAWRASON (MASON v.). See Case No. 9,242.

Case No. 8,133.

In re LAWRENCE et al.

[10 Ben. 4;[1] 18 N. B. R. 516; 26 Pittsb. Leg. J. 143.]

District Court, S. D. New York. June 19, 1878.

ACT OF BANKRUPTCY — VOLUNTARY ASSIGNMENT DEFECTIVE AS TO ITS EXECUTION.

1. Creditors of a firm, composed of five persons, filed a petition in bankruptcy against the firm. On the return day certain other creditors appeared and moved for leave to intervene and con-

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

test the adjudication, on the ground that the assignment was void, being executed by only three of the five partners personally, and in the firm name by one partner, signing as attorney in fact, but, as the moving creditors alleged, not having any power of attorney from the firm authorizing him to execute the assignment: *Held*, that, as it was not alleged that the other partners did not consent to the assignment, the motion must be denied, for the making of the assignment with their consent would be an act of bankruptcy, even though the execution of the assignment were defective.

2. The levies of execution by the creditors applying to intervene after the filing of the petition gave them no greater right to intervene than creditors at large have.

[In the matter of James Lawrence and others, alleged bankrupts.]

F. N. Bangs, for the motion.
Geo. Bell and E. G. Bell, opposed.

CHOATE, District Judge. Petition by creditors against five partners constituting the firm of Henry Lawrence & Sons. The act of bankruptcy alleged in the petition is the making of a voluntary assignment by the firm for the benefit of creditors. Upon the return day of the order to show cause certain creditors of the alleged bankrupts, not being petitioning creditors, appear and move for leave to intervene and contest the adjudication, upon the ground that the voluntary assignment was void, being executed by only three of the five partners personally and in the firm name by one of the partners signing as attorney in fact for the firm; and the affidavits of the creditors moving to intervene allege on information and belief that the partner signing for the firm "never held any power of attorney from the firm or any member thereof empowering him in the name of said firm to make or execute said pretended assignment."

The moving creditors have since the filing of the petition prosecuted to judgment actions against the alleged bankrupts commenced before the filing of the petition, and they claim to have made levies on their executions issued under said judgments.

The motion to intervene must be denied. The moving creditors do not make a case of fraud or collusion to procure an adjudication to which the petitioning creditors are not in fact entitled (In re Hopkins [Case No. 6,684], decided 19th June, 1878). Notwithstanding what they allege in regard to the want of a power of attorney, the voluntary assignment may be an act of bankruptcy. The defective execution of it, if defective, does not prevent its being an act of bankruptcy. In re Mendelsohn [Id. 9,420]. It is entirely consistent with all the facts alleged in the moving papers that the two members of the firm not signing consented to the making of the assignment. It is not alleged that they did not consent. And if they consented, it is plain enough that the assignment was an act of bankruptcy, even if defectively executed.

As to the claim of the creditors moving to intervene, the fact that they have levied on the property of the alleged bankrupts since the filing of the petition gives them no rights as against the petitioning creditors different from that of creditors at large. Vogel's Case [Id. 16,981]. Motion denied.

[This case was afterwards heard by the court upon the application of certain judgment creditors of the bankrupts to be paid out of the proceeds of real estate sold by the assignee under order of the court. The application was granted. 5 Fed. 349.]

LAWRENCE (AMORY v.). See Case No. 336.

LAWRENCE (BANK OF COLUMBIA v.). See Case No. 872.

LAWRENCE (BELMONT v.). See Case No. 1,280.

LAWRENCE (BOVING v.). See Cases Nos. 1,711 and 1,712.

Case No. 8,134.

LAWRENCE et al. v. BOWMAN et al.

[1 McAll. 419.] [1]

Circuit Court, N. D. California. July Term, 1858.

INJUNCTION—TO RESTRAIN PROCEEDINGS AT LAW—NOTICE—RULES OF COURT AS TO ISSUING—UPON WHAT TERMS GRANTED—WHAT PROCEEDINGS ENJOINED.

1. Injunctions granted in this court are all special, and grantable only on notice.

2. Due notice is not susceptible of a fixed definition, and must be construed in each case by its circumstances.

3. Under ordinary circumstances, one day's notice is too brief; but there is no fixed limit as to time.

4. Every court of equity has power to mould its rules to meet the purposes of justice.

5. It is not indispensable that a bill for an injunction should contain a prayer for discovery.

6. In the English chancery, where common injunctions are issued, unless special application be made, only proceedings at law subsequent to the judgment are enjoined. Aliter in this country.

7. The form of an injunction in England included a provision that the party at law might proceed to judgment and execution. Aliter in this country.

8. A party who applies for an injunction to enjoin proceedings at law, is not bound to confess judgment at law, as pre-requisite to his obtaining relief in equity.

The bill in this case was exhibited to obtain an injunction to enjoin the trial of a case on the common-law side of this court. A motion is now made on the bill, exhibits, and affidavits, for the issue of an injunction. The facts as set forth in the bill, and the objections urged against the granting of the injunction, are stated in the opinion of the court.

Hall McAllister and E. L. Gould, for complainants.
Johnson & Rose, for defendants.

McALLISTER, Circuit Judge. The bill in this case is exhibited for the purpose of ob-

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

taining an injunction to stay the trial of an action of ejectment pending on the common-law side of this court. The trial of the action at law was fixed, by consent of parties, for the 24th day of the current month. On the day previous, an order was obtained from the judge to be served on the plaintiffs, to show cause why an injunction should not issue to stay the proceeding at law until complainant could obtain a hearing on the merits of his bill. As the trial at law was fixed for the succeeding day, and as the judge could grant no injunction without previous notice to the adverse party, he was obliged to act upon the idea that under no circumstances could an injunction issue in any case when applied for on the day preceding the trial of the cause sought to be restrained, and thus leave the complainant without remedy by injunction. The facts stated in the bill on a motion for an injunction, are to be taken as true; and the bill charged gross fraud of a character which it was alleged could not be availed of by the complainant in a court of law. On the following day the parties appeared, and among other grounds taken against the motion by defendants' solicitor, was the briefness of the notice and the laches of complainants in not moving at an earlier moment. The court acquiescing in the propriety of the suggestion as to the briefness of the notice, proffered an extension of time, which was declined by defendants' solicitor, who proceeded to the argument; and the first ground taken against the motion was the laches of the complainant; and the 35th rule of this court was cited as a reason for the denial of this motion. That rule prescribes that special injunctions shall be granted only on due notice to the opposite party. No fixed rule can be recognized as to what shall constitute "due notice." "Due" is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances. Referring to rules generally, in Poultney v. City of Lafayette, 12 Pet. [37 U. S.] 472, the court say, "Every court of equity possesses the power to mould its rules, in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject." These views apply to all the rules of a court, and if the power to mould them is given, it certainly possesses that of construing them for similar purposes. In ordinary circumstances, the application for an injunction to stay a proceeding at law fixed, as this was, by consent of parties for trial on the following day, will be viewed with suspicion. But in this case there are circumstances which arrest the attention of the court. The parties are differently represented in this case than in the action of law. The solicitors for the respective parties before this court, are not those who are the attorneys of the parties in the action of ejectment. The latter evidently intended to place their defense in a court of law on equitable grounds. Those recently engaged for complainants fear to risk that movement, and now seek the interposition of a court of equity. The question to be decided has never been before this tribunal, and it has been understood that there have been conflicting decisions upon it in the courts of this state. The wavering policy indicated by a change of counsel, produced by such a condition of things disaffirms willful laches by the party, and is a circumstance which the court, in exercising its discretion, should take into consideration, particularly where its action is to affect seriously the rights of the party. If the motion be granted, the injury to defendants would be slight; as the court will give a hearing on the merits at once; if desired by them. I cannot think then, that the delay in filing this bill in view of the circumstances should, per se, prevent all inquiry into the alleged fraud.

I shall proceed to investigate the other objections made to the motion. It is urged, that the bill sets forth no equity; that it prays no discovery; that it admits the legal title of plaintiff, and that defendant only avers an equitable right. It is also urged that by the bill and exhibits, and showing of complainants, the defendant is entitled to judgment and costs, and such damages on an issue to be had which he may recover at law; and that in the ordinary course of chancery proceedings, no injunction can issue save upon the terms that the complainant (defendant in the ejectment suit) suffer a judgment to go against him for the land, and upon the further condition of furnishing bond with sufficient security for the costs and such damages as may be recovered on the issue. These objections involve following propositions, and may be considered together. 1. There is no equity in the bill to restrain the prosecution of the suit at law, because no discovery in, and of it is asked, and the legal title in defendant is admitted. 2. That if an injunction is granted it must be upon terms that the defendants at law submit to a judgment for the land with costs.

By section 254 of the practice act of this state it is enacted, "that an action may be brought by any person in possession by himself or his tenant of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest." The complainants have filed a bill to determine the adverse claim of defendants, who have asserted one in the most emphatic manner, by bringing an action at law for the recovery of the land. The fact that the assertion is made in the form of an action at law, does not deprive complainant at

any time after the claim is asserted, of the right of vindicating his claim in opposition to the adverse one, if the circumstances are such as to authorize this court acting as a court of equity to take cognizance of the case. This section of the practice act is but a reiteration of general principles of equity, and is not without influence on the action of this court in the present case. The language of the statute is unrestricted. The right of a party in possession is not defeated by the fact that the adverse claim is being asserted by an action. The complainant comes within the very letter of the law; and it is doubtful whether any course of chancery practice would authorize this court to consider the fact that the adverse claim was pending in the form of an ejectment suit, a reason to compel complainant to submit to a judgment at law, before he could have extended to him any equitable relief. It may be urged, that the statute of a state cannot affect the jurisdiction of this court, in the exercise of its equity jurisdiction. But this question has been before the supreme court of the United States. In the case of Clark v. Smith, 13 Pet. [38 U. S.] 195, the legislature of Kentucky, had passed a law, the only difference between which and the statute of this state is, that the former authorized one who had both the legal title and possession of real estate, to institute a suit, and described the decree to be made in case of a determination against the adverse claim; whereas the latter gives the right to any one who is in possession, and prescribes no form of decree. The reasoning of the court in that case relative to the statute of Kentucky, is applicable to that of this state. "Kentucky" (say they) "has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country." "The state legislatures certainly have no authority to prescribe the modes and forms of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued as it is in the state courts." [Clark v. Smith] Id. 203. Now, if this suit had been instituted in a state court, not controlled by chancery proceedings, is it probable such tribunal, had it deemed the complainant entitled to the relief asked for, would withhold it until the party would submit to a judgment in the other suit? Apart from all foregoing considerations, arising out of the statute, we will inquire whether the proposition urged by counsel, that, according to the course of chancery proceedings, before an injunction can issue the complainant must submit to judgment for the land and costs, be correct. The authorities cited by defendant's solicitor, are two cases from the Irish chancery and exchequer courts, one from the English chancery, and two decisions from the state of New York. The two cases from Ireland are cited from Chit. Eq. Dig. p. 2265, §§ 7, 11. The reports from which the notices are taken, are not accessible. These authorities, similar to most insertions in digests, are without a statement of the case, or of the reasons of the court, no authorities cited, and depend for correctness on the conclusions of the digester. Lord Mansfield has said, "There is no cause of greater ambiguity than arguing from cases without distinguishing accurately the grounds upon which they are decided." In every case of a digest cited, the accuracy of the digester has to be relied on. The unreliable character of such authority, if such it can be called, forbids confidence. From what can be gathered from the digest in the first case, that of Home v. Thompson [1 Sausse & S. 615], some fact not mentioned in the case must necessarily differ it from this; for instance, it appears in that case, that if the injunction had been granted the defendant would still have had a trial at law. In the second case,—Redmond v. Goodall [2 Jones, 812],—the digester states, generally, that an injunction to restrain proceedings in ejectment, until the hearing will not be granted except the defendant give a complete judgment at law; and when defendant refused to do so, the injunction was refused. What were the facts, or grounds of decision, are not stated. Was the decision founded upon a rule of court similar to one existing in New York, or based upon the general course of chancery proceedings? Nothing is said upon the point. In the English case (Barnard v. Wallis, 1 Craig & P. 85) cited, three questions were involved in the defense,—two purely equitable and one legal; a common injunction having issued, motion was made to dissolve it, which was granted. This case belongs to a peculiar class, where the defense is composed of both legal and equitable questions, referred to by Daniel, in his treatise on Equity Practice (page 1844). "Sometimes (he says) the question between the parties depends partly upon a legal title, and partly upon an equity which will arise only in the event of that title being decided in one way. In this case, the practice of the court is, to require that the party applying to the court for its interposition, should admit the legal title of the other party, as in the case of giving judgment in ejectment." The case of Barnard v. Wallis belongs to such class of cases, and is totally dissimilar from this. It is true, that the judge, in his opinion, by way of recital alludes to the giving judgment in ejectment suits, as a common case. It was for this reason, perhaps, that the case was cited by counsel as authority. The next case relied on, is that of Carroll v. Sand, 10 Paige,

298; but this was decided with express reference to the 33d rule of chancery in New York. Even that rule contains a proviso, that a party may make special application to the court to restrain all proceedings at law after issue joined. The last case cited is Ham v. Schuyler, 2 Johns. Ch. 141. This is the only authority which sustains the proposition. The whole is comprehended in eight lines, and a single authority cited, that of Hinde's Chancery. Still, it is the opinion of an eminent chancellor, entitled to profound respect; and if the doctrine enunciated had not been repeatedly repudiated, would control the action of this court. This decision was made more than forty years ago, and rests upon an ancient text-writer, who wrote prior to the time of Lord Eldon, who was the founder of the modern practice of injunction. Lord Campbell has said, "Almost all the principles upon which this relief is granted or refused, the terms and conditions upon which it is dissolved, continued, extended, or made perpetual, are to be found in Lord Eldon's judgments alone." 7 Lives of Chan. p. 496. A case was decided in Virginia which enunciates doctrines similar to that announced by Chancellor Kent in above case, which has not been brought to the notice of this court. Warwick v. Norvell, 1 Leigh, 96. The only authority cited is 1 Vern. 120; an ancient authority, obnoxious to the objections heretofore stated as to Hinde's Chancery.

Having commented on each of the authorities cited for this motion, a reference will be made to some which announce a different doctrine. Eden, in his treatise on Injunctions, states the general rule "that injunctions to stay proceedings at law, are granted either before or after the commencement of the action, or to stay proceedings, or after verdict to stay judgment, or after judgment to stay execution, &c." The court, he says, are unwilling to interfere where it "appears, the plaintiff has lain by till after a verdict has taken place, if it is necessary for the obtaining a fair decision. Eden, Inj. (by Waterman) 68, 69. In Hoffman v. Livingston, 1 Johns. Ch. 211, an injunction had been issued to stay proceedings at law, for in that case, the defendant moved to be permitted to go to trial for a portion of the lands not claimed; and the motion for a dissolution of the injunction quoad hoc was refused. In Pyke v. Northwood, 1 Beav. 152, the same doctrine is enunciated. In Apthorpe v. Comstock, Hopk. Ch. 143, the bill was filed for relief against a deed of conveyance of lands alleged to be fraudulent, and for an injunction to restrain the prosecution of certain actions of ejectment brought for the recovery of the lands. No discovery was prayed. Neither plaintiff nor defendant had any knowledge regarding the early transactions out of which the alleged fraudulent deed arose. This case was decided in 1824; and it enunciates the principle that it is a proper head of equity jurisdiction to relieve against fraudulent deeds, and that an injunction, in such a case, is properly auxiliary to the relief sought, as this court takes the whole controversy into its own hands, to prevent double litigation, and give more effectual relief than can be given at common law. In the case of State v. Reed, 4 Har. & McH. 6, 8, 10, 11, ejectment was enjoined before trial, and made perpetual on the hearing. No discovery was prayed in the bill. The next case is that of Duke of Beaufort v. Neeld, decided in the house of lords, on appeal from the chancellor, in the year 1845. Separate opinions were delivered by Cottingham, Brougham, and Campbell. The case is reported in 12 Clark & F. 249. In that case, the Duke of Beaufort was legal owner of the premises; but Mr. Neeld was in possession, obtained under circumstances which gave him a mere equity against the duke; who brought ejectment to recover possession. Mr. Neeld filed his bill to enjoin the further prosecution of the suit. Injunction was granted; but after answer filed, which denied the equity of the bill, the injunction was dissolved by the vice-chancellor, and the ejectment was proceeded in by the plaintiff at law. An appeal was taken from the vice-chancellor to the chancellor, who reversed the decision. An appeal was taken to the house of lords, who decided the vice-chancellor was wrong. Lord Campbell, in delivering the opinion, uses the following language: "With regard to the first injunction (the one issued to restrain the ejectment-suit before trial), I must own that I never entertained a doubt, and down to this moment I have not been able to learn on what ground the vice-chancellor of England dissolved that injunction." Id. 284. In that case, the bill prayed for no discovery in aid of the suit at law. The last authority to which the court will refer, is the case of Gaines v. Nicholson, 9 How. [50 U. S.] 356. The bill in that case, is set out in totidem verbis. No discovery was prayed. The case was an appeal from the decree of the circuit court, U. S., in Mississippi, granting a perpetual injunction to enjoin a pending ejectment-suit on the common-law side of the court. The supreme court admit the regularity of the proceeding. They say, "And, undoubtedly, if the facts thus charged have been established by the pleadings and proofs, a right to such equitable interposition for the relief sought has been made out, and the decree of the court should be upheld." After looking into the pleadings and proofs, they concluded that the charge of fraud had not been made out; and on that ground alone, reversed the decision of the court below. This court has entered more minutely into the authorities in this case by reason of the large interests at stake, and because there has been some conflict in the authorities.

Against the decisions invoked in favor of this motion, from the Irish chancery and exchequer, from New York, and a case from the English chancery, we find two decisions from New York, one from Kentucky, two from

England,—one of them in 1845, by Cottingham, Brougham, and Campbell,—and one by the supreme court of the United States. The weight of authority is decidedly against the principle embodied in the present motion. The court can, therefore, consult the spirit and policy of the statute of this state, without violating any of the rules of chancery proceedings.

The remaining question is, does this case present such equitable claim as to call for the interposition of this court? In England, common injunctions are those which issue of course. The special, are issued only on due notice, and founded on the circumstances of each case as they arise. 3 Daniell, Ch. Prac. 1810. The distinction between them does not exist in the federal courts. In England, the injunction only operates upon the judgment and execution, consequently if a party seeks to stay proceedings at common law before trial, he must make special application on previous notice. The form of a writ of injunction in England always included a provision that the party at law might proceed to judgment and execution. In this country, on every application for an injunction the court has to decide whether the injunction shall issue, and to what extent. In the case at bar, complainants allege they are tenants in fee as tenants in common with the heirs of Stephen Smith, and are in possession of the land; that the defendants have instituted an action at law to eject them from the possession, upon a documentary title they allege to be fraudulent for causes of which they can only avail themselves in a court of equity. Now, all these allegations, until denied, must on this motion be considered as true. They certainly constitute a case which entitles the complainants to the equitable interposition of the court. An injunction must therefore be issued in accordance with the prayer of the bill.

LAWRENCE (BRISSAC v.). See Case No. 1,888.

LAWRENCE (CLARK v.). See Case No. 2,827.

LAWRENCE (COGGILL v.). See Case No. 2,957.

LAWRENCE (CORNETT v.). See Case No. 3,241.

Case No. 8,135.

LAWRENCE v. CUPPLES et al.

[9 O. G. 254.]

Circuit Court, D. Massachusetts. Oct., 1875.

COPYRIGHT—GENERAL PLAN AND ARRANGEMENT—ACCIDENTAL RESEMBLANCES.

In an action for infringement of a copyright, the question to be decided is whether the defendants have used the plan, arrangements, and illustrations of the complainant as the model of their own book, with colorable alterations and variations only to disguise the use thereof, or whether the work is the result of their own labor, skill, and use of common materials and common sources of knowledge, and the resemblances are either accidental or arising from the nature of the subject.

[Cited in Bullinger v. Mackey, Case No. 2,127.]

[This was a bill in equity by Samuel E. Lawrence against Joseph E. Cupples and others, for the infringement of a copyright.]

C. D. Moore, for complainant.

O. S. Knapp and C. J. Brooks, for defendants.

SHEPLEY, Circuit Judge. Complainant is the publisher of a book called "The Advertiser and Collector's Chart," which he has duly copyrighted in accordance with the provisions of the act of congress [16 Stat. 212], and which he has the exclusive right of publishing. The publication is a monthly chart, published each month for the purpose of advertising generally, and also contains, in a tabular form, a list of debtors whose bills cannot be collected after due effort, alphabetically arranged, giving the names and address of the debtor and creditor, the amount of the claim, and in some instances the discount at which the claim will be sold for cash. The bill of complaint alleges that the defendants have published a book entitled "The New England Mercantile Guide," which is a copy of and from the tabular list above described, and prepared by Samuel E. Lawrence the complainant, and that it adopts the plan of Lawrence's work in arranging the names and residences of debtors and creditors, and in stating the amounts, and in the objects and purposes of said arrangement. The answer denies that the book published by the defendants is a copy, in whole or in part, of "The Advertiser and Collector's Chart," and denies that the complainant can have any valid copyright for any arrangement of the names of debtors and creditors, or any other classes of persons, or for stating amounts, or any other purposes of arrangement. The publication of the complainant is clearly one of that class embracing dictionaries, directories, catalogues, maps, and similar publications where the same sources of information being open to all, the author, by his copyright, only protects himself from a piracy of his own labors by a copy from his publication, but cannot exclude others from publishing similar maps or charts from their own surveys, or similar directories or catalogues, the result of their own labors and compilations, without copying the copyrighted publication or availing themselves of the labors of the author or compiler. Although the plan or arrangement of a book may be secured to the author if it be the product of his own genius, there does not seem in this case to be anything in a mere list of debtors and creditors, with their residences, and amounts and value of debts, which possesses any such novelty of plan or arrangement as would preclude any other person from making and publishing from his own independent sources of information similar lists.

The question is correctly stated by the learned counsel for the complainant to be whether the defendants have used the plan, arrangements, and illustrations of the complainant as the model of their own book with colorable alterations and variations only to disguise the use thereof, or whether the work is the result of their own labor, skill, and use of common materials and common sources of knowledge, and the resemblances are either accidental or arising from the nature of the subject. Curt. Copyr. 258, 260. Although many of the same names, residences, and amounts appear in the defendants' as in the complainant's tables, the answer positively denies that they were copied, and the uncontradicted proof is that they were derived from independent sources of information. One of the defendants testifies that the names of debtors are on bills placed in defendants' hands for collection, and that a great many of the subscribers (creditors) are persons they were doing business with previous to complainant's publication, and that they were obtained through their canvassing clerk. The list of names marked as identical in the two publications are testified to have been in possession of defendants previous to the publication of complainant's "chart" or of defendants' "guide." There is no evidence, therefore, of any infringement of any rights secured by his copyright to the complainant. Bill dismissed, with costs.

Case No. 8,136.

LAWRENCE v. DANA et al.

[4 Cliff. 1; [1] 2 Am. Law T. Rep. (N. S.) 402; 7 O. G. 81.]

Circuit Court, D. Massachusetts. Sept. 20, 1869.

COPYRIGHT—MEMORANDUM OF AGREEMENT—CONTRACT — FRAUD — PROPRIETORS NOT AUTHORS—EDITOR OF WORK — NOTES — SUBSEQUENT EDITION—EXPERT EVIDENCE OF IDENTITY—COINCIDENCE OF ERRORS—LITERARY LABOR.

1. If parties make a memorandum of an agreement, not at that time regarded as a contract, but afterwards adopt the memorandum as a contract, and understandingly execute it as such, their rights under it must be ascertained from the language employed, as applied, in view of the surrounding circumstances, to the subject-matter of the negotiation.

2. The stipulations contained in the memorandum in this case were *held* to constitute a perfected agreement, and not a mere proposal.

3. Mere proposals may in general be withdrawn before they are accepted; and ordinary contracts, executory on both sides, may in certain cases be regarded as forfeited where the reciprocal stipulations are dependent, and where the party seeking to enforce performance has omitted to do something required to be performed by him as a condition precedent to his right of action.

4. A party may be estopped from setting up a particular contract, where he has agreed, in due form of law, for a valuable consideration to relinquish its benefits or not to enforce its provisions; or where he has designedly caused the other party to believe that the contract has been discharged, or would not be enforced, and thus induced such other party to act on that belief to his pecuniary prejudice.

5. Contracts executed on one side and unperformed on the other are under the operation of a very different principle from those where nothing has been done by either, so far as they relate to the party who has fulfilled his obligation. Rights and obligations secured or imposed under such circumstances have become vested and absolute.

6. If the delinquent party seeks to avoid the obligation imposed on him, he must allege and prove a new contract, amounting to a release; or, that the other party is estopped to enforce the obligation by virtue of some operative agreement to relinquish the benefits of the same; or, he must allege and prove that he has been designedly misled by the admissions and representations of the other party.

7. None of the elements of estoppel exist in this branch of this case, because the complainant did not agree that he would discharge the memorandum.

8. A certain memorandum had been drawn and agreed to. After this the complainant stated in writing, "On reflection, I have determined to decline accepting any paper whatever from Mrs. W——, and therefore return the enclosed,"—meaning an amended draft for the formal agreement. *Held*, this should be construed in view of what had preceded it in the negotiations, and of the subject-matter to which it related; that the statement was not inconsistent with the memorandum or a relinquishment of it.

9. Expressions of a doubtful character are not sufficient to support a defence to a contract executed on the part of the complainant.

10. Estoppels are allowed to shut out the truth only when it is necessary to protect a party setting up such a defence against an injury to which he is exposed without his own fault, in consequence of having trusted to the representations designedly made by the other party in order to expose him to such injury, which representations were of such character that a man of ordinary prudence would take them as true, and believe that he should act upon them as exhibiting the true state of the case.

11. These representations must be proved, and they will not by implication be extended beyond their plain import.

12. Although abundant evidence existed to show that the defendant was willing to concede the complainant's claim to a certain part of the matter in dispute, still, as the complainant elected to stand on the original memorandum of agreement, and such part was not included therein, it was *held* he had relinquished such part.

13. When fraud is set up as a defence to a contract, the burden is on the party setting it up; and it must be satisfactorily proved.

14. Inferences sought to be drawn from correspondence of parties are not sufficient to substantiate the defence of fraud in the making of a contract otherwise legal and binding.

15. Under the copyright act now in force, copyright may be granted to the author of any book within the classes described in section 1, if the author is a citizen of the United States.

16. Executors, administrators, and legal assigns of the author are also included within the purview of that section.

17. Where the author is the owner, he is entitled to the copyright; but if he has parted with the ownership, the requirement of the law is that the clerk of the district court shall give a copy of the title, under seal, to the proprietor.

18. Proprietors of such books, though not authors, are entitled to the benefits of the act under a provision of section 4.

[Cited in Carte v. Evans, 27 Fed. 863.]

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

19. Legal proprietors, although not authors, may recover of persons who print or publish any manuscript, owned by such proprietors, without their consent, all damages occasioned by such injury.

20. Where services in editing and preparing a certain work for publication were, by agreement, gratuitous as to two editions thereof, it was *held* that the contributions of the editor became the property of the proprietor of the work just as effectually as if the editor had been paid for his work on those editions, and the title to the same vested in the proprietor of the original work, as the labor was done, to the extent of the gift, subject to the trust in favor of the donor as necessarily implied by the terms of the arrangement.

21. Delivery was made as the work was performed, and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed.

22. The proprietor needed no assignment from the contributor, because the contributor had no title to the contributions, nor any inchoate right of copyright in the editions of the work.

23. In order to the obtaining of a copyright, deposit must be made before publication, if the subject-matter is a book, of a copy of such book in the clerk's office of the district court, and the applicant must give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published, during the term secured, on the title-page, or page succeeding, the following words: "Entered according to the act of congress, in the year ——, by A. B., in the clerk's office of the district court of" (as the case may be).

24. Omission to comply with these requirements renders the copyright invalid.

25. Section 5 of the act does not require that the same notice be inserted in the several copies of each and every edition published during the term secured, so that the second and every subsequent edition may correctly specify the date of the original entry.

26. Acts of congress are construed by the rules of the common law, and the construction should be such as to carry into effect the true intent and meaning of the legislature; but the province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances.

27. Change of date in the notice required in case of successive editions of the same book is not required by section 5, but the meaning of the provision is, that a new notice in the same prescribed form shall be given in every improved edition published during the term.

28. When the original edition is published, compliance with that requirement is protection for that edition, but not for a second edition with notes, or any succeeding edition with improvements.

29. Copyrights to editions of a work other than the original one are granted for additions to or emendations of the work, and every copyright should bear date of the day when secured.

30. Subsequent editions without change or addition should have the same entry as the first; subsequent editions with notes or improvements are new books within the meaning of the copyright acts.

31. Copyrights, like patents, afford no protection to what was not in existence at the time they were granted.

32. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter the book contained when the printed copy of the same was deposited in the office of the clerk of the district court.

33. Whenever a renewal is obtained under section 2 of the copyright act, the requirement is, that the title of the work so secured shall be a second time recorded, but there is nothing to show that the date of the original entry shall be specified in each successive edition.

34. The agreement in this case was that Mrs. Wheaton, who held the legal title of the copyrights, should make no use of the notes in a new edition without the written consent of the complainant, and that she would give him the right to make any use of the same he might see fit, which was in all respects equivalent to a contract to transfer and assign to him the legal title to the copyrights.

35. Equity would have compelled the execution of the formal instrument therein stipulated, if the right to demand it had not been waived by the complainant.

36. In this case, Mrs. Wheaton, by virtue of the agreement with the complainant, became the absolute owner of the notes as they were prepared, so far as respects the editions in question; and she also acquired therewith the right to copyright the same for the protection of the property; but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the annotated work without the consent of the complainant.

37. Literary property, even when secured by copyright, differs in many respects from property in personal chattels, and the tenure of the property is governed by somewhat different rules; but the nature and tenure of copyright property is still more unlike the tenure of other property, before the copyright is taken out, and while the right to that protection is inchoate.

38. Title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé by virtue of a contract of employment, and without any written assignment.

[Cited in Black v. Henry G. Allen Co., 42 Fed. 625.]

39. But such cannot be held to be a mere license, when, as in this case, the contract was that the proprietor of the book should take the exclusive right to the contributions for two successive editions, together with the right to copyright the same for the protection of the property.

40. The inchoate right of the copyright passed to the proprietor of the book by the same arrangement.

41. The inchoate right is incapable of any other limitation than that prescribed by the copyright act, so that the proprietor of the book in this case took out the copyright in the usual form. She took it out for her own protection and for that of the complainant, when her property in the notes should cease.

42. In this case it was *held* that the complainant, in the view of a court of equity, was the equitable owner of the notes, including the arrangement of the same, and the mode in which they are therein combined and connected with the text, and of the copyrights taken out by the proprietor of the book for the protection of the property.

43. Whatever puts a party upon inquiry is in equity sufficient notice.

44. Ordinary prudence is required of every person dealing with trust property. If he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty.

45. Constructive notice is *held* sufficient upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of third persons may be affected, an inquiry as to the state of facts is a moral duty, and diligence an act of justice.

46. If a person dealing with trust property omits to inquire, he is then chargeable with all the knowledge of the facts that by proper inquiry he might have learned.

47. Inquiry is a moral duty whenever the circumstances are such that a person of ordinary prudence would refuse to act. If a party under such circumstances shuts his eyes to the means of knowledge which he knows is at hand, he then forfeits every pretence of defence, as such conduct is equivalent to actual notice of all the facts he might have ascertained by a performance of his duty.

48. Expert testimony was put into the case upon a comparison of two editions of a book, upon the point whether the two editions were or were not of the same character. *Held*, that though admissible in such a case, the opinions of the experts were in the nature of secondary evidence.

49. The court found it necessary to examine the comparisons itself in order to come to a satisfactory conclusion, although much aid was derived from the comparisons made by the experts.

50. In this case it was *held* that the question of fact was, what use did the respondent, who edited the edition in question, make of the complainant's notes?

51. The question of law was, was the use which it was admitted he did make of those notes a lawful use, or did it infringe the complainant's rights?

52. Although it may be difficult to make proof, still the complainant is not entitled to any decree, unless he proves infringement as alleged, to the satisfaction of the court, because the burden is on the party making the charge. In a case of this character the parties are compelled to rely chiefly upon a comparison of the contents of the respective books upon the question of infringement.

53. Great latitude is given in the reception of circumstantial evidence, the aid of which is constantly required in the administration of justice.

54. Whenever the necessity for the use of such evidence arises, either from the nature of the inquiry, or the failure of direct proof, objections to the relevancy of evidence are not favored, for the reason that the force and effect of circumstantial facts usually and almost always depend upon their connection with each other.

55. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute full and conclusive proof.

56. In cases for infringement of copyright, the strongest proof of copying may sometimes be derived from the coincidence of errors in two works.

[Cited in List Pub. Co. v. Keller, 30 Fed. 774.]

57. Coincidence of citation is another evidence of copying; so, also, is identity of plan and arrangement.

58. Copyright may be justly claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, because skill and discretion were exercised in making the selections, arrangement, and combination, and something new and useful has been achieved.

[Cited in Hanson v. Jaccard Jewelry Co., 32 Fed. 203.]

59. The author of such a work has as much right in his plan, method, and arrangement, as he has in his thoughts, reflections, or opinions.

60. Others may use the old materials for a different purpose, but they cannot copy his plan, arrangement, or combination of those materials.

61. A person could take the old materials, as found in the sources from which they were drawn, and use them as he pleased in illustration of new and original propositions, or for any other purpose not substantially the same as that to which they were applied in works protected by a copyright on some particular plan or combination.

62. One cannot, however, use the materials as collected and furnished in the copyrighted work, or the plan and arrangement therein, beyond the extent falling within the definition of fair use, which rule is applicable only to the materials and not to the plan and arrangement.

63. In this case respondent had used the facts, citations, and authorities as collected, arranged, and combined by the complainant, and the work occupied the same field, and was made and composed for the same general purpose.

64. The sole right and liberty of printing, reprinting, publishing, and vending a book, secured by the copyright law, means the exclusive right of multiplying copies for the benefit of the author or his assigns.

[Cited in Henry Bill Pub. Co. v. Smythe, 27 Fed. 921.]

65. An abridgment of an original work, where intellectual labor and judgment are involved, made and condensed by another person, without the consent of the author, is not an infringement of a copyright on the original.

66. What constitutes a fair and bona fide abridgment is a very difficult question for judicial decision. In this case the book of the respondent was not an abridgment.

67. Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable variations to disguise the source from which the material was derived.

68. It is not necessary that the whole, or the larger part, of a work should be copied in order to constitute an invasion of a copyright.

69. Some use may be made, by a subsequent writer, of a book antecedently made, composed, and copyrighted by another, whether such former book were wholly or partly original.

70. Copyrights differ in this respect from patents, which admit of no use of the patented thing without consent of the patentee.

71. The recomposition of the same book, without copying, though not likely to occur, would not be an infringement.

72. Identity of contents, arrangement, and combination is strong evidence that the second book was borrowed from the first, because it is highly improbable that two authors would express their thoughts and sentiments in the same language, or adopt the same method and arrangement.

73. Absence of intent, alone, to copy a copyrighted work would not free a person from the charge of copying; the court looks at the result, and not the intention in the man's mind at the time of doing the act complained of.

74. Evidence of intent might have some bearing on the question of fair use, but it is not a defence where the party setting it up has invaded the copyright of the complaining party.

75. If so much is taken from a copyrighted work that its value is sensibly diminished, or the labors of the original author, to an injurious extent, appropriated by another, it is sufficient to constitute infringement.

76. In a review of a work, sufficient may be taken to give a correct view of the whole, but the privilege of making extracts is limited to those objects, and cannot be exercised so that the review may become a substitute for the work reviewed.

77. Equity will not interfere, by injunction, to prevent further use of a copyrighted book, when the amount copied is small and of little value,

if there is no proof of bad motive, or where there is a well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable negligence in seeking redress, especially if the delay has misled the respondent.

78. New materials are the subjects of copyright; so also are old materials arranged according to a new plan. Damages are recovered in the one case for the use of the new materials, in the other for the use of the old materials, according to the new arrangement, combination, or plan.

79. Where the two works are complex, as in this case, the case is referred to a master to state the facts, and his opinion as to the similarity of the same, for the consideration of the court. Cases may arise where the court would not order the reference.

80. A book may in one part infringe the copyright of another, and in other parts be original. In such case the remedy is not to be extended beyond the injury.

[Cited in West Pub. Co. v. Lawyer's Co-operative Pub. Co., 64 Fed. 364.]

81. If the borrowed matter is so involved with that which is original, in a subsequent book, then he who made the improper use of borrowed materials must suffer the consequences of so doing.

82. In such case, if the injunction prevents the use, on the part of the copyist, of his original materials in any particular book, he only is to blame for such commingling of the materials.

83. No man is entitled to avail himself of the previous literary labors of another, which have been copyrighted, for the purpose of conveying to the public the same information, even though he may append additional information to that already published.

84. Equity suits for infringement of copyright are usually referred to a master, before final hearing, to ascertain whether the charge is proved; and if so, for a report as to the nature and extent of the infringement.

85. In such cases the rule is, that the complainant is entitled to an injunction, if at all, at the time the decretal order is entered, to restrain the defendant from any further violation of his rights, as the whole case is then before the court.

86. Even when the case is heard before any such reference and report, if the charges of infringement are few and of a character easily determined, without reference to a master, and if the case is one where injunction is the proper remedy, the court will order it at the time the decision on the merits is announced.

87. When the case comes to a final hearing, without any report, if the charges of infringement are numerous, and such as require extended examination, the court will ordinarily send the case to a master for report on the matters not previously settled by it.

88. In such cases the general rule is, that the injunction will not be granted until the nature and extent of the infringement are fully ascertained, because its operation might work great injustice. Such a course was pursued in this case.

89. Where the arguments in a case in equity have been finally closed, there can be no further argument unless the court should reach some point where they desire reargument, and request the same of the counsel.

Bill in equity [by William B. Lawrence against Richard H. Dana, Jr., Charles C. Little, Augustus Flagg, John Bartlett, Henry J. Miles, and Martha B. Wheaton], praying for an account, and for an injunction for the violation of an alleged copyright to a certain edition, with notes, of Wheaton's Elements of International Law. The complainant alleged in substance and effect that Catharine Wheaton, deceased, widow of the late Henry Wheaton, in the year 1853, then in full life, requested him to prepare a new edition of Wheaton's Elements of International Law, and that he, in pursuance of that request, prepared such notes for that purpose as seemed to him fit, and also an appendix and introductory remarks, with a full and careful memoir of the life of the deceased author, that, so far as the edition contained matters not previously published in this country, it was duly copyrighted by the said Catharine as proprietor thereof; that the same was subsequently published by the firm of Little, Brown, & Company, and that all the profits arising out of the contract with the publishers were enjoyed by the said Catharine as the complainant intended they should be when he undertook to prepare the edition; that he afterwards, in pursuance of a similar request from the same source, prepared other annotations of the same work, which were also copyrighted by the same person, and that they were published in 1863 by the same publishers; that he was advised and believed that the transactions as recited, in respect to those two editions, operated to convey to the said Catharine no other beneficial interest in the said annotations and additions to the work, than the right to use the same in those editions; that in fact it was always understood and agreed by and between them that the beneficial interest in the same, except as aforesaid, belonged to the complainant, and that the copyrights were taken out and held in trust by the said Catharine in accordance with that understanding and agreement. Prior to that period, the author, as the complainant alleged, had caused four several editions of the work to be published, two at Philadelphia, one at London, and one in 1848 at Leipzig, in two volumes, by F. A. Brockhaüs, in the French language; that in the edition of 1848 the author inserted and published, both in the text and notes, many new matters never before published by him in the English language; that the author died in 1848; that the French edition was reprinted by the said Brockhaüs in 1853, and that the complainant, in 1860, ascertained that the said Brockhaüs had published another edition of the work in French, without the knowledge or consent of the representatives of the author, and that he contemplated publishing further editions of the same without paying any thing to those representatives for copyright; that in view of these circumstances, and at the request of the said Catharine, he commenced negotiations with the said Brockhaüs upon the subject, the result of which was, that the parties came to an agreement that the complainant should revise and translate his annotations, and adapt the same for a work to be sold in Europe, making such additions thereto as should render the work as complete as pos-

sible down to the time of publication; that the representatives of the deceased author should give up all claim on the said Brockhaüs in respect to the editions published and to be published; and that in consideration thereof the said Brockhaüs agreed to pay to the said Catharine, if the complainant so directed, the sum of 6,000 francs, together with the sum of $450, to be paid to the complainant to defray in part the expenses to be incurred in preparing the translations; that the complainant, before the agreement was completed, stated to the said Catharine or her agent, Martha B. Wheaton, that he would do no more work on any book over which he did not possess exclusive control; that he would only undertake the work required of him in the proposed arrangement, on the condition that the entire copyright should be assigned to him; that the said Catharine, manifesting a great desire to retain the legal title to the copyrights of the book, requested him to confer with Professor Parsons in her behalf, in order that some arrangement might be made which should substantially secure to the complainant what he desired, and be at the same time acceptable to the said Catharine; and the complainant alleged that he assented to that proposition, that he had one or more interviews with Mr. Parsons, and made an agreement with him as to the title to the copyrights and other matters, as expressed in the memoradum set forth in the bill of complaint, as follows:—"Memorandum: Mr. Lawrence will write to Mr. Brockhaüs in terms to bring to Mrs. Wheaton the right to draw on Mr. Brockhaüs at once for 6,000 francs. He will also endeavor to get from Mr. Brockhaüs as much as he can towards the actual expense of having the translation into French made here, and so much of that expense as he fails to get from Brockhaüs, Mrs. Wheaton will pay from the proceeds of the draft on Brockhaüs. Mrs. Wheaton will, on the payment of her draft on Brockhaüs, agree formally to make no use of Mr. Lawrence's notes in a new edition without his written consent, and Mrs. Wheaton will give to Mr. Lawrence the right to make any use he wishes to of his own notes;" that the said Parsons, for the purpose of being more certain that the memorandum would be approved by the said Catharine, wrote on the same sheet of paper to the respondent, Martha B. Wheaton, that he and the complainant had come to a perfectly amicable result, as expressed generally in the memorandum, and suggested to her that she should make a copy of the same for herself, if the result was satisfactory; and the complainant also alleged that the said Martha afterwards, in behalf of her mother and herself, and to signify their approval of the result, signed the said memorandum, and wrote the date, "June 14, 1863," thereon, and caused the same to be delivered to the complainant.

Additions were subsequently made to the agreement, and the terms of it were in some respects varied, as appeared by the correspondence between the parties; but the complainant alleged that he was advised and believed that the amendments to the same did not vary any such parts of the same as related to the copyrights in this country; and he also alleged that the consideration of the agreement of the said Brockhaüs to pay said amount to the said Catharine was the promise of the complainant to furnish new and additional notes for the future editions of the work, as was well known and understood by the parties; that he, the complainant wrote to said Brockhaüs, as agreed; that the letter was approved by the other parties, and was by the said Martha and Catharine sent to the said Brockhaüs, and that the said Catharine, on the 17th of June, 1863, drew a bill of exchange on him for the amount specified in the memorandum; and that the same, in consequence of said letter and of the promises and undertakings of the complainant, was duly honored and paid.

The theory of the complainant was, and he accordingly alleged, that there was not, on the 1st of January, 1865, any valid subsisting copyrights of the editions published respectively in 1836 and 1846; that the copyrights of the editions published in 1855 and 1863 secured the exclusive right to the same only so far as those editions differed from the aforesaid antecedent editions; that it was a part of the agreement made through the agency of the said Parsons, that the said Catharine should execute and deliver to the complainant a formal instrument, securing to him all his rights in the premises, of such a nature as to admit of being recorded, as required by the acts of congress relating to copyrights; and he averred that the other respondents had full notice and knowledge of the agreement, and that he, in a court of equity, by virtue of that agreement, is taken and deemed to be the owner and proprietor of the last-mentioned copyrights, in and as to all matters contributed by him as aforesaid; and that, by reason thereof, the respondents were bound not to make any use of any such matters so contributed by him to either of the said editions of the said work. Based upon these and other allegations, the claim of the complainant was, that he was in equity the exclusive owner and proprietor of the copyrights for all the matters which he contributed to those two editions; and he charged that the said firm of Little, Brown, & Company procured and induced the said Martha, in her own behalf and that of her mother, to consent and agree that the said publishing firm of Little, Brown, & Company should publish an edition of that work, and procure the same to be edited and notes to be prepared for the same by some person other than the complainant; that thereupon the said firm procured and em-

ployed Richard H. Dana, Jr., one of the respondents, to edit the proposed edition, and to prepare the notes as aforesaid; and the complainant further showed that the respondents, without his consent, had caused the proposed edition to be printed, published, and publicly sold. Reference was also made to certain alleged pretences set up by the respondents; and the complainant prayed for an account and for an injunction, and that the respondents might be decreed to surrender and deliver up all copies of the book on hand, and to make and deliver to the complainant a good and sufficient deed of the copyrights of 1853 and 1863 in accordance with his equitable title.

J. J. Storrow. (Mr. Storrow stated very fully the relations between the complainant and Mr. Wheaton and his family from 1822 to the time of filing the bill, and the relations of some of the respondents with each other and the complainant, reading from the correspondence printed in the record.)

The negotiations with Mr. Brockhaüs were begun in 1860; his first definite proposition was not made until he had seen the advance sheets of the second edition in 1863. These negotiations were all by correspondence, which was communicated to the Wheatons and to Mr. Little, and is now before the court, together with the correspondence between the parties on the subject. It is true, and was known to the Wheatons at the time, that Brockhaüs was induced to make the offer in order to obtain from Mr. Little and the Wheatons the exclusive right to print in French, on the continent, Mr. Lawrence's annotations, with emendations to be made by that gentleman. Thereupon, after a negotiation with Professor Parsons, of the Dane Law School, who represented the Wheatons, the agreement stated in the bill was made, Mr. Lawrence gave the required promise to Mr. Brockhaüs, and the Wheatons thereupon received the money. This contract was negotiated and drawn by skilful counsel, representing the Wheatons; it secured for them 6,000 francs due to Mr. Lawrence's labors; it imposed on him a serious burden of work and expense; it at most only gave him the formal title to that which they confess fairly belonged to him; up to the time of this suit they have always declared it to be entirely satisfactory: to avoid it on the ground of fraud, the respondents must show clearly that the complainant misrepresented to Mr. Parsons, or designedly concealed from him some fact, or some means of knowledge, and that this misrepresentation or concealment was the inducement which in fact led the Wheatons to make the agreement. 1 Story, Eq. Jur. § 200 et seq.; Attwood v. Small, 6 Clark & F. 447; Park v. Johnson, 4 Allen, 266; Jennings v. Broughton, 5 De Gex, M. & G. 130; Veazie v. Williams [Case No. 16,907]; Campbell v. Fleming, 1 Adol. & E. 40. The correspondence clearly disproves all this. From the time the Wheatons received the 6,000 francs, Mr. Lawrence, in the view of a court of equity, was the absolute owner of the notes. Fletcher v. Morey [Case No. 4,864]; Parker v. Muggridge [Id. 10,743]; Clarke v. Southwick [Id. 2,863]; Collyer v. Fallon, Turn. & R. 469; Rerick v. Kern, 14 Serg. & R. 271; Simms v. Marryat, 7 Eng. Law & Eq. 337. The correspondence shows that the parties understood that the memorandum had this effect and they cannot take advantage of their refusal to execute the further assurance which the memorandum called for. Browne, Frauds, §§ 444–446. Similar agreements have been held sufficient in copyright cases to sustain a bill and an injunction for piracy both as against a party to the contract and as against publishers claiming under such party, though without actual notice. Curt. Copyr. 315; Mawman v. Tegg, 2 Russ. 385; Sweet v. Shaw, 3 Jur. 217; Colburn v. Duncombe, 9 Sim. 155; Sweet v. Cater, 5 Jur. 68, 11 Sim. 572; Longman v. Oxberry (1820), cited in Gods. Pat. 314. The evidence, and particularly the correspondence of the parties, shows that this memorandum contained the whole and true agreement of the parties, clearly and explicitly stated.

The next defence is that after the complainant had (as they alleged) practised a fraud to obtain the control of his own property, he voluntarily gave it back again. Rights conferred or secured, or obligations imposed by an executed agreement, where the consideration has passed by full performance on one side and enjoyment on the other, cannot be returned or transferred back by an agreement not under seal without a new and valuable consideration. 1 Smith, Lead. Cas. 595, note to Cumber v. Wane; Wildes v. Fessenden, 4 Metc. [Mass.] 12, and cases cited; Smith v. Bartholomew, 1 Metc. [Mass.] 277; Edwards v. Chapman, 1 Mees. & W. 231. Even in cases where there has not been a completed performance there must be proof of an intention to abandon and a deliberate act sufficient to carry out that intention. McCormick v. Seymour [Case No. 8,726]; Flagg v. Mann [Id. 4,847]; Kendall v. Winsor, 21 How. [62 U. S.] 331; Shaw v. Cooper, 7 Pet. [32 U. S.] 320; Mowry v. Sheldon, 2 R. I. 378; Brewer v. Boston & W. R. R., 5 Metc. [Mass.] 483; Rich v. Atwater, 16 Conn. 416, and cases cited. When the act is without anything which the law deems a consideration, it may be revoked. Pierrepont v. Barnard, 2 Seld. [6 N. Y.] 289; Mumford v. Whitney, 15 Wend. 387; Holmes v. Fisher, 13 N. H. 12; Brewer v. Boston & W. R. R., 5 Metc. [Mass.] 478; McKay v. Holland, 4 Metc. [Mass.] 73; 2 Smith, Lead. Cas. 753, 767. The correspondence relied on as constituting the alleged waiver does not contain language which can fairly bear the construction contended for. If it even left the complainant's

actual intention in doubt, the respondents were bound to make inquiry of him specifically before assuming that he meant to abandon any thing. Mowry v. Sheldon, 2 R. I. 378. See, also, Shaw v. Cooper, 7 Pet. [32 U. S.] 320. Whatever might be the legal effect of the language used, yet if in fact they knew that the complainant did not intend it to be and did not believe it to be an abandonment, they cannot be heard to set it up as an abandonment. It is clear that this was the case: he proceeded with his work under the agreement, at great labor and expense to himself, and they never offered to relieve him of it, or to cancel his obligations to to Mr. Brockhaüs. The explicit directions they gave to Mr. Dana, not to make any use of Mr. Lawrence's notes, and the idea Mr. Dana derived from them of his duty in the premises, exactly conform to the memorandum; and one avowed reason for these instructions was to guard against any complaint from Mr. Lawrence, and because they felt embarrassed by their relations growing out of the Brockhaüs matter. After receiving the letter they rely on, in which Mr. Lawrence returned the formal instrument as not satisfying the memorandum, Miss Wheaton wrote, "He declined it, and preferred none beyond the one signed in June by M. B. W." This is conclusive that their understanding was that he meant to decline the further paper and to stand on and not abandon the memorandum of June. Such an estoppel could operate to give even to a valid instrument an effect contrary to the legal interpretation of its language. Hawes v. Marchant [Case No. 6,240]; Erwin v. Lowry, 7 How. [48 U. S.] 183; Philadelphia, W. & B. R. Co. v. Howard, 13 How. [54 U. S.] 336. Neither Mr. Lawrence's letter, nor his conduct, nor any acts of his give rise to any estoppel against him. Hawes v. Marchant [supra]; Van Rensselaer v. Kearney, 11 How. [52 U. S.] 326; Pickard v. Sears, 6 Adol. & E. 469; Freeman v. Cooke, 2 Exch. 661; Andrews v. Lyons, 11 Allen, 351; Turner v. Coffin, 12 Allen, 401; Lawrence v. Dole, 11 Vt. 555; Brewer v. Boston & W. R. R., 5 Metc. [Mass.] 483; Heane v. Rogers, 9 Barn. & C. 585; Cambridge Sav. Bank v. Littlefield, 6 Cush. 214; Wallis v. Truesdell, 6 Pick. 456; Dunnell M. Co. v. Pawtucket, 7 Gray, 277; 2 Smith, Lead. Cas. (Am. Ed.) 704, 742, 745, 747, 767, 768; Am. Lead. Cas. 750, 764, 768, 772, 775, 776. The evidence negatives the existence of all the essential elements of an estoppel. They had full and express notice of Mr. Lawrence's rights, before the acts complained of.

Miss Wheaton and the other respondents are estopped to set up the invalidity of those copyrights. Eicoltz v. Bannister, 1 Barnard. 77; Cairncross v. Lorimer, 3 Law T. [N. S.] 130; Hull Flax & Cotton Mill Co. v. Wellesley, 2 Law T. [N. S.] 728; Simms v. Marryat, 7 Eng. Law & Eq. 337; Sherman v. Champlain T. Co., 31 Vt. 175; Beckman v. Bormann, 3 E. D. Smith, 409; Random v. Tobey, 11 How. [52 U. S.] 521; Coolidge v. Brigham, 1 Metc. [Mass.] 551; Pierpont v. Fowle [Case No. 11,152]; Smith, Lead. Cas. 704. The agreement amounts to an express covenant "to make no use of Lawrence's notes without his written consent;" and this is binding on all the respondents, and its violation will be restrained by the court. Barfield v. Kelly, 4 Russ. 355; Farina v. Silverlock, 1 Kay & J. 509, 39 Eng. Law & Eq. 516; Longman v. Oxberry, Gods. Pat. 314. The agreement of June covers not only the foot-notes, but all that Mr. Lawrence, as editor and annotator, did to the book to make it different from Mr. Wheaton's last edition of 1845. Mr. Parsons describes the agreement as intended to give to Mrs. Lawrence "any thing he had done for her husband's book;" the memorandum which Mr. Parsons drew to express that agreement and the term "notes," the same gentleman's letter of June 19, 1863, which is part of the agreement, describes the agreement as covering "matter which you have written;" the formal instruments which Mr. Parsons drafted convey the "notes and other matter of his (Lawrence's) own composition." "Notes for references" have been held not to be restricted to foot-notes. Little v. Gould [Case No. 8,395]. Mr. Lawrence prepared the text with great care, labor, and judgment, from the different English and French editions, so that it differed from any previous edition to the extent of sixty pages: this was stated in his preface as long ago as 1855. Mr. Dana's preface states that "this edition contains nothing but the text of Mr. Wheaton according to his last revision, his notes, and the original matter contributed by the editor." yet he has exactly reprinted the text according to Mr. Lawrence's revision.

T. K. Lothrop, for respondents.[2]

The bill is founded on copyright. The prayer for relief determines the construction of the bill, and shows this. 1 Daniell, Ch. Prac. 334, 383, 386, and cases cited; Adams, Eq. 309. The claim is rested on two grounds: First, a trust arising from the fact that the complainant's annotations were gratuitous, and an agreement and understanding at the outset that the copyright should be held on such a trust; second, upon a contract alleged to have been made between Mrs. Wheaton and the complainant, and to be contained in the memorandum dated June 14, 1863, a copy of which is set out in the bill. No trust arises by intendment of law from the fact that the complainant's labors were gratuitous. Hill, Trust. 107; Cook v. Fountain, 3 Swanst. 591; Young v. Peachy, 2 Atk. 256. The alleged "understanding" is denied, and is not made out by the evidence. Even as stated by the complainant, it is too vague for a court to act

[2] In this case four counsel were allowed to argue for the respondents, each counsel taking separate points, but the court declared that this should not be a precedent for allowing more than two counsel to speak on a side.

upon. The making the agreement in June, 1863, and the correspondence at and prior to that time, show that he considered that he had neither claim nor interest prior to June, 1863, and that his desire to have any rights about his notes first arose in his mind in 1863. The memorandum of June 14, 1863, includes only the notes, and not the text, nor the memoir, nor the index, nor the arrangement by which the notes are connected with the text. The memorandum does not provide for a transfer of the copyright, as prayed for, but only for a license. The memorandum was not a perfected contract, but a mere note of some of the general stipulations of a proposed agreement between the parties; as to which they never actually agreed, and their minds never in fact met. It was one step towards a conclusion, but was not a conclusion. It is clear on the evidence that this was the understanding of the parties. If the complainant's account of his pre-existing rights is true, this memorandum only operated to restrict them, and therefore could have been only one stipulation to form part of a complete agreement. The circumstances and the correspondence show that Mr. Lawrence's purpose and desire was for something far beyond this memorandum, and towards which this memorandum and all that was done was only one element. When the formal agreement came to be made after the money was received from Brockhaüs, the correspondence shows that each party understood that it was to embrace not only the memorandum, but points covered by subsequent negotiations. But the hoped-for agreement was never reached, and all these steps were fruitless. If there is any doubt on this point, the court will not decree a specific performance. Carr v. Duval, 14 Pet. [39 U. S.] 77. The memorandum was only a note of some general stipulations, but did not cover many points which both parties expected would be included in the proposed agreement. Among other things, it contained no provision as to whether it should or should not interfere with the edition already sold to Little, Brown, & Co. The only right conferred by that memorandum was a right to call for a formal conveyance, and that right the complainant abandoned by "declining to accept any paper whatever from Mrs. Wheaton" (letter of Nov. 2, 1863). He believed that he already had all that he now claims under the memorandum; he was ready to give it up; and the terms in which he alludes to "the decision at which I have arrived" show that his intention was to abandon all claims under that memorandum.

The respondents understood that he intended so to abandon; they prepared a new edition, and then, after the publication of it, and after a lapse of nearly three years, he, for the first time, attempts to obtain specific performance of it. He is too late. Seton v. Slade, 3 White & T. Lead. Cas. Eq. 78-84; Fry, Spec. Perf. p. 413, § 709; Id. p. 422, note; argument of Sir S. Romilly, 13 Ves. 226; Price v. Dyer, 17 Ves. 356; Stevens v. Cooper, 1 Johns. Ch. 430; Schmidt v. Livingston, 3 Edw. Ch. 213; Boyce v. McCulloch, 3 Watts & S. 429; King v. Morford, Saxt. [1 N. J. Eq.] 281. Where there is such delay, it is not necessary that the other party should have changed his position. Lautour v. Attorney General, 11 Law T. [N. S.] 563. The memorandum professes only to touch the right to the notes; if, as alleged in the bill, the complainant believed that it would practically give him the control of all future editions of Wheaton's Elements, and expected by it to secure that control, and did not disclose this to Mr. Parsons or Miss Wheaton, a court of equity will not decree a specific performance. Cathcart v. Robinson, 5 Pet. [30 U. S.] 265; Fry, Spec. Perf. (Ed. 1861) pp. 192, 368.

Causten Browne, for respondents.

The alleged agreement of June, 1863, is void, because Mrs. Wheaton was induced to enter into it by the fraudulent misrepresentations and concealments of the complainant. It is not necessary to show that if Mrs. Wheaton had known the facts of the case as they were known to the complainant, she would not have entered into the agreement; for it is an established principle of equity jurisprudence that a court of equity will not decree the specific execution of an agreement when the party asking the decree has been himself guilty of any fraud, deception, or unfairness towards the party agreeing, which operated in any way to mislead him in reference to the agreement. 1 Story, Eq. Jur. §§ 200, 769. It is enough, if the misrepresentation be upon a matter in any way material, that it be incorrect and tending to mislead (though not made in bad faith, and though the respondents may not have exercised a wise judgment with regard to its value), and that it be in reference to any matter inducing the execution of the contract, though not touching the direct subject of the contract. Clermont v. Tasburgh, 1 Jac. & W. 112; Cadman v. Horner, 18 Ves. 10; West v. Habgood, 6 Law J. Ch. 369; Day v. Newman, 2 Cox, 79: Shirley v. Stratton, 1 Brown. Ch. 440; Bowles v. Round, 5 Ves. 508; Higginson v. Clowes, 15 Ves. 516; Twining v. Morrice, 2 Brown, Ch. 326; Rodman v. Zilley, Saxt. [1 N. J. Eq.] 323; Thompson v. Tod [Case No. 13,978]; Phillips v. Duke of Bucks, 1 Vern. 229; Cathcart v. Robinson, 5 Pet. [30 U. S.] 264, 270, 277; Miller v. Chetwood, 1 Green, Ch. [2 N. J. Eq.] 199. The evidence sustains these propositions: that, prior to his letter of April 29, 1863, Mr. Brockhaüs had made no absolute offer to pay the Wheatons any money; that he did make such an offer by that letter, to wit: to pay six thousand francs without requiring from Mr. Lawrence either revision or translation for the European edition; that Mr. Lawrence, having received this letter, concealed from the Wheatons Mr. Brockhaüs's positive offer to pay, therein contained; or, what is as good for our purposes, if he communicated that letter to them, he

added a positive statement that certain things were required of him before Mr. Brockhaüs would pay the money; that, as a consideration for complying with that pretended requisition, he demanded the agreement of June, 1863, which he now seeks to enforce; lastly, that the Wheatons, believing those representations, and induced thereby, did make that agreement. Little, Brown, & Co. are not affected by that memorandum: at most, Mr. Little only knew, or heard, that some negotiations were going on, and understood and believed that they were only steps towards an agreement never concluded, and that the whole matter was abandoned. The other partners had no personal knowledge whatever of the transactions.

W. G. Russell, for respondents.

The memorandum and the negotiations from which it resulted were entered into by both parties in the belief that there was a valid subsisting copyright (the property of Mrs. Wheaton) in the notes of the complainant contributed to the editions of 1855 and 1863. The existence of this supposed copyright formed the basis of these negotiations and this memorandum, and this supposed copyright was the subject-matter with which they dealt. These copyrights were taken out in the name of Mrs. Wheaton as "proprietor," and were void because no written assignment of the author's inchoate right was ever made to her, so as to constitute her the "proprietor" or "legal assignee" entitled to take out a copyright under the act of congress. Prior to Stat. 5 & 6 Vict. 45, no positive enactment of English law provided that transfers of copyright or of the author's inchoate right thereto must be in writing. The statutes 8 Anne and 41 Geo. III. contained language almost identical with our own in their description of the person entitled to copyright. It was settled in England that to constitute a person a "proprietor," either by a transfer of the copyright or of the inchoate right thereto, the transfer must be in writing. Power v. Walker, 4 Camp. 8, 3 Maule & S. 7; Latour v. Bland, 2 Starkie, 384; Clementi v. Walker, 2 Barn. & C. 861; De Pinna v. Polhill, 8 Car. & P. 78; Barnett v. Glossop, 1 Bing. N. C. 633; Rundell v. Murray, Jac. 311; Morris v. Kelly, 1 Jac. & W. 481. The same rule seems to have been adopted here in the only case in which the question has arisen. Nelson, J., in Gould v. Banks, 8 Wend. 562. No distinction has been or can be made in this regard between assignments before and after copyright. Gayler v. Wilder, 10 How. [51 U. S.] 477. It is admitted that notice of the copyright of 1836 was not published in the editions of 1855 and 1863. The complainant contends that this destroys the copyright of 1836, and leaves those of 1855 and 1863 valid only as to the new matter then added, namely, the contributions of the complainant. But this omission destroys the copyrights of 1855 and 1863, because the act provides that no person shall be entitled to its benefit unless he gives notice in each and every edition, &c. The requirement about notice must be strictly complied with. Ewer v. Coxe [Case No. 4,584]; Wheaton v. Peters, 8 Pet. [33 U. S.] 591, 663–665; Baker v. Taylor [Case No. 782]; Jollie v. Jaques [Id. 7,437]; Struve v. Schwedler [Id. 13,551]. It ought to be complied with in this respect; otherwise the public would be misled into the belief that this copyright expired in 1891, whereas it expired in part in 1864.

If the complainant's claim, that those copyrights were taken out in trust for his benefit, is sustained, then they are void, because in that case Mrs. Wheaton was not the "proprietor." Shepherd v. Conquest, 17 C. B. 427; Pierpont v. Fowle [Case No. 11,152]; Binns v. Woodruff [Id. 1,424]; Atwill v. Ferrett [Id. 640]; De Witt v. Brooks [Id. 3,851], by Judge Nelson, in 1861. See, also, Brown v. Cooke, 11 Jur. 77; Richardson v. Gilbert, 1 Sim. (N. S.) 336. Upon the facts alleged by the complainant in his bill and testified to by him, and upon which he relies to establish a trust in Mrs. Wheaton in his favor for the copyrights of 1855 and 1863, subject to a right in her to use them in those editions, the copyrights are wholly void, because they should have been taken out by Mr. Lawrence in the district where he resided, and not by Mrs. Wheaton in the district where she resided. These copyrights apply only to his contributions; of these he certainly claims to be the "author," and upon his own showing he never ceased to be the "proprietor." If he had composed them entirely for her sole and perpetual use, she would not be the "legal assign" of the author (even if a parol assignment were sufficient), because the case supposed does not constitute such assignment of the legal title. Shepherd v. Conquest, 17 C. B. 427; Pierpont v. Fowle [Case No. 11,152]; Binns v. Woodruff [supra]; Atwill v. Ferrett [supra]; De Witt v. Brooks [supra], by Judge Nelson, in 1861, cited in Law on Copyright. Under the English statutes 5 & 6 Vict. c. 45, § 18, allowing the publisher of a magazine, &c., to copyright in his own name articles which he has procured to be written for a compensation, actual payment is essential. Brown v. Cooke, 11 Jur. 77; Richardson v. Gilbert, 1 Sim. (N. S.) 336. He also alleges and testifies that it was agreed and understood that Mrs. Wheaton's only title or interest in the annotations consisted in a right to print two editions. She was therefore a mere licensee and not the "proprietor." Roberts v. Myers [Case No. 11,906]; Little v. Gould [Id. 8,394]. A partial or limited assignment of a partial or limited interest cannot constitute a person the "legal assign" of the author, or entitle her to take out the copyright as "proprietor." It is true that an equitable title may be sufficient to maintain a bill, but it is because it presupposes a valid copyright and a legal title in some one. See Little v. Gould [Id. 8,395]; Mawman v. Tegg, 2 Russ. 385;

Sweet v. Cater, 11 Sim. 572. As the supposed subject-matter and basis of the negotiation and memorandum did not exist, the court, for this reason, will refuse to enforce the alleged agreement. Hitchcock v. Giddings, 4 Price, 135; Dale v. Roosevelt, 5 Johns. Ch. 174. If complainant has suffered any wrong, which we deny, his remedy must be sought by another process or in another court. Adams, Eq. 81; 1 Daniell, Ch. Prac. 386; Stevens v. Guppy, 3 Russ. 171; English v. Foxall, 2 Pet. [27 U. S.] 595–612. The respondent, Mr. Dana, is not affected with notice of the alleged trust or agreement.

S. Bartlett, for respondents.

The defence presents five points. (1.) The complainant is not in a position to ask the aid of a court of equity, for in the negotiation which led to the agreement on which the bill is founded, he asserted that Brockhaüs required him to undertake some new work, which was not a true assertion. (2.) The parties' minds never came to a common consent as to what were to be the details of the agreement of June, 1863. When they came to make the formal agreement, new details came up, e. g. Mr. Lawrence claimed the "Histoire," which was not in the memorandum of June; the Wheatons claimed an exception in favor of Little, Brown, & Co. for the copies of the edition of 1863; Mr. Parsons yielded the one, Mr. Lawrence would not yield the other. (3.) The memorandum professed to be an agreement about a copyright; both parties were mistaken, and no valid copyright existed; this avoids the agreement, at least so far that this court can give no relief. That the subject-matter was wanting proves that their minds did not meet. These points have been sufficiently discussed. I now submit (4.) that in no view of the case—even upon his own exposition of it—can the complainant maintain his bill upon any ground. The bill is founded entirely on the ground that the entire and exclusive copyright is held in trust by the Wheatons, and that Mr. Lawrence is entitled to a conveyance of it: no other relief can be given under the bill; it is framed for nothing else. The special prayers are only appropriate to such a case; the case stated by the bill is an entire equitable title in a copyright alleged to have been violated. The claim of a trust prior to June, 1863, has been disposed of by Mr. Russell, and if there had been such a trust, the agreement of June absorbed it. The whole case rests on the memorandum. This is not an agreement transferring or providing for a transfer of the entire exclusive copyright; as matter of construction, from its language and also from the circumstances, it excepted the copies of the edition of 1863. It provides for a mere license, and the papers drawn in pursuance of it were agreements and not conveyances. It was not in fact, and Mrs. Wheaton had not the power to make it, an agreement to transfer an exclusive license. If the bill is founded on an exclusive title and this is not proved, there is a fatal variance, and the bill cannot be maintained. It, at most, amounts to a mere license, and not an agreement to hold in trust: Mrs. Wheaton was not bound to sue and protect him by means of the copyright. That this is not implied appears from the express stipulation that she herself shall not use. It is not an agreement for a trust; for if it were, this covenant would be superfluous. The whole jurisdiction over the case made by the bill, rests upon a trust; if no trust is established, then the bill fails. Looked upon as a contract, it is not the subject of equity jurisdiction. In proper cases there may be an injunction upon a threat to violate a contract, but there is no jurisdiction in equity to compensate for breach of a covenant, except as ancillary to the main relief. The act complained of is not the act of selling: Little, Brown, & Co. cannot be charged with notice as to this thing; the breach alleged is the use of the notes, and not the sale of each copy. There was not even an agreement to hold the entire copyright for complainant's exclusive benefit. Mrs. Wheaton could not do this; she did not agree to do it. (5.) Mr. Lawrence has abandoned whatever right he may have had, or so conducted himself with regard to it that he cannot ask a court of equity to enforce it. The complainant's authorities apply to common-law estoppel; but any thing that shows that he has waived, or leaves it doubtful whether he has or not waived his claim, disentitles him to ask the aid of a court of equity. Equity does not require a consideration, but only a consensus animorum, to constitute a waiver. Its only strictness in such cases is with regard to trusting to oral evidence; but here we have a letter. If there ever was a trust, we have changed our position and incurred expense, though this is not necessary to our case, as complainant has been guilty of laches. A clear abandonment has been made. The letter of Nov. 2, 1863, implies a gift; during two years he made no claim. His own testimony as to his own intention is not important; the question turns on the construction of the letter, and the belief of the defendants. The letter which he wrote and did not send is quite different from the one he did send. The indorsement said to have been made by Miss Wheaton is not evidence. The testimony does not prove her handwriting. She is not a party to the contract; it is only her construction of a writing now before the court, and her opinion is not important.

B. R. Curtis, for complainant.

This is not a bill for specific performance. It is a bill for an injunction and account, founded on an equitable title to a copyright in the first place, and founded on a covenant not to use Mr. Lawrence's notes in the second place. Upon this bill an injunction and an account will be decreed, not only against

Mrs. Wheaton, the maker of that covenant, but against those who aided and abetted her, and profited by aiding and abetting her, in the breach of that covenant. Barfield v. Nicholson, 2 Sim. & S. 4, 4 Russ. 355. The bill sets out the facts and the written agreement, and contains a prayer for general relief: it is, therefore, properly framed to entitle us to all the relief that can be given on those facts and that agreement; it is not material whether we have or have not alleged, as the legal conclusion therefrom, more than they entitle us to. A perfected agreement, covering the whole matter, was concluded between the parties and is expressed in the memorandum and accompanying letters; it contained all the stipulations that were necessary to be expressed: the correspondence proves this. It is clear, from the correspondence, that the money procured from Brockhaüs was entirely due to Mr. Lawrence's exertions, to the use of his annotations, and to the new work he undertook in connection with the French edition; that he never delayed the result, but pushed the negotiations with vigor; and that all these negotiations were duly communicated to the Wheatons and their advisers. In weighing the testimony and the motives of the parties, the court will take into consideration that the injurious charges in this behalf, distinctly contradicted by all the correspondence, are made by or on behalf of persons who are under great obligations to the complainant.

The defence of abandonment of rights, overlooks the fact, that this contract was not executory, but was fully executed on Mr. Lawrence's part, so that, for a valuable consideration, actually parted with by him, and enjoyed by the other side, he had purchased and acquired a vested equitable right; to wit, the exclusive control over his own notes. There can be no forfeiture of a right or valuable interest thus acquired and paid for, without a new contract upon consideration, or without conduct, on his side, leading the other parties so to change their condition, upon the belief that he had parted with his right, that a court of law would treat it as an equitable estoppel, and a court of equity may treat it as a new contract. Moore v. Crofton, 3 Jones & L. 438. No new contract, and no consideration moving to Mr. Lawrence, is pretended: his letter of Nov. 2 is all that is relied on. The presumption is, that nobody abandons a vested right without a consideration; that presumption is to be overcome; it is to be overcome by the use of language so clear that the party cannot even be left in any doubt for which he could ask an explanation. It is apparent that, finding they would not give him the formal paper without new and onerous restrictions which he had never agreed to, he intended simply to give up any further contention with regard to that formal paper, and to retain the rights already acquired. This is the natural meaning of his language; this is the meaning which the respondents put upon it, as shown by Miss Wheaton's writing on the paper returned. That writing was made, at the time of the transaction, by Miss Wheaton, who then represented her mother, and who is now a defendant and the only person interested in the copyright, and it is part of an exhibit produced by the respondents; it is, therefore, evidence for all purposes. Before any thing was really done in reference to the act now complained of, all the defendants were expressly notified of Mr. Lawrence's claims. So far from acting in reliance on any abandonment, all the answers state that they intended and took pains to respect Mr. Lawrence's notes just as if he owned them, and their instructions to Mr. Dana were explicit on this point. It was at their peril if they published without taking pains to ascertain that Mr. Dana had not obeyed his instructions. There has been no laches; no such defence is set up in the answers; the complainant moved upon his right to control his notes the moment it was violated. The defence that the copyright is invalid for want of a formal assignment of the inchoate right is founded on some English decisions which almost amount to legislation, even under the English copyright act. But our statute, unlike the English, makes special provision for recording assignments after copyright, and the court cannot enact a new section concerning assignments before copyright.

Objection is taken that our copyrights are invalid on the ground that the copyrights of the former editions are not noticed on the back of the title-page. This defence is not set up in the answers; no valid copyright of the former editions existed to be noticed; that of 1846 was taken out in the Eastern district of Pennsylvania, where Mr. Wheaton had never resided; that of 1836 was taken out by Lea & Blanchard as proprietors; and both were also void because the notice of those copyrights has not since been inserted in "each and every edition published during the term." None of these respondents are entitled to take advantage of any flaws in these copyrights. The parties had acted under them, and received profits under them, supposing them to be valid; they were thus in possession of personal property with a concealed flaw in the title, if it was a flaw. When they sold to Mr. Lawrence and received the consideration, they impliedly warranted the right, and cannot now say that none existed. Randon v. Tobey, 11 How. [52 U. S.] 521; Coolidge v. Brigham, 1 Metc. [Mass.] 551; Sherman v. Champlain T. Co., 31 Vt. 175, and cases cited in the opening. The memorandum was a promise to confer a right on the complainant; it therefore amounts to an express warranty. Simms v. Marryat, 7 Eng. Law & Eq. 337. The respondent Dana is employed by the Wheatons, and the publishers, who act under them, stand in no better position. The memorandum contains a negative covenant not to use, as well as a grant of right. A court of equity will

not only restrain the covenantor from violating it, but will restrain any one who has notice from aiding her in a breach of it. Farina v. Silverlock, 1 Kay & J. 509.

Argument for respondent Mr. Dana: [3]

Copyright is not the title of the author to his production. It is the statute monopoly to multiply copies of the book. Stephens v. Cady, 14 How. [55 U. S.] 529; Stowe v. Thomas [Case No. 13,514]. It attaches only to the book deposited. Mrs. Wheaton's copyright is the right to multiply copies of that complex work, consisting of the text, the notes of Wheaton, the notes of Lawrence, in their character of notes to Wheaton, with their connections and attachments thereto. Lawrence's work was attaching addenda and corrigenda to such portion of the text as he thought proper, so that they should perform the function of a note to that text, and nothing further. They are not intended to and cannot stand alone. Lawrence has nothing which can be multiplied by printed copies. The agreements alleged do not give him any right so to multiply them. He does not own the text, nor do the agreements profess to give him any right to use it in any way, but quite the contrary. The memorandum, professing to place the control of the text and notes in different persons, severed them forever, and forbade either to be used in connection with the other. The memorandum, at most, gives him a right to multiply copies of the notes as dissevered from Wheaton; that is, practically the right to use them as material in some new work which will of necessity differ essentially from any thing now existing, and which will not be protected by any existing copyright, but will require a new copyright to give him the exclusive right to multiply copies of it. The true test, therefore, is not whether the notes of 1866 interfere with the notes of 1863, in the function for which they were designed, namely, to act as notes to Wheaton, but whether the notes of Mr. Dana, as they stand in the edition of 1866, do so interfere with or impair the right of Mr. Lawrence to use the materials of his notes of 1863, in some new mode or combination, as to require the intervention of a court of equity. All questions as to use of Mr. Lawrence's combination and arrangement, or of his connection of the new matter with the text, are, therefore, immaterial: whatever value may exist in this is lost to every one. The court may also throw aside any mere literary and personal question, how far Mr. Dana is indebted to Mr. Lawrence.

Mr. Dana's finished work is very different from Mr. Lawrence's. Mr. Dana prepared complete essays upon the whole subject of the notes, often going over the same ground as the text, and capable of standing alone and being published as monographs. Mr. Lawrence merely supplements Wheaton, by adding more recent authorities, &c. Mr. Dana gives events, the substance of opinions, diplomatic letters, &c., in his own language; Mr. Lawrence generally gives long quotations, his merit being in selecting and collecting rather than digesting; e. g. Mr. Dana's note 36, on the "Monroe Doctrine;" note 215, "Neutrality Acts;" note 228, "Carrying Hostile Persons or Papers," and others. The term "piracy" or "infringement" is not appropriate to this case; "interference" is more proper. It is important to consider that, before undertaking this work, Mr. Dana held, by birth, association, and still more by his own labors and merits, a rank among the leading men of his day. He had a reputation as a writer, early established, and had already for years held a place among the leaders of the bar, both state and national, and had, especially in practice, devoted himself to admiralty, maritime, constitutional, and public law, while his position as United States district attorney all through the war, gave him a particular knowledge of prize law. When he undertook this work, international law was receiving great study; materials were never more abundant, and all writers used the works of their predecessors with great freedom. The motives of the literary pirate and plagiarist are usually mercenary. Mr. Dana's relations with this undertaking were those of large pecuniary sacrifice, and he had a reputation at risk. He did, in fact, employ upon this work a great deal of time and severe intellectual labor, and that of the highest quality. Careful study and preparation, original thought, and a style entirely free from any thing like copying, characterize these notes. The work is much shorter than Mr. Lawrence's, yet no omission is complained of; this is due to a clear and condensed treatment, differing in this respect very much from Mr. Lawrence's. Mr. Dana resectioned the text, and

[3] On Nov. 11, 1867, and succeeding days, the complainant filed the usual brief, and opened his case at length on the question of title and on the question of piracy. The respondent's counsel stated that they were not prepared to argue the latter point, and thereupon the court ordered that the argument on the question of title should be completed orally on both sides, but that the further argument on the question of piracy should be presented in print in the order in which the case would have been argued had the argument proceeded orally, as was expected. The respective arguments on this point, covering upwards of two hundred printed pages on each side, were filed in the following spring and summer. Motions were afterwards made by the defendant for leave to present, as further argument, a pamphlet of about one hundred pages, entitled a reply to the complainant's argument; but, after a hearing, the court declined to receive it, upon the ground that there was nothing in the complainant's argument which the respondent was entitled to reply to, and that the pamphlet offered by him appeared on examination to be a re-argument of the case, and not a reply to the complainant; and that the allegations as to the introduction of new matter into the complainant's closing argument were not well founded in point of fact, some of the longest passages thus complained of, being literal reprints of the brief and of the short-hand report of the opening oral argument.

added marginal titles; a work of much labor, not called for by his contract, and performed solely for the good of the book.

Mr. Dana has voluntarily produced the manuscript from which his book was printed, and it is all in the handwriting of himself or his amanuensis. His longer notes were written on large foolscap sheets. His shorter notes were written in this manner: he had Lawrence's edition of 1863 interleaved and loosely bound in two parts, for the greater convenience of making memoranda while studying Wheaton and Lawrence's notes, preparatory to entering upon the work of writing his own notes. He studied this book, reading at the same time, upon each topic, the other principal writers, making memoranda upon these interleaves and upon loose paper. Afterwards, he wrote his shorter notes on these interleaves. It is proved that, at great personal sacrifices, he devoted nearly two years to his work to the utmost of his capacity, and placed himself in communication with prominent gentlemen who were in a position to afford him aid in the way of new information, recent books, &c., and that he had access to many valuable libraries. Thus he bestowed great original labor upon this work. An examination of the testimony of Mr. Lawrence and of his expert shows that their conclusions are not to be relied on, but that the court must examine and compare the books for itself. The analysis, criticisms, digestings, comparisons, and distinctions, the thoughts, ideas, reflections, and general principles elicited, go for nothing with these gentlemen, if the facts, documents, and authorities—that is, the raw materials—of the two notes are the same. (The argument then proceeded to examine in detail a large number of the notes, respondent denying the correctness of many of the facts alleged about them, criticising the inferences the complainant had drawn from the facts, explaining the character of the notes, and wherein each resembled, if at all, and wherein each differed from, the note of Mr. Lawrence to which it was said to correspond.)

The result of this examination may be fairly stated thus. It is demonstrated, as to most of these notes, that they are not taken from Lawrence. It is shown that the object of the notes, the points presented, the analyses, the suggestions, the positions, are the independent work of Mr. Dana, of which there is no counterpart in the work of Mr. Lawrence. As to many of these notes it is shown affirmatively that they not only were not taken, but could not have been taken, from Lawrence; that not only the mental processes, but the materials, are not to be found in Lawrence's book. There is no evidence to show as to any one note that it was taken, as alleged, "wholly from Lawrence." There is no evidence to show, as to any one note, that it was taken in any part from Lawrence. All that is shown is that, as to a few of the notes, the quotations and citations are nearly the same; but this applies to a few only: and as to these there is almost always some difference in the authorities, tending to show independent research. The utmost that can be said is that many of the materials found in respondent's work may have been taken from Lawrence. But this is absolutely nothing. Lawrence has no monopoly in authorities. Dana is not to decline using one because Lawrence has used it, even though Dana had derived his first knowledge of it, or his notion of using it, from Lawrence's note. And it may be that he derived this from some other work; for authors on this subject necessarily use the same materials. The complainant has not even made out a prima facie case that any thing was in fact taken from Lawrence. With this result from the detailed examination of sixty-eight of the accused notes, we do not care to waste time over the remainder. It appears also that those classed as chief offenders are mostly the short notes, and that but few of the principle ones, on which the character and credit and usefulness of Dana's edition depend, are even accused. It is clear that there is nothing to sustain the charge of copying Lawrence's original matter; the only question presented is, how far has Mr. Dana used the materials collected and selected by Mr. Lawrence. Doubtless Mr. Lawrence did not originate these, but derived them from other works, and doubtless Mr. Dana went to the same sources. For this reason, and from the nature of the case, the coincidences in authorities between Lawrence and Dana would be numerous, and for this reason such coincidences do not prove copying from Lawrence. The burden of proof is not on Mr. Dana to show where he got them. He makes oath that he got them all from somewhere, and discloses his numerous sources, including Lawrence. He swears that he cannot now tell from which source he derived any one authority, and that he cannot ascertain except by examining all those sources to see in which it is found, and this would involve so much labor that it cannot be required of him.

Mr. Dana's deposition states how he obtained his authorities, how he used his materials when collected, and what labor, thought, and study he bestowed upon them, and proves great original research and independent examination. It states what use he made of Mr. Lawrence's notes; all that he did was to use the materials found in the work of Lawrence as he did the materials found in other writers, intending to let nothing valuable escape him wherever found, and this use is proper. It is not proved by any reliable evidence that Mr. Dana did not examine the originals of all the authorities to which Mr. Lawrence's notes directed him. The repetition of some erroneous citations is pointed out, but it may well be that in

studying Lawrence's notes and other books he made memoranda of the authorities cited therein, then took his memoranda to a library, examined the originals, and forgot to correct the errors or did not notice them. Again it may be that the error crept into Lawrence's notes because he copied from a predecessor, and that Dana copied it from the same source, or from some later writer who took it from that source. This disposes of all the alleged typographical errors, and typographical peculiarities. Moreover some of them will be found not to be worthy to be put into such lists. The same argument disposes of several other classes of alleged identity in the form of dates, of citations, &c. If Mr. Lawrence made citations from original documents in the department of state or elsewhere, he has given them to the world, and a subsequent writer may use them.

Not only is it true that the burden is not on Mr. Dana to show whence he derived his citations, but the burden is on Mr. Lawrence to show that they were derived from his notes and not elsewhere. The very difficulty of proving this suggests that where this is all that is relied on, a strong case must be made out of continuous and large transfers, and then they go for nothing in themselves, the use being different, but are only evidence of an animus furandi. Cary v. Kearsley, 4 Esp. 168. Undoubtedly Story and Parsons and Redfield are directly indebted to their predecessors for large quantities of citations, and properly so. Now so far from making out a strong case, the complainant has hardly even attempted to make out any case of this sort against Mr. Dana. Mr. Dana's testimony and the evidence show that whatever assistance he may have derived from any source, he made an original and independent examination of the authorities and of the whole matter. Mr. Dana has voluntarily put into the case his whole manuscript, which would certainly be unusual in a plagiarist conscious of fault. (The complainant's inferences from the MS. were commented on at length, and several other matters of detail were gone into. Some personal charges against Mr. Dana generally and as a witness, were commented upon and declared to be unfounded.)

Points of Law Applicable to this Case.

The court will not exercise its equity powers unless something more than a mere technical case of infringement is made out. All prior editions of Wheaton have been sold, and are out of the market. The only chance to procure the text of Wheaton is by the purchase of Mr. Dana's edition. No publisher would undertake an edition of Wheaton's text simply. The twenty years since his death has wrought great changes in the science in which he dealt, as well as in the events to which that science is applied. An injunction, though confined to the notes, would in effect suppress the text for several years, until a new edition could be prepared. All the copies of Dana's edition, owned by Little, Brown, & Co., would be lost. The suppression of Mr. Dana's notes would be a public loss, and the court cannot pick out and suppress a few references and leave the rest standing. No injunction has ever been granted in copyright cases, except upon the ground of protecting a pecuniary and existing interest in an existing book. There must be damnum as well as injuria, and one of the strongest grounds for issuing the writ is to prevent damages from competition, the extent of which a jury cannot accurately estimate. Tinsley v. Lacy, 1 Hem. & M. 747; Hogg v. Kirby, 8 Ves. 224; Geary v. Norton, 1 De Gex & S. 9; Phil. Copyr. 146; Curt. Copyr. 314.

It is not enough even that a book is in preparation; it must be actually on sale. Maxwell v. Hogg, 16 Law T. [N. S.] 130; Correspondent N. P. Co. v. Saunders, 12 Law T. [N. S.] 541. In this case nothing exists, or is even directly contemplated; there is only the bare possibility of a new book entirely different from any thing now existing, not only because it must be in a different form, but because, before Mr. Lawrence could write it, so much would have happened that he would desire to change the whole, and it may be would leave out, as then having no value, the only materials which Mr. Dana is charged with having used. And the evidence shows that it is hardly possible that Mr. Lawrence can ever find time for such a work. There is no subject in existence, and no pecuniary interest to be protected by the use of this extraordinary power of a court of equity: therefore it will not be exercised. On the contrary, courts require a grave and serious injury or threatened pecuniary loss before they interfere in this manner. Lewis v. Fullarton, 2 Beav. 6; Webb v. Powers [Case No. 17,323]; Whittingham v. Wooler, 2 Swanst. 428; Bell v. Whitehead, 8 Law J. Ch. 141; Curt. Copyr. 324, 326. In this case there has not been even a bare violation of right. In works of pure imagination or invention there should be no traces of a predecessor; if there is borrowing, it is clear plagiarism, and if enough in extent to injure the first work in the market, a court will interfere. There is a class of works, such as catalogues, which are mere compilations in the simplest form, and can hardly have any standing under copyright laws, which are intended to favor science and learning and not mere industry. Clayton v. Stone [Case No. 2,872]. Some works, such as modern dictionaries, are mainly mere compilations, yet require learning and intellectual labor. In the lowest form of compilations, which only set down ultimate facts, any identity due to copying is piracy. And in these the subsequent verification of the matters copied does not excuse the copying. This is because in these works there is little or nothing that can really be called authorship. Lewis v. Ful-

larton, 2 Beav. 8; Longman v. Winchester, 16 Ves. 269; Scott v. Stanford, L. R. 3 Eq. 723; Murray v. Bogue, 1 Drew. 353; Cornish v. Upton, 4 Law T. [N. S.] 862. There is a middle kind of works, partly compilations and partly original, consisting sometimes of simple facts ascertained and collected with great care and skill, sometimes of well-known facts arranged on a meritorious and valuable plan, sometimes of references not ultimate facts, but matters whose value chiefly consists in the rule or principle lying behind them. Kelly v. Morris, L. R. 1 Eq. 697. Maps are of the first class: they ought to be identical if correct, and there is no middle ground between a copy of the first and independent labor leading to the same result. Even here the second maker may use the former chart for example, to be sure that he has omitted nothing. Jarrold v. Houlston, 3 Kay & J. 708. See, also, Sayre v. Moore, 1 East, 361, note; Lewis v. Fullarton, 2 Beav. 6; Wilkins v. Aiken, 17 Ves. 423; Blunt v. Patten [Case No. 1,580]; Murray v. Bogue, 1 Drew. 353; Cary v. Kearsley, 4 Esp. 168. The question is whether there has been a legitimate use, in the fair exercise of a mental operation, deserving the character of an original work, or whether matter has been taken colorably, animo furandi. Gray v. Russell [Case No. 5,728]; Emerson v. Davies [Id. 4,436]; Campbell v. Scott, 11 Sim. 31; Wilkins v. Aiken, 17 Ves. 423; Hodges v. Welsh, 2 Ir. Eq. 266; Scott v. Stanford, L. R. 3 Eq. 722; Murray v. Bogue, 1 Drew. 353; Jarrold v. Houlston, 3 Kay & J. 708; Reade v. Lacy, 1 Johns. & H. 524; Whittingham v. Wooler, 2 Swanst. 428; Bell v. Whitehead, 8 Law J. Ch. 141; Webb v. Powers [Case No. 17,323]; Tinsley v. Lacy, 1 Hem. & M. 747; Reed v. Carusi [Case No. 11,642]. In considering this case, care must be taken to distinguish the subject-matter, with the view to ascertain whether it is mainly of simple, ultimate facts, the merit of which consists mostly in the labor of ascertaining them; or whether there is a large merit in their classification and arrangement; or, lastly, whether the great merit is in thought and expression, and in the rules and principles derived from the facts cited. Spiers v. Brown, 6 Wkly. Rep. 352.

Another class, quite by themselves, are law books, or books which are both elementary and commentaries on rules and principles, and compilations of authorities. This case rests on an alleged use by Dana of the mere materials—citations and authorities—that are in Lawrence's book. These are not like the ultimate facts in directories; a reference to a commentator, treaty, or despatch is not to an ultimate fact, but to a place where some rule or principle is, or is thought to be, contained. International law is the practice of nations, gathered from decisions, diplomatic and governmental acts, and the opinions of jurists who have acquired the confidence of nations. Every law-writer must and should study his predecessors; his merit consists in his knowledge of the force of the authorities separately, and what they prove when combined. In this case it is not proved that Dana used the language or thoughts of Lawrence, or used an authority in the same connection or to the same purpose. The reproduction of clerical errors merely proves copying the citation, not that it is used in the same way. In spite of the attempt of the complainant to degrade his work to the level of a mere compilation of ultimate facts, so as to bring it within certain decisions, and although it may come near to that level, neither of these books is of that character. A writer has no exclusive title to any particular citation. He has only a right to multiply copies of the book copyrighted, and to be secured against such a reproduction of this matter, as a whole, in all its relations, and upon all the above considerations, as will seriously injure it as a commodity for sale in the market. The court will not interfere unless there has been both a violation of right and a great damage; it must be made to appear that the defendant has, taking the whole book together, so far made a mere servile copy of it, without the requisite labor and thought of his own, as to make a work which not only competes with the plaintiff's in the market, but competes with it by reason of an unfair use made of it.

Argument for the Complainant on the Question of Piracy.

Since Mr. Wheaton wrote, the science of international law has made great progress, and new events and new authorities and new questions to be discussed in the light of old and new events and authorities have arisen. Mr. Wheaton's book did not contain all that existed, or even all that he knew, when he wrote, but presented what, at that time, he thought it most important to present, having regard to the size of his book. By reason of knowledge which the author did not possess, and which the annotator has acquired, he discerns that certain passages of the text admit or require annotation: the acquisition of this additional knowledge, the selection of so much of it as the annotator's judgment determines him to present, the arrangement of it, its reduction to the form of notes and the connecting them with the appropriate passages, constitute his work. It is obvious that when the annotator has thus selected a passage to be annotated, and has supplied, in the form of a note, the new and additional matter to illustrate, supplement, correct, or qualify the text, he has performed the work of an author, and his note is the subject of a copyright. And it is equally obvious that when a subsequent annotator, having the work of the first before him, by means of his use of that work, and not by independent knowledge, thought, and study of his own, selects the same passage of the text as a sub-

ject for a note, and uses for it the matter which the first had collected, selected, and arranged in the form of a note to that passage, the second avails himself of the labors of the first unlawfully, and in violation of the rights of the first. It is not material that the second adds new matter not given by the first, or that he does not copy the very language of the first, for it is too clear to require argument, that one man cannot lawfully appropriate the property of another by adding something of his own, or by using his ingenuity to disguise what he has taken. Greene v. Bishop [Case No. 5,763]; Folsom v. Marsh [Id. 4,901]; Gray v. Russell [Id. 5,728]; Emerson v. Davies [Id. 4,436]; Kelly v. Morris, L. R. 1 Eq. 697; Scott v. Stanford, L. R. 3 Eq. 718; Lewis v. Fullarton, 2 Beav. 6; Longman v. Winchester, 16 Ves. 269; Wilkins v. Aiken, 17 Ves. 424; Cary v. Faden, 5 Ves. 23, note; Hodges v. Welsh, 2 Ir. Eq. 266; Blunt v. Patten [Case No. 1,580]; Curt. Copyr. cc. 5, 9, pp. 263, 277–284, and cases cited; 2 Kent, Comm. 383;[4] Campbell v. Scott, 11 Sim. 31.[4]

These are law-books. Their object is not to promulgate the theories of the writer, but to state the law. This is drawn from the practice of nations, the decisions of tribunals, the opinions of jurists and thinkers; these are not used to illustrate the views of the writer nor as reasons for the law: they are facts proving the law, and the work of the writer is to learn them accurately, to understand their legal aspect and the principle proved by each, to determine, by a critical analysis of everything bearing upon the subject, which are to be accepted as sound proof of principles, which are to be rejected entirely, and which are to be taken as contradicting or as introducing qualifications or exceptions to commonly received rules. This requires not only study and knowledge of each fact, but knowledge of the principles of international law, careful thought as to the topic of each note and the bearing of each fact or authority upon it, and the exercise of an enlightened judgment upon the whole. The result of all this the annotator presents in such a form, with so much brevity or fulness, and with so much of his own explanation or comment as he thinks is required to enable the reader to understand and correctly appreciate the bearing and value of these matters. Accordingly the essential and valuable part of his note is what is presented, and not the form or manner in which the writer undertakes to convey it to the reader. The respondents' expert and witness says correctly, "The original notes in both editions are either statements of historical events, accounts of legislative debates, narratives of diplomatic discussions, negotiations, or correspondence, abstracts of cases in the courts or judicial tribunals of different countries, summaries of the views of other text-writers or essayists on International Law and kindred topics." 7 Direct Ans. p. 401. The field from which these are to be drawn is practically unlimited, for the materials are to be found not only in judicial reports and text-books, but in treaties, state papers, parliamentary debates, state archives, histories, memoirs of prominent men, annuaires, reviews, periodicals, and newspapers. This is a fact proved in the case. It appears that Mr. Lawrence has a library of over 5,000 volumes on this special subject, and the number of volumes of English, French, and American public documents, debates, &c., is enormous; that Mr. Phillimore cites (being only his selection) 650 works, not including law reports; Kluber, by Ott (1861 Ed.) has a list of over 1,000 separate works. There are no careful digests, as in the case of law reports, but, especially for all diplomatic and historical authorities, by far the most numerous and important, the writer must rely chiefly on his own study, and on a knowledge which can only come of a lifetime of intelligent and observant attention to the matter, such as the complainant has bestowed upon it; and there is positive evidence as to the great labor, study, and expense which he in fact bestowed upon this portion of his work, and of the great and recognized value of what he accomplished in this respect. The mere collection of such authorities as are in the complainant's notes, is therefore highly meritorious, as well as the thought and judgment displayed in his "selection, arrangement, and combination." The nature of the work to be done, and the enormous field open to the writers, show the occasion for intellectual exertion, the opportunity for originality, and the certainty that, if originality is employed, the results will exhibit those differences which always follow independent thought. And also substantial differences between different writers on the same general subject show that it requires original thought, and that such thought produces differences of result wherever applied. The a priori certainty of such differences, and the actual existence of such differences—as in the facts and authorities cited by authors—are facts proved in this case. Identity between Lawrence and Dana in these respects proves, therefore, that their two books have but one intellectual authorship.

This entire want of identity between writers is fully proved by our witness, Judge Potter. Indeed a presumption arises from the similitude between Lawrence's and Dana's books, which the law requires the respondent to explain. Emerson v. Davies [supra], and opinion of Lord Ellenborough there quoted. Accordingly the respondent announced at the outset that he proposed to

[4] Before the master, the complainant also cited the late cases of Pike v. Nicholas, 17 Wkly. Rep. 842; Morris v. Ashbee, L. R. 7 Eq. 40; Wood v. Boosey, L. R. 2 Q. B. 340; 37 Law J. Exch. pt. 2, p. 86.

show that the matter charged to have been obtained only by copying from Lawrence was common to other writers on the subject, and on one occasion his counsel obtained a continuance or delay, granted expressly for this purpose. His expert testified that his examination was particularly directed to this point (Record, pp. 407, 428), and their utter failure to establish any such identity between Dana and other writers is entirely conclusive. Almost the only instances produced turn out to be cases where some other recent writer had quoted from Lawrence, giving credit for the matter which Mr. Dana had copied and presented as his own, giving no credit. Among many other illustrations it appears that only about two-fifths of the works cited by Mr. Dana are in Phillimore's list of 650. President Woolsey's "brief selection" contains 48 works of an historical and diplomatic character, not including public documents, debates, &c., which he says are very valuable but difficult of access. Mr. Dana, writing at the same time with Woolsey, cites 72 works of the same character, but only ten of them are common to the two writers. Every difference which can ever exist should exist between these two books. Mr. Dana testified: "Mr. Lawrence's entire organization, as far as it affects him as an author or annotator, as well as his mental habits for a lifetime, are probably as unlike my own as it is well possible to conceive."

When an annotator has performed the work of an author in the manner described, whether he presents the substance of the authorities in his own language, or in the words of those authorities themselves, whether he states the rule which his judgment informs him is correct in his own phraseology, or in that of a writer of authority, does not make his work any the more or the less original and thoughtful. Nor does the use of the language of "generalization" or "philosophic deduction" vary the matter, for the real merit is that the facts stated should (1) support the results they are adduced to prove, and (2) correctly represent the whole field. Now Mr. Dana has not even selected and combined for himself facts scattered at hap-hazard through Lawrence's notes, or used them in connection with different topics, or to support new principles or rules different from those which Lawrence had employed them to prove or illustrate, but he has made each note by taking what Lawrence had presented as his annotation to the same passage of the text. In other words, he has not merely unduly availed himself of a collection due to Lawrence's learning and industry, but he has copied the "selection, arrangement, and combination" which is the result of Lawrence's thought, study, and critical judgment. This "selection, arrangement, and combination" consists of two parts: one is the selection, arrangement, and combination of the matters contained in the note inter sese, as bearing in a certain way upon a certain principle of international law, and the other consists in perceiving that a particular passage of the text so states or refers to that principle that it admits of or requires the annotation to be attached to it. To reproduce the matter of the annotation in a new and different book, having no reference to Wheaton's text, copies the first and more meritorious part; to reproduce it as an annotation to the same passage of Wheaton's text is to copy both parts, and all that gives value of any kind to the annotation. Our evidence charges and shows that the notes copied embrace rather more than their fair numerical proportion of Mr. Dana's large and more important notes; the suggestion to the contrary rests on a misreading of the testimony.

The suggestion that Lawrence's work was merely to add authorities since Wheaton is entirely unfounded in fact. Lawrence takes up the matter from the beginning quite as much as Dana, and a full proportion of the matter in Dana, before Wheaton's time, is copied from Lawrence.

Proof of the Piracy.

First, Mr. Dana's confessions. If he really intended to annotate Mr. Wheaton's text with original notes of his own, as if it had never before been annotated (as he pretends), he should have taken Mr. Wheaton's last edition. If he wanted to use merely Mr. Lawrence's revision of the text, he should have taken the edition of 1855, which has the same text as that of 1863, and is more convenient as being smaller, a copy of which, it appears, he had. Instead of that, he began by having his copy of Lawrence's Wheaton of 1863 interleaved with writing-paper, and then carefully studied the text, Mr. Lawrence's notes, and certain other books. "When I began reading upon a topic," he testifies, "in addition to what I may call memoranda of mental suggestions, my general course was, on important points, to copy directly from the author the citations he made," putting them on sheets of paper. "As to Mr. Lawrence, I felt at liberty to examine his notes as I did the writing of other persons, whether copyrighted or not. I entered his citations on my rough sheets as I did those from other writers." "In reading Mr. Lawrence's notes, as in reading other authors, I intended to let no important fact or authority escape me, and in all alike I took some mode of securing that end by note, memoranda, or otherwise." "In some cases I may have afterwards written out a memorandum of what I considered to be the substance of the note, and placed it among my materials upon the subject. In other cases I may have trusted to rereading." Having pursued this course, he undertook "to make it known to the public" that he had "built up a new and original body of notes on this basis of the text of Wheaton, and had detached Mr. Lawrence altogether from the book." One way in which he made this known was by printing in his preface that his "edition contains nothing but the text of Mr.

Wheaton according to his last revision, his notes, and the original matter contributed by the present editor," and that "the notes of Mr. Lawrence do not form any part of this edition. It is confined, as has been said, to the text and notes of the author and the notes of the present editor," making no other allusion to Mr. Lawrence's work in any part of his book.

Internal Evidence of Copying.

After the notes have been examined, to ascertain their resemblance and identity in accordance with the principles already explained, we come to what is called physical proof of copying. This depends upon bringing together many details. It may be done by collecting in one list all the instances of typographical errors reproduced which are scattered through the whole book; then making lists of all other details in appropriate classes. The weight of this evidence increases not by addition, but by multiplication. One instance of one class might be by accident, ten cannot be. And when various instances of different classes occur in the same sentence, the presumptions are no longer one to ten, but one to a hundred. Add to this the fact that there is no such identity between Dana and other writers, and that Dana wrote with Lawrence before his eyes, and it is no longer a question of weighing evidence,—it is infinity to nothing. We have collected such lists, classified according to the character of the instances, and have also examined each note separately, to see how many of these instances concur in one note, and what other special proof there is applicable to each note. The reproduction of typographical errors and peculiarities is not only absolute proof that the passages containing them are copied, but requires the court to presume, prima facie, that all other passages, which are the same as passages in the original book, are copied, though no blunders occur in them. Jeremy, Eq. Jur. p. 322; Curt. Copyr. 254; Mawman v. Tegg, 2 Russ. 393. There are fifty-four of these instances. These not only prove copying in the first instance, but they prove copying without ever going to the originals. If he went to the authorities for substance, he would have brought from them something not in Lawrence's book, and he has not done it in any one of these cases. If he went to verify the references he would have corrected them, and he has not done it in a single instance except one, where there was a very special reason requiring him to go to it,—and then he corrected a date. Some of these errors are so serious—vol. viii. instead of ix., p. 249 instead of 429, 354 instead of 255—that he could not have looked at the authorities without noticing them. In several cases Lawrence has cited the same despatch, &c., twice, giving the wrong date once, and the right date once, and Dana, in his corresponding notes, has precisely reproduced this. Sometimes in different notes, and sometimes in the same note (because his book was written in 1855, and added to in 1863), Lawrence has cited from different editions of the same book: nine of these instances have been reproduced by Dana, and none corrected. He has literally reproduced translations made by Lawrence, differing from all other known translations. Besides these fifty-four there are lists of fifty-nine other typographical and clerical peculiarities reproduced. In some cases Lawrence has mentioned several matters, and given references for each. Dana has reproduced some of them, omitting others, and attached to such as he has copied the citations or dates for those which he omitted. There are a very large number of cases where differences have been pointed out between Lawrence and Dana, and on examination it appears that these differences are just as a shrewd person would be likely to make, by guessing and trying to change while copying, and such as one who studied the matter would not make, for they are errors. And in some of them we find that Dana's original MSS. were exactly like Lawrence, and the change made afterwards.

There are many books and authorities to which Dana has constant references, but never any except such as are found, in substance and form, in the corresponding note of Lawrence. Among them are Twiss, Westlake, Annuaire des Deux Mondes, Almanach de Gotha, Le Nord, Hansard, &c. He has quoted or cited from twenty-five despatches, &c., procured by Lawrence from department of state, or other MSS., and cited by Lawrence as from "Dep't of State," "MSS.," &c., and never printed elsewhere. He has long lists of authorities found in the same order in which they are found in the corresponding note of Lawrence. Mr. Dana confesses that he studied Lawrence with care, for the purpose of taking from it, and that he did take from it, all that he thought sufficiently valuable, and he cannot tell from recollection or memoranda, in any instance, what he did take. Every similitude in the two works is necessarily presumed to arise from copying, unless that presumption is rebutted. The burden is on the respondent. Curtis on Copyright, 255, and opinion of Lord Ellenborough there quoted. Emerson v. Davies [Case No. 4,436]. It is moreover proved, as matter of fact in this case, as already stated, that the identity between Lawrence and Dana can only have arisen by copying Lawrence. Most of Dana's notes were re-written one or more times. We have the final MSS. that went to the printer; all the intervening writings, the memoranda made while studying Lawrence's notes being no longer in existence, except in a few cases where they happened to be on the same sheet as a finished note, and except also such marks as were made in the margin of his interleaved copy of Lawrence. It is natural that he should put this MSS. into the case, to avoid the conclusive presumption that would arise from withholding it. In the margin of his copy of Lawrence's appendix on naturaliza-

tion there are many of his pencil-marks, made, he says, to show that these were matters which he ought to "recur to when at work upon his notes." The matters thus marked embody four typographical errors, and every one of these matters, in almost exactly the same order, and with all these errors, is reproduced in Dana's long note 49, of which, with trifling exceptions, they constitute the whole. There are many other similar instances. His shorter notes were written on the interleaves, so that, his note being attached to the same word with Lawrence's, he actually wrote with Lawrence's note under his eyes, and, in some cases, the erasures and interlineations show that he kept his eyes on Lawrence's note while writing, copying first the phrases found in Lawrence, and then changing them while writing. He testifies that "the interleaving was very convenient." In two of his notes, which were entirely copied from Lawrence, he had cited Lawrence's notes as his authority. Afterwards he struck out Lawrence's name, but retained the copied matter. He says he did this "after reflection," apparently being satisfied to draw the line between the existence of indebtedness and the acknowledgment of it. These and other instances of his care to avoid all allusion to Lawrence, coupled with his disclaimer in the preface, show an animus inconsistent with even a belief that he was making a fair and legitimate use of complainant's book.

Going to the other line of proof suggested, we shall now show that note after note reproduces, in whole or in part, matters from the note which Lawrence has attached to the same passage, that, except in a few peculiar cases forming a class by themselves, Dana has derived nothing from the authorities, either in form or substance, which requires or indicates the use of any thing except Lawrence's note from which he was copying, and that he has made no use of the matters thus copied in any way different from the use made by Lawrence, in the note from which they are copied, with such additions and changes of form as could readily be made by a lawyer of respectable intelligence and attainments.

The defence of "a fair use" is not tenable in this case. The use made far exceeds anything which the law of copyright has ever been held to allow. As already shown, Dana did not merely use Lawrence's work as a storehouse of facts, but he reproduced Lawrence's selection, combination, and arrangement. The agreement provided that Mrs. Wheaton should make no use of Mr. Lawrence's notes, and one avowed object of it was to secure to Mr. Lawrence the exclusive use of the "great amount of valuable learning which he had gathered with great labor from a wide variety of sources." This defence is not open to Mr. Dana. To present copied matter as original is not a fair use in the opinion of literary men. 1 White, Shakespeare, p. 22; Goldsmith's Life of Parnell, p. 39, of Little, Brown, & Co.'s edition of Parnell; Worcest. Dict., Preface, p. 6. Courts take the same view. The want of acknowledgment or denial of indebtedness is a very strong indication of an animus furandi, and excludes the question of a fair use, or lawful abridgment. Tinsley v. Lacy, 1 Hem. & M. 754; Sweet v. Shaw, 3 Jur. 217; Wilkins v. Aiken, 17 Ves. 426; Jarrold v. Houlston, 3 Kay & J. 715, 716, 722. The cases put by courts as illustrating what is a fair use are quotations and extracts for the bona fide and avowed purpose of comment or criticism, or for the purpose of presenting the views of the writer as an authority. Bell v. Whitehead, 8 Law J. Ch. 142; Cary v. Kearsley, 4 Esp. 168; Story's Ex'rs v. Holcomb [Case No. 13,497]. "The insertion of such extracts in reviews, moreover, tends to extend the sale of the works reviewed." Bell v. Whitehead, supra.

The act of congress does not require the complainant to keep copies on sale. It appears that the fact that the edition of 1863 was exhausted, and a new one in preparation, was concealed from Mr. Lawrence until too late for him to publish, and he is entitled to settle the question of copyright before undertaking a new publication. The French edition is in press, and it can be sold here or translated. The memorandum does not require him to use his notes. Mr. Lawrence may reprint Lawrence's Wheaton, for there are no valid copyrights except his. He may connect his notes with the "History," for it appears that a third party owns that copyright, and that the respondents knew that Mr. Lawrence had commenced negotiations to that end. He may embody them in a new work. He may treat with the Wheatons, if they have any rights in the text. In whatever way or in whatever form he uses them, the book will be in demand, because it contains the matters found in the notes of 1863; its sale will be injured just so far as the public are able to find the same matters in the defendants' book; and the defendants' book besides, or in spite of the merits or demerits due to Mr. Dana, will compete with it by reason of an unfair use made of the results of Mr. Lawrence's learning, research, and judgment.

The closing arguments had been made in the case about ten months. A motion was made by the respondent to file a new printed argument of ninety-eight pages, upon the ground that the plaintiff, in his closing argument, had introduced new matters. The plaintiff denied this, and showed that what was claimed as new matter was largely from the opening argument of the plaintiff and from the printed brief; the extracts being mere reprints.

CLIFFORD, Circuit Justice, said that the court had given the matter very careful consideration, and that he concurred with Judge

LOWELL. He wished to add, the twenty-second additional rule of this court provides that "counsel will not be heard unless a written or printed abstract of the case be first filed, together with the points intended to be made and the authorities intended to be cited, in support of them arranged under the respective points." The construction of that rule has never been that the party must state his whole argument, but his "points" and authorities. The practice varies with different counsel, and with their own convenience and the circumstances of each case, whether the brief shall be short or extensive. Also, counsel sometimes interchange new authorities at the argument, and this is allowed if it is done in season for the other side to reply to them. Cases frequently arise, where arguments are oral, where the respondents will suggest that the complainant has used new authorities, and will ask leave to reply to them orally or in writing, which is generally allowed. Sometimes, where they are important, a week has been allowed for such a reply. Where arguments are oral, no practical difficulties arise, because every thing is in the presence of the court, and can be settled at once. Where the argument is in writing, the application of the rule is more difficult, but the rule itself is the same.

The court remembers no cases in this circuit, and few in the supreme court, where controversies like this have arisen; yet the court does not see any serious difficulty in determining what ought to be done. If new authorities or new propositions touching the merits had been introduced, the obvious course would have been, reasonably, to cite legal authorities responsive to them, or to reply to particular propositions. That would have presented no difficulty, because at a glance we would have verified whether these were new cases; if so, the court would desire to hear suggestions about them, and to know whether there were other cases which would control them. This is to be taken in connection with the twenty-second rule of the supreme court, binding on this court, and which provides that the plaintiff or appellant shall be entitled to open and close. These, being settled rules of practice, are the rights of the parties, and the court must follow them. The complainant was entitled to open and close. The respondent had a right to expect a brief, and one was furnished. The case was argued under the order already read. According to it, the respondent replied upon the point of title upon which he was ready, and the complainant closed upon that branch of the case. Under it, time was given to the respondent to reply in writing upon the point of piracy, upon which he was not then ready, and that time was enlarged by a proper agreement of counsel, owing to the engagements of the respondent. Time was also given to the complainant to close on the question of piracy, and that time was enlarged by an agreement of counsel, for their convenience. The arguments came in on the 1st of August, and the court has had the case under consideration for seven or eight months, not devoting all its time to it, but taking it up from time to time, as its other engagements permitted. At this stage of the case there can be no further argument, unless the court should reach some point where they desire a re-argument. In other words, a proposition for re-argument must come from the court, and not from the party.

Questions of intrinsic importance and of great difficulty are presented for decision in respect to the title of the complainant, and as they are in their nature preliminary, they will be first considered. Briefly stated, his claim of title, considered broadly, is to the additions to and emendations of the text of the two editions as published under his supervision, to the memoir of the author, as contained in those editions, to the annotations prepared by him and published in those editions, and to the arrangement of the same, and the mode in which they are therein combined and connected with the text, and to the indices as published in those editions. He rests his claim upon the following grounds, as substantially stated in the bill of complaint: First, upon a contract or agreement between Catharine Wheaton and himself, that she should make no use of his notes aforesaid in any new edition of the work without his written consent; and that she would convey to him by a formal instrument, the right to make any use he might see fit to make of his own notes. Secondly, upon the ground that in the consideration of a court of equity he is taken and deemed to be the owner and proprietor of the copyrights, in and as to all the matters contributed by him and published in those two editions. Evidently, both claims, as presented, have respect to the agreement as expressed in the memorandum of June 14, 1863, and the subsequent correspondence upon that subject, as the first is founded in covenant or contract, and the second in an equitable title to the copyright, derived from the original arrangement and by virtue of the agreement expressed in that written paper. Confirmation of that proposition is not needed, because the language employed in the stating part of the bill of complaint is too plain for controversy; but if it were not so, every vestige of ambiguity is removed by the principal prayers of the bill of complaint, which are for an injunction, and for an account, and for a good and sufficient deed conveying the legal title to the copyrights.

The respondents contend that the complainant is not entitled to any relief for several reasons: 1. Because the memorandum, as they contend, is not a perfected contract, but merely a note or memorandum of the stipulations of a proposed agreement, as to the true

understanding and definite terms of which the parties never actually agreed, and on which their minds never in fact met. 2. Because, the parties having failed to agree as to the true understanding of the memorandum and the terms of the formal agreement which it contemplated, the complainant relinquished and abandoned the whole subject-matter of the instrument, and so notified the respondents. 3. They also contend that the agreement cannot be enforced, because the same was procured by fraudulent misrepresentations and concealments of the complainant. 4. That the agreement cannot be enforced, because the memorandum is without consideration. 5. Because the basis of the memorandum and the negotiations which led to it were the supposed legal copyrights held by the said Catharine; and they insist that those copyrights are void, and consequently that the agreement is inoperative, inasmuch as the parties entered into the same through mutual mistake. 6. Because the memorandum containing the agreement does not transfer nor assign any copyright to the complainant, or provide for or contemplate any such transfer or assignment.

Search is made in vain for any support to the first proposition of the defence, as applied to the terms or execution of the memorandum. Interviews took place between the complainant and Professor Parsons, and they conferred together upon the subject-matter embraced in that memorandum, as suggested by the said Catharine; and the proofs show that they came to a perfectly amicable result; that the memorandum was drawn by the latter and delivered to the complainant, to be transmitted to the said Martha B. for her examination, and that she afterwards, on behalf of her mother and herself, and to signify their approval, signed the memorandum and wrote the date thereon, and caused the same to be delivered to the complainant. Expressed in intelligible terms as the memorandum is, the construction and effect of the language are questions of law, which cannot be controlled or influenced by the opinion of any witness, not even by that of the person employed to prepare the draft for the consideration of the parties. He may not at the time have regarded it as a contract, but they were at liberty to adopt it as such; and if they did so, and it was duly and understandingly executed as such, their rights under it must be ascertained from the language employed, as applied, in view of the surrounding circumstances, to the subject-matter of the negotiation.

They subsequently differed, as the correspondence shows, as to the proper terms of the formal agreement for which the memorandum provides; but it was not denied, throughout that period, that the said Catharine had agreed "to make no use of Mr. Lawrence's notes in a new edition, without his written consent," nor that she had also agreed to give him "the right to make any use he wishes to of his own notes." Attempt was made, it is true, to ingraft the qualification into the latter branch of the stipulation, that the complainant should not publish in the United States a new edition of the notes and other matter of his own composition, "which he had added to the said two editions of said book, until the last edition is sold;" but it is clear to a demonstration that the agreement, as expressed in the memorandum, contains no such qualification. Properly considered, it is equally clear, also, that there is nothing in the correspondence to sustain the theory of the respondents as presented in their first proposition. "On reflection," said the complainant in his letter to Mr. Parsons, dated June 14, 1863, "the suggestion you made yesterday offers many advantages over my proposed plan . . . as is settles at once and for ever all questions in regard to the book." Influenced by those considerations, as he represents, he wrote a second letter of that date as a substitute, if preferred by the other party, for the one previously prepared to be forwarded to Mr. Brockhaüs, and submitted it to the approval of Mr. Parsons, as the friend of the said Catharine; but he expressly stated therein, that, in sending it, he did not wish to recede from the former arrangement. On the contrary, he stated in the enclosed letter that, having made an arrangement with the said Catharine, which gave him the entire control over his notes as published in English, and any claim she might have to the editions published by his correspondent, he had advised her to the effect that she might draw for the whole 6,000 francs. He proposed, in that letter to Mr. Parsons, that the said Catharine might retain the copyright to the text, and to relinquish all claim for the expenses of the stipulated translation; but he did not propose to vary the agreement, as expressed in the memorandum, as to his own notes, and he also made claim to the right, if any, that the said Catharine had to the text and notes of the foreign editions.

Full consultation took place between Mr. Parsons and the said Martha, as the agent of the said Catharine; and Mr. Parsons, under date of June 16, 1863, wrote to the complainant that: "1. Mrs. Wheaton will send your last letter to Mr. Brockhaüs, and returns you your former letter. 2. Mrs. Wheaton will draw at once on Mr. Brockhaüs, at twenty days, for 6,000 francs. 3. When Mrs. Wheaton learns that the bill is paid, she will execute instruments satisfactory to you, which shall, in the first place, bind her not to use your notes without your written consent, and, in the next place, give you all her claims and interests in respect to the whole book, text, and notes, for continental Europe in future." Inadvertently, Mr. Parsons omitted to re-state the second clause of the agreement as expressed in the memorandum, that Mrs. Wheaton would give to the complainant the right to make any use he wished of his own notes; but his attention having been called to the

omission, by the complainant, on the following day, he replied, on the 19th of the same month, that the complainant was certainly right in his construction of their arrangement, that the complainant, under it, could make any use he saw fit of the matter which he had contributed. Appended to that letter is a note in the nature of a postscript, dated four days later, in which the writer suggests that Mrs. Wheaton was bound by her contract with Little, Brown, & Company, as the publishers of the then current edition of the work, and that she could not convey to him any thing covered by her copyright in any way detrimental to that edition; but he proposed no alterations of the agreement, and confirmed the same by his two letters, and none was made or proposed by the parties. Prior to the 31st of August, 1863, the complainant received intelligence that the bill of exchange drawn by the said Catharine had been duly honored; and on that day he wrote to Mr. Parsons, requesting him to cause the agreement of June 14, 1863, to be carried into effect. Delay ensued before any response was received to that request; but when it came, October 17, 1863, it brought with it a draft for the formal agreement, as stipulated in the memorandum. As originally prepared, the draft contained three several stipulations. First, that the said Catharine should retain unimpaired the full legal exclusive copyright in the text of the book. Second, that she should in all ways respect the rights of the complainant to all the notes and other matter of his own composition, which he had added to the book, in the same manner and to the same extent as if he had a full legal copyright of the same. Third, that she thereby transferred and assigned to him thereafter the whole title, text, and notes to the editions published in continental Europe.

Besides these several stipulations, there were interlined in pencil at the close of the second stipulation the words following: to wit, "But the said W. B. Lawrence shall not publish a new edition thereof until the last edition is sold." Beyond doubt the draft was prepared without the words in pencil, and the explanations of Mr. Parsons upon the subject are, that he probably exhibited the paper after it was drawn to the said Martha B., or to the respondent, Charles C. Little, and that he made the interpolation at their suggestion. Dissatisfied with the draft as prepared, the complainant returned it to Mr. Parsons. His objections were twofold, as expressed in the letter returning the paper. First, because it made no reference to the "Histoire du Droit des Gens"; but, chiefly, on account of the stipulation that he should not publish a new edition until the last edition was sold, which he declared to be wholly inadmissible, as it would lead to new embarrassments. Alterations were subsequently made in the form of the draft, obviating the first objection, and limiting the restriction constituting the second and principal one, so that the complainant might publish a new edition before the last was sold anywhere except in the United States; but he declined to adopt it, insisting that the agreement as expressed in the memorandum contained no such stipulation. Determined not to involve himself in new complications, the complainant returned the last draft, as amended, to Mr. Parsons, stating to him, at the same time, that he had concluded, on reflection, to decline accepting any paper from Mrs. Wheaton. He had previously given him to understand that no such arrangement could be accepted, and more than intimated that if Mrs. Wheaton did not accede to his views in that behalf, matters must rest as they were in the original agreement. Contention, however, arose by some means between the parties in respect to what was quite unimportant, and what was not probably thought of by them or by Mr. Parsons when the memorandum was framed and executed. Stipulations for the protection of the contract with the publishers of the prior editions were unnecessary, as their remaining interests, if any, were vested, and, being antecedent to the negotiations between these parties, could not be impaired by the agreement contained in the memorandum, for the reason, as clearly stated by the complainant, that Mrs. Wheaton could not convey what she did not own.

Viewed in any light, the correspondence shows nothing more than that the parties disagreed as to the extent of the obligation imposed by the memorandum, which is a question of construction; but it was never even suggested that it did not contain a complete valid agreement. Conclusive proof that neither Mr. Parsons nor Mrs. Wheaton entertained any such views during that period, is found in the drafts for the formal instrument as prepared by the former, executed by the latter, and forwarded to the complainant for his acceptance. Both were prepared and signed, as therein recited, "in execution of an agreement heretofore made by and between" Mrs. Wheaton and the complainant, which is plenary evidence that up to that time the agreement expressed in the memorandum as to the notes was regarded as complete and obligatory.

Abandonment is the next defence to be considered; but the proposition must be examined in view of the conclusion announced, that the stipulations contained in the memorandum, as to the notes contributed by the complainant, are a perfected agreement, and not a mere proposal, as suggested by the respondents. Mere proposals may in general be withdrawn at any time before they are accepted by the party to whom they are made; and ordinary contracts, executory on both sides, may in certain cases be regarded as forfeited, as where the reciprocal stipulations are dependent, and where a party seeking to enforce performance has himself omitted to do something which he was required to perform as a condition precedent to his right of action. Cases may arise also where

a party is estopped to set up a particular contract, as where he has subsequently agreed in due form of law and for a valuable consideration to relinquish its benefits, or not to enforce its provisions, or where he has, by his representations and conduct, designedly caused the other party to believe that the contract had been discharged or that it would not be enforced, and has intentionally induced that party to act on that belief, to his pecuniary prejudice; if the belief so induced is unfounded, the party in fault in such a case is estopped to allege or prove the falsity of his representations as evidenced by his words and conduct. Pickard v. Sears, 6 Adol. & E. 471; Freeman v. Cooke, 2 Exch. 654; Van Rensselaer v. Kearney, 11 How. [52 U. S.] 326; Hawes v. Marchant [Case No. 6,240]; Moore v. Crofton, 3 Jones & L. 446.

Argument to show that the case is not one of forfeiture is unnecessary, as the proposition finds no support whatever in the evidence. Contracts executed on one side and unperformed on the other stand upon a very different principle from those where nothing has been done by either, so far as respects the party who has fulfilled his obligation and paid the stipulated consideration. Rights and obligations secured or imposed under such circumstances have become vested and absolute; and if the delinquent party seeks to avoid the obligation imposed on him, he must allege and prove a new contract, for a valuable consideration, amounting to a valid release, or that the other party is estopped to enforce the obligation by virtue of some operative binding agreement to relinquish the benefits from the same, or not to enforce the stipulation; or he must allege and prove that he has been deceived and designedly misled by the admissions and representations of the other party, as before explained. Foster v. Dawber, 6 Exch. 839; Edwards v. Chapman, 1 Mees. & W. 231; Wildes v. Fessenden, 4 Metc. [Mass.] 12; 1 Smith, Lead. Cas. (5th Am. Ed.) 462; Bank of Virginia v. Groves, 12 How. [53 U. S.] 51.

None of the elements of estoppel exist in this branch of the case, as the complainant did not agree that he would discharge the memorandum or that he would not enforce its provisions. Nothing approximating to such an agreement is exhibited in the record, nor do the respondents in fact set up any such defence. What they do set up is, that the complainant relinquished and abandoned any agreement in the premises, and so notified the respondents, by which it is understood they refer to the letter of the complainant, addressed to Mr. Parsons, of the 2d of November, 1863, in which he says: "On reflection, I have determined to decline accepting any paper whatever from Mrs. Wheaton, and therefore return the enclosed," meaning the amended draft for the formal agreement. Disconnected from the circumstances and the other correspondence, it might be possible to misunderstand the meaning of the writer of that letter; but it must be construed in view of what preceded it, and of the subject-matter to which it related. After the 31st of August preceding the date of that letter, the complainant had been more or less engaged in efforts to procure the formal agreement in respect to the notes as stipulated in the memorandum; but all his efforts proved fruitless. Only eight days before, he prepared the draft of the letter exhibited in the record as one intended for the same correspondent, in which he stated to the effect that his sole object in asking for the formal agreement was to prevent any further litigation, saying that he was satisfied that without it he could restrain any attempt to use these notes by Mrs. Wheaton, or any one else, in a future edition, adding, at the same time, that if she "does not sign the paper as now suggested," meaning one of the drafts for the formal agreement, without any restriction as to the use of the notes, then "matters can rest as they are." Although never sent to his correspondent, the exhibit may well be referred to as tending to show the real intent of the complainant at the time it was written.

Weighed in view of the antecedent correspondence and the surrounding circumstances, it certainly would be a perversion of the language of the complainant to regard what he wrote on that occasion, either as an agreement to relinquish or not to enforce that stipulation; and, even when separately considered, the language falls far short of what is necessary to justify any such conclusion. He made no admission by that statement inconsistent with the claim he now sets up; nor did he say any thing to induce the said Catharine, or any one of the respondents, so to act that either she or they will be injured if the agreement expressed in the memorandum is held valid and enforced. Howard v. Hudson, 2 El. & Bl. 1; Audenried v. Betteley, 5 Allen, 383; Pierrepont v. Barnard, 2 Seld. [6 N. Y.] 291; Rich v. Atwater, 16 Conn. 416; Plumer v. Lord, 9 Allen, 458. Expressions of a doubtful character are not sufficient to support such a defence as against a contract fully executed on the part of the complainant; but the meaning of the language employed must be clearly such that a man of ordinary prudence would take the representation to be true, and believe that it was meant that he should act upon it; and it must also appear that he did act upon it as true, so that he will be pecuniarily injured if it be allowed to be disproved. Rich v. Atwater, 16 Conn. 415; Mowry v. Sheldon, 2 R. I. 379; Flagg v. Mann [Case No. 4,847]; Langdon v. Doud, 10 Allen, 435; Moore v. Crofton, 3 Jones & L. 446.

Estoppels are allowed to shut out the truth only when it is necessary to protect a party setting up such a claim or defence,

against an injury or liability to which he is exposed without his own fault, and by reason of having trusted to the statements designedly made by the other party to expose him to such injury or liability, and which were of such a character that a man of ordinary prudence would take the representations to be true, and believe it was meant that he should act upon them as presenting the true state of the case. They must be proved, and will not be extended by implication beyond the plain import of the deceptive act, admission, agreement, or representation. When the request was made by the complainant for the formal agreement, he doubtless expected that it would include the "Histoire," as well as the notes specified in the memorandum, and perhaps the memoir of the author and the indices; but the better opinion is, that, when he wrote the letter of June 14, 1863, he surrendered all claim to every thing mentioned in the antecedent negotiations, except the claim to the notes as already secured, including of course the arrangement of the same, and the mode in which they are therein combined and connected with the text. All claim to the copyright of the text was abandoned by the complainant at a very early period of the negotiations, and it does not appear that it was ever after renewed.

Abundant evidence exists in the record to show that Mrs. Wheaton, as well as Mr. Parsons and Miss Wheaton, was willing to concede the claim of the complainant as to the History; but inasmuch as it was not included in the memorandum, the conclusion of the court is, that the complainant, when he elected to stand upon the original agreement, relinquished that claim. He had previously described it as a matter of little or no value; and when he gave notice that he had determined not to accept any paper whatever from Mrs. Wheaton, it must be understood that he was content with what was secured to him in the memorandum. His right to the notes is therein plainly expressed, and there is no evidence in the record which shows that Mrs. Wheaton, or any one of the respondents, was ever misled by the language of the letter giving that notice. Conclusive evidence to the contrary is found in the several answers of the respondents, and their subsequent conduct confirms that conclusion.

Grant that the memorandum was regarded by the parties thereto as a contract, still the respondents contend that it cannot be enforced, because, as they alleged, it was procured by the fraudulent misrepresentations and concealments of the complainant. They submit that general proposition, and under it they make the following specific accusations: 1. That, when the negotiation as to the notes was commenced, there was not in fact any understanding between the complainant and Mr. Brockhaüs that the former should perform for the latter any editorial labor, either of revision or of translation. 2. That the foreign publisher was ready, at that time, to pay the 6,000 francs to Mrs. Wheaton, without requiring any such labor from the complainant. 3. That the said publisher had not then made a final proposal to the complainant to pay any thing to any one in that behalf, as appears by his letters addressed to the complainant. 4. That the complainant concealed the contents of those letters from Mrs. Wheaton, and those acting in her behalf. 5. That he falsely represented to her and those acting for her, that the said publisher would not pay the sum specified except upon his undertaking to revise his annotations and make such additions to the same as would adapt them to a new edition to be sold in Europe, and the general charge is, that she was induced to assent to the memorandum by reason of those false representations.

Accusations of fraud amount to nothing as a defence to a contract otherwise legal and binding, unless they are satisfactorily proved; and the burden of proof to establish such a defence is upon the party who makes such a charge. Attwood v. Small, 6 Clark & F. 447; 1 Story, Eq. Jur. § 200; Park v. Johnson, 4 Allen, 266; Jennings v. Broughton, 5 De Gex, M. & G. 132; Campbell v. Fleming, 1 Adol. & E. 41. Apart from the inferences attempted to be drawn from the correspondence between the complainant and the foreign publisher, it is scarcely pretended that those accusations find any substantial support in the record; and the court is of the opinion that the several letters, when properly construed, and considered in their proper connection, show that every one of the specific suggestions of fraud is unfounded. Correspondence between the complainant and the foreign publisher, in relation to a new edition of the work for the foreign market, commenced more than three years before the date of the memorandum; and in the first letter written by the complainant he stated, that he did not expect any compensation for his services, but that he should desire to obtain what he could for the widow of the author; and it is a mistake to suppose that the negotiation as to the notes commenced before there was any understanding upon that subject between those parties. Enough certainly had been learned to satisfy any reasonable person that the arrangement could be made if desired, and that was sufficient to justify the complainant in ascertaining what would be conceded as to the notes. Equally unfounded also is the charge that Mr. Brockhaüs was ready, at that time, or at any time before or afterwards, to pay the 6,000 francs without any stipulation from the complainant to revise the notes and superintend their publication. His letter of the 20th of April, 1863, is a complete refutation of both those charges,

and shows to a demonstration that the services to be rendered by the complainant really constituted the chief inducement to the arrangement. Convinced that the "rich emendations" made to the work by the complainant would, if adapted to his proposed new edition, be of great value, he was desirous to secure his services to accomplish that object, and, in order to do that, he was willing to pay the described amount. By his letter of June 12, 1860, Mr. Brockhaüs called for a definite proposal; and the complainant, in his letter of August 25, 1862, complied with that request, and made the proposal which, with slight modifications, was subsequently accepted; but whether before or after the commencement of the negotiation as to the notes, is wholly immaterial. The charge that the letter of the 29th of April, 1863, or any of the others, was concealed from Mrs. Wheaton or those acting in her behalf, is disproved by the correspondence from which the inference is attempted to be drawn. Taken as a whole, the correspondence satisfies the court that the foreign publisher never did agree to pay the 6,000 francs except upon the undertaking of the complainant to revise his annotations, and to adapt the same to the proposed new edition for the foreign market, and that the respondents have failed to prove that the complainant was guilty of any fraudulent misrepresentation or concealment.

Any extended argument to show that the fourth proposition of the respondents cannot be sustained is unnecessary, as it finds no support in the evidence. Founded [as the proposition is] [5] upon the theory that the foreign publisher was willing to pay the money for antecedent obligations, or as a gratuity to the family of the author, it is a sufficient answer to it, to refer to what is said in response to the preceding proposition, without entering into details.

The next proposition of the respondents is, that the copyrights of the editions of 1855 and 1863 are void, and consequently that the agreement expressed in the memorandum is inoperative, inasmuch as the parties entered into the same through mutual mistake. They insist that the copyrights are void for several reasons, which will be separately considered. 1. "Because no written assignment of copyright, or of the inchoate right of the complainant thereto, as the author, was ever made to Mrs. Wheaton." 2. Because the "notice of copyright inserted in the several copies published of said editions" is defective, "in the omission to give notice in said editions of the copyright secured in the" original edition of the work. 3. Because, upon the facts alleged and proved by the complainant, the copyrights of the editions in question were not taken out by the proper person, nor in the proper district.

Copyright may be granted under the copyright act to the author of any book falling within the classes described in section 1 of the act, if the author is a citizen of the United States or permanently resident therein; and section 1 also provides that such author shall have "the sole right and liberty of printing, reprinting, publishing, and vending such book," for the term of twenty-eight years from the time of recording the title of the same as therein required. Executors, administrators, and legal assigns of the author are also included in the purview of the section; but section 4 provides that no person shall be entitled to the benefit of the act unless he shall, before publication, deposit a printed copy of the title of such book in the clerk's office of the district court of the district where the author or proprietor shall reside; and the provision is, that the clerk of such court shall record such printed copy forthwith, in a book to be kept for that purpose, and in the form therein prescribed. 4 Stat. 437. Where the author continues to be the owner, he is entitled to a copy of the title; but if he has parted with the ownership, the requirement is, that the clerk of such district shall give a copy of the title under the seal of the court to the proprietor. Id. 437. Proprietors of any such book, though not authors, are also recognized as entitled to the benefits of the act in another provision of section 4, in which they are required within three months from the publication of said book to deliver, or cause to be delivered, a copy of the same to the clerk of said district. Legal proprietors, though not authors, may also recover, of persons who print or publish any manuscript, the property of which is in them, without their consent, all damages occasioned by such injury. Stevens v. Gladding, 17 How. [58 U. S.] 447. See, also, 4 Stat. 437, 439, §§ 6, 15.

Left in moderate circumstances, Mrs. Wheaton very properly desired to obtain something from the literary publications of her late husband; and, with that view, she sought the advice of the complainant, as the intimate friend of the author and of his family. Consultations accordingly took place between them upon the subject. Suggestion was first made that his reports of the decisions of the supreme court might be re-published; but their attention was soon directed to a new edition of the Elements of International Law, as affording more promise of profit beyond mere remuneration. Editorial labors were necessary to such an undertaking, and the complainant tendered his services, and the same were gladly accepted by Mrs. Wheaton and her children.

Pursuant to that arrangement, the complainant edited in succession the two editions in question; that is, he made some

[5] [From 7 O. G. 81, and 2 Am. Law T. Rep. (N. S.) 402.]

additions to and emendations of the text, prepared the notes, composed the memoir, and made the indices. Alterations were made in the arrangement as first concluded; but it is unnecessary to enter into details, as the proofs are clear that the complainant acted throughout that entire period with the distinct understanding, that his services in editing those editions were to be gratuitous and without any charge. Speaking of the first annotated edition, the agreement was distinct that the contributions were to be furnished without charge, and the edition of 1863 was prepared with the same explicit understanding between the parties. Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement. Sweet v. Benning, 16 C. B. 480; Mayhew v. Maxwell, 1 Johns. & H. 315. Delivery was made as the work was done; and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed. Sweet v. Cater, 11 Sim. 572; Simms v. Marryat, 7 Eng. Law & Eq. 337; Woods v. Russell, 5 Barn. & Ald. 942; Atkinson v. Bell, 8 Barn. & C. 277. The title and property of the contributions being vested in Mrs. Wheaton, she would not acquire any thing by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions. He could not assign any thing, because he owned nothing in praesenti, as the title to his contributions and the inchoate right of copyright for those editions, had become vested in Mrs. Wheaton as proprietor of the book. Clarke v. Spence, 4 Adol. & E. 448; Laidler v. Burlinson, 2 Mees. & W. 602. Guided by these views, the court is of the opinion that none of the authorities cited by the respondents to show that a written assignment from the complainant to Mrs. Wheaton was necessary have any proper application to the question under consideration; because the complainant never acquired any right to demand a copyright in his contributions to those two editions, but the contributions, as they were made and composed or put in form, became vested in the proprietor. Shepherd v. Conquest, 17 C. B. 427; Chit. Cont. (10th Am. Ed.) 401; Tonson v. Walker, 3 Swanst. 672. Certain remarks are found in the opinion of the court in the case of Pierpont v. Fowle [Case No. 11,152], apparently inconsistent with the views here expressed; but the decision of the court in that case is a sufficient answer to those remarks. Contrary views, it is sometimes supposed, are also expressed in the case of Atwill v. Ferrett [Id. 640]; but the learned judge admits that an equitable title may vest in one person to the labors of another, where the relations of the parties are such that the former is entitled to an assignment of the production, which is the precise point involved in the case before the court; and many other authorities than those cited in that case, sustain the same principle. Sweet v. Shaw, 3 Jur. 217; Colburn v. Duncombe, 9 Sim. 155; Little v. Gould [Case No. 8,395]; Sweet v. Cater, 11 Sim. 572; Mawman v. Tegg, 2 Russ. 385; Nicol v. Stockdale, 3 Swanst. 687; Cary v. Longman, 3 Esp. 273.

The second defect in the copyrights, as alleged in argument by the respondent, "consists in the omission to give notice in said editions of the copyright secured in the original edition." Persons desirous of securing a copyright must comply with the conditions of the copyright act, and if they fail to do so, they are not entitled to the benefit of its provisions. Authorities to support that proposition are not necessary, as those conditions are prescribed by an act of congress. Deposit must be made before publication, if the subject-matter is a book, of a copy of such book in the clerk's office of the district court, as before explained; and the applicant must give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title-page or the page succeeding, the following words, viz., "Entered according to act of congress in the year ——, by A. B., in the clerk's office of the district court of ——," (as the case may be). Beyond doubt, the omission to comply with those requirements renders the copyright invalid, as the act provides that no person shall be entitled to the benefit of the act unless he fulfills those conditions; but the important inquiry arises, what are those conditions? Wheaton v. Peters, 8 Pet. [33 U. S.] 591; Ewer v. Coxe [Case No. 4,584].

Full compliance with the conditions prescribed in section 4 of the act is conceded; but the theory of the respondents is, that section 5 of the act requires that the same notice in totidem verbis must be inserted in the several copies of each and every edition published during the term secured, so that the second, and every subsequent edition, shall correctly specify the date of the original entry. They cite no authorities which support the proposition, and they assign no reasons in support of it, except that the act makes no provision for a change of the date in the successive notices to be given, and that the omission to give notice of the original copyright in subsequent editions tends

to mislead the public. Acts of congress are to be construed by the rules of the common law, and the construction should be such as will carry into effect the true intent and meaning of the legislature; but the province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances. Rice v. Railroad, 1 Black [66 U. S.] 359; Binney v. Canal Co., 8 Pet. [33 U. S.] 201. Change of date in the notice required in case of successive editions of the same book, it may be conceded, is not contemplated by section 5 of the copyright act; but the meaning of the provision is, that a new notice in the same prescribed form shall be given in every improved edition published during the term. Compliance with that requirement, when the original edition is published, is a full protection for that edition throughout the term; but it is no protection to a second edition with notes, nor to any succeeding edition with improvements; because the requirement is, that the "information of copyright secured" shall be "inserted in the several copies of each and every edition." Neglect to comply with that condition in a second edition will not vitiate the copyright of the original edition if it was regularly secured, nor will a valid copyright of a second edition cure material defects in the copyright of the original edition. Copyrights of the editions of a work, other than the original edition, are granted for additions to, emendations of, or improvements in the work, and every copyright should bear date of the day when it was secured.

Authors or proprietors of a book for which a copyright is secured are required, by section 2 of the act of the 3d of March, 1865, "within one month of the date of publication," to transmit, free of postage or other expense, a printed copy of the book to the library of congress at Washington, for the use of said library, and section 4 provides, that in the construction of that act the word "book" shall be construed to mean every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto, and shall include a copy of any second or subsequent edition which shall be published with any additions; but the proviso enacts that the author or proprietor shall not be required to deliver to the said library any copy of the second or any subsequent edition of any book, unless the same shall contain additions as aforesaid, nor of any book not the subject of copyright. 13 Stat. 540.

Prior to the passage of that act, the courts had decided that the "information of copyright being secured," if duly entered in the first volume of a work of several volumes, was sufficient; but all the residue of the provision is merely in affirmance of the true intent and meaning of the copyright act. Dwight v. Appleton [Case No. 4,215]. Subsequent editions without alterations or additions should have the same entry, because they find their only protection in the original copyright; but second or subsequent editions, with notes or other improvements, are new books, within the meaning of the copyright acts, and the authors or proprietors of the same are required to "deposit a printed copy of such book," and "give information of copyright being secured," as if no prior edition of the work had ever been published; and the term of the copyright as to the notes or improvements, is computed from the time of recording the title thereof, and not from the time of recording the title of the original work. Copyrights, like letters-patent, afford no protection to what was not in existence at the time when they were granted. Improvements in an invention not made when the original letters-patent were issued, are not protected by the letters-patent, nor are the improvements in a book not made or composed when the printed copy of the book was deposited and the title thereof recorded as required in section 4 of the copyright act. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter which the book contained when the printed copy of the same was deposited in the office of the clerk of the district court, as required by section 4 of the copyright act; but new matter made or composed afterwards, requires a new copyright, and if none is taken out, the matter becomes public property, just as the original book would have become if a copyright for it had never been secured. Publishers may be in the habit of inserting more than one notice in new editions, but there is no act of congress prescribing any such condition.

Whenever a renewal is obtained under section 2 of the copyright act, the requirement is, that the title of the work so secured shall be a second time recorded, and that the applicant must comply with all the other regulations in regard to original copyrights; but there is nothing in any act of congress to show that each successive edition must specify the date of the original copyright, as contended by the respondents. Any tendency to mislead the public cannot be successfully predicated of a copyright in due form of law, where it appears that the party who secured it complied with all the conditions prescribed in the copyright act. This is all that need be remarked in reply to the suggestion of the respondents upon that subject.

Special examination of the third objection made by the respondents to the copyrights in question is unnecessary, as it is clear that if the property and title of the matter contributed by the complainant vested in Mrs. Wheaton as the work was done, she was the proper person to take out the copyright; and it is not controverted that, if she was the proper person, she took it out in the proper district.

The objections to the validity of the copy-

rights being based upon an assumed construction of section 5 of the copyright act, the court thought it right to examine the several questions presented upon their merits; but it would be a sufficient answer to the entire proposition to say that no such defence is set up in the answer. Foster v. Goddard, 1 Black [66 U. S.] 506. Other answers are made by the complainant to the proposition; but the court, having come to the conclusion that it is founded in a misconstruction of the copyright act, do not find it necessary to give the other suggestions much consideration. Stated in brief words, the conclusions of the court are, that the copyrights are valid, and that the agreement set forth in the memorandum is binding.

Not being executed, however, the agreement does not transfer nor assign the copyrights in question to the complainant. Both parties agree to that proposition; but the respondents err in supposing that the agreement does not provide for, nor contemplate any such transfer or assignment as is plainly shown by the very terms of the memorandum. A copyright of a book, when taken out in due form, secures to the author or proprietor the sole right and liberty of printing, reprinting, publishing, and vending such book, during the term for which it is granted; but it secures nothing more; and the agreement was, that Mrs. Wheaton, who held the legal title of the copyrights, should make no use of the notes in a new edition without the written consent of the complainant, and that she would give him the right to make any use of the same he might see fit, which was in all respects equivalent to a contract to transfer and assign to him the legal title to the copyrights. Equity would have compelled the execution of the formal instrument therein stipulated, if the right to demand it had not been waived by the complainant. His claim as now presented is twofold, and in the judgment of the court it may be sustained upon both grounds. Curt. Copyr. 315; Mawman v. Tegg, 2 Russ. 385; Sweet v. Shaw, 3 Jur. 217; Colburn v. Duncombe, 9 Sim. 155. The legal title to the copyrights is in Mrs. Wheaton or her legal representative; that the complainant claims in the first place that the same is held in trust for him as the equitable owner of the notes, by virtue of the original arrangement under which the same were prepared. Secondly, the complainant claims that the negative as well as the affirmative promise contained in the agreement, in regard to the use of the notes, was binding upon Mrs. Wheaton, and that both are obligatory upon her legal representative, and all others having notice of the existence of those covenants. Barfield v. Kelly, 4 Russ. 355.

Two principal objections are taken by the respondents to the claim of the complainant that he is the equitable owner of the notes under the original arrangement. 1. They deny that the proofs in the case warrant any such finding, especially as the theory is denied in the answer. 2. They contend that Mrs. Wheaton, if such was the agreement, could not legally copyright the notes, as it would show that she was but a mere licensee, and that the copyrights in that state of the case would be void on that account.

1. Conclusive proof to show what was the original understanding between the parties, is found in the correspondence upon the subject. Unaided by any one, the complainant prepared the notes, but with the express understanding that he would do so without any charge, and that the property of the same, so far as respected the new edition, should vest in the proprietor of the book, and that she should take out the copyright and remain, as she was, the sole and exclusive owner of the entire book. Liberal, however, as the agreement was towards the proprietor of the book, yet it did not include any thing except that edition; and when the second annotated edition was prepared under a similar arrangement, as conceded by both parties, the agreement was not extended beyond that publication. Confirmation of those propositions is unnecessary, as they are not controverted by the respondents. They deny that it was agreed between the parties that the notes should ever afterwards become the property of the complainant, but they do not allege nor offer any proof tending to show that his agreement with Mrs. Wheaton extended beyond the annotated editions. Tested by these indubitable facts, the rights of the parties are plain and easy to be understood. As the proprietor of the book, Mrs. Wheaton, by virtue of that arrangement, became the absolute owner of the notes as they were prepared, so far as respects the editions in question; and she also acquired therewith the right to copyright the same for the protection of the property; but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the annotated work, without the consent of the complainant. Proof to support any such right or title is entirely wanting in the record, and no such right or title is set up in the answer. Sweet v. Cater, 11 Sim. 572. Such omission confirms the view that no such right or title was intended to be conveyed, and the subsequent conduct of the parties in executing the memorandum tends strongly to the same conclusion.

2. Suppose the facts to be so, then the respondents contend that the copyrights are void, because, as they insist, the applicant for the same was a mere licensee of the author of the notes; but the court is of a different opinion, for the reasons already given, as well as for others yet to be mentioned. Literary property, even when secured by copyright, differs in many respects from property in personal chattels, and the tenure of the property is governed by somewhat different rules; but the difference in

the nature and tenure of the property is much greater before copyright is taken out, and while the right to that protection for the same remains entirely inchoate. Title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé, by virtue of the contract of employment, without any written assignment; and, when so acquired, the tenure of the property depends upon the terms of the contract, but it cannot be held to be a mere license where, as in this case, the contract was that the proprietor of the book should take the exclusive right to the contributions for two successive editions, together with the right to copyright the same for the protection of the property, as the inchoate right of copyright unquestionably passed to the proprietor of the book by the same arrangement. Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 603; Fletcher v. Morey [Case No. 4,864]. Such inchoate right is incapable of any other limitation than that prescribed by the copyright act, so that the proprietor of the book necessarily took out the copyright in the usual form. Beyond controversy, she took it out by the consent of the complainant; and it is equally clear, in the judgment of the court, that she took it out for the protection of her own property in the notes, and in trust for the complainant when her property in the notes should cease. Mawman v. Tegg, 2 Russ. 385; Little v. Gould [Case No. 8,395]. Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right. Fletcher v. Morey [supra]. Having been entered into in good faith, and with a full knowledge of all the facts, it was not void; and neither the representative of the proprietor of the book, nor any other person having notice of the same, is at liberty to repudiate it, as it appears that it was knowingly acted upon in a way that the complainant would suffer serious pecuniary injury to allow it to be disproved. Farina v. Silverlock, 39 Eng. Law & Eq. 516; Eichholz v. Bannister, 17 C. B. (N. S.) 708; Sherman v. Champlain T. Co., 31 Vt. 175; Cairncross v. Lorimer, 3 Law T. [N. S.] 130.

Covenant is the second ground of claim as set forth in the bill of complainant; and it is undoubtedly true, as contended by the respondents, that the theory of the claim as presented in allegation and in proof is, that the legal title to the copyrights vested in the proprietor of the book. The respondents in argument deny that proposition, and insist that the copyrights are void; but the objections they make to their validity have already been examined and overruled, and the reasons assigned for the conclusions need not be repeated. Expressed as the promises are, both the negative and affirmative, in plain and unambiguous language, they require neither construction nor explanation; and it is clear that they are binding upon the legal representative of the proprietor of the book, and all others having notice of the rights of the complainant. Colburn v. Duncombe, 9 Sim. 155. Mrs. Wheaton died March 5, 1866, leaving two children; but it is alleged and conceded that the respondent, Martha B. Wheaton, is the administratrix of her estate, and, so far as respects the book in question, her sole heir. Controlled by these reasons, the court is of the opinion that the complainant, in the view of a court of equity, is the equitable owner of the notes, including the arrangement of the same, and the mode in which they are therein combined and connected with the text, and of the copyrights taken out by the proprietor of the book for the protection of the property, including the equitable ownership of the complainant. Fletcher v. Morey [supra]; Parker v. Muggridge [Case No. 10,743]; Clarke v. Southwick [Id. 2,863]; Rerick v. Kern, 14 Serg. & R. 271; Simms v. Marryat, 7 Eng. Law & Eq. 337; Curt. Copyr. 315; Mayhew v. Maxwell, 1 Johns. & H. 315.

Brief examination will next be made of the special defence set up by the respondents who published the edition of the work which is the subject of complaint, and also by the respondent who edited the same, that they cannot be adjudged liable to any decree because they had no notice of the alleged trust or agreement. Plenary proof is exhibited in the record that the senior partner of the publishing firm had full knowledge of all the circumstances attending the preparation of the notes and the publication of the two annotated editions, and also full knowledge of the memorandum at the time it was executed, and of all the subsequent negotiations in respect to the formal agreement. Reference need only be made to the correspondence in the record, and to his own answer and deposition in the case in support of that proposition; and the circumstances as disclosed in the correspondence show, to the entire satisfaction of the court, that the other members of the firm knew, or might have known, what the claim of the complainant was to the notes, long before the contract for publishing the edition in question was executed, and all the facts and circumstances connected with the claim, as fully as they were known to their senior partner. Proof beyond what already appears is certainly unnecessary to show that the proprietor of the book, and the respondent, Martha B. Wheaton, were repeatedly apprised of the claim of the complainant in terms which could not be misunderstood. Their friend and legal adviser knew all that had transpired, and, in view of the circum-

stances, and the acknowledged intimacy of the respondent who edited the edition, the conclusion of the court is, without hesitation, that he knew enough of the claim of the complainant to put him upon inquiry. His answer tends strongly to support that proposition, and the same inference is fully justified by his deposition. He admits that the proprietor of the book, when the agreement that he should edit the edition in question was made between them, expressed the wish that he should not make any use of the notes prepared by the complainant; and in his cross-examination he states to the effect that the respondent, Martha B. Wheaton, proposed to read to him all that had passed between her mother and herself, Mr. Parsons and Mr. Lawrence, but that he declined to hear it, wishing to confine himself as much as possible to the position of an editor. Some of the remarks made by the same respondent, in the interview which took place between him and the complainant, and his conduct in refusing to read the letter of the complainant when it was handed to him for that purpose, tend strongly in the same direction. Nothing is better settled than the rule, that whatever puts a party upon inquiry is sufficient notice in equity.

Ordinary prudence is required of every person dealing with trust property; and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. Hill v. Simpson, 7 Ves. 152; Kennedy v. Green, 3 Mylne & K. 722; 2 Com. Dig. tit. "Chancery," 4, C, 2; Smith v. Low, 1 Atk. 490; 3 Sugd. Vend. (10th Ed.) 471; Jones v. Smith, 1 Hare, 43; Booth v. Barnum, 9 Conn. 286; Pitney v. Leonard, 1 Paige, 461; Carr v. Hilton [Case No. 2,436].

Constructive notice is held sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Hence, says Judge Duer, in the case of Pringle v. Phillips, 5 Sandf. 157, he proceeds at his peril when he omits to inquire, and is then chargeable with all the knowledge of the facts that by a proper inquiry he might have ascertained. Hawley v. Cramer, 4 Cow. 717; Williamson v. Brown, 20 Law Rep. 397; Fulton Bank v. New York & S. Canal Co., 4 Paige, 127; Bank of Alexandria v. Seton, 1 Pet. [26 U. S.] 309. Inquiry is a moral duty whenever the circumstances are such that a person of ordinary prudence would refuse to act; but if a party under those circumstances shuts his eyes to the means of knowledge which he knows is at hand, he then forfeits every pretence of defence, as such conduct is equivalent to actual notice of all the facts he might have ascertained by a performance of his duty. May v. Chapman, 16 Mees. & W. 355.

Grant that the several conclusions announced by the court are correct, still the respondents insist that the complainant is not entitled to a decree; because they contend that they have not infringed the equitable right of the complainant to the exclusive use of the notes in question, nor violated the terms of the agreement as expressed in the memorandum.

Before proceeding to examine the question of infringement, it will be necessary to reproduce, as concisely as possible, some of the principal issues upon the subject as presented in the pleadings.

The statement of the complainant is that, prior to the last edition annotated by him, there was no book of international law in which all the authorities bearing upon the different questions discussed or referred to in the original work of the author, or in his antecedent annotations, were collected and presented in a convenient form for reference. Such authorities, as he represents, consisted of judicial decisions, diplomatic discussions by distinguished diplomatists, and dissertations, treatises, and lectures of learned publicists and writers upon the law of nations; that he undertook to collect and present, and by a considerable amount of labor and intellectual exertion, did collect and present, in his notes and in a convenient form, with reference to each question so discussed, the discussions and opinions as aforesaid, translating such as were in any foreign language, and giving them in full where they seemed sufficiently important to be so presented, and in other cases referring to them, giving the name of the book and the page where the passage could be found; that many of the authorities so collected, and particularly those relating to diplomatic discussions and negotiations, and those showing the way in which cases involving principles of international law have arisen between different nations and been determined, are to be found in newspapers, gazettes, legislative debates, the series of books such as the Annual Register, and others named or referred to in the bill of complaint, not treatises on international law; that there is no book which can serve as an index or digest to assist an author in any material respect, in collecting such authorities; that the number of books and papers of that nature examined by him in searching for the authorities and matters cited by him is so great, that it is only possible to make such collection by devoting much attention to the subject for many years, and by making and preserving memoranda of such matters bearing upon the subject, as from time to time they come to the knowledge of a person giving a large share of his attention to such matters, and reading all such books as relate to the subject, and availing himself of much intercourse with persons conversant with such matters. The corresponding statement of the respondent is, that the plan of work he adopted was to take the text of the author of the book with his notes, and annotate the

same with original notes of his own, in the same manner as if they had never before been annotated; that it was no part of his plan to revise, reduce, or alter the complainant's notes, even in such manner as the law of copyright would have permitted if the complainant had had a copyright therein; but that his course was, after reading a topic in the text, if he thought it required annotation, to examine all the works to which he had access bearing upon the topic, and, among others, but not more or differently than others, the contributions of the complainant. When he had made all the examination he thought necessary, the allegation is, that he then gave the subject the best reflection he could, and subsequently wrote out a new and original note in every instance, in manuscript throughout, in his own hand or that of an amanuensis, and without other reference to, or assistance from, any notes of the complainant than as above stated.

The complainant also alleges, that in preparing the text of his edition he exercised a considerable amount of skill and judgment in the arrangement of his annotations, and in combining and connecting them with the text, and that he prepared a complete index to the same; and he charges that the respondents, in their book, have copied, conformed to, and pirated the said annotated book and the annotations of the same which he prepared; and that they have used and availed themselves of the said book and annotations and the said labors of the complainant. Responsive to the charge that his notes are in a great part taken and copied from those of the complainant, and that he has pirated and unduly used the contributions of the complainant, the respondent totally denies the same and every part thereof. Evidence to show that the notes in the two annotated editions of Wheaton's Elements of International Law, as prepared by the complainant, involved great research and labor, beyond what appears in those two works, is unnecessary, especially as the allegations in the bill of complaint to that effect are not directly denied in the answer; and it is equally obvious and clear that the results of the research and labor there exhibited could not well have been accomplished by any person other than one of great learning, reading, and experience in such studies and investigations. Such a comprehensive collection of authorities, explanations, and well-considered suggestions, is nowhere, in the judgment of the court, to be found in our language, unless it be in the text and notes of the author of the original work. Uncontradicted as these propositions are, it is unnecessary to add any thing further in their support. Much, also, has been accomplished by the last editor of the work in the same direction, and in the collection and presentation of similar matters wholly distinct and separate from what was antecedently collected and presented by the complainant. But the review and comparison of the merits of the respective books are not matters within the province of the court, except so far as the same become necessary in order to decide the issues involved in the pleadings. Stripped of all mere form, the charge against the respondent is, that he has infringed the rights of the complainant; and that question is the only one of much importance which remains to be considered.

Apart from the testimony of the parties themselves, and the comparison of the books, the evidence in the case consists mainly of the testimony of the two experts, and the result of the respective comparisons made by them, of the notes and citations of authorities contained in one of the books, with those of a corresponding character contained in the other, together with the opinion of each expert witness, whether the several notes and citations so examined and compared are or are not of the same character. Though admissible in all such cases, the opinion of experts are nevertheless in their nature secondary evidence; but the comparisons made by them in this case have very much facilitated the investigations made by the court. Considerable aid has been derived from that source, and from the testimony of the parties; but the court has found it necessary to re-examine the comparisons made by the witnesses, and to make others for themselves, in order to come to a satisfactory conclusion. Regarded as a basis to enable the court to compare one book with the other, the results given by the experts, as exhibited in their depositions, have proved to be of great service to the court in estimating the weight to be given to their respective opinions. Complicated as the facts are, the examination of the case has imposed much labor upon the judges; but the investigation has been made with care, and continued from time to time until both are satisfied that the court is prepared to render a just decision.

Like other controversies of a similar character, the issue upon the merits presents two questions, one of fact and the other of law. Stated in brief terms, the question of fact is, what use did the respondent who edited the edition in question make of the complainant's notes? And the question of law presented, inasmuch as it is conceded that he used the same to some extent, is, was that use allowable, or was it of a character and to such an extent that it infringed the complainant's rights. Direct evidence upon the subject is unattainable, because the respondent states that he cannot remember nor undertake to give the authors from whom he derived any particular class of citations. Difficult though it be to make proof, still the complainant is not entitled to any decree, unless he proves infringement, as alleged, to the satisfaction of the court, as the burden in that issue is always upon the party making the charge. Except that the burden is upon the complainant, the same difficulty is experienced by the re-

spondents in their efforts to prove the affirmative allegations of the answer, and consequently both parties are obliged to rely chiefly upon a comparison of the contents of the respective books, as the best evidence which either party is able to produce. Examination of the notes contained in the respective books will show that the description given of them by one of the respondents' witnesses is quite accurate. He states to the effect, that they are either statements of historical events, accounts of legislative debates, narratives of diplomatic discussions, negotiations or correspondence, abstracts of cases in the courts or judicial tribunals of different countries, or summaries of other text-writers or essayists on international law, and other kindred topics, accompanied with references to the books and documents where the matters are to be found. Such authorities and references of the kind mentioned are very numerous in the edition containing the notes of the complainant, and he contends that the respondent has made a much larger use of such notes, references and authorities, including those collected and presented by him to illustrate particular topics of international law, than the law of copyright or the agreement between him and Mrs. Wheaton, as expressed in the memorandum, will permit. Numerous instances are given where the same topics are illustrated in the two works by reference to the same historical facts or diplomatic negotiations, and where the views expressed are supported by the citation of the same books, pamphlets, debates and newspapers; and the complainant contends that these coincidences occur in instances so numerous that it is past belief that they could be accidental; and he insists that the just inferences to be drawn from these coincidences, when taken in connection with the admission of the respondent that he did make some use of the complainant's book, for the purposes of reference, fully sustain the burden of proof on his part, and justify the conclusion that, in each particular instance in which the citations and authorities are the same, they were in fact taken from his book, unless the respondent can explain these coincidences, or show that the citations and authorities were derived from some other quarter. Weighed as required by the rules of circumstantial evidence, the complainant contends that these coincidences of fact, as exhibited in the two books, are not only consistent with the charge of infringement, but that they, taken as a whole, are absolutely inconsistent with any other theory, which is the test usually applied in cases where proof is required beyond any reasonable doubt. Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required in the administration of justice; and whenever the necessity for a resort to such evidence arises, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy, even in common-law suits, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute full and conclusive proof. Castle v. Bullard, 23 How. [64 U. S.] 187; 1 Starkie, Ev. 58, 862.

Instances quite numerous are also given where clerical and typographical errors and peculiarities, including special translations, are reproduced in the edition prepared by the respondent; and the court is reminded in argument that cases have arisen where the strongest proof of copying consisted "in the coincidence of errors." Jeremy, Eq. Jur. 322. Where the question is whether the defendant, in preparing his book, had before him and copied or imitated the book of the plaintiff, it is manifest, says Mr. Curtis, that this kind of evidence is the strongest proof, short of direct evidence, of which the fact is capable. Curt. Copyr. 255; Murray v. Bogue, 1 Drew. 367; Spiers v. Brown, 6 Wkly. Rep. 353. Other authorities may be cited where the presumption arising from the identity of inaccuracies is carried much further, and where it is held that when a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with passages in the original book must be presumed, prima facie, to be likewise copied, though no blunders occur in them. Mawman v. Tegg, 2 Russ. 394; Longman v. Winchester, 16 Ves. 269.

Coincidence of citation is also invoked by the complainant as evidence of copying; and the instances given as examples are many where the authorities are cited in the same way; that is, by volume and page, or by chapter and section, as the case may be, and from the same edition of the work, and from the same place.

Identity in the plan and arrangement of the notes, and in the mode of combining and connecting the same with the text, is also invoked by the complainant, as strongly supporting the charge of infringement; and it is quite apparent, on a comparison of the two books, that the instances of identity in that respect are numerous and pervading. Copyright may justly be claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that, in so doing, he has exercised skill and discretion in making the selections, arrangement, and combination, and, having presented something that is new and useful, he is entitled

to the exclusive enjoyment of his improvement, as provided in the copyright act. Gray v. Russell [Case No. 5,728]; Lewis v. Fullarton, 2 Beav. 6; Greene v. Bishop [Case No. 5,763]; Emerson v. Davies [Id. 4,436]; Story v. Holcombe [Id. 13,497]. Books "made and composed" in that manner are the proper subjects of copyright; and the author of such a book has as much right in his plan, arrangement, and combination of the materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old material for a different purpose. All he acquires by virtue of the copyright is "the sole right and liberty of printing, reprinting, publishing, and vending such book" for the period prescribed by law. Others may use the old materials for a different purpose, but they cannot copy and use his improvement, which includes his plan, arrangement, and combination of the materials, as well as the materials themselves, of which the book is made and composed. Emerson v. Davies [supra]; Curt. Copyr. 180; Gray v. Russell [supra].

Many other facts and circumstances are adduced by the complainant in support of the charge of infringement; but the classes mentioned will be sufficient for the present investigation, as it is not the purpose of the court to enter into the details of the evidence. Infringement in any and every form, as alleged in the bill of complaint, is denied in the answer; and the respondent, in addition to such denials, has presented in proof and in argument very elaborate and minute explanations of all the principal facts and instances adduced by the complainant in support of the charge of infringement. Separate examination at this time of each one of the explanations so given would be impracticable, and any partial review of them in the opinion would necessarily be unsatisfactory, as it would afford ground for inference that the residue had been overlooked, or that they had not been duly considered. Suffice it to say, that they have all been read, studied, and made the subject of careful comparison with the facts and circumstances adduced by the complainant; but the conclusion of the court is, that they are not of a character, speaking generally, to rebut the particular proofs of the complainant, to which it was intended they should be applied. But the respondent contends that, even if it be true that matters of fact, citations, and authorities have been borrowed to a considerable extent, he had a right to take them, as the use he made of them was substantially new, and different from that made by the complainant in the two prior annotated editions of the work, because they were used by him in illustration of new and original propositions. Secondly, he contends that the complainant is not entitled to any decree on account of any use he has made of the matters of fact, citations, and authorities exhibited in those editions, because, as he insists, the use he so made amounts to no more than a fair and original abridgment of the former editions. The doctrine of new and different use in the law of copyright applies more particularly to the old materials, and not the materials of a work like that of the last annotated edition of the complainant, where the materials collected are much abridged, and sometimes paraphrased and newly arranged, and combined with the text of the original work.

Beyond all doubt, he might take the old materials, as found in the sources from which the matters of fact, citations, and authorities of the complainant were drawn, and use them as he pleased, in illustration of new and original propositions, or for any other purpose not substantially the same as that to which they are applied in the annotated editions edited by the complainant; but he could not borrow the materials as therein collected and furnished, nor could he rightfully use the plan and arrangement, or the mode by which they are combined with the text, beyond the extent falling within the definition of fair use, which rule is only applicable to the materials, and not to the plan, arrangement, and mode of operation. Proper attention to the nature of the charge in the bill of complaint, will show that the doctrine of new and different use is wholly inapplicable to the matter in issue between the parties, because the charge is, that the respondent has borrowed the matters of fact, citations, and authorities collected and presented in the notes of the complainant, and not that he has made the same use of the old materials. On the contrary, the charge is, that he has not consulted the old materials at all, but that he has borrowed the matters of fact, citations, and authorities exhibited in his book, from the matters of fact, citations, and authorities as collected, arranged, and combined with the text in thost two annotated editions. Even supposing the rule to be otherwise, and that a second writer may take bodily the matters of fact, citations, and authorities collected, arranged, and combined, as in the two annotated editions before the court, if the use he makes of the materials is substantially new and different, still the concession will not benefit the respondent, as his edition of the work, except the new materials collected and presented, occupies the same field and was designed for the same class of readers, and was "made and composed" for the same general purpose. Unsupported by the evidence, as the theory of fact involved in the proposition is, it is quite clear that it cannot furnish any defence for the respondent, even if the principle is correct. Argument to show that an author may have a copyright in his notes to an older work, though the materials collected are not

new, is unnecessary, as the proposition is elementary, if it appear that they have never before been collected and embodied. Gray v. Russell [Case No. 5,728].

The respondent's second proposition deserves more consideration, as it presents a defence applicable to the main issue involved in the pleadings. Concisely stated, the proposition is, that, even conceding that he borrowed materials from the prior annotated editions to a considerable extent, still the quantity so taken and used did not amount to more than a fair and original abridgment of the former annotated editions. Third persons cannot make any use of a patented invention, without the consent or license of the patentee, because he acquires, by virtue of his letters-patent issued under the patent act, the full and exclusive right and liberty of making and using his invention, as well as of vending it to others to be used, for the term allowed by law; but the right secured to the author or proprietor of a book is only "the sole right and liberty of printing, reprinting, publishing, and vending such book," which, as construed by the courts, means the exclusive right to multiply copies for the benefit of the author or his assigns. Stephens v. Cady, 14 How. [55 U. S.] 529; Reade v. Lacy, 1 Johns. & H. 526; Millar v. Taylor, 4 Burrows, 2311; [Stowe v. Thomas, Case No. 13,514.] [6] Courts have sometimes supposed that the same rule of decision should be applied to a copyright as to a patent for a machine, and consequently that an abridgment of an original work, made and condensed by another person without the consent of the author of the original work, ought to be regarded as an infringement; but the language of the respective acts of congress making provision for the protection of such rights is different; and the opposite doctrine has been too long established to be considered at the present time as open to controversy. Story v. Holcombe [Id. 13,497]. Whatever might be thought if the question was an open one, it is too late to agitate it at the present time, as the rule is settled that the publication of an unauthorized but bona fide abridgment or digest of a published literary copyright, in a certain class of cases at least, is no infringement of the original. Phil. Copyr. 171; Newbery's Case, Lofft, 775; Dodsley v. Kinnersley, 1 Amb. 403; Whittingham v. Wooler, 2 Swanst. 428; Gyles v. Wilcox, 2 Atk. 142.

Strong doubts are expressed by Mr. Curtis, whether the definition of an allowable abridgment, as given in the earlier cases, can be sustained, except as applied to such works as histories, or works composed of translations, and others of like kind; but it was decided in this court in the case of Folsom v. Marsh [Case No. 4,901], that an abridgment in which there is a substantial condensation of the materials of the original work, and which required intellectual labor and judgment to make the same, does not constitute an infringement of the copyright of the original author; and the court, as now constituted, is inclined to adopt that rule in cases where it also appears that the abridgment was made bona fide as such, and that it is not of a character to supersede the copyrighted publication. Unless it be denied that a legal copyright secures to the author "the sole right and liberty of printing, reprinting, publishing, and vending the book" copyrighted, it cannot be held that an abridgment, or digest of any kind, of the contents of the copyrighted publication, which is of a character to supersede the original work, is not an infringement of the franchise secured by the copyright. What constitutes a fair and bona fide abridgment in the sense of the law is, or may be, under particular circumstances, one of the most difficult questions which can well arise for judicial consideration; but it is well settled that a mere selection or different arrangement of parts of the original work into a smaller compass will not be held to be such an abridgment. Campbell v. Scott, 11 Sim. 38, and note; Gyles v. Wilcox, 2 Atk. 142; Folsom v. Marsh [supra]. Substantially the same views are expressed in the case of Tinsley v. Lacy, 1 Hem. & M. 753; and the vice-chancellor in that case, in speaking of the authorities by which fair abridgments have been sustained, goes on to say, that the courts have gone far enough in that direction, and adds that it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in the diffusion of knowledge.

Viewed in the light of these principles, it is quite clear that the book of the respondent, even if it could be regarded as an abridgment of the prior editions, must still be held to be an infringement of the same; but the court is of the opinion that it is not an abridgment of those editions, in any sense known to the law of copyright. Instead of being an abridgment of the prior editions, it is precisely what it purports to be, a reprint of the text of the author, with notes by a new editor; and the proofs are full to the point that he was employed to edit a new edition of the work, to supersede the antecedent editions annotated by the complainant. Instructed as he was to make no use of the complainant's notes, his principal defence still is, that he complied with those instructions, and that he did not make any use of the notes in his edition, beyond what is allowable as fair quotations from the published work of a prior author, treating upon the same subject. Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or

[6] [From 7 O. G. 81, and 2 Am. Law T. Rep. (N. S.) 402.]

transferred, with more or less colorable alterations to disguise the source from which the material was derived; nor is it necessary that the whole or even the larger portion of the work should be taken, in order to constitute an invasion of a copyright. Some use may be made by a subsequent writer of the contents of a book or treatise antecedently made, composed and copyrighted by another person, in making and composing a new book upon the same subject, whether the contents of the antecedent book or treatise were wholly original, or were partly original and partly made up of selections from other authors. Copyright differs in this respect from patent right, which admits of no use of the patented thing without the consent or license of the patentee. Persons making, using, or vending to others to be used, the patented article are guilty of infringing the letters-patent, even though they may have subsequently invented the same thing without any knowledge of the existence of the letters-patent; but the recomposition of the same book without copying, though not likely to occur, would not be an infringement. Coincidence, if perfect, is sufficient to prove the infringement of a patent, as the charge is that the defendant, if it be a machine, has made machines in the similitude of the patented machine, and with the same mode of operation. Copying is essential to constitute an infringement of copyright, but identity of contents, arrangement, and combination, is strong evidence that the second book was borrowed from the first, because it is highly improbable that two authors would express their thoughts and sentiments in the same language, throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication. Reade v. Lacy, 1 Johns. & H. 526.

Great difficulty attends every attempt to define in precise terms the privilege allowed by law to a subsequent writer to use without consent or license the contents of a book or treatise antecedently made, composed, and copyrighted by another author; or to mark the boundaries of the privilege of such subsequent writer to borrow the materials in a book like the annotated editions of the complainant, where the materials have been selected from such a variety of sources, and where the materials so selected are arranged and combined with certain chosen passages of the text of the original work, and in a manner showing the exercise of discretion, skill, learning, experience, and judgment. Decided cases are referred to where the principal criterion of determination is held to be the intent with which the person acted who is charged with infringement. Remarks to that effect are to be found in the opinion of the court in the case of Cary v. Kearsley, 4 Esp. 170, and the decision in the case of Spiers v. Brown, 6 Wkly. Rep. 353, refusing the application for an injunction, turned to some extent upon the same consideration; but the vice-chancellor (now chancellor) refused to apply that doctrine in the subsequent case of Scott v. Stanford, L. R. 3 Eq. 722, and explained the grounds of his ruling in the former case, which show that he would not sanction that rule in any case unless it appeared that the defendant had bestowed such mental labor upon what he had taken as to produce an original result.

Evidence of innocent intention may have a bearing upon the question of "fair use;" and where it appeared that the amount taken was small, it would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused: but it cannot be admitted that it is a legal defence where it appears that the party setting it up has invaded a copyright. Cary v. Faden, 5 Ves. 23; Reade v. Lacy, 1 Johns. & H. 526; Bramwell v. Halcomb, 3 Mylne & C. 738. Few judges have devised safer rules upon the subject than Judge Story. He held that, to constitute an invasion of copyright, it was not necessary that the whole of a work should be copied, nor even a large portion of it, in form or substance; that if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient in point of law to constitute an infringement; that, in deciding questions of this sort, courts must "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work." Folsom v. Marsh [Case No. 4,901]. Mere honest intention on the part of the appropriator will not suffice, said Vice-Chancellor Wood, as the court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects. Scott v. Stanford, L. R. 3 Eq. 723; Hodges v. Welsh, 2 Ir. Eq. 266. Twenty years before that decision was made, Mr. Curtis, in his valuable work on the law of copyright, expressed the same views, and this court entertains no doubt they are correct. Curtis on Copyright, 240. Recent decisions afford more ample protection to copyright than those of an earlier date, and they also restrict the privilege of the subsequent writer or compiler in respect to the use of the matter protected by the copyright, within narrower limits. The decision in Kelly v. Morris, L. R. 1 Eq. 697, is, that in the case of a map guide-book, or directory, or the like, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to do for himself that which was done by the first compiler; that he is not

entitled to take one word of the information published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and that the only use he can make of a previous publication of that kind is to verify his own calculations and results when obtained. Rights secured by copyright are property within the meaning of the law of copyright, and whoever invades that property beyond the privilege conceded to subsequent authors commits a tort, and is liable to an action. None of these rules of decision are inconsistent with the privilege of a subsequent writer to make what is called a fair use of a prior publication; but their effect undoubtedly is, to limit that privilege so that it shall not be exercised to an extent to work substantial injury to the property which is under the legal protection of copyright. Reviewers may make extracts sufficient to show the merits or demerits of the work, but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed. Story v. Holcombe [Case No. 13,497].

Examined as a question of strict law, apart from exceptional cases, the privilege of fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication; but cases frequently arise in which, though there is some injury, yet equity will not interpose by injunction to prevent the further use, as where the amount copied is small and of little value, if there is no proof of bad motive, or where there is a well-founded doubt as to the legal title, or where there has been long acquiescence in the infringement, or culpable laches and negligence in seeking redress, especially if it appear that the delay has misled the respondent. Sweet v. Cater, 11 Sim. 580; Tinsley v. Lacy, 1 Hem. & M. 752; Spiers v. Brown, 6 Wkly. Rep. 353; Strahan v. Graham, 15 Wkly. Rep. 487; Bramwell v. Halcomb, 3 Mylne & C. 738; Reade v. Lacy, 1 Johns. & H. 527; Jarrold v. Houlston, 3 Kay & J. 717; Lewis v. Fullarton, 2 Beav. 6; Bell v. Whitehead, 8 Law J. Ch. 141; Curt. Copyr. 326; Saunders v. Smith, 3 Mylne & C. 711.

Guided by the rules of law, as already explained, the court, after having examined the whole case with care, is of the opinion that many of the notes presented in the edition edited by the respondent whose case is under consideration do infringe the corresponding notes in the two editions edited and annotated by the complainant, and that the respondent borrowed very largely the arrangement of the antecedent edition, as well as the mode in which the notes in that edition are combined and connected with the text. Judge Story held, in the case of Emerson v. Davies [Case No. 4,436], that every author had a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original; and it was also held, in Greene v. Bishop [Id. 5,763], that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials; and no doubt is entertained that both those decisions were correct; but it is a mistake to suppose that a subsequent writer can be held to have infringed a book where he has not borrowed any of the materials of which the book is composed. New materials are certainly the proper objects of copyright; and old materials, when subsequently collected, arranged, and combined in a new and original form, are equally so: and in either case, the plan, arrangement, and combination of the materials are as fully protected by the copyright as the materials embodied in the plan, arrangement, and combination. Damages may be recovered in either of the supposed cases for the infringement of the property protected by the copyright; but the property in the latter case consists chiefly, if not entirely, in the plan, arrangement, and combination of the materials collected and presented in the book, as any other person may collect from the original sources the same materials, and arrange and combine them in any other manner not substantially the same as that of the antecedent author. Barfield v. Nicholson, 2 Sim. & S. 6.

A detailed specification of the instances of infringement, as shown by a comparison of the two books, would be impracticable, and will not be attempted; as the settled practice in equity is, where the works are voluminous and of a complex character, containing, as in this case, much original matter mixed wth common property, the cause will, at some stage of the case, be referred to a master, to state the facts, together with his opinion, for the consideration of the court. It is a better course to make the reference before the final hearing; but the parties in this case waived any reference at that stage of the cause, and elected to proceed to final hearing without any such report. Cases arise where the court, under such circumstances, would not order a reference, but would proceed to compare the books and ascertain the details of the infringement; but the case before the court is far too complex to admit of that course of action. Curtis, Copyr. 325; Mawman v. Tegg, 2 Russ. 400; 2 Story, Eq. Jur. § 941. Details have been examined as far as practicable, consistent with the claims of other official duties, but the judges are of the opinion that they should be further examined, and the results classified, before the court proceeds to determine the extent of the infringement, as the danger of injustice cannot well be avoided in any other way. New

matter of value has been collected and presented by the respondent, and he has added much that is valuable in his references to events which have occurred since the publication of the last preceding annotated edition. Whatever may have been the rule in the earlier history of equity jurisprudence, it is now settled law in this court, that a book may in one part of it infringe the copyright of another, while in other parts it may be entirely original and the proper object of a copyright; and in such a case, it was held, in Greene v. Bishop [Case No. 5,763], that the remedy will not be extended beyond the injury. Preceding that decision, the same rule had been adopted in Story v. Halcombe [Id. 13,497], in which the opinion was given by the late Mr. Justice McLean. The modern practice in the chancery courts of England is the same as appears in the case of Jarrold v. Houlston, 3 Kay & J. 721, in which the opinion was given by Vice-Chancellor Wood, since promoted to the office of chancellor. Kelly v. Morris, L. R. 1 Eq. 701; Carnan v Bowles, 2 Brown, Ch. 80; Curt. Copyr. 325. It is suggested that it will be impossible to separate that which is original from that which was borrowed, and to some extent the suggestion may be of weight; but the court is of the opinion that the difficulties in that behalf, when the matters pass under the searching examination of a master, will be much less than is apprehended by the parties. Should the difficulty in any instance or class prove to be insurmountable, then the rule in equity is, that if the parts which have been copied cannot be separated from those which are original without destroying the use of the original matter, he who made the improper use of that which did not belong to him must suffer the consequences of so doing. If a second writer mixes the literary matter of another, which is under the protection of a copyright, with his own, without the license or consent of the proprietor, he must nevertheless be restrained from publishing what does not belong to him; and if the parts of the work cannot be separated, so that the injunction prevents also the publication of his own literary production, so mixed with that of another, he has only himself to blame. Mawman v. Tegg, 2 Russ. 390; Lewis v. Fullarton, 2 Beav. 11. It is believed that an extended application of that rule will not be required, in view of the proofs exhibited in the record, and of the facilities afforded by the comparison of the notes in the respective editions, to separate what is original from that which has been copied.

Attention is called by the respondent to the fact that some of the notes in the edition edited by him are entirely original, that in others the material copied is much condensed, or the notes reduced to a mere reproduction of the authorities cited in the prior edition, and that other notes have been enlarged and improved by the addition of new matter, and in view of those circumstances, he contends that the edition edited by him should be regarded as a new and original work; but the decisive answer to the first and last suggestion is, that no man is entitled to avail himself of the previous labors of another for the purpose of conveying to the public the same information, even though he may append additional information to that already published. Scott v. Stanford, L. R. 3 Eq. 724; 2 Story, Eq. Jur. § 940; 2 Kent, Comm. 382, 383; Cary v. Faden, 5 Ves. 25. and note; Wheaton v. Peters, 8 Pet. [33 U. S.] 591; Bramwell v. Halcomb, 3 Mylne & C. 737.

Additional remarks in respect to the alleged fact that the contents of the notes copied were condensed are unnecessary, as it is quite clear, as before explained, that the change made in that behalf is not of a character to afford the respondent any defence.

Supported by these reasons, the conclusions of the court are as follows:—1. That the complainant in a court of equity is the equitable owner of the notes in the two annotated editions described in the pleadings as arranged, and the mode in which they are combined and connected with the text. 2. That the title to the entire text, together with the title to the memoir and indices, is in the proprietor of the book, and not in the complainant as alleged in the bill of complaint. 3. That there are notes in the edition edited by the respondent, of substantial importance in point of number, and the value of the materials, which do infringe the equitable rights of the complainant, as explained and defined by the court. 4. That all the respondents had notice of the claim of the complainant, as explained and defined by the court. 5. That there are notes in that edition of substantial importance in point of number and the value of the materials which do not infringe any rights of the complainant. 6. That the notes in that edition consisting wholly of citations found in the corresponding notes of the complainant do infringe his rights, as explained and defined by the court, though many of them are unaccompanied by the extracts collected and presented in the next preceding edition. 7. That notes consisting of authorities or collections of authorities copied in like manner as described in the preceding proposition, and without remarks or comments, do also infringe the complainant's rights, though they are found inserted in, or prefixed or appended to, notes otherwise not objectionable. 8. That notes of which the whole or some substantial and material part is condensed from the corresponding notes in the preceding edition, or from the extracts therein printed and published without any marks of original labor, or of any such labor except the study of the note copied and adopted, do also infringe the complainant's rights, as explained and defined. 9. That notes wholly original do not infringe. 10. That notes partly original and partly copied from the preceding edition do not infringe,

except for the matter copied, if it be practicable to ascertain and define the separate proportions and make the separation of the same; but if not, still the respondent at the proper stage of the case, must be restrained from using the part copied. 11. That the cause must be referred to a master to examine the pleadings and proofs, and report the extent of the infringement as adjudged by the court in this investigation, and also to examine and ascertain what, if any, other instances of the alleged infringements within the principles here explained are proved; and if any to classify the same, and report the details, together with the reasons for his conclusions, for the consideration of the court. 12. That all other matters in the cause will be reserved until the coming in of the master's report. 13. That the cause is referred to Henry W. Paine as master, for his examination and report in the premises, in conformity to the opinion and directions of the court.

Equity suits for the infringement of a copyright are usually referred to a master before the final hearing, to ascertain whether the charge is proved, and, if so, for a report as to the nature and extent of the infringement; and in such cases the general rule is, that the complainant, if he prevails in the suit, is entitled, if at all, to an injunction at the time the decretal order is entered, to restrain the respondent from any further violation of his rights, as the whole case is then before the court. Even when the case is heard before any such reference and report, if the charges of infringement are few and of a character that the extent of the infringement can be conveniently determined by the court without sending the case to a master, the court, if the case be one where an injunction is the proper remedy, will order it at the same time that the decision is announced upon the merits. But where the cause comes to a final hearing without any such report, the court, if the charges of infringement are numerous and of a character to require extended examination before the extent of the infringement can be ascertained, will ordinarily send the case to a master for further examination and report in respect to all matters not previously adjudged by the court; and the general rule in such cases is, that the injunction will not be granted until the nature and extent of the infringement are fully ascertained and determined, as its effect and operation might work great injustice. Obviously the present case falls within the latter rule, and therefore an injunction will not be ordered until the court shall have acted finally upon the report of the master.

[See, for a very interesting account of the history of this case and its attendant circumstances, the Life of Richard Henry Dana by Charles Francis Adams (volume 2, c. 6), published by Houghton, Miflin & Co. In this connection, we herewith reprint the master's report found in the appendix of that volume. We also reprint from the same source an extract from a letter of Thornton K. Lothrop in relation to this matter.]

THE MASTER'S REPORT.

The manuscript report of the master in the case of Lawrence v. Dana, as filed January 14, 1881, in the United States circuit court, district of Massachusetts, covers 211 quarto pages. It has never been printed. The following extracts therefrom relate solely to those notes in which infringements of the complainant's "equitable rights" were found, according to the rules prescribed by the court to govern the master in his examination. The order in which the master stated the points involved has, for the sake of clearness, been changed so far as to permit his citations from the notes in dispute, of the respective editors, and his remarks concerning them, to be presented in parallel columns. Every case of infringement is here given, also the master's preface to his report and concluding remarks.

Certain variations from the exact text of the notes in the master's citations have been indicated by inserting within brackets, in their proper places, words omitted by him, and by italicising words supplied by him not in the originals.

To the Honorable the Justices of the Circuit Court for the District of Massachusetts.

The undersigned, special master, in the matter of William Beach Lawrence v. Richard H. Dana et al., having duly notified the parties, and having met them and heard their proofs and arguments, respectfully submits the following report:

The complainant claimed that certain notes in the last edition of Wheaton's International Law infringed his equitable rights, within the meaning either of the first, the second, the third, or the fourth rule in the decree of the court, and divided these notes accordingly into four classes. The master has assumed that the honorable court did not mean to be understood as deciding that a citation by the respondent identical with one in a corresponding note of the complainant was necessarily an infringement of the rights of the latter, but that it might be an infringement upon sufficient evidence, although there was no other matter in the respondent's notes besides the citation. It must be remembered that D. was to cover by his notes a period of eighteen years, since Wheaton published his last edition in 1848, fifteen years of which had been covered by the learned and exhaustive notes of the complainant. It is apparent, therefore, that if the second annotator discharged his duty with diligence and fidelity, there must inevitably be a strong resemblance between the two sets of notes, and a large proportion of the citations must be common to both.

Direct and positive proof as to where the second annotator found his citations, or as to how far he traced them back, is not attainable. For he testifies, that if he now had the sheets, on which, as he was reading, he noted references to volumes and pages and sometimes to words, it would be impossible for him to tell to what author he was indebted for them. He further testifies that he does not mean to state, as matter of recollection, that he examined the originals of all the citations which he put in his notes. "Indeed," he swears, "I know I have cited in the sense we have used that word, without quoting language, in a group of citations, at the end of a note or paragraph, works which I had never seen, and which perhaps no living person has ever seen." It was therefore necessary to resort to indirect and circumstantial evidence. The respondent proved that he had referred to sixty-nine works and made two hundred and one citations nowhere found in L., not including adjudged cases, treaties, statutes, speeches, diplomatic letters or transient matter; that he had four hundred and seventy citations to authors not impeached by L., not including adjudged cases, treaties, statutes, diplomatic correspondence, or speeches; that he gives two hundred and four adjudged cases nowhere in L. or in Wheaton, twenty-three of which are re-citations, leaving one hundred and eighty-one new cases; that L. contributes one hundred and sixty-nine citations to adjudged cases not in Wheaton, of which thirty-

one are re-citations, leaving one hundred and thirty-eight new cases contributed by L.,—that D. has sixty-four citations of cases in Wheaton which are not in L., which D. has used for purposes other than as used by Wheaton (of these sixty-four, sixteen are re-citations); that D. has fifty-four (54) adjudged cases, which though in L., are not impeached; that D. has one hundred and twenty-two notes at places where L. has no note; that D. has one hundred and two notes at places where L. has a note, but where Wheaton had placed a note: that of these eighty-seven (87) are at the end of chapters or sections; that of D.'s two hundred and fifty-eight notes all but thirty-four are either where L. has none or where Wheaton as well as L. has a note. It also appears that D. re-sectioned Wheaton's text, increasing the number of sections from two hundred and thirty-four to five hundred and fifty-one. Wheaton's sections were numbered anew for each chapter, while D.'s sections are numbered continuously. As all Wheaton's cross-references were to the sections as numbered by him, D. was obliged to make new cross-references in every instance. Wheaton's sections were numbered anew for each chapter, while D.'s sections are numbered continuously. D. has given new or amended titles to two hundred and two sections. This was outside of D.'s contract. Of D.'s notes, one hundred and twelve are not impeached. There are typographical errors in some of the citations in L. which are repeated in D. This fact is relied on as showing that D. simply transcribed from L., and did not consult the original. Such is undoubtedly the tendency of this fact. But the master has not regarded it as conclusive, for it might well be, that one having taken with him to a library a citation found in L. or any other writer, and having found the place and the doctrine which he was seeking, would omit to correct the erroneous citation. L. in many of his notes has referred to authorities in manuscript, and he testifies that he has never seen them in print. And there has been no attempt to rebut the inference to be drawn from this testimony.

The master has assumed that the burden of proof is on the complainant to show copying by the respondent, and in doubtful or nicely balanced cases he has allowed much weight to the evidences of study and labor on the part of the second annotator where he has found them. The master has endeavored to present, as briefly as possible, the questions raised as to each of the notes assailed dividing them into four classes,—and to state the proofs and counter-proofs relied on. In many cases he has ventured an opinion, after much hesitation.

Notes of the First Class.

[Eleven of Dana's notes were impeached.]

Sixth. Note 120, p. 291. The author says: "Where an empire is severed by the revolt of a province or a colony declaring and maintaining its independence, foreign states are governed by expediency in determining whether they will commence diplomatic intercourse with the new state, or wait for its recognition by the metropolitan country."

D.'s note is attached to this text. He refers to his note 16, "On Recognition of Independence," and note 41, on, "Intervention in Mexico and Recognition of the Empire." He adds: "See, also, Mr. Buchanan to Mr. Rush, of 31st March, 1848; Mr. Webster to Mr. Rives, of Jan. 12, 1852; Mr. Everett to Mr. Rives of [17th February, 1863] Jany. 12th, 1863."

L. has a note of two pages at same place, note 117, p. 376. He says: "No difficulty [in recognizing a government *de facto*] can well arise with foreign states [when] where a prince, [though] claiming to be sovereign *de jure*, voluntarily renounces all attempt to exercise his rights;" quotes from a notification addressed to the foreign courts on the death of the Duke of Angouleme; gives an extract from letter of Mr. Buchanan to Mr. Rush, the 31st March, 1848, citing department of state MSS.; an extract from a letter of the date of Jany. 12, 1852, from the secretary of state to the minister, Mr. Webster to Mr. Rives, Cong. Doc. 1851–2 [Senate], Vol. iv., Doc. 19; and a short extract from instructions of Mr. Everett to Mr. Rives, 17 Feby., 1853, citing department of state MSS. It is observable that the dates are the same in both, save that the date of Mr. Everett's letter as given by D. is 1863.

Two of these letters are by L. quoted from manuscripts. D. does not say where these letters may be found.

Of these eleven notes the master finds that one alone infringes, viz., note the sixth. As it does not appear that the letters of Mr. Everett to Mr. Rives and of Mr. Buchanan to Mr. Rush have been published; L. citing department of state MSS., D. not saying where they may be found.

Notes of the Second Class.

[*Three of Dana's notes of this class were impeached; but the master reported none as infringements of the complainant's equitable rights.*]

Notes of the Third Class.

[*Fifty-nine of Dana's notes of this class were impeached. The master reported four as infringing the complainant's equitable rights.*]

Thirty-fifth. Note 117, p. 277, is of six lines.

D. says: "The treaty of Paris of 1856 applies the declaration of the freedom of rivers running between or through several states, by the congress of Vienna, to the Danube, and opens it to the trade of all nations, with no duties founded solely on the right to navigate. It makes special provisions respecting police, quarantine, and customs duties, and the removal of physical obstructions to navigation. See, also, art. 17 of treaty of 1857. Martens, Nouveau Recueil, xv. 647, 776; xvii. 75, 622, 632."

L. has a note at the same place of more than a page,—note 113, p. 349. He says: "The free navigation of the Danube had been one of the four points made the basis of the negotiation at the congress of Paris. The principles of the Vienna treaties were applied to it [by the treaty of March 30, 1856], as follows." Then follows what purports to be articles xv., xvi., xvii. and xviii. of the treaty of Paris, citing "Martens, par Samwer, Nouveau Recueil, tom. xv. pp. 647, 776." "The act of navigation of the Danube was concluded between Austria, Bavaria, the Ottoman Porte, and Wurtemburg, in pursuance of the 17th article of the treaty, on the 7th of November, 1857. It recognizes the freedom of navigation for vessels of all nations, which are to be treated in every respect on a footing of perfect equality. Ib. tom. xvi. part ii. p. 75. The European commission established,

under the date of June 27th, and July 25th, 1860, provisional regulations of police for the lower Danube and a tariff of tolls at the mouth of the Soulina, without, however, terminating its labors. Ib. pp. 622, 632."

It is apparent that D. might have written his note without reading more than L.'s.

The 17th article of the treaty of Paris provides for a commission to be composed of delegates of Austria, Bavaria, the Sublime Porte and Wurtemburg—(one of each of the powers), to whom shall be added commissioners from the three Danubian Principalities whose nomination shall be approved by the Porte:

1. To prepare regulations of navigation and river police:

2. To remove the impediments, of whatever nature, which *shall* still prevent the application to the Danube of the arrangements of the treaty of Vienna:

3. To order and cause to be executed the necessary works throughout the whole course of the river:

4. *And* [shall] after the dissolution of the European commission, *to* see to maintaiuing the mouths of the Danube and the neighboring part of the sea in a navigable state.

D. cites article 17 of the treaty of 1857. There was no treaty of 1857. The act of the navigation of the Danube was concluded in pursuance to the 17th article [of the treaty between Austria, Bavaria, Turkey and Wurtemburg] 7th of November, 1857.

The citation of Martens Nouveau Recueil. xvii. 75, 622, 632, is a mistake, for these citations have no relation to the matter for which they were cited by D.

This has the appearance of a hasty transfer of citations from L.'s note.

Thirty-seventh. Note 122, p. 295, is a note of fourteen lines.

The note of D. was written on an interleaf. It might have been written, including the citations, from the three notes of L. D. does not indicate where the letters he mentions are to be found, nor does L. in all instances.

L. has a note of eleven lines, note 120, p. 384; a note of half a page, note 121, p. 385, at the same place as D.'s; and a note of ten lines, note 122, p. 386.

Forty-first. Note 131, p. 319, is of sixteen lines.

D. says: "Dr. Twiss (Law of Nations, i., § 203) states the present rule and practice somewhat differently," and then makes a quotation.

L., at same place, has a note of twenty-one lines, note 133, p. 416, in which he says: "The statement in the text does not accord with what we deem the correct rule on principle, nor with what was the usage in England during the editor's official residence in that country." . . . The same extract from Twiss follows—except that the words "the rates" are substituted for the word "them." The first three paragraphs are from the text of Dr. Twiss, the last three from his note on the same page. Though there is no indication of this in either.

D. directed the printer to reprint this extract from L., which was done, except that the word "*them*" in the quotation as made by Mr. Lawrence was changed for the words "*the rates.*"

"Them" is the word in the original.

D. would hardly have undertaken to correct the author he was citing, he must have supposed that a mistake had been made in copying, as he would not have substituted "*the rates*" for "*them.*" He probably did not take the trouble to compare the quotation of L. with the original.

Forty-fourth. Note 138, p. 338, is of twelve lines. The text says: "It is, consequently, an implied condition in negotiating with foreign powers, that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the state."

D. says: "For this reason, the representatives of the United States are not willing to sign or receive declarations or other notes in connection with a treaty. If such [notes] can possibly affect the treaty, they should be communicated to the senate, as a part of the compact. (Mr. Adams to Earl Russell, Aug. 23, 1861, on the declaration proposed to be attached to the convention on the subject of the declarations of Paris. U. S. Dipl. Corr. 1861, p. 186. See, also, Mr. Cass to Mr. Sandford, Oct. 22, 1859, Sen. Ex. Doc. 36th Cong. 2d Sess. No. 10. President Polk's message of Feby. 8, 1849, Cong. Globe, 1849, p. 486.) This subject was also discussed in connection with the Clayton-Bulwer treaty, where the British Minister, in exchanging ratifications, sent a note of explanation to Mr. Clayton, to which the latter replied. Sen. Ex. Doc. No. 12, 32d Cong. 2d Sess. Also Mr. Wheaton's letter to the state department, of 8th July, 1840, respecting the treaty with Hanover."

L. has a note of a page and a half, note 153, p. 454, and another note at the same place as D.'s of thirteen lines, note 154, p. 456. In the latter L. says: "It is not necessary to submit to the senate, for its formal approval, conventions providing for the adjustment of private claims, unless such a course is indicated in the convention itself," citing "36th Cong. 2d Sess. Senate Ex. Doc. No. 10, p. 472. Mr. Cass to Mr. Sandford, October 22, 1859."

In note 153, L. says, "On occasion of the treaty concluded by Mr. Wheaton with Hanover, it was proposed to declare by a protocol, [. . .] that, though the treaty [had been] concluded in English and French, in case of any disagreement [. . .] the French [copy] should be deemed the original. It was, however, the opinion of Mr. Wheaton, in which the secretary of state concurred, that no such declaration could be entered into without submitting the treaty anew to the senate." Citing "Mr. Wheaton to secretary of state, 8th July, 1840, department of state MS."

He says: "On the exchange of the ratifications of the treaty of peace between the United States and Mexico, a protocol of the conference between the commissioners, embodying their opinion as to the operation of certain amendments of the sen-

ate to the original treaty, was signed at Queretaro on the 20th of May, [1848]. . . The president did not send the memorandum of the conference, called a protocol, to congress, when he communicated to them the treaty on the 6th July, 1848, because it was not regarded as in any way material, and had the protocol varied the treaty as amended by the senate, it would have had no binding effect." Citing "Congressional Globe, 1848-9, p. 486."

In the next two paragraphs, he says: "In proceeding to [the] exchange of the ratifications of the convention, signed at Washington, on the 19th of April, 1850, [between her Britannic majesty and the United States of America, relative to the establishment of a communication, by ship-canal, between the Atlantic and Pacific Oceans." Mr. H. L. Bulwer, the British minister, says, he "has received her majesty's instructions to declare that her majesty does not understand the engagements of that convention to apply to her majesty's settlement at Honduras, or to its dependencies. Her majesty's ratification of the said convention is exchanged under the explicit declaration above mentioned. . . It appears from the printed documents that Mr. Clayton filed, on 5th of July, 1850, a memorandum [in the department of state, stating] *saying* he had received the above declaration on day of its date; that he wrote, in reply, on *the* 4th July, a note acknowledging [that] he had understood that British Honduras was not embraced in the treaty of *the* 19th of April, but, at the same time, declining to affirm or deny the British title; and that, after signing the note [of] 4th of July, which he delivered to Sir Henry Bulwer, they immediately proceeded to exchange the ratifications of the treaty." Citing "Cong. Doc. 32d Cong. 2d Sess. Senate Ex. Doc. No. 12, January 4, 1853."

In the next and last paragraph he quotes from a letter from Mr. C. F. Adams to Earl Russell, Aug. 23d, 1861, in which he gives his reasons for declining to attach a declaration to proposed convention of maritime law, citing, "Papers Relating to Foreign Affairs, Accompanying the President's Message, 1861, p. 123."

It is manifest on examination of D.'s note 36, on the Monroe doctrine, p. 97, and his note 215, on the Neutrality and Foreign Enlistment Acts, p. 536, that he had made himself familiar with the Clayton and Bulwer treaty and with the history of its negotiation.

For the correspondence between Mr. C. F. Adams and Earl Russell, D. refers to U. S. Dipl. Correspondence in 1861, p. 126, [136], while L. refers to the papers accompanying the president's message.

For the letter of Mr. Wheaton to secretary of state, 8th July, 1840, L. cites department of state MS.

D. does not say where this letter may be found. L., see Record, p. 125, says he has never seen the letter of Mr. Wheaton to secretary of state in print. And it is not proved on the other side that it had been printed.

Of the notes of this class, the master finds that the *thirty-fifth*, note 117, p. 277; the *thirty-seventh*, note 122, p. 295; the *forty-first*, note 131, p. 319; and the *forty-fourth*, *note 160*, *p. 417*, [note 138, p. 388]—do infringe the equitable rights of the complainant. That the *forty-seventh*, note 160, p. 417, in which is cited by the respondent the letter of Mr. Cass to Mr. Clay, minister to Peru, Nov. 26, 1858, which the complainant had quoted and cited in manuscript; and that the *fifty-fifth*, note 232, p. 671, in which is cited by the respondent the letter of Mr. Wheaton to Mr. Buchanan, secretary of state, July 1st, 1846,[7] which the complainant had quoted and cited in manuscript, do generally infringe the complainant's equitable right to the extent of such citations. But the master has not found satisfactory evidence of copying by the respondent in any of the notes in this class, or rather he has not found proof sufficient to overcome the presumption of innocence. There [*are*] of necessity many matters in common.

Notes of the Fourth Class.

[*Forty-one of Dana's notes of this class were impeached. The master reported eight as infringing the complainant's equitable rights.*]

Sixth. Note 30, p. 77, is of a page. It is claimed that the first five sentences of D.'s first paragraph and his entire second paragraph are taken from L.'s note of six pages at the same place, note 38, p. 91, and his Addenda, 983, 984. Both notes are historical, though unlike, they contain coincidences of phraseology, such as "In 1848 an attempt was made," "Parliament met in May, 1848," "with the approbation of the diet," "Austria, Wurtemburg, Bavaria and Hanover," in the same order.

D. has a cluster of citations at the end of his fifth sentence, "Annual Register, 1848, p. 362; 1848, pp. 347, 364; 1850, pp. 313, 320; 1851, p. 276." These are all at the end of the second paragraph of L.'s note, p. 92, in the same order, with two others not in D. L. encloses the pages of the Register to which he refers in brackets, or rather places a bracket after the pages. The Annual Register is a book, each volume of which is of two parts. One part has the numerals only, the other, the numerals with a bracket after them. D. testifies that he was familiar with the work. Did he obtain these citations from the book or from L.?

D. might have written these five sentences

[7] [Th's must be a mistake. The reference is to a letter in the next note 235, p. 674, which is not assailed.]

from L.'s note, and as further proof that D. did not examine the books to which he refers, it is remarked that when he writes of events occurring since the last edition of L. was published, he states facts generally without furnishing any references or any means for verifying his statements. The answer is that when D. wrote, these events were generally too recent to be found in books.

The second and last paragraph of D. is taken from p. 95 of L. and his Addenda, 983, 984, as is contended. But D., p. 78, says: "The states of the second order began the movement in 1859, countenanced by Austria, Saxony taking the lead. Their proposition, known as the Dresden project, was declined by Prussia." I do not find any authority in L. for the statement that this proposition was known as the Dresden project.

At the end of his note D. cites "Le Nord, Aug. 15, Aug. 31, Oct. 18, Nov. 1 and 21, 1862." But L. cites Le Nord as authority for each of his several statements of fact, and he makes many which D. does not, and it is proved that D. has cited Le Nord only where it had been cited in L.

All D.'s citations of Le Nord are found in L. pp. 983, 984, and 985.

In the opinion of the master, the final paragraph of this note of D.'s does infringe the rights of the complainant.

Seventeenth. Note 108, p. 258, is of less than three pages on "Municipal Seizures Beyond the Marine League or Cannon-Shot."

L. has a short note at the same place, note 105, p. 323, in which the reader is referred to his note p. 266, note 105, of ten pages. It is claimed that some parts of D.'s note were taken from the two notes of L.

The notes appear to have been written for a different purpose and they have not much in common.

D. cites U. S. Laws 1797, § 27; Rose v. Himely, 4 Cranch [8 U. S.] 241; Hudson v. Guestier, Id. 293; Church v. Hubbard, 2 Cranch [6 U. S.] 187; Hudson v. Guestier, 6 Cranch [10 U. S.] 281. Neither of these is in L.'s notes; D. cites for Lord Stowell's opinion in the Case of The Louis, 2 Dob. 245. L. cites 246 Stowell, begins on p. 245.

Both refer to the opinion of Dr. Twiss, in the Cagliari Case. L. has a long extract from the opinion. D. quotes a part of L.'s extract.

It is in proof that both have omitted one and the same line of the original. D. nowhere indicates where the opinion may be found, nor does L. D. says, p. 260: "This subject was discussed incidentally in the case of the Cagliari which was a seizure on the high seas, not for violation of revenue laws, but on a claim somewhat mixed of piracy and war."

I do not find any authority for this in L.'s note.

Mr. Dana cannot tell where he got his quotation from the opinion of Dr. Twiss, and Mr. Morse had not seen it elsewhere. Mr. Potter (Record 158–159) swears that both omit one whole line of the original and neither notices the omission, that he never saw it printed entire in any book though he had seen a printed copy of it in Mr. Lawrence's library.

The master is of opinion that D. took the third paragraph of his note from L.'s note, and finds that this paragraph infringes the rights of the complainant.

Twentieth. Note 128, p. 303, is of more than half a page.

The first sentence is: "Heffter says that a minister in a Christian country has no authority to inflict penalties upon his suite and no jurisdiction to decide controversies of legal rights among them and between his fellow citizens residing in the country." (Europ. Völker. § 216.) De Martens, § 215. To this there is no objection. The next sentence is: "Mr. Cass, secretary of state, in a letter to Mr. Fay, the United States minister at Berne, of Nov. 12, 1860, takes the ground that a minister of the United States has no civil or criminal jurisdiction among his fellow countrymen or over his suite, and that what is called the extra-territoriality of the embassy relates only to what is necessary to the proper discharge of diplomatic functions, and does not make the place of the minister's residence a portion of the United States in such a sense that private persons, by presenting themselves there for purposes of private contracts, whether of marriage or of business, can give to their acts exemption from the law of that country, or the sanction of the law of their own country. If the latter effect is produced it must be by force of statute law. 12 Stat. 72, c. 179.

L. has a note not at same word of the text, but to a preceding word in the same section, of near a page and a half, note 133, p. 398. In this note he quotes more than a page, citing Mr. Cass to Mr. Fay, minister at Berne, Nov. 12, 1860, department of state MS.

There can be no doubt that the substance of the foregoing sentence is found in the quotation from Mr. Cass's letter in L. Mr. Lawrence testifies that to the best of his knowledge there has been no printed copy of this manuscript extract, save what was in his note. And there was no attempt to contest this evidence.

D. then devotes four sentences to the views of Dr. Woolsey, citing Woolsey's Introd. § 92. His last sentence is a statement of what the British government claimed and admitted in the case of the coachman of Mr. Gallatin, the United States minister in London. D. does not say where the case may be found.

Mr. Lawrence testifies: "The case of Mr. Gallatin's coachman is also mentioned by D., p. 303. I give it in the addenda, p. 1006. I have never known of its being stated elsewhere. It occurred while I was secretary of the legation, and the discussion with the foreign office was carried on by me. Gallatin's despatch and my private memoranda." Record, p. 124.

L., p. 1006, gives a brief history of the coachman's case, p. 1006, and from this D. might have written the last sentence of his note.

The master finds that the second and last sentences do infringe the rights of the complainant.

Twenty-second. Note 135, p. 324, is of more than half a page, in two paragraphs. The text speaks of consuls in civil cases being subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state.

The author has a note at the same point, citing several authorities.

D. says: "As to the *status* of consuls, and the privileges usually accorded to them in the practice of nations, for further authorities see *Twiss's Law of Nations, i. 318;* Woolsey's Introd. §§ 95, 96; Phillimore's Intern. Law, 240–275; Heffter's Europ. Volker, § 244, a. 249; Hallock's Intern. Law, 239-267; *Opinions of Attorneys General (U. S.) vii. 22, viii. 16; Martens, Guide Dipl. ch. XII.* §§ *72, 79; Guide des Consulats (De Clercq et De Vallat), i. 6-16; Davis v. Packard, Peters's Rep. vii. 276; Valarino v. Thompson, 7 Selden's Rep. (N. Y.) 576.*

He then gives a short history of the case of Mr. Dillon, the French consul at San Francisco. "After a long correspondence," he says, "the point was settled by instructions from the French government to its consuls to obey the subpœna in future cases." Citing *Mr. Marcy to Mr. Mason, Sept. 11, 1854, and 18 January, 1855; notes of Mr. Mason and M. Walewski, Aug. 3 and 7, 1855; Annuaire des Deux Mondes, 1853-4, p. 762; 1854-5, p. 732.*

D. does not say where the correspondence may be found. D.'s second paragraph is not assailed.

L. has a note to the same word in the text. Note 143, extending from page 423 to page 437, a storehouse of learning. The citations in D. which are underscored are found in L. The others are not. L. has many citations which are not in D. L. gives a very full account of Dillon's case. For the correspondence between Mr. Marcy and Mr. Mason and between Mr. Mason and M. Walewski, L. cites MS. and Annuaire des deux Mondes, 1853-4, p. 762; 1854-5, p. 732. Mr. Lawrence testifies that this is a correspondence which he has never seen elsewhere in print; and that his attention was directed to it by Mr. Marcy.

The master finds that all of the note of D. after the first sentence does infringe the rights of the complainant.

Twenty-fourth. Note 143, p. 352, is of more than a page on the "Effect of War on Treaties."

D. undertakes to indicate what treaties are and what treaties are not annulled or suspended by war. He quotes from Halleck (Intern. Law, 371, 862); from Kent (Commentaries, i. 420); from the opinion of the supreme court (in the case of the Society for the Propagation of the Gospel v. New Haven, 8 Wheat. [21 U. S.] 464); from Woolsey (Introd. § 152). Says, "The older text-writers made the survival of treaty rights dependent on the origin of the war" — citing Grotius, liv. 3, ch. 20, §§ 27, 28, and Vattel, liv. iv. ch. 4, § 42. Then follows a short commentary. He adds: "See, also, the debate in the house of commons on the declaration of Paris of 1856; *speeches of Sir George Lewis and Mr. Bright of March 11 and 17, 1862, and of the Earl of Derby of Feb. 7, 1862; despatch of Mr. Marcy to Mr. Mason of Dec. 8, 1856;* Phillimore's Intern. Law, iii. App. 21."

L. has a note of some three pages at same place. Note 160, p. 472. He has none of the citations in D., except those which are underscored. He has a quotation from Mr. Marcy's despatch to Mr. Mason, for which he refers the reader to department of state MS. And this is a manuscript which Mr. Lawrence swears he never saw elsewhere in print.

The speech of Lord Derby so far as quoted by L. does not bear on any matter set forth in D. Both cite this speech as made Feby. 7th. Hansard gives it as made Feby. 6th.

L. quotes from Sir George Cornwall Lewis, p. 474, and from Mr. Bright. He also quotes from Phillimore, citing International Law, vol. iii. p. 602.

The high probability is that D. took his references to the speeches of Earl Derby, Sir George Lewis, and Mr. Bright from L.'s note, as also citation of Mr. Marcy's despatch, and in the opinion of the master these citations by D. do infringe the complainant's rights.

Twenty-sixth. Note 156, p. 387, is of nearly two pages on "Enemy's Property Found in the Country on the Breaking Out of War." At the same point Mr. Wheaton has this note. "Mr. Chief Justice Marshall, in Brown v. U. S., 8 Cranch [12 U. S.] 123–129."

D. in his first and second paragraphs gives the decision of the court, and states the question upon which they were divided and quotes from Kent. These two paragraphs are not assailed. In the third paragraph he says, "Hautefeuille contends that the law of nations exempts from confiscation property found within the country on the breaking out of war, including vessels and cargoes afloat," citing *tom. iv. p. 267; tom. iii. p. 278,* and adds: "It does not follow that the learned author considers his view to be sustained by the decisions of courts or practice of nations. He refers rather to treaties securing [the] exemption, and to the opinions of text-writers whom he considers sound and trustworthy."

In the fourth paragraph he says: "The English text-writers, like the American, are of opinion that the law of nations is not settled against the right, but, indeed, admits it. *Manning, Law of Nations, 167;* Phillimore, Intern. Law, i. 115-135."

The fifth paragraph is devoted to the orders and declarations issued and made by the parties to the Crimean War —France and Great Britain—citing "*French Declaration of March 27,* and *British Declaration of March 29, 1854.*"

He says: "On her part, Russia allowed French and English vessels six weeks to load and sail from ports in the Black Sea, Baltic [and] sea of Azof, and six weeks from the opening of navigation, to vessels in the White

L. has two notes, neither at the same place as D.'s, but near it,—one, note 172, p. 530, of half a page; the other, note 173, p. 531. In the first of which he gives an extract from Earl Derby's despatch of Dec. 6, 1861, which embraces the quotations of D.—all that D. says of that despatch is found in said note 172. L. cites "Parliamentary Papers, 1862, Correspondence Relating to Civil War in the United States, p. 108." The learning of D.'s paragraphs four and five may be found in L.'s note 173, except the last two sentences of the fourth, and in this note are found all the aforesaid citations by D. which are underscored, and many others not found in D. There is no "Paris Moniteur." It is the "Moniteur Universel"; but L. and Hallech cite it as "Paris Moniteur." The Russian paper is called in Hosack, "Commercial Gazette." But L. and D. call it "Gazette du Commerce."

In L. the last citation is stated to be from second edition. The first citation is reprinted by L. from his edition of 1855, p. 371.

Sea." At the end of this paragraph are cited "*Paris Moniteur, March 28, 1854; London Gazette, 18th April, 1854; Gazette du Commerce, 19th April, 1854; Hosack's Law of Neutrals, 57; App. 112;* Ortolan, ii. 443-448."

In his next and last paragraph, after a short commentary, D. quotes from a despatch from Earl Russell of 6th of December, 1861, to the British consul at Richmond, Va., and closes by citing Parliamentary Papers, 1862, p. 108. He refers to his notes 157 and 169 *infra*.

D. in his third paragraph has two citations of Hautefeuille, tom. iv. p. 267; tom. iii. p. 278. He does not say which edition he refers to. It is in evidence (Record, 219) that tom. iv. p. 267 of the four volume edition is the same as tom. iii. p. 278 of the second edition.

The last two sentences of D.'s fourth paragraph are not found in L.

The master finds that the third paragraph infringes the complainant's rights, and that the others do not.

Thirty-seventh. Note 228, p. 637, is of twenty-four pages. Five paragraphs (p. 639) only are assailed.

First.

D. says, p. 639: "At the beginning of the Crimean War, the declaration of Great Britain, of 28 March, 1854 (and that of France was to the same effect), was in these words: 'It is impossible [for her majesty] to forego the exercise of her right of seizing articles contraband of war, and of *preventing neutrals from bearing the enemy's despatches.*' "

L. has a note at the same word of the text, note 230, p. 805. He says, p. 771: "The preventing of neutrals bearing enemy's despatches was included with the seizing of articles of contraband, as an exception to the otherwise unrestricted freedom of commerce, conceded to them by the 'declarations' of England and France, and by the order in council, of the 15th of April, 1854." The language of the declaration is not there given, but in the note of L. 228, p. 771, he says: "The ministers of England and France communicated to the secretary of state of the United States on the 21st of April, the declaration made on the 28th March." He then quotes from the declaration, and a part of L.'s quotation is the quotation of D.

Second.

D. says (p. 639): "At the beginning of the Civil War in the United States, the royal proclamation of neutrality of 13th May, 1861, warns British subjects against carrying officers, soldiers, despatches, *arms, military stores*, . . . for the use of either of the contending parties," as "acts in derogation of their duty as subjects of a neutral sovereign."

L. says (p. 805): "The queen of England's declaration of neutrality, in the present war between the United States and the Confederate States, includes in the same category with articals of contraband, "carrying of officers, soldiers, despatches, &c., for the use or service of either of the [said] contending parties." The words in D. underscored, viz: "arms and military stores" are not found in L. nor is the date of the declaration. But on page 698 of L. the date is given and words underscored are found.

Third.

D. (p. 639) says: "The decree of the emperor of the French was more general," and gives a quotation from it.

L. (p. 699) says: "The French decree, as published in the Moniteur, June, 1861, was as follows." Then follows an extract of which the quotation of D. is a part.

Fourth.

D. (p. 639) says: "The Spanish decree of June 17, 1861, says: 'The transportation of munitions of war is forbidden, as well as the carrying of papers or communications for the belligerents.' "

L. (p. 699) gives the same date and the same quotation and more.

Fifth.

D. (p. 699) says: "The declaration of Paris is silent on this subject. The proposed International Code of Spanish America, of 1862, in connection with its recognition of the declaration of Paris, had this provision: 'Besides the articles qualified as such, are to be deemed contraband of war commissioners of every description sent by belligerents, and the despatches of which they are the bearers.' "

D. does not indicate where any of these papers from which he quotes are to be found.

L. (p. 951): "The questions raised by the affair of The Trent did not enter in any manner into the declaration of the congress of Paris. . . . The proposed international code of Spanish America, while recognizing the principles of the declaration of Paris, inserts a provision that." Then follows in *ipsissimis verbis* the quotation of D. L. cites "La Cronica, 6 de Octubre, 1862."

The master finds that the seventh, eighth, ninth and tenth paragraphs do infringe the rights of the complainant.

Fortieth. Note 240, p. 688, is of two pages.

D. gives a history of the case of the Cagliari, the opinions in brief of Dr. Twiss and Dr. Phillimore, and finally his own opinion and the reasons therefor at some length. At the end of his note he cites "Martens, Causes Celebres, v. 600." Martens gives a history of the case but does not allude to Dr. Twiss or Dr. Phillimore. D. had Abdy's Kent, in which the history of the case is given, and a short extract from Dr. Twiss's opin-

L. (pp. 267 and 268) gives the opinions of Twiss and Phillimore and in his index under the word Cagliari, refers the reader to p. 267. Neither of the experts has seen these opinions in any other book, and no one intimates where they are to be seen. It is not claimed that D. has taken from L. anything but the two sentences on p. 688 in which appear these opinions.

ion in the case; but it is no authority for the opinions as reported by D. The history of the case as given by D. is not found in L.

The master finds that D. was indebted to L. for his reports of the opinions of Dr. Twiss and Dr. Phillimore, and has, to that extent, infringed the complainant's rights.

The master has indicated such parts of the respondent's notes in the fourth class as he finds to infringe the rights of the complainant, and as to other parts of said notes he finds they do not infringe, either because he is satisfied they do not, or is not satisfied that they do.

He has endeavored to present the facts, the questions raised and the proofs and suggestions relied on by the respective parties, as briefly as is consistent with the proper discharge of his duty to the court.

Respectfully submitted, H. W. Paine.

Extract from Letter of Mr. Lothrop.

Hotel Jungfraublick, Interlaken,
August 25, 1890.

My Dear Adams: * * * * * * * Into the merits of the unfortunate controversy and litigation which followed the publication of his edition of Wheaton I have no wish or purpose to enter. Mr. Dana would never have denied his use of Mr. Lawrence's collections of citations, but these citations—mere lists of other persons' writings,—were in his opinion common property, and the labor and research employed in finding and collecting them he hardly regarded as intellectual work. No original thought or expression of Mr. Lawrence's is anywhere to be found in Mr. Dana's notes; nor does any idea of Mr. Lawrence's anywhere serve as a basis for, or seem to have suggested, any note or part of a note to Mr. Dana. But Mr. Lawrence's collections of citations are constantly reprinted exactly in the order in which they stand in the editions of Wheaton published under his supervision. This is, however, rather a technical illegality than a moral injustice, for had any one on Mr. Dana's behalf verified these lists by referring to the books cited he might then without reproach have reprinted them in the same order, so far as he found them correct. And it is gratifying to know that the report of the master to whom the case was referred, made after a most laborious and exhaustive investigation, reduced to a minimum the invasion of Mr. Lawrence's copyright; if indeed there were any invasion at all. The report was never acted upon, and upon the death of both the parties the litigation practically ceased. The whole controversy is the more unfortunate, as there is reason to believe that, had Mr. Dana thoroughly recognized the value and extent of Mr. Lawrence's labors, and publicly expressed his obligations for Mr. Lawrence's exhaustive researches, there would have been no difficulty and no lawsuit. It is much to be regretted that this was not done, and it must be admitted, I think, by Mr. Dana's best friends, that his failure to perceive and acknowledge the advantage to himself, as well as to all students of international law, of Mr. Lawrence's diligence in research, was unjust as well as unfortunate. In spite of the time devoted to his work on Wheaton, Mr. Dana was able during these years to discharge all the duties his office required, and when he resigned he had the satisfaction of knowing that, though no addition had ever been made to the number of his assistants, the whole work of the office in the busiest times had been done without the employment in a single instance of any additional counsel, or any professional aid from outside. I have now given you, my dear Adams, my best recollections of Dana's district attorneyship, about which you ask me. What I have written is all that I can do here. I wish you had applied to me before I came away. The whole thing is absolutely yours to treat and use in any way you like. I have only one request, that you will not let me in any way appear in print with any statement where your better knowledge shows my recollection to be inaccurate.

Very truly yours, Thornton K. Lothrop.

P. S. Did ever a man suffer more than Dana from his mental peculiarities, perversities or obliquities, or whatever you choose to call them? He thought anybody could collect authorities, and that to do this was a day laborer's task; he used Lawrence's collections, and then despised his notes because they were mere collections of authorities, and at last thought himself under no obligation to him, because the notes were what anybody could have done, and so would not say the soft word that might have turned away wrath, but wrote instead what almost rendered a lawsuit inevitable;—and then Lawrence pursued him with a personal and political vindictiveness which ruined Dana's career, lost him his only chance, and was to Lawrence, whatever became of his lawsuit, a perfectly satisfactory vindication. Two hundred and fifty dollars paid ——, or some other equally accurate man would have rendered any suit impossible; and a little harmless and truthful flattery would have removed all desire for a controversy from Lawrence's mind. But the whole thing was very characteristic of one side of Dana's mind.

I may add that my recollection of the Prize Causes is very shaky. If I could have got hold of a brief or a volume of reports, it would all have come back to me; but my endeavors in this direction were in vain, and my recollections are rather of points talked over between Mr. Dana and myself in these and other like cases than of the actual argument of the cases. Dana, as you know, was always absolutely absorbed in the one thing he was doing; and this question of—was there a war?—could there be prize? took absolute possession of him. It had been agreed between us that he should take charge of all such questions, and should not be troubled with the other office work except in cases of emergency, and that I should have charge of and be responsible for the other work, and from the outset the office was managed in this way during all the time I was there.

Case No. 8,137.

LAWRENCE et al. v. DAVIS et al.

[3 McLean, 177.] [1]

Circuit Court, D. Illinois. June Term, 1843.

CREDITOR'S BILL — ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSENT OF ASSIGNEES —PREFERENCE.

1. An assignment of property to creditors, or for their benefit, to others, cannot be held void for want of consideration.

[Cited in Gates v. Labeaume, 19 Mo. 27; Hardcastle v. Fisher, 24 Mo. 73.]

2. To give an assignment of property validity, the assignees must assent to it.

[Followed in Pierson v. Manning, 2 Mich. 462. Cited in Gibson v. Chedic, 1 Nev. 497.]

3. By the common law a debtor may give a preference to certain creditors over others. And this is not prohibited by any statute of Illinois.

[Cited in Fuller v. Steiglitz, 27 Ohio St. 363; Mathews v. Stewart, 44 Mich. 216, 6 N. W. 635.]

[This was a bill in equity by Lawrence, Gaither, and others against Davis and others.]

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

Mr. Chickering, for complainants.
Strong & Pickering, for defendants.

OPINION OF THE COURT. This bill is brought by the complainants, who are creditors of the defendants, to set aside an assignment of their effects by the defendants for the benefit of certain creditors, giving a preference to certain persons named. The plaintiffs are named in the assignment, but Hamly, Davis and McAffee are preferred to them.

1. This assignment it is contended is void, because it was made without consideration. An assignment to creditors, or to individuals for the benefit of certain creditors, cannot be said to be without consideration.

2. It is also objected that the creditors have not accepted the assignment. That the complainants being creditors have not accepted it. In making an assignment of property, as in every other case of contract, the assent of at least two persons is necessary to its validity. A debtor cannot change his relation to his creditors by a voluntary assignment of his property to them. If, therefore, he make an assignment, and his creditors do not accept it, there is no change of property; and legal redress is open to the creditors as before the attempted assignment. That which purports to have been done for the benefit of creditors, and which was manifestly to their advantage, will be presumed to have been done with their assent, unless the contrary appear.

3. But in the third place, it is contended that the assignment was conditional, and that the condition has not been complied with. The condition was, "that the assignees shall and will render an account, &c. to a major part of the creditors, and that they shall sanction the assignment before it can take effect." And it is earnestly averred that the acquiescence of a majority has not been shown. 2 Story, Cont. 302, 303; Garrard v. Lord Lauderdale, 11 Eng. Ch. 451, 3 Sim. 1. This last objection has not been answered, and it seems fatal to the assignment. A majority of the creditors have not assented to it, and without this, by the terms of the assignment, it cannot take effect. By the common law, a debtor may give a preference to a part of his creditors. Under the bankrupt law this could not be done; nor is it permitted in several of the states, where the law secures an equal distribution of the effects of an insolvent among his creditors. It is believed that there is nothing in the statutes of Illinois, which renders a preference to certain creditors fraudulent or void. But the assignment is set aside and annulled, on the ground that the condition of it has never been complied with.

LAWRENCE (DE BRUNS v.). See Case No. 3,716.

LAWRENCE (DURAND v.). See Case No. 4,187.

LAWRENCE (FIELDEN v.). See Case No. 4,774.

LAWRENCE (FOCKE v.). See Case No. 4,894.

Case No. 8,138.

LAWRENCE v. GRAVES.

[5 N. B. R. 279.] [1]

Circuit Court, E. D. Missouri. 1871.

BANKRUPTCY—FRAUDULENT TRANSFER—THROUGH AGENCY OF THIRD PARTY—REGISTER—POWER TO ADMINISTER OATH—TO TAKE DEPOSITION—CHARGE TO JURY.

1. Although a register may have no authority to take a particular deposition, he has full authority to administer oaths, and when by the assent of parties he has taken such a deposition to be used in evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the party causing the deposition to be so taken cannot object.

2. It is not error to direct the attention of the jury to the distinction between "reasonable cause to believe," and "actual belief."

[Cited in Babbitt v. Walbrun, Case No. 695.]

3. If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys, out of the usual course of trade, a large portion of the insolvent's property, and gives notes payable at long dates, cashes the notes and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, that is certainly a transfer of the bankrupt's property to his wife in fraud of his creditors through the agency of the wife's father, and therefore fraudulent and void.

[Error to the district court of the United States for the Eastern district of Missouri.]

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

TREAT, District Judge. Many of the errors assigned are dehors the record. This was an action, substantially, of trespass de bonis asportatis. The declaration avers that the bankrupt did, on the (blank) day of October, eighteen hundred and sixty-nine, "transfer, assign and convey" (the statutory terms) to the defendant, &c. The counsel below seems to have supposed the time material, and that the cause of action was limited to a technical assignment, as under the state statute, and consequently no evidence was admissible as to any other form of an alleged fraudulent transfer or conveyance, or as to any such transfer or conveyance at a different time from that stated in the declaration. The declaration is so framed as to cover any fraudulent transfer, assignment or conveyance during the six months prior to the filing of the petition in bankruptcy. Hence all the errors assigned, which are based on the incorrect hypothesis of counsel below as to the cause of action, disappear.

It is said there is no evidence that An-

[1] [Reprinted by permission.]

drews was adjudged bankrupt, or the plaintiff appointed assignee. The declaration avers these facts, and that the adjudication, etc., was made by the court which tried the case; and frequent reference is made at every stage of the case to the records of the court in the bankruptcy proceedings, showing that those records were produced and recognized as in evidence. No objection was made below that they were not formally read or offered in evidence; but all parties treated them as before the court and jury.

It appears that the defendant caused the deposition of Higgins to be taken on notice, before Register Lindenbower, and that at the time and place designated, both parties appeared by counsel and examined, cross-examined and re-examined the witnesses at great length; that said deposition was duly filed in said cause, and that defendant moved to strike the same from the files, on the grounds set out in the written motion therefor, and subsequently objected to the plaintiff's reading said deposition for reason stated. The grounds thus stated are, except in one particular, dehors the record, and for aught known to this court, the motion and the objections were overruled, because it was apparent to the court that they had no foundation in fact. It does appear that the deposition was taken before a register at the instance of the defendant himself, and with the assent of the plaintiff, and after being duly certified was placed on file in the case.

In Yeaton v. Fry, 5 Cranch [9 U. S.] 335, one of the errors assigned was that the plaintiff was permitted to read in evidence, depositions informally taken by the defendant under a commission, and the supreme court held that there was no error committed, Chief Justice Marshall delivering the opinion. That case does not expressly determine all the points here presented, but it decides that, when depositions are not taken ex parte or de bene esse under the act of seventeen hundred and eighty-nine [1 Stat. 73], or both parties appear and examine and cross-examine, and the depositions are subsequently placed on file, the party at whose instance they were taken, cannot object to their being read by the opposite party on the ground of any irregularity or informality. Having taken a deposition under the circumstances named, he cannot except thereto, nor cause the same to be suppressed. The officer before whom taken ought to cause the same to be transmitted to the court, for the benefit of all concerned, and once on file, the defendant could not suppress or withdraw them. Although a register has no authority to take such a deposition, yet he has full authority to administer oaths; and when by the assent of parties he has taken such a deposition to be used as evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the defendant causing the same to be so taken cannot object. The irregularity was defendant's, to which the plaintiff might have excepted, not the defendant.

We do not understand the record to show that there was any objection to the use of the deposition on account of the incompetency of the officer before whom it was taken; nor does the objection seem to have been made, that one party could not use the deposition taken by another, had it been properly certified, returned and filed. But there having been an appearance before the officer by counsel of both parties and a full examination and cross-examination of the witness, and no showing that the witness was present in court, and the course pursued being conformable to the usual practice in the state, we unite in holding that the court did not err in allowing the deposition to be read, without now deciding that one party has in all cases an absolute right to use depositions taken by his adversary. As the records of the court before the judge fixed the precise date at which Andrews' petition in bankruptcy was filed, and were absolute verity, no error was committed in stating that date to the jury.

To determine whether there was error in charging the jury, it is necessary to look to the whole charge, so as to ascertain whether one part thereof is not qualified by another, and thus the law fairly presented. The definition of insolvency in this case (the defendant being a merchant) was not only correct, but the allusion to another provision of the act, as illustrative of the reason of the rule, was unobjectionable. All through the charge the court endeavored to enforce upon the jury that it was their exclusive province to weigh the testimony and determine what it established. Their attention was called to the testimony bearing upon certain points to be ascertained, and the rules of law in reference thereto stated. If the charge were to be considered as to each sentence or point, dissevered from the other sentences or points in the complex problem, room might exist for sharp criticism as to successive details; but the question for review is whether the law governing the case was fairly and correctly stated, and not whether another and different mode of presenting them would not have been more satisfactory to one or the other of the parties litigant.

The law on which is based the plaintiff's right to recover, requires these facts to be proved: First. The vendor was insolvent or in contemplation of insolvency, &c. Second. The vendee had reasonable cause to believe such to be the condition of the vendor. Third. The sale was made by the vendor with a view to contravene the provisions of the bankrupt act. Fourth. The vendee had good reason to believe such to be the view or intent of the insolvent vendor in making the sale. Hence as to the vendor, it must be shown that he was insolvent, &c., and that he made the sale with the view named;

and on the part of the vendee, that he had reasonable cause to believe the status of the vendor to be as charged, and his purpose or intent to be in making the sale a contravention of the act.

In ascertaining the alleged act of insolvency, it was proper to charge the jury in such a way as to give them a clear view of the legal meaning of the term. That was done. Not only was a correct definition of insolvency given, as applicable to a merchant, but it was illustrated by reference to another provision of the act. That illustration, so far from being ground of error, was quite appropriate, in order that the jury might have a clear understanding of the general proposition stated. So it was proper to direct the attention of the jury to the distinction between "reasonable cause to believe" and "actual belief"—between wilfully shutting the eyes against demonstrative facts and circumstances, and their obvious existence. In that respect the charge was more favorable to the defendant than a stricter statement of the rule might have justified.

The statute declares what shall be prima facie evidence of a fraudulent transfer, and when such a prima facie case is made out, and no explanatory evidence is offered, it is unnecessary for the court to enter upon minute or elaborate distinctions as to the force and effect thereof. The case should be treated in the light of the law as applicable to the testimony produced, and not with reference to supposed or imaginary states of proofs possible to be adduced in some other cause. The jury are to be instructed and not confused; and there is no need of going beyond the legal requirements of the case presented. In the light of the testimony, the court was called upon to define the rules of law applicable thereto, and did so without repeating each element of the problem as it passed to the next in logical order. The testimony sufficiently established the insolvency of the vendor, and reasonable cause of the vendee to believe the vendor insolvent. It also showed that the sale was made out of the ordinary course of business, and consequently there was prima facie evidence of fraud—fraud on the part of the vendor, in which the defendant was directly participating. If the law declares a sale under given circumstances prima facie evidence of fraud, it is prima facie evidence to all concerned, to the vendee as well as to the vendor. It is difficult to perceive how, when prima facie evidence of a fact is presented, a person has not reasonable cause to believe the fact to exist, or, in the language of the decision, "to be put upon inquiry."

Dealing with the case as it thus stands, the court below brought with sufficient clearness to the minds of the jury the legal rules by which their action was to be governed, and guardedly stated that it was exclusively for them to give, even to the prima facie evidence, such weight as they might deem proper. In referring to the testimony concerning the mortgage on the property of the bankrupt's wife, and the manner in which by the contrivance of the defendant and bankrupt conjoined, that mortgage was paid off at the expense of the creditors, the court used the strong language in which the law characterizes such a transaction. Certainly there is no assignable error on that ground. If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys out of the usual course of trade a large, if not the largest portion of the insolvent's property, and gives notes payable at long dates, and then cashes the notes and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, it is not improper to say the law frowns on such contrivances for using the bankrupt's means to the detriment of his honest creditors. That transaction obviously was the transfer of the bankrupt's property to his wife in fraud of his creditors, through the agency of his wife's father, for the benefit of herself and of his son, the mortgagee.

The defect in the declaration was cured by the verdict under the statute of jeofails. Affirmed.

LAWRENCE (GRAY v.). See Case No. 5,722.

LAWRENCE (GRINNELL v.). See Case No. 5,831.

LAWRENCE (GRISWOLD v.). See Case No. 5,837.

LAWRENCE (KEUTGEN v.). See Case No. 7,745.

Case No. 8,139.

LAWRENCE v. The LIEUTENANT ADMIRAL CALLOMBERG.

[3 Wkly. Law Gaz. 248.]

District Court, S. D. New York. 1859.[1]

DAMAGES TO CARGO—DUTY OF MASTER—INHERENT DEFECT.

[1. A vessel is not liable for injuries to her cargo of fruit while she is detained for necessary repairs, even if the means used by the master to preserve it, under the advice of experienced and competent persons, were not the most suitable and well judged.]

[2. Fruit shipped being inherently subject to decay, and the bill of lading being qualified with that condition, the vessel is not responsible for its sound delivery without evidence of some misfeasance of the master which set in action or aggravated such tendency.]

This was a libel in rem filed [by John S. Lawrence] against the brig [Lieutenant Admiral Callomberg] to recover damages alleged

[1] [Affirmed in Case No. 3,716. Decree of circuit court affirmed in 1 Black (66 U. S.) 170.]

to have been sustained by a cargo of fruit shipped on board the brig at Palermo, in December, 185–, to be carried to this port. The answer averred the full performance of the bill of lading, except that 414 boxes of lemons and oranges perished from inherent tendency to decay, and without fault or negligence on the part of the vessel.

HELD BY THE COURT. That the libelants have not proved that any wrongful act had been done by the master of the vessel, or that he had been guilty of any culpable omission of duty on the voyage, which caused the loss or deterioration of the cargo; or that the delay of the vessel in Lisbon, where she put in for necessary repairs, beyond the time reasonably required to obtain such repairs, was the immediate or proximate cause of the injuries which the fruit sustained on the voyage. It being proved that the efforts of the master, in Lisbon, to preserve the fruit lost or deteriorated, were made in good faith, and under the advice of experienced and competent persons, and conformably to the best judgment of the master, the vessel is not responsible for the injuries the fruit may have received, even if the means used to save it were not the most suitable and well judged. The master was quasi agent of both parties, in relation to the cargo found in a perishing condition on board at Lisbon, and his acts, honestly put forth under any emergency, with intent to the benefit of both, are to be favorably construed in his behalf against the complaints of either. The fruit being proved to be inherently subject to decay, and the bill of lading being qualified with that condition. the vessel is not responsible for its sound delivery, without evidence of some misfeasance of the master, which set in action or aggravated that tendency. Libel dismissed, with costs.

[NOTE. The decision in this case was affirmed upon appeal by the shippers to the circuit court. Case No. 3,716. The same parties then took an appeal to the supreme court, which affirmed the decision of the circuit court, Mr. Justice Clifford delivering the opinion, in which he says: "It is conceded that the injuries received by the brig on the 2d of January fully justified the master in bearing away and running into Lisbon as a port of distress, to refit the vessel, and rendering her capable of continuing and prosecuting the voyage. * * * But it was insisted by the appellant in the suit against the vessel that the repairs were not executed with proper diligence, and that the discharging of that portion of the cargo in question, and the opening of the boxes, and taking out and repacking the fruit, were improper and injudicious, and had the effect to promote or increase the inherent tendency to decay. * * * Looking at the whole evidence, it is clear that he sought the best advice he could obtain, and followed it faithfully, and, notwithstanding the opinion expressed by certain witnesses to the contrary, we are by no means prepared to admit that he did not pursue a judicious course to prevent the fruit from perishing." With this view of the law, the learned justice affirms the decrees of the circuit court denying the claim for damages and affirming the decree for freight. 1 Black (66 U. S.) 170.]

LAWRENCE v. The LIEUTENANT-ADMIRAL COLLINBERG. See Case No. 3,716.

LAWRENCE (LOTTIMER v.). See Case No. 8,521.

LAWRENCE (McCALL v.). See Case No. 8,672.

LAWRENCE (McCALMONT v.). See Case No. 8,676.

LAWRENCE (MAILLARD v.). See Cases Nos. 8,971 and 8,972.

LAWRENCE (MORLOT v.). See Cases Nos. 9,815 and 9,816.

Case No. 8,139a.

LAWRENCE v. NEW YORK.

[13 Reporter, 742.] [1]

Circuit Court, S. D. New York. April 22, 1882.

ASSESSMENTS FOR CITY IMPROVEMENTS—VALIDITY—FRAUD—BURDEN OF PROOF.

In an action to set aside assessments as fraudulent, where the proofs do not show whether the complainant or the defendant was affected by the fraud, the burden upon the complainant is not sustained, and the bill will be dismissed.

Bill in equity to vacate assessments for street improvements upon lands of the orators' testator, in the city of New York, upon the ground that the assessments, though regular in form, were fraudulent in fact, and for that reason void, but constituted a cloud upon the title.

J. S. Cram, for orators.

Wm. C. Whiting, for defendant.

WHEELER, District Judge. The fraud is, in general terms, denied in the answer. That fraud is never to be presumed, but must be proved, in order to furnish any ground for relief or recovery, is elementary. The burden of proving fraud, and fraud upon their testator in this case, rests upon the plaintiffs. The fraud alleged consisted in giving up one contract, against which no objection is made, and substituting another at largely increased prices, with no apparent object except plunder of the funds. This would be a fraud noticeable in law in favor of the party suffering from it. The cost of the work under the first contract would have been $99,865.02. Under the second contract it was $170,215.51. If the assessments would make any considerable portion of this increase come out of the property of the testator, they would be, at least, pro tanto, fraudulent as to him. By section 7, c. 326, p. 273, Laws N. Y. 1840, the assessments could not exceed one-half the value of the land, as valued by the assessors of the ward. Of this expenditure $6,531.64 was assessed upon the testator's lands. The case does not show what the valuation of them was. What was not assessed upon lands was borne by the city; what part was borne by the city

[1] [Reprinted by permission.]

and what by the landholders does not appear. It may be that the assessments would not exceed the costs under the first contract. It cannot be found from the case whether they would or not. If they would not, the increase in the cost by the second contract would not affect the landholders; the increase would defraud the city, not them. Proof of a fraudulent increase does not make out any fraud upon them. Fraud vitiates everything, but only as to those affected by it. The city and the testator both may be defrauded by this transaction. If the city is defrauded by having to pay an increased amount above the assessments, it would be defrauded still further by being compelled to lose the assessments. The burden is not upon the city to show that it, and not the testator, was defrauded; and it was not cast upon the city by showing that one or the other was. The burden is upon the orators throughout to show that the testator was, and this burden is not sustained. This conclusion renders consideration of the other questions raised unnecessary. Bill dismissed.

Case No. 8,140.

LAWRENCE v. NEW BEDFORD COMMERCIAL INS. CO.

[2 Story, 471; 10 Hunt, Mer. Mag. 79.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1843.

SHIPPING—SHIP TOTAL LOSS — RIGHT OF MASTER TO SELL—PROCEEDS REINVESTED —SANCTION OF MASTER'S ACTS—MASTER'S RIGHT TO COMPENSATION.

1. Where a ship is abandoned for a total loss, the master cannot sell the cargo, and invest the proceeds in other goods, unless he be justified by necessity, or by a high degree of expediency. [Cited in The Lucinda Snow, Case No. 8,591.]

2. But if he do make such a sale and investment, when they are unnecessary or inexpedient, yet, if the parties interested receive the property, without objection, and adopt the acts of the master, they must bear all proper charges thereupon.

3. If, however, they receive the property, reserving their rights and waiving no objections, and it do not yield a profit beyond the fair value of the property shipped, they are liable for no charges upon it; but if it do yield such a profit, and the master act without fraud, he is entitled to be paid a reasonable compensation and his reasonable expenses, not exceeding such profit.

Assumpsit on a policy of insurance. A verdict being found for the plaintiff, in this case, it was, pursuant to the agreement of the parties, referred to auditors, to ascertain the amount of the loss for which the underwriters were liable, deducting the salvage. In order to understand the case, it is proper to state, that the ship Boston, after the surveys made at the Bay of Islands, in New Zealand, was condemned, because the necessary repairs would amount to more than the ship would be worth after she was repaired. She was accordingly sold at the Bay of Islands by Hempstead, the master. The master remained there for four months, to take care of the property, as was his duty, and sold part of the cargo of oil there, and shipped the remainder of the cargo on board of the ship Henry Tuke, bound to New York, via Rio Janeiro. By the bill of lading, the shipment was for New London, with the privilege to discharge the same at Rio. The master embarked with the cargo on board the Henry Tuke, which duly arrived at Rio; he there caused the oil to be unladen and sold, and the proceeds invested in coffee, which was laden on board the Henry Tuke and carried to New York, and there sold with the consent of the underwriters. The master came with the shipment in the ship to New York. The coffee sustained some damage during the voyage. The report of the auditors having been returned to the court, objections were taken to certain allowances made to the master, which will fully appear in the argument of the counsel for the defendants.

Messrs. Colby and Coffin, for defendants, argued as follows:

In this case, it appears that the master of the Boston shipped the oil on board the ship Henry Tuke for New York; that the master came as passenger; that the ship touched at Rio Janeiro, where the master of the Boston landed a portion of the oil, invested the proceeds in coffee, which he shipped on board the said Henry Tuke; that the coffee was damaged on the passage, was finally landed at New York, and sold. On this state of facts, the underwriters have been charged, in the adjustment, with the following items, viz.:

Passage of Capt. Hempstead in Henry Tuke to New York	$150
Expense and board paid at Rio Janeiro while unloading oil and loading coffee	190
Capt. Hempstead's board and services, 17-348	365
Sale of oil at Rio Janeiro.	
Invoice as invested in coffee.	
Net proceeds of coffee, &c.	
Freight of oil, 10 cents per gal. 5 per cent. primage.	
Duties.	
Conference and Trapiche.	
Brokerage, ½ per cent.	
Gauging.	
Commissions, 5 per cent.	
Cost of 946 bags coffee invested as per invoice.	
Commissions, Joseph Lawrence, 2½ per cent.	
Survey on damaged coffee.	
Premium on policy of insurance on oil from Bay of Islands.	
Benj. Hempstead, for services at Rio, disposing of oil and buying coffee.	

These items are arranged under different heads, in the adjustment, but they are presented in this order for the purpose of presenting our objection. We do not suppose, that it is within the range of a master's authority, after having shipped his cargo home,

[1] [Reported by William W. Story, Esq. 10 Hunt, Mer. Mag. 79, contains only a partial report.]

to speculate upon it at any port he may enter on the passage, and that the underwriters shall pay all the expenses of such speculation, in the way of duties, commissions, services, &c., and take upon themselves thereby the fluctuations of the market. On this principle, he might have exchanged the coffee for molasses, and that for lumber, and gone to every port this side of Cape Horn, to trade and speculate for the underwriters.

The following authorities were then cited: Suydam v. Insurance Co., 2 Johns. 143; 2 Phil. Ins. (2d Ed.) pp. 216–220, 222.

The captain having chartered the vessel to bring the cargo to the United States, had no authority to sell it at Rio Janeiro; and although this fact may not affect the rights of the assured, nevertheless, he cannot, by his own unauthorized and unwarranted act, entitle himself to the compensation, to which, under other circumstances, he would have been entitled. His charges of commissions, expenses, &c., arising from this sale at Rio, are, on that account objected to. The charges of his passage and time (the latter especially) are objectionable. By the terms of his contract with the owners, he was bound to give his time to the transportation of the cargo, and his lay is payment for the time included in making passages. There is no reason, therefore, why he should, because of the total loss, receive pay for his services beyond that which was contemplated by his share or lay. The premium paid by the owners, for a re-insurance of property, which they now say belonged to the defendants, by force of the abandonment, would seem not only to be unjust, but unreasonable.

Messrs. Choate and Crowninshield, for plaintiff, argued as follows:

In this case a verdict was rendered in favor of the plaintiff for a round sum, and liberty was given to the defendants to have the amount made up by an auditor. The loss has been made up by Messrs. Hales & Welbasky, insurance brokers in the city of Boston, which statement the parties take as a basis on which to present certain objections to the court, instead of an auditor's report. The defendants' counsel have filed certain objections or exceptions to the "statement" thus made up, which objections we will shortly consider.

1. It is not true, in fact, as stated in the beginning of the defendants' statement of objections, that the master shipped the oil for New York. By turning to the first bill of lading, annexed to the master's deposition (B. B. Hempstead's), it will be seen that the oil was shipped for New London, "with privilege to discharge at Rio Janeiro." The true statement of the matter is this. Owing to damage, which the ship had sustained by perils of the seas, as the jury have now found, the ship was condemned and sold at the Bay of Islands. The whaling voyage, not then completed, was broken up. The master waited a period of about four months, taking care of and preserving the property, and then shipped the cargo home by the first opportunity; and as the ship must, on her voyage to the United States, pass directly by Rio Janeiro; and as that is usually a good markket for oil, he, in pursuance of a right reserved in his bill of lading, stopped there and sold his oil, and invested the proceeds in coffee, and together with the whalebone, brought it to New York, where it was sold.

The defendants' counsel raise two principal objections, which we will consider in the following order: 1st. That the master had no right to sell his oil at Rio and invest the proceeds in coffee, on the underwriters' account. 2d. They object to compensating the master for his time and services, spent and rendered in preserving the property saved, and in shipping and selling such portion thereof as was shipped and sold under his direction and responsibility; for expenses incurred by him while in that service; for board at the Bay of Islands, Rio, &c., and for his passages.

As to the first objection, it will be remembered, that the owner promptly abandoned the property assured to the underwriter, the voyage having been broken up, so that the master was the agent of the underwriter, from the time of the loss; and all the acts done by him in regard to the shipping the cargo, the salvage of the ship, &c., were for account, not of the owner, but of the underwriter. There is no proof or suggestion, that the master has not acted with the most perfect good faith, or that the course pursued was not perfectly prudent and proper under the circumstances. He had no orders or directions from the plaintiff how to act, but in a case of loss, he acted upon his own judgment for the best interests of all concerned. He considered that as the best mode of remitting the property. The citations from 2 Johns. and 2 Phil. Ins. are entirely inapplicable. Those cases refer to an adjustment of a partial loss, where there was no abandonment. The case of Insurance Co. v. Catlett, 4 Wend. 75, 1 Wend. 561, 1 Paine, 619 (see 2 Phil. Ins., New Ed., p. 343), is like the present, and seems decisive. See, also, 2 Phil. Ins. (2d Ed.) p. 439 et seq.

2d. As to the master's compensation. When the ship was condemned and sold, the mates and crew might lawfully leave her and go about their business; but the master was bound to remain and take care of the property for the benefit of whomsoever it might concern. Now here no objection is made as to the amount charged by the master for his expenses and services, that the price is unreasonable, but that he has no such claim. If the law devolves the duty on the master, it will see him compensated. If he became the agent of the underwriter, then the underwriter must pay him for his services as

agent. The defendants contend, that for waiting for the space of four months at the Bay of Islands, for his responsibility in shipping the cargo, selling the vessel, and for his accompanying the cargo to Rio, and his responsibility and services in selling the oil and buying coffee, he is not to be paid! They speak of his "unauthorized and unwarranted act," in selling oil at Rio. But is there any proof that the master did not act bonâ fide? They contend, that his lay as master compensates him. We submit, that his lay compensates him for his duty on the whaling voyage to the same extent, that it does the crew, but no further; and that, from the time of the loss, he assumes a new duty, and is entitled to a new compensation. He is no longer acting for his own advantage. Indeed, the usage to compensate a master under such circumstances, has been too well settled to be now questioned. For his mere passage home, there may be a question whether the underwriters be liable; but we submit, that this is not that case. He went in the same ship as that in which the cargo was shipped; it was in his charge, and he was to decide at Rio whether to sell there or not. He was in the service of the underwriters and acting for them, and they should pay his expenses. He might very likely have procured employment, or another voyage, at the Bay of Islands, but he was not at liberty to seek it. The freight of the oil, merchants' commissions, duties, and general charges and expenses at Rio, are a proper charge on the coffee purchased and oil sold, just as much as the same charges at home would be. It was the property of the underwriters, not ours. The salvage came to our hands charged with these expenses; we had no power to resist them. We account only for what we receive. If the underwriters are dissatisfied with the charges, they must look elsewhere for redress. The master first deducts his charges; we cannot prevent it. So does the commission merchant.

In the next place, as to Mr. Lawrence's commission. He went to New York by the consent and authority of the defendants, and took charge of the cargo on its arrival there, and attended to the sale of it; of course, he is entitled to the usual commission. This objection, however, does not seem to be insisted on.

There is one charge, however, about which we think that the objection is perhaps well taken. When Mr. Lawrence heard of the loss, finding there was to be a dispute, ex majori cautelâ, he insured the salvage home, "for whom it might concern," and he charges that premium. Now, as the salvage was by the abandonment, at the risk of the defendants, perhaps he had no right to charge them with a premium of insurance on that.

STORY, Circuit Justice. In the present case, the abandonment having been made in due season for a total loss by the perils of the seas, and a verdict having been found in favor of the plaintiff for a total loss, it is clear, that from the time to which the abandonment relates, that is, from the time of the condemnation and sale of the Boston, the master became, and was the agent of the underwriters. It follows, that all his acts, whether rightful or wrongful, in the shipment and sale of the oil, and in the investment of the proceeds, in coffee, are to be treated as acts of the agent of the underwriters and not of the assured, and that the underwriters are solely responsible therefor. Still, however, as, in the present case, it is thought desirable by all the parties to have the questions raised finally disposed of, in order to prevent future litigation or controversy, I have no objection to state my own view of them. In the first place, I deem it perfectly clear, that Capt. Hempstead's necessary expenses at the Bay of Islands, in taking care of the property insured while there, and until the shipment of the oil in the Henry Tuke, together with a reasonable compensation for his services, are to be a charge upon the underwriters. If his accompanying the shipment of the oil was a reasonable and prudent act for the benefit of the underwriters, and if the oil had been carried to New York, I have no doubt, that his passage to New York in the Henry Tuke ought also to be a charge upon the underwriters. The difficulty, that arises, is from the sale of the oil at Rio Janeiro, and the investment of the proceeds in coffee there. If that sale was a highly reasonable and prudent act, such as the master ought, in pursuance of his duty, to have adopted for the benefit of his principals (the underwriters), then his passages to Rio and from thence to New York, in the Henry Tuke, ought also to be a charge upon the underwriters, as well as his expenses at Rio Janeiro, and also a reasonable commission for his services in the sale and investment of the proceeds in the coffee. Now, certainly, a master of a ship, in a case circumstanced like the present, has not a right, as a matter of course, to dispose of the property confided to his care, and to invest the proceeds thereof in other goods upon speculation. There must be either a necessity for the sale, or, at least, it must, with reference to the voyage and the nature of the property, be in a very high degree expedient; otherwise it will be treated as a tortious conversion. If, on the other hand, the master does make a sale, without such necessity or high expediency, and it turns out to be advantageous to the parties interested, and they adopt the acts of the master, and receive the property without reserve or objection, that will amount to a ratification, and they must then take the property or its proceeds cum onere. If, on the other hand, they receive the property, or its proceeds, reserving all their rights, and waiving no objections, then they are entitled to receive the proceeds, without any charges upon them, if the proceeds do not yield a profit to them beyond the fair value of the property shipped,

and so improperly converted, as it would have been on its arrival at the original port of destination. But if a profit ultra such value has come to the hands of the underwriters, by reason of the new investment, then I think that if the master has acted without fraud, and under a mere mistake of judgment, he ought to be entitled, out of those profits, to receive his reasonable expenses, and also a reasonable compensation for his services, not exceeding those profits. Now, there is nothing in the facts and circumstances presented by the report in the present case to enable me to pass any judgment upon these matters. They must, if they furnish grounds for controversy between the parties, be specially ascertained by the auditors, and with their judgment thereon be reported to the court.

These remarks, I believe, are sufficient to furnish an answer to all the objections and suggestions made at the argument, except those which respect Mr. Lawrence's commissions, and his claim for the premium upon the new policy on the oil from the Bay of Islands. The latter claim is surrendered by his counsel, and is clearly unmaintainable. The former is silently abandoned by the counsel for the defendants; and, indeed, as the sale was made by Mr. Lawrence, with the consent of the underwriters, it is clearly a charge which ought to be borne by them.

LAWRENCE, CITY OF (PARROT v.). See Case No. 10,772.

LAWRENCE (PIERSON v.). See Case No. 11,158.

Case No. 8,141.

LAWRENCE v. REMINGTON.

[6 Biss. 44.] [1]

Circuit Court, W. D. Wisconsin. April, 1874.

PRACTICE AT LAW—PENDENCY OF SUIT IN ANOTHER STATE—PLEA IN BAR.

1. The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand had been attached, is a bar to a second suit in this court.

[Cited in Radford v. Folsom, 14 Fed. 100; The Haytian Republic, 57 Fed. 512.]

2. The rule in some courts that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, does not apply where the plaintiff has secured his debt by attachment in such action.

This was an action upon a judgment recovered in this state in favor of the plaintiff [Mary J. Lawrence], to which the defendant [Henry W. Remington] has interposed two defenses: First. That an action is pending for the same cause in the district court of the state of Iowa, for the county of Muscatine, a court of general jurisdiction, in which the property of the defendant to an amount exceeding in value the sum due upon such judgment and costs, has been attached and held to answer any judgment that may be recovered in said court by the plaintiff against the defendant, and that issue has been joined in said suit, and the same is now in readiness for trial. Second. The defendant's discharge under the insolvent laws of this state since the recovery of the judgments sued upon, and alleging that he was then and still is a resident of this state, and that the contract upon which the judgment was obtained was made in this state, and that the plaintiff when the contract was made, and at the time of obtaining such judgment, was also a resident of this state.

Tenneys, Flower & Abercrombie, for plaintiff.

J. H. Carpenter, for defendant.

HOPKINS, District Judge. These issues were by stipulation of the parties tried by the court, and the evidence fully sustained the allegations in the answer. But it was shown that, before the defendant instituted his proceedings in insolvency, the plaintiff had removed from the state and was not there, and has not since been a resident or citizen, and did not appear nor participate in those proceedings.

To parties not acquainted with the practice under the code of this state, the mode of pleading adopted here must seem quite anomalous. But the Code of Practice of this state allows parties to set up in their answers as many defenses as they have. This has been construed to allow matters in abatement and bar to be set up in the same answer, as was done here. Sweet v. Tuttle, 4 Kern. [14 N. Y.] 465; Gardner v. Clark, 21 N. Y. 399; Freeman v. Carpenter, 17 Wis. 126.

To avoid confusion, the judge, if the case is tried before a jury, orders a special verdict, and when it is tried by the court, he directs the kind of judgment to be entered, either in abatement or bar, as the case may demand.

In this case I think the action should be abated. The plaintiff having an action pending in the state of Iowa, for the same cause, and property attached there sufficient to pay the judgment, in case one is recovered, she cannot maintain this action in this court. This suit is wholly unnecessary, and a suit which is unnecessary is oppressive and vexatious, and should not be sanctioned or sustained by a court.

I know it is held in some cases that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, and one reason assigned is that a party may not be able to obtain satisfaction of his judgment in such jurisdiction, if he obtain one, so that in order to furnish all reasonable facilities he is allowed to proceed in the courts of different states. Walsh v. Dur-

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

kin, 12 Johns. 99; Bowne v. Joy, 9 Johns. 221.

But I do not understand that this doctrine has been carried to the extent to allow a party who has secured his debt by attachment of property sufficient to satisfy his claim in a foreign jurisdiction, to sue in another jurisdiction without abandoning his prior suit. Embree v. Hanna, 5 Johns. 101; Wheeler v. Raymond, 8 Cow. 311, note a; Imlay v. Ellefsen, 2 East, 457.

In Earl v. Raymond [Case No. 4,243], it is held that the pendency of a suit in a state court, between the same parties, for the same cause of action, when it does not appear that any property had been attached, was pleadable in abatement in the federal courts. Justice McLean refers in his opinion to cases in 9 and 12 Johns., above cited, but declines to follow them. In Smith v. Atlantic Mut. Fire Ins. Co., 2 Fost. (N. H.) 21, the court sustained the plea of another action pending in the federal court of that state. The judgment of the Iowa court in the suit upon this judgment would be a bar, and pleadable as such to an action in this court upon the same judgment, if the suit were commenced after such judgment. It is now well settled that a judgment of a state court of competent jurisdiction merges the cause of action, so that a suit in the federal courts cannot be sustained upon the same cause of action. Mason v. Eldred, 6 Wall. [73 U. S.] 321; Eldred v. Bank, 17 Wall. [84 U. S.] 545.

According to that doctrine, I do not discover any reason in holding that the pendency of such suit should not be pleadable in abatement. If the judgment, when recovered, would be a bar, the pendency of the suit to recover it should operate as a suspension of the right to sue upon the same cause of action during such pendency.

I think, therefore, this action should be abated and the writ be quashed, and order judgment accordingly, without considering at all the second ground of defense.

To a plea of another action pending, it is a good replication that since the filing of the plea the suit had been dismissed. Chamberlain v. Eckert [Case No. 2,576].

LAWRENCE (RICHARDSON v.). See Case No. 11,785.

Case No. 8,142.

LAWRENCE v. The ROANOKE.

[N. Y. Times, Dec. 27, 1856.]

District Court, S. D. New York. 1856.

COLLISION—STEAM AND SAIL VESSELS—RIGHT OF SAIL VESSEL TO HOLD COURSE.

[A steamer is solely in fault for a collision with a sail vessel which she saw in good season, where the sail vessel holds her course.]

[This was a libel in rem by Sebastian D. Lawrence and others against the steamship Roanoke for collision.]

Beebe, Dean & Donohue, for libelants.
Mr. Van Winkle, for claimants.

Before INGERSOLL, District Judge.

The libel in this case was filed by the owners of the schooner Sidney Miner, to recover for the loss of the schooner and a full cargo of coal and marble, by a collision with the steamboat, which happened about 11 o'clock on the night of April 5, 1856, about 18 miles south of Barnegat. The night was clear with a good breeze from the northwest. The schooner was bound from Philadelphia to Boston, heading N. E. by N., closehauled, with her larboard tacks aboard, and did not change her course; but when she discovered the steamer approaching, one point on her larboard bow, her mate swung a light. The steamer was heading S. S. W., and first saw the schooner a point on her starboard bow, when her helm was starboarded, and then afterwards starboarded again, and the steamer struck the schooner stem on, amidships, on the larboard side, cutting her in to her main mast and sinking her in a few minutes.

HELD BY THE COURT: That the schooner, having kept her course, was guilty of no fault. That the collision was occasioned by the wrong manoeuvre of the steamboat in starboarding her helm, whereas she should have ported it. Decree for libelants, with a reference.

LAWRENCE (SCHNEIDER v.). See Case No. 12,470.

LAWRENCE (SCHUCHARDT v.). See Case No. 12,484.

Case No. 8,143.

LAWRENCE v. SCHUYLKILL NAV. CO.

[4 Wash. C. C. 562.] [1]

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

ACCOUNT STATED—EFFECT OF RECEIPT—MISTAKE AS TO LEGAL RIGHTS—CORRECTION OF ERRORS—COMPROMISE.

1. A receipt in full on a settled account is not conclusive on the parties, but is merely prima facie evidence of what it purports, and may be opened if it be unfairly obtained, or be given under a mistake of facts or of the legal rights of the party complaining, for the correction of such errors as may be made out by proof. But yet if it be the result of a compromise, it is binding.

[Cited in Leak v. Isaacson, Case No. 8,160; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 12 Sup. Ct. 89.]

[Cited in Fuller v. Crittenden, 9 Conn. 406; Kelly v. Perseverance Building Ass'n, 39 Pa. St. 151. Cited in brief in Ball v. McGeoch, 81 Wis. 160, 51 N. W. 445.]

2. What kind of mistake is sufficient to admit of correction.

This action was brought to recover a balance of account claimed to be due to the plain-

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

tiff, under the following circumstances. The plaintiff was employed to execute certain stone work, in constructing the locks on the Schuylkill Canal, for which he was to receive a stated compensation, as was proved by witnesses on the trial. After the work was completed, there was some dispute between the parties as to the quantity of work done and the price; and one of the officers of the company was directed, by one or more of the directors, to make out the account, which he did. The plaintiff was then desired to come to Philadelphia to receive what was due to him. He did so, when an account was presented to him by the directors, making the balance due to him to be $3833 (but whether it was the same as the one above alluded to, or one variant from it, did not appear in evidence), with the following memorandum subjoined, viz. "This account is to include every claim I have against the Schuylkill Navigation Company." This memorandum was subscribed by the plaintiff, who gave also to the company, at the same time, a receipt acknowledging that he had received from them $3833 being the full amount due on the settlement of all his accounts against the said company. The sum claimed in this action is about $4000 more than that for which the receipt was given, and appeared from the evidence to arise principally from the difference between the quality and price of the work stated in the above settled account, and those proved by the witnesses. The only question of law was, whether the receipt in full, and the settled account, ought to be opened or not? The counsel for the plaintiff stated the following cases: 1 Johns. 145; 5 Johns. 68. For the defendant were cited: 1 Esp. 84, 279; Thompson v. Fausset [Case No. 13,954].

Charles & Joseph R. Ingersoll, for plaintiff.
Sergeant & Binney, for defendants.

WASHINGTON, Circuit Justice (charging jury). The only question which the court has to deal with is a mixed one of law and fact. The former is, whether a settled account, or a receipt in full, can, under any circumstances, be set aside, and parol evidence admitted to correct errors in them; and if they can, then (2) under what circumstances can it be done? The question of fact, which the jury will have to decide, is, whether the circumstances are proved to exist in the present case?

The principles laid down by this court in the case of Thompson v. Fausset are admitted by the counsel on both sides to be correct; and all therefore that will remain to be done will be to apply them to the present case. These principles are (1) that a receipt in full is not conclusive, but is mere prima facie evidence of what it purports; (2) that if proof be made that it was unfairly obtained, or that it was given under a mistake of facts, or of the legal rights of the party who gives it, it is open for examination of any errors which may be pointed out and proved; (3) but if the claim of the person giving the receipt in full be honestly contested, and a compromise be agreed upon, both parties are bound by it. Lastly. That being prima facie evidence of what it purports, the party who would impeach it on the ground of unfairness or mistake, must maintain his allegation by proof

There is no charge of unfairness on the part of the defendants in this case. Whether there is any evidence to support a suggestion of the plaintiff's counsel that the plaintiff was tempted by his necessities, and the prospect of having them immediately relieved, to sign the memorandum and receipt, the jury will say. And even if that fact be proved, it will not be sufficient to open the account and receipt, unless it appears that the defendants took advantage of the circumstances to practise an imposition on the plaintiff. Whether the defendant examined the account, and understood it, before he signed the memorandum, does not appear, as no person who was present at the time, has been examined as a witness; but it may be observed, in the absence of all testimony on the subject, that it may fairly be presumed, that no man of ordinary caution will put his signature to an acknowledgement of the correctness of an account, and give a receipt in full for the balance stated in it, without first examining and understanding it.

The whole question then turns upon the matter of fact, whether that kind of mistake which the law allows to be sufficient to open a settled account, or to let in evidence to explain and control a receipt in full, exists in the present case? And here it may be material to explain what kind of mistake is meant. It is not sufficient for the party who attempts to impeach the instrument to allege an error in the account, by merely offering proof, that for the same services as those stated on it, other persons had received a higher rate of compensation, or even that such was agreed to be paid in the particular case; because, if the parties, with a full knowledge of their rights, agree to vary from the prices so proved, they have an undisputed right to do so, and consequently, such variances cease to be errors, in virtue of such agreement. For what is a settled account, and a receipt in full, but agreements that such account is correct, and that the claim of the party giving the receipt has been fully satisfied? And this agreement being subsequent in date to that which gave rise to the transactions, must operate to show either that the witnesses to prove that agreement are mistaken, so far as they contradict the settled account, or that the parties had afterwards thought proper, from a spirit of compromise, or from some other motive, to qualify and change the agreement so proved, and thus far to control it. But to set aside, or open the account, so as to let in explanation, the party must, in ad-

dition to such evidence, prove satisfactorily that, in agreeing to those instruments, he acted under an ignorance and mistake of his rights, either in point of law, or as to facts; for in such a case, all idea of compromise is necessarily excluded. The error may be so apparent, and of such a nature, as to prove, per se, the matter which is meant; such, for example, as miscalculation. But if the party is not shown to have acted under such ignorance, or mistake, the mere signing of the account or receipt, ought to be considered as evidence of a compromise under a new agreement. The question of fact, whether the plaintiff acted under the kind of mistake which has been mentioned, is to be decided by the jury; and if he did not, in their opinion, then the verdict ought to be for the defendants; if otherwise, the jury must examine the account, and correct any errors in it which are satisfactorily proved to exist.

Verdict for the defendants.

Case No. 8,144.

LAWRENCE et al. v. SHERMAN.

[2 McLean, 488.] [1]

Circuit Court, D. Illinois. June Term, 1841.

SALE UNDER DEFECTIVE EXECUTION — COLOR OF OFFICE — SHERIFF LIABLE FOR ACTS OF DEPUTY—PROPERTY CLAIMED BY THIRD PARTY.

1. Proof that a sheriff, or other public officer, acted as such, is sufficient.

[Cited in State v. Roberts, 52 N. H. 496.]

2. Where a deputy sheriff has sold property under a defective execution, the principal is chargeable, he having sanctioned the transaction.

3. By the statute of Illinois, where property is claimed by a third person, a jury is required to be summoned by the sheriff to try the right, and their verdict must be in writing under their signatures. Parol proof of such a proceeding is not admissible.

4. This writing it is in the power of the sheriff to produce, and he must produce it, or show that it has been lost or destroyed.

[This was an action at law by Lawrence and Emmerson against Sherman.]

Mr. Butterfield, for plaintiffs.

Mr. Spring, for defendant.

OPINION OF THE COURT. This is an action of trover, for certain articles of ready-made clothing and two pieces of cloth. This property the plaintiffs insist belonged to Mary Sewell, she having received it from her father, and for whom the plaintiffs act as trustees. The defendant filed the general issue. On this issue the capacity in which the plaintiffs sue is not, they insist, contested. A deed, however, was introduced showing the appointment of the plaintiffs as trustees, and the title to the articles claimed was proved to be in them, though Mary Sewell had possession of them. The property was levied on by virtue of an execution in behalf of the State Bank v. G. Doolittle, issued to the defendant, who is sheriff, as the property of Doolittle. The property was levied on, and sold by Smith the deputy sheriff. The execution seems not to have been sealed, and it was objected that the deputy was not authorized to act under it, and that the act did not bind his principal. But the court held, that the act being done under color of authority, and having been sanctioned by the principal, he was responsible. They, also, held that no other proof than that the defendant acted as sheriff was necessary to charge him as such. By a statute of Illinois, when property is levied on which is claimed by a person, other than the defendant, the sheriff or other officer is required, on notice of such claim, to summon a jury of twelve persons, and, after being sworn, the evidence of property is heard by them, and they return their verdict, in writing, under their signatures, and this verdict, if against the claimant, is a justification to the sheriff in selling the property. Parol proof of this proceeding was offered and overruled by the court. The effect of this proceeding is a justification of the sheriff. The inquest was called by him, on notice of the claimant, and he superintended the inquiry. He has possession or control of this action of the jury, and no excuse is offered why the writing is not produced. It is the best evidence, and no proof of a secondary character can be received, unless it be shown that the written verdict is lost or destroyed.

The jury found for the plaintiff, on which a judgment was rendered.

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

LAWRENCE (SILL v.). See Case No. 12,850.

LAWRENCE (STONE v.). See Case No. 13,484.

LAWRENCE (STOYEL v.). See Case No. 13,517.

LAWRENCE (THORP v.). See Case No. 14,005.

Case No. 8,145.

LAWRENCE v. UNITED STATES.

[2 McLean, 581.] [1]

Circuit Court, D. Michigan. Oct. Term, 1841.

OFFICIAL BONDS — SUIT AGAINST SURETY — RECEIPTS OF POSTMASTER—JUDGMENT MORE THAN PENALTY OF BOND.

1. A transcript from the postoffice department, to show the indebtment of a postmaster, need not contain a full copy of his quarterly returns. In such return, the postmaster strikes the balance due by him, and this is sufficient to charge him.

2. Where the surety is charged with receipts, for postage, for a part of the quarter, the return for the full quarter is evidence, to show an average liability for a part of it.

3. A payment made, by a postmaster, of a greater sum than the receipts for the preceding

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

quarter, should be applied as a credit for the quarter, as well before as after the date of the bond.

4. On a penal bond, a judgment can not be rendered beyond the penalty.

[Error to the district court of the United States for the district of Michigan.]

Mr. Frazer, for plaintiff.

Mr. Goodwin, Dist. Atty., for defendants.

OPINION OF THE COURT. This case is brought before this court, by a writ of error, to the district court. The action was brought against Lawrence, as security on a bond, in the penalty of two thousand dollars, given by Adams, as deputy postmaster, dated the 21st February, 1837. On the trial the district attorney offered a transcript, from the books of the postoffice department, showing the amount of the defalcation of the late postmaster. To the admission of this transcript, in evidence, the defendant objected—First. Because it does not purport to contain copies of the quarterly returns of the postmaster, but merely a statement of his indebtment. Second. Because it purports to contain a statement of the account of the postmaster, and an indebtment, on his part, anterior to the date of the bond.

And it is insisted that the court erred in permitting the transcript to be read, as evidence, and, also, in its instructions to the jury—First. By informing them that the whole of the transcript was evidence. Second. By charging the jury that they should apply the credit, of $708 69, under the date of 15th April, 1837, to the payment of the item on the debit side, of $699 24, being for the quarter of the 1st January, to the 31st March, 1837. Third. By instructing the jury that it was competent for the district attorney to apply said credit to a prior indebtment of said postmaster. Fourth. By charging the jury, if they found the balance due to exceed the penalty in the bond, they could find the penalty, and interest. Fifth. By rendering judgment for the penalty and interest, found by the jury.

The counsel for the plaintiff in error insists that the admission of this transcript in evidence, being in derogation of the common law, should strictly conform to the statute; and, in support of this position, a reference is made to the case of Smith v. U. S., 5 Pet. [30 U. S.] 300. In that case the court say, where copies are made evidence by statute, the mode of authentication required must be strictly pursued. Against the authentication of the transcript, in this case, there seems to be no valid objection. But, it may be admitted, that the body of the transcript must, substantially, conform to the statute.

The first question to be considered, is, the objection to the admission of the transcript, as evidence, because it does not purport to contain copies of the quarterly returns of the postmaster, but a statement of his indebtment. These quarterly returns consist, on the debit side, of the gross amount received for postages during the quarter; and, on the credit side, are entered the commissions of the postmaster, the incidental expenses, and some other items; which, being deducted from the amount on the debtor side, shows the amount due, by the postmaster, at the close of the quarter. And this balance is stated, by the postmaster, in his return. That this amount is stated in the transcript, as an indebtment against the postmaster, without enumerating the other items of the return, is the objection made. If this balance were struck, by the accounting officers of the postoffice department, from the items composing the quarterly return, the objection would be fatal. For, in a case like the present, it is not the action of the department which is to bind the department, but the judgment of the court and jury, on the evidence on which that action was founded. The balance, charged, was struck by the postmaster himself, and acknowledged by him, in his return, to be the amount of his indebtment. It does not, therefore, come within the rule, which requires the items in the original account to be certified, and not the balance ascertained by the accounting officers.

The next objection to the admission of the transcript, is, that it shows an indebtment of the postmaster anterior to the date of the bond. It is clear that the security can only be charged, for defalcations of the postmaster, subsequent to the date of the bond. But the bond bears date the 21st February, near the middle of the quarter, which commenced the 1st January, 1837, and ended the 31st March; and, as the postmaster is not required to keep an account of the receipt of postages, except the gross amount within the quarter, the sum received, from the date of the bond to the close of the quarter, can only be ascertained by an average estimate on the sum received during the quarter. To enable the jury to make this estimate, it was proper to admit the transcript, in evidence, which showed the amount of postages received for the quarter. And, in this view, the instruction of the court to the jury, that the whole of the transcript was relevant and proper evidence, which is objected to, was right. The second instruction, that the jury should apply the credit of $708 69, under date the 15th April, 1837, to the payment of the item of $699 24, on the debit side, is also objected to. The latter sum was the net amount of postages for the quarter. Payments are made by postmasters, either on the drafts of the department, or by deposits in some bank, as directed; and credits are given at the time of such payments or deposits. The above credit was given the 15th of April, and the question is, how it should be applied. That this sum included the postages received for the entire quarter, is apparent; and it is equally clear that it was properly applied, under the instruction of

the court, in discharge of postages received for the quarter, as well before as after the date of the bond. At the time of the payment, two weeks of the new quarter had expired, and the sum paid must have included a part, or the whole, of the postages received during that time. It is in this way that the excess of the payment, over the amount due for the preceding quarter, is accounted for. This was an application of the credit not only authorized, but required, from the face of the transcript. It can not be supposed that the postmaster paid the above sum in advance of the receipts of his office; nor is there any doubt as to the intent with which the payment was made by him, and received by the department. And, where this is the case, there is no occasion to refer to the general doctrine, as to the right of the one party, or the other, to make the application of the payment.

The two last exceptions to the charge, that the jury could find interest on the penalty of the bond, for which judgment was rendered, will be now considered. There is some contrariety in the authorities on this point. In the case of Lowe v. Peers, 4 Burrows, 2228, Lord Mansfield said: "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has had his election. He may either bring an action of debt for the penalty, and recover the penalty; or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, toties quoties." This point seems not to have been involved in that case; and it must be regarded, rather as a dictum by his lordship, than a solemn decision. But it is considered law by Espinasse, in the 2d volume of his Nisi Prius, 279. In the case of Lord Lonsdale v. Church, 2 Term R. 388, where a motion was made to stay proceedings, on the payment of the penalties of the two bonds, on which suit was brought, Justice Buller expressed dissatisfaction with the decision, in White v. Sealy, 1 Doug. 49, and cited Collins v. Collins, 2 Burrows, 820, and Holdipp v. Otway, 2 Saund. 106, where the interest, beyond the penalty of the bond, was recovered by way of damages. In Graham v. Bickham, 4 Dall. [4 U. S.] 149, 2 Yeates, 32, it was held that where the penalty is not in the nature of stated and ascertained damages, the injured party may recover beyond the penalty. That case was brought on a contract, for the transfer of stock, not under seal. The same doctrine was held in the case of Harris v. Clap, 1 Mass. 308. And in the case of U. S. v. Arnold [Case No. 14,469], Mr. Justice Story says, "I think the true principle supported by the better authorities is, that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." The judgment in that case was affirmed on a writ of error, but the above point was not considered. [Arnold v. U. S.] 9 Cranch [13 U. S.] 104. In Martin v. Taylor [Case No. 9,166], the court say, "in an action of covenant, on an agreement under a penalty, the jury, in estimating the damages, are not bound to give the penalty only; but where the penalty is in the nature of liquidated damages, the stipulated sum must govern the jury in estimating damages." That damages may be recovered beyond the penalty is laid down in 4 Mass. 333; 7 Am. Com. Law, 244; 2 Am. Com. Law, 441; and Bank of U. S. v. Magill [Case No. 929].

There are many cases opposed to these decisions. In Brangwin v. Perrot, 2 W. Bl. 1190, a motion was made to pay the penalty of the bond, when Chief Justice De Grey observed, "This is really so plain a case that one knows not what to say to make it clearer. The bond ascertains the damages by consent of parties. In White v. Sealy, 1 Doug. 49, Buller concurred with Ashurst and Lord Mansfield that the defendants were liable only for the penalty. In the case of Tew v. Earl of Winterton, 3 Brown, Ch. 490, and in Knight v. Maclean, Id. 496, Lord Thurlow held that the penalty was the extent of the obligor's liability.

Afterwards, the king's bench, in Wilde v. Clarkson, 6 Term R. 303, decided that more than the penalty could not be recovered. Lord Kenyon said, "I cannot accede to the case of Lonsdale v. Church." The same principle was recognized in McClure v. Dunkin, 1 East, 436, and in Hefford v. Alger, 1 Taunt. 218; 2 Wash. [Va.] 143; Clark v. Bush, 3 Cow. 151; Fairlie v. Lawson, 5 Cow. 424; Goldhawk v. Duane [Case No. 5,511]. But the decision in the case of Farror v. U. S., 5 Pet. [30 U. S.] 385, is most authoritative on this court. That action was brought on a bond, in the penalty of thirty thousand dollars, given by Rector, and signed by the plaintiffs in error as sureties for the faithful performance of the duties as surveyor general. The jury found a verdict in favor of the United States for forty one thousand dollars, on which a judgment to recover the damages assessed was rendered.

The supreme court say, "It is perfectly clear that against the sureties a judgment cannot be rendered beyond the penalty to be discharged on payment of what is actually due; which, of course, can only be where it is a sum less than the penalty." That a release of the excess of the damages would not cure the form of the judgment so as to authorize its affirmance. This language cannot be misunderstood. It lays down, in express terms, that the judgment against the surety cannot exceed the penalty. And this equally excludes damages beyond the penalty, for interest or on any other ground. The rule which gives interest on the penalty from the breach of the condition would seem to be reasonable: but as this would make the judgment greater than the penalty, it would be in conflict with the above decision. And it seems to be impossible to avoid the pressure

of its authority. Where the condition of a penal bond is not for the faithful application of public moneys, but for the performance of other duties, public or private, the damages could be ascertained only by the amount of injury sustained. In such a case it would be difficult to apply the rule that interest shall be recovered on the penalty from the time of the breach, should the damages be assessed to that amount. And the propriety of a rule of but limited application may be doubted. Upon the whole, as the judgment of the district court on the bond, against the plaintiff in error was for a larger sum than the penalty, it must be reversed.

LAWRENCE, The (UNITED STATES v.). See Case No. 15,571.

LAWRENCE (UNITED STATES v.). See Cases Nos. 8,122, 15,572–15,577.

Case No. 8,146.

LAWRENCE et al. v. VERNON.

[3 Sumn. 20.] [1]

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

RES JUDICATA—ON THE MERITS—SAME EVIDENCE TO SUPPORT—DIFFERENT WRITS.

1. A judgment on the merits in a personal action is a bar to another action on the same claim, and between the same parties, though the forms of the two actions be not the same.

[Cited in Fifield v. Edwards, 39 Mich. 267; Wright v. Griffey, 147 Ill. 500, 35 N. E. 733.]

2. It is the same cause of action, where the same evidence will support both actions, although grounded on different writs.

3. In an action by L. A. & B. to recover of the defendant his proportion of a sum of money paid by the plaintiffs for widening the upper and lower end of a street, upon which the defendant was an abutter, the jury found, "that the defendant promised, so far as to make himself liable for the damages incurred by widening the upper part of Doane street." *Held*, that the judgment on this verdict was not a bar to a subsequent action brought by L. & A. (two of the former plaintiffs) against the defendant for contribution, on account of the widening of the lower end of the same street.

[Cited in Gayer v. Parker, 24 Neb. 645, 39 N. W. 846; Oleson v. Merrihew, 45 Wis. 401; Kitson v. Hillabold, 95 Ind. 139.]

Assumpsit to recover a sum of money alleged to be due to the plaintiffs [William Lawrence and Benjamin Adams] from the defendant [William Vernon], as his proportion of a large sum of money paid by them for widening the lower end of Doane street, upon which the defendant was an abutter and owner of real estate. Plea the general issue. At the trial the defendant offered in evidence the record of a former action brought by William Lawrence and Benjamin Adams (the present plaintiffs) and one Thomas Lamb, against the present defendant, in which the plaintiffs sought to recover a certain sum of money asserted to have been paid by the plaintiffs in that action for the defendant, as his proportion of a sum of money paid for the widening of the upper and lower ends of Doane street, upon which the defendant was an abutter and owner of real estate. In that action, which was tried at October term, 1836, in this court, the jury found a verdict for the plaintiffs for the sum of $2,500, upon which judgment was rendered for the plaintiffs. And in explanation of their verdict the jury further found, "that the defendant promised, so far as to make himself liable for the damages incurred by widening the upper part of Doane street;" and upon that basis their verdict was given for the sum of $2,500.[2] It was contended by the defendant that this record was conclusive against the claim of the plaintiffs in the present action, as the declaration in the former action embraced the claim for widening both the upper and the lower ends of Doane street; and the jury, by their verdict, had negatived the claim as to the widening the lower end. The record was admitted to go to the jury. But it was ruled by the court, that the record and judgment so offered were not a bar to the present suit. The whole evidence in the cause then went to the jury, who returned a verdict in favor of the present plaintiffs for the sum of $2,732.88, as a sum due from the defendant for widening the lower end of Doane street. Afterwards the defendant moved for a new trial on the ground that the former judgment was of itself a bar to the present action; and that the court, in refusing so to charge, had misdirected the jury.

C. P. Curtis and J. Pickering, for plaintiffs.

Peabody & Minot, for defendant.

STORY, Circuit Justice. The sole question is, whether the judgment in the former action is, under the circumstances, a good bar to the present claim, and ought so to have been ruled at the trial before the jury. It is said, and I believe truly, that substantially the same evidence upon all the points in controversy was laid before the jury at each trial; and that, therefore, it is apparent that the questions were the same in each case; and the former verdict and judgment under such circumstances are a complete bar. I agree, that, where a former verdict and judgment have been given upon the same claim, in a personal action, between the same parties, upon the merits, it is a good bar to a second action for that claim.

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

[2] Upon the trial of the first cause, the main question was whether the defendant was liable for the money paid for the widening of the lower end of Doane street. After all the evidence was offered by the plaintiffs, the defendant's counsel moved for a nonsuit. The court refused it, considering that there was evidence before the jury proper for their consideration on both parts of the claim; and there could not be a nonsuit if any part of the claim was established.

And it is by no means necessary that the form of action should be the same in each case, if the merits of the whole claim have been substantially tried in the first action. The case of Hitchin v. Campbell, 2 W. Bl. 827, 828 (Same Case, 3 Wils. 304), sufficiently establishes that doctrine, and affords a strong illustration of it. In that case the first action was trover for the conversion of certain goods brought by the plaintiffs, as assignees of a bankrupt, against the defendant, who was sheriff of Surrey, and the second action was for money had and received, the proceeds of the sale of the same goods sold by the same defendant. In the former suit a verdict and judgment were given for the defendant; and the court held that they were a good bar to the present suit. The court said, that a party shall not bring the same cause of action twice to a final determination. "Nemo debet bis vexari pro eadem causa." What is meant by the same cause of action is, where the same evidence will support both actions, although the actions may happen to be grounded on different writs. This is the test to know, whether a final determination in a former action is a bar or not to a subsequent action. And the court relied in support of this doctrine upon Ferrer's Case, 6 Coke, 7, where it was resolved, "that when one is barred in any action, real or personal, by judgment upon demurrer, confession, verdict, &c., he is barred as to that or the like action, of the like nature, for the same thing for ever"; for "Expedit reipublicae ut sit finis litium." The court added, "Nemo debet bis vexari," is the general rule, to which there are some exceptions; as, where a man mistakes his action by suing an administrator, when in truth he is an executor. So, also, there is no question, that, if a man mistakes his declaration, and the defendant demurs and has judgment, the plaintiff may set it right in a second action. But the principal consideration is, whether it be precisely the same cause of action in both.

Such is the substance of the doctrine asserted by the court on this point, as it appears in the reports in 2 W. Bl. 827, and 3 Wils. 304. I see no reason whatsoever to be dissatisfied with it; but, on the contrary, I fully concur in it. But it is important to consider, that both of the actions in that case were between the same identical parties, and no others; and that in each the sole question was, as to the property in the goods; and in each case, as the property was found to belong to the plaintiff or to the defendant, the verdict must be in his favor. The plaintiff, having elected to proceed in tort, and had a decision against him upon the merits, was not entitled to turn round and retry the same question, and none other, in another action.

But the present case is totally different in character and results. The parties are not the same. The causes of action are not the same. The parties, plaintiffs in the former suit, were Lawrence, Adams, and Lamb; in the present suit, Lawrence and Adams only. In the former suit the promise was alleged to be to three persons; and unless a joint promise was proved to all three, that action was not maintainable; for nothing is better settled than the doctrine, that in assumpsit on a joint promise to three, a promise to all jointly must be proved. A promise to two or one of the plaintiffs will not maintain the suit. Upon this plain ground a promise, if proved, in the former suit to Lawrence and Adams alone, would not have entitled the plaintiffs in that suit to a verdict. On the contrary, the verdict must have been, under such circumstances, for the defendant. Nay, in the former suit the verdict of the jury for the defendant may have proceeded upon the very ground, which, in the present action, would entitle the plaintiffs to recover, viz. that the promise as to the lower end of Doane street was to Lawrence and Adams alone, and not to Lawrence, Adams, and Lamb. In point of fact, too, it appeared at both trials that the money was paid directly by Lawrence and Adams, and not by Lamb, for the opening of the lower end of Doane street. But I lay no stress on this circumstance. What I do lay stress on is the finding of the jury, that there was no promise to the three plaintiffs to pay the money for opening the lower end of Doane street. But that is quite consistent with the fact, that there was a promise to pay to two of them (the present plaintiffs) that sum. And if that were so, then the very ground, upon which the former verdict was found for the defendant, furnishes the clearest proof of a right to recover in the present suit; for the merits of the present suit were not and could not in such a state of facts be tried in the former. Suppose a demurrer had been filed in the former suit, upon which judgment had passed for the defendants; surely it would not be contended, that such a judgment would bar the present suit; that a judgment, in a suit brought by three, could bar a suit brought by two on contract. I agree, also, that the true test, generally, though perhaps not universally, whether the causes of action are the same, is whether the same evidence will support each. Lord Eldon so held in Martin v. Kennedy, 2 Bos. & P. 71. But, tried by this test, the argument of the learned counsel must fail. The question is not, whether the same evidence was offered or produced in each case; but whether the same evidence would support each case. Now, the evidence necessary to maintain the former case was the proof of a joint promise, a promise by the defendant to pay all three plaintiffs, Lawrence, Adams, and Lamb. Evidence of a promise to pay two of them, viz. Lawrence and Adams, would not have sustained that action. Yet that evidence would clearly sustain the present action. So that it is clear, that the

same evidence would not support both actions. The infirmity of the argument is, that it confounds the evidence offered in an action conducing to establish the facts necessary to support it, with the evidence indispensable to support it in point of law. Evidence may be offered in a cause conducing to prove a promise to three, and yet it may satisfactorily prove only a promise to two. The law in such a case holds, that the evidence of a promise to two, will not support an action by the three. How, then, can we say, that the evidence to maintain both actions, that is, the facts necessary to maintain both actions, are the same?

The case of Sheehy v. Mandeville, 6 Cranch [10 U. S.] 253, 264, 265, affords no inconsiderable light as to the opinion of the supreme court of the United States, upon the effect of a former judgment upon the same cause of action. In that case, it seems to have been thought, that a former judgment, obtained by the plaintiff against one partner upon a joint contract, was no bar to a subsequent action against both of the partners upon the same contract. And it was decided in the same case, that, at all events, it could not be set up as a bar in a several plea by the partner not sued in the former action. That case is much stronger than the present; for in a suit upon a joint contract against one promisor, the nonjoinder of the other promisor is pleadable in abatement only, and not in bar; whereas if all the proper plaintiffs do not sue, it is a fatal objection upon the trial. This doctrine was a good deal commented on in Lechmere v. Fletcher, 1 Cromp. & M. 623, where the court thought, that, if a contract was joint only, and not joint and several, a former judgment against one of the promisors might be a good bar to a second suit against both promisors; not, indeed, upon principle, but upon the ground of a technical difficulty in making the proper parties, since the defendant in the former suit might plead the former several judgment against himself in bar of the joint action against himself; and if that judgment should be a merger of the contract as to the party against whom the judgment was had, it would be fatal in the second suit, as the plaintiff would have sued more defendants than were liable in that suit. The case of Robertson v. Smith, 18 Johns. 459, is directly in point on this head. The same subject came before the circuit court in U. S. v. Cushman [Case No. 14,908], for consideration. I do not dwell upon the reasoning or authorities there stated; but I will add, that, upon further reflection, I adhere to the doctrine there decided. The case of Robertson v. Smith, 18 Johns. 459, is in direct conflict with that of Sheehy v. Mandeville [supra] on its leading point; though, if I were compelled to decide between them, my judicial opinion would be authoritatively bound up by the latter. But what I cite Sheehy v. Mandeville for is, that it shows that, even where the cause of action is the same, if the parties are not the same in each suit, the former judgment is not necessarily a merger of the contract so as to bar the second suit; that, to operate as such a positive bar, it must be a judgment between the same parties. In short, the same evidence will not, or at least may not, support each action. Proof of a several contract will not establish a joint contract; though proof of a joint contract may establish a several liability. So far as the case of Sheehy v. Mandeville goes, it is authority against the argument of the defendant in the present case.

Upon the whole, and upon the most mature reflection upon this subject, I am satisfied that the ruling of the court at the trial was correct. My only regret is, that the learned counsel have not an opportunity, from the position of the cause, to take the opinion of the supreme court of the United States upon the point. Motion for a new trial overruled.

LAWRENCE (VOCE v.). See Case No. 16,979.

LAWRENCE (WALLACE v.). See Case No. 17,101.

Case No. 8,147.

LAWRENCE v. WHITE et al.

[5 McLean, 108.] [1]

Circuit Court, D. Indiana. May Term, 1850.

CONTRACTS — DELIVERY AT PLACE OF CONTRACT — INJURY AFTERWARDS.

1. A contract to deliver pork at Madison, in the state of Indiana, well put up, for the English market, when received at Baltimore was spoiled; the court permitted evidence to show the condition of the article at New Orleans and at Baltimore, from which the jury might judge, whether it could have been well put up at Madison.

2. The jury were instructed that if the pork was put up according to contract at Madison, the defendants were not responsible.

[This was an action at law by Josiah Lawrence against White and Stevens.]

Mr. Sullivan, for plaintiff.

Mr. Marshal, for defendants.

OPINION OF THE COURT. This action is brought on a contract to deliver three hundred and thirty-nine boxes of long middles, intended for the English market. There are two kinds of middles. One is called the Cumberland cut, in which a part of the bone is left in. This was the kind contracted for. From six to seven or eight long middles were contained in a box. They were to be shipped to Baltimore by the way of New Orleans. The contract was at first made for five hundred long middles, which was afterwards changed to the above number. Mr. Payne, the agent

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

of the plaintiff, superintended the packing. The defendants agreed to put up the pork in prime order. The pork was inspected by experienced inspectors before it was put in the boxes. It was shipped by the way of New Orleans, and when received at Baltimore, it was in a very bad condition. The witnesses say it was worth but little, and was sold to soap boilers. And this action is brought to recover damages, on the ground that the pork was not delivered in prime order, as the contract stipulated.

THE COURT permitted evidence to show the condition of the pork when at New Orleans, and also at Baltimore, from which the jury might infer, whether it could have been put up at Madison in good order.

THE COURT instructed the jury that as the article was inspected and delivered to the agent of the plaintiff, at Madison, and as there was no warranty of the article, or, that it should pass inspection at Baltimore, there can be no recovery of damages unless there was a failure to put up the pork in good order by the defendants. An action of deceit is the proper remedy where there has been fraud. If representations were made of the quality of the pork, at the time of the delivery which were untrue, or if there was any deception in the packing of it, and the condition of the pork at Baltimore resulted from the manner in which it was packed at Madison, the defendants may be held responsible. And in that event, the difference between the article contracted for and that which was delivered, will constitute the damages to which the plaintiff is entitled.

On the other hand, if the injury resulted from the shipment of the pork to Baltimore, by the way of New Orleans, by exposure or otherwise, the defendants are not responsible. They did not guaranty the shipment of the pork to Baltimore. Their contract began and ended at Madison, and if the pork was put up by the defendants in good order, at Madison, they are not responsible for any loss or subsequent injury it received on the voyage, or after its delivery at Baltimore.

The jury found for the defendants.

Case No. 8,148.

LAWRENCE et al. v. WICKWARE et al.

[4 McLean, 56.] [1]

Circuit Court, D. Michigan. June Term, 1845.

STATE EXEMPTION—EXEMPTION LAW PASSED AFTER SUIT COMMENCED—GREATER EXEMPTION—ADOPTION OF LAW BY COURT.

A suit after it shall have been commenced, cannot be affected by a state law extending the exemption of the property of the defendants, such law never having been adopted by the court; and the law previously adopted authorized an exemption to a more limited extent.

[This was a bill in equity by Lawrence and Keese against Wickware and Cobb.]

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

Mr. Fraser, for complainants.

Mr. Emmons, for defendants.

OPINION OF THE COURT. This is a case in chancery, in which a receiver was appointed, and the legislature of the state having passed a law exempting certain articles of property from execution, in addition to those formerly exempted, a motion is made to extend the exemption under the recent act. But THE COURT held, that the revised act which had been adopted by the court, and under which the present proceedings were instituted, should govern the case. The property was ordered to be sold.

LAWRENCE (WILBUR v.). See Case No. 17,635.

LAWRENCE (WILSON v.). See Case No. 17,816.

LAWRENCE CO. (ADAMS v.). See Case No. 59.

LAWRENCE CO. (POLLOCK v.). See Case No. 11,255.

LAWRY (BURRILL v.). See Case No. 2,199.

LAWRY (FOGG v.). See Case No. 4,897.

LAWS (UNITED STATES v.). See Case No. 15,579.

Case No. 8,149.

In re LAWSON.

[2 N. B. R. 54 (Quarto, 19).] [1]

District Court, D. Maryland. 1868.

BANKRUPTCY—EXEMPTION — MONEY IN HANDS OF ASSIGNEE.

An assignee has no right, where bankrupt's property has been seized and sold under execution and distress for rent, to allow money, the proceeds of debts due to the bankrupt, for the purpose of making good the property that would have been exempted had it not been sold.

[Disapproved in Re Hay, Case No. 6,253.]

By B. J. M. HURLEY, Register:

I, the undersigned, having been designated by the court as the register in bankruptcy, before whom the proceedings in the above matter of the bankruptcy of James H. Lawson are to be had, do hereby certify that in the due course of such proceedings the following question, pertinent to the same, arose, and was stated and agreed to by Francis Brengle, assignee, and James H. Lawson, bankrupt. "Where the bankrupt's property has been seized and sold under execution and distress for rent, leaving him nothing to claim as exempted property under the fourteenth section of the bankrupt act [of 1867 (14 Stat. 522)], and the bankrupt having books with a large amount of debts due and owing to him, can the assignee allow him any money to make good the property that would have been exempted had they not been sold?" The facts in

[1] [Reprinted by permission.]

the case are these: The bankrupt was carrying on a mill, and failed, and his household and his kitchen furniture, together with his stock were seized under execution and distress for rent, and left him without anything in the shape of property excepting his books. On the day of sale he took the oath and filed a petition in bankruptcy. The petition did not reach the clerk of the court until two days after the sale. I am of the opinion that the assignee can only allow the bankrupt one hundred dollars in money, by the laws of the state of Maryland, which amount is exempted from any levy and sale upon execution or other process. And the said parties requested that the same should be certified to your honor for your opinion thereon.

GILES, District Judge. The register in this case has certified into court the following questions: "Where the bankrupt's property has been seized and sold under execution and distress for rent, leaving him nothing to claim under the fourteenth section, and the bankrupt having books with a large amount of debts due and owing to him, can the assignee allow any money to make good the property that would have been exempted had they not been sold?" This is a most important question, and one that will frequently arise in the future administration of the bankrupt law, and I hope that an exception may be taken to the action of the assignee, that I may be able to decide it in court, with the benefit of a full argument. It has never been decided by any of the courts, so far as I can learn, and is therefore a new question.

I do not consider that under the state law that money as such is exempt. It exempts property either real or personal, to be selected in the manner specified in the law; and only provides that where the property cannot be divided so as to set apart a portion of it of the value of one hundred dollars, the whole shall be sold, and the defendant shall receive one hundred dollars out of the proceeds.

Does the bankrupt act make any different provisions? I confess there is a strong equity, in that where the bankrupt possesses no personal property of the character exempted by the act, he should have an allowance made him out of his other assets; but I cannot find in the act any language which would warrant the allowance by the assignee to the bankrupt, of money collected by such assignee from debts due the bankrupt. The only word to be found in the act that, if standing alone, might be construed to mean money, is the word "necessaries," but in the connection where it occurs, I think it means provisions and other articles of family use, such as fuel, &c., for after it is used comes the provision "but altogether not to exceed in value the sum of five hundred dollars." If the register, when he speaks in his question of "books," means the library of the bankrupt, this is exempted by the state law.

I do not consider that in this case any allowance in money can be made by the assignee to the bankrupt, and the question is, therefore, answered in the negative.

[It was decided in this case that the attorney for the creditors is eligible to the office of assignee (Case No. 8,150), and that, upon the allegation of fraudulent preference, the creditors were entitled to trial of issue by jury (Case No. 8,151).]

Case No. 8,150.

In re LAWSON.

[2 N. B. R. 113 (Quarto, 44).] [1]

District Court, D. Maryland. 1868.

BANKRUPTCY — ATTORNEY FOR CREDITORS AS ASSIGNEE.

There is nothing in the act to prevent an attorney for the creditors from being chosen and appointed assignee by them.

[In the matter of James H. Lawson, a bankrupt.]

GILES, District Judge. In this case the register has certified the following question for my decision: "Can an attorney for the creditors be eligible to the office of an assignee?" There seems to be nothing in the act preventing the attorney for the creditors from being chosen and appointed assignee by the creditors; and when not otherwise objectionable, will be approved.

[It was decided in this case that the bankrupt was not entitled to any exemption in money (Case No. 8,149), and subsequently that upon the allegation of fraudulent preference the creditors were entitled to trial of issue by jury (Case No. 8,151).]

Case No. 8,151.

In re LAWSON.

[2 N. B. R. 396 (Quarto, 125).] [1]

District Court, D. Maryland. Dec., 1868.

BANKRUPTCY—CHARGE OF FRAUD—RIGHT TO TRIAL OF ISSUE BY JURY.

Creditors are entitled to a jury trial where the allegations are that the bankrupt, being insolvent and in contemplation of bankruptcy, had made a fraudulent preference, without having previously specially prayed for such trial.

[Cited in Morgan v. Thornhill, 11 Wall. (78 U. S.) 77; Re Holst, 11 Fed. 857.]

[Cited in Redick v. Woolworth, 17 Neb. 260, 22 N. W. 693.]

This case, tried on December 4th, 1868, was the first that has arisen in the Maryland district upon specifications of the creditors against the discharge of the bankrupt [James H. Lawson].

The first point argued and decided by THE COURT was, that the creditors were entitled to a trial by jury upon these allegations, without having previously specially prayed a jury

[1] [Reprinted by permission.]

trial. The allegations were, that the bankrupt "being insolvent," and in contemplation of becoming bankrupt, "had made a fraudulent preference" within the prohibition of section 35 [of the act of 1867 (14 Stat. 534)], and payment for "the purpose of preferring a certain creditor." The specifications set forth the facts and circumstances at large, so that no point was made as to their sufficiency. The prayers on behalf of the creditors involved the proposition that the words "in contemplation of becoming bankrupt," did not require evidence of actual intent to take the benefit of the bankrupt act, but that that provision of the act was responded to by showing that the bankrupt, at the time of the alleged payment, knew the condition of his affairs to be such that he would be unable to pay his debts, and would be compelled to wind up his business.

The verdict of the jury was "for the creditors—allegations sustained," the effect of which is, that the assignee still continues to settle and distribute the estate, but the bankrupt is denied his discharge.

Albert Ritchie, for creditors.

William Fell Giles, Jr., for bankrupt.

[NOTE. It was previously decided in this case that the attorney for the creditors is eligible as assignee (Case No. 8,150), and that the bankrupt is not entitled to any exemption of money in the hands of assignee (Case No. 8,149).]

LAWSON (WELCH v.). See Case No. 17,369.

LAWSON, The ALBERT G. See Case No. 7,364.

LAY (McCOUN v.). See Case No. 8,729.

LAZARUS (MURRAY v.). See Case No. 9,962.

Case No. 8,152.

The L. B. GOLDSMITH.

[Newb. 123.] [1]

District Court, D. Michigan. 1856.

PRACTICE IN ADMIRALTY—REMNANTS — DISTRIBUTION BY COURT—JURISDICTION ONCE ATTACHED —EFFECT OF ANSWERS TO SPECIAL INTERROGATORIES.

1. Under the 43d rule of admiralty practice, the party entitled to remnants or the surplus in court, can only obtain it by petition or motion, and any one having an interest has a right to intervene "pro interesse suo," whether his application involves the settlement of partnership accounts or not.

2. When several part owners, having unsettled accounts between them, petition for a statement of account and payment of their shares, and the managing owner of the boat asks that the whole should be paid over to him; it would be unjust to pay the surplus to the managing owner, and turn the other petitioners over to a bill in chancery, for the recovery of their interest; and it would operate oppressively to retain the amount in the registry of the court until the matter was settled in equity.

[Cited in The John E. Mulford, 18 Fed. 457.]

3. When the admiralty has taken jurisdiction of the subject matter, it will continue the exercise of the same until the remnants are appropriated.

4. Answers to special interrogatories are considered as analogous to the decisory oath of the civil law, and no more evidence for one party than the other, and will not be conclusive for either, where the weight of the other proof in the case preponderates against the fact sworn to, or when, by self contradiction, suspicion attaches to the fidelity of the answers.

[Cited in Havermeyers & E. Sugar Refining Co. v. Compania Transatlantica Espanola, 43 Fed. 91.]

The schooner L. B. Goldsmith was built in Toledo in 1855. In the winter of 1856, she was libeled at Detroit, and decrees pronounced against her to the amount of $750. The vessel was sold by the marshal for $3,000, and after payment of the decrees, there was a surplus of about $2,250, in the registry. N. & N. W. Edson file their petition, and claim the greater part, and B. F. Bruce & Co. file an answer, and a petition that the amount be paid to them as managing owners. They also file an exception, claiming that the court has no jurisdiction to settle the accounts between the parties. N. & N. W. Edson, then, by leave of the court, propound to B. F. Bruce a number of special interrogatories, as to the matters in difference between them. B. F. Bruce & Co. file their answers thereto, and the matter is referred to a commissioner to take proofs. The commissioner reports the testimony back to the court, and the case is called for hearing.

Howard, Bishop & Holbrook, for N. and N. W. Edson.

Towle, Hunt & Newberry, for B. F. Bruce & Co.

Mr. Bishop. The answers to interrogatories are not full evidence for the party who makes them. Their effect is simply to turn the scale, when the case stands in equilibrio, or in great doubt. 3 Greenl. Ev. § 392; 2 Conkl. Adm. 626–629, and note; Cushman v. Ryan [Case No. 3,515]; 1 Poth. Obl. 826.

Mr. Towle. This case involves a settlement of partnership accounts, a matter not within the jurisdiction of this court. The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175, 182; The Apollo, 1 Hagg. Adm. 306; Atkyns v. Burrows [Case No. 61-]; The John, 3 C. Rob. Adm. 288, cited in full in Conkl. Adm. 41–45; Harper v. A New Brig [Case No. 6,090]; Ben. Adm. § 562.

WILKINS, District Judge. Nathan Edson and Nathan W. Edson, of Toledo, Ohio, on the 31st of March last, presented and filed in this court their petition, under the 43d rule of the practice in admiralty prescribed by the supreme court of the United States, for part, or whole of the remnants or surplus in court, of the proceeds of the sale of the L. B. Goldsmith. Having given the notice required, their prayer is resisted

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

by B. F. Bruce & Co., alleging their interest in these proceeds, as part owners before sale and condemnation.

From the proofs, it appears that this scow was built at Toledo, in the year 1855. On her second voyage, in the fall of that year, she was laid up for the winter at Detroit; libeled by Marcus Emerson and others, and sold, in the spring of 1856, by the decree of this court, for $3,000. The decrees in all amount to about $750, leaving a surplus in the custody of the clerk, of $2,250. The Edsons set forth in their petition (which is not denied by the other claimants, B. F. Bruce & Co.), "that, in the summer of 1855, they, as ship builders, commenced building this scow, at the port of Toledo: that after they had expended $1,600 in her construction, Bruce & Co. purchased from them one-half of their interest for the sum of $800, under an agreement to furnish that amount in goods and boat stores for finishing said scow; and all subsequent necessary expenses in finishing and furnishing, were to be equally borne by both parties."

B. F. Bruce, of the firm of B. F. Bruce & Co., claims as the managing owner of the scow, at the time she was libeled, the whole of the remnants, urging that this court cannot adjudicate upon the subject in controversy, because a settlement of partnership accounts is involved, over which a court of admiralty has no jurisdiction. The position is erroneously assumed. The scow, the subject of the partnership, has been taken from their joint possession; and the controversy is, as to the distribution of the proceeds after sale, and the satisfaction of the decrees obtained against her, under the law prescribed for the government of the courts of the United States in such cases, by the 43d rule of admiralty practice. The party entitled to the remnant or surplus, can only obtain it by petition or motion. And any person having an interest, has a right to intervene "pro interesse suo," upon due notice to adverse parties, whether his application may, or may not involve the settlement of partnership accounts. The court would not, under the circumstances disclosed by the proofs, direct the entire fund to be paid to B. F. Bruce as managing agent of the boat. His agency ceased, when the boat was libeled and sold. The partnership terminated at the same time; and he appears now in court, not as agent of the Edsons, but in his individual character, as claiming only the interest of B. F. Bruce & Co. It would be unjust to the Edsons, to direct this surplus to be paid to Bruce, and turn them over to their bill in chancery for the recovery of their interest. It would likewise operate oppressively, to retain the amount in the registry of the court, until the matter is adjudicated by the same judge, sitting on the equity side of the circuit court for this district.

The admiralty having taken jurisdiction of the subject matter, will, under the practice prescribed by the act of congress, continue the exercise of the same, until the remnants are appropriated; and there is no mode known to the law, by which the amount can be taken from its custody, but in the way indicated by the 43d rule. Moreover, the matter is not so complicated as to disable the admiralty judge from passing upon the accounts of the parties. Sitting in admiralty, he may not enjoy as enlightened a conscience, as when sitting in the circuit, but he possesses the same power of facilitating his labors, by directing computation, and whether in the one or the other relation, the duty is incumbent of passing upon the various items of the accounts of the parties, and allowing or disallowing according to the rules of law, and the weight of the testimony. The sum in the registry is about $2,200. The petitioners and the Bruces will be entitled to an appropriation according to their respective investments in the scow.

First, then, what was the interest of the Edsons? It is conceded that the boat was worth $1,600, when half was purchased by the Bruces. Their payment was $800 in goods to be worked in the boat. Consequently, at the time of the sale, the Edsons' interest was $1,600, and the Bruces' $800. After this, each party is to be credited for their legal advances and services; and to that we proceed. But, at the threshold of this inquiry, we deem it necessary to observe that the answers of B. F. Bruce to the interrogations propounded by the petitioners, are not so free from all shade of suspicion as to render them conclusive as to the disputed facts. Although considered as analogous to the decisory oath of the civil law, yet their effect, at the utmost, is but to turn the scale when in equilibrio, or to settle a doubtful point in the proofs. The answers are, it is true, sworn responses to special interrogatories propounded by the petitioners in an appeal to the conscience of the respondent, and, as held by Judge Ware, in Stutson v. Jordan, 18 Am. Jur. 294, are propounded with the intention of making the decision depend on the answers, and, therefore, to give to them the force of evidence. But they are no more evidence for one party, than for the other, and will not be conclusive for either, where the weight of the other proofs in the case preponderates against the fact sworn to, or where, by self contradiction, suspicion attaches to the fidelity of the answers. Antecedent, then, to any advances by either party, at the time of sale, the Edsons had two-thirds of the scow, and the Bruces the other. This entitles the Edsons to $1,600 to begin with. To this is to be added their proven account, amounting to $1,174; in the total $2,274.90.

What then is the claim of Bruce & Co., as sustained by the proofs? In the first place, the court reject the whole of their private account against the Edsons, amounting to $633.

Because, by the agreement of the parties when the Edsons sold, only the necessary expenses in finishing and furnishing the boat, were chargeable against her, and the fund in court is the fund of the boat, to be distributed among its claimants; and this private account constituted no such lien; and furthermore, it is not a joint account against the Edsons, and most of the items are family supplies, and not a lien upon the scow.

For these reasons, deeming them sufficient, I reject the claim, withholding comment as to the character of the account of the Bruces as compared with the pass-book of the Edsons. Certainly, where a discrepancy exists, the judgment must be in favor of the pass-book, as constituting entries and charges in the handwriting of the Bruces, at the time the charges were made. The account, if just, can be sustained before another tribunal than this; and the Cleveland judgment of $102.00, being of record, is susceptible of stronger proof than parol evidence.

Exhibit B, attached in the response to interrogatory 8, must be sustained with certain deductions, although supported alone by the answer to the interrogatory. These deductions are, 1st. The item for lumber (considered disproved), $22.40. 2d. The item of materials to the amount of $800.00. This sum was the consideration for the purchase of the one-half, and is already allowed to the Bruces.

Exhibit C, in response to the tenth interrogatory, shows the amount of freight received for the two voyages at $485.05, which sum is to be deducted from Exhibit D, which shows the expenses incurred at $606.63; and consequently a loss to the scow of the difference of $120.68, one-half of which must be credited to the Bruces as being their proportion; and they having paid the whole, I do not consider the proof submitted by the petitioner as to what the freight ought to be, as sufficient to overturn the positive account and statement of what it actually was, made in response to the special interrogatory of the petitioner. Yet, from this Exhibit D, should be deducted the bill of Wilcox & Fuller of $17.24, which is unpaid, the towing and captain's wages being allowed. As to the necessity of towing, this court will not now inquire, and also will presume that the other items are unobjectionable, saving the charge made by B. F. Bruce, for his expenses to Detroit, of $39.65, making the deductions from Exhibit D $56.89, and leaving as a correct charge, $549.74. To which add as credit, half of the loss on freight, $56.89. Total, $606.63.

The additional libels filed in favor of Brayman and others, but not prosecuted, constitute no lien upon the remnant. If such liens ever existed, they should have been prosecuted, and they cannot be allowed as a credit to the Bruces, because no proof has been furnished of their payment by them. With these deductions, we state the account of the Bruces. Exhibit B, $900.92; Exhibit D, and C, $606.63; total, $1,507.55; making the division of the surplus to be in this proportion: the Edsons, $2,774.90; the Bruces, $1,507.55. Let the clerk enter a decree accordingly.

Case No. 8,153.

LEA v. The ALEXANDER.

[2 Paine, 466.] [1]

Circuit Court.[2]

SALVAGE—SERVICE BY PILOTS—IN LINE OF DUTY AS PILOT—KIND OF SERVICE RENDERED—MEANS EMPLOYED BY SALVORS.

1. Salvage is an allowance for saving a ship or goods at sea, or both, from dangers, fire, pirates or enemies.

2. Whenever a vessel in the charge of her officers is exposed to imminent peril on the high seas, and is relieved therefrom by others, it presents a case for salvage, even though the service has been rendered by pilots; and to entitle to salvage, there need not have been risk of life, expenditure of money, or the application of any extraordinary means, but may be exclusively a case of skill.

[Cited in Flanders v. Tripp, Case No. 4,854.]

3. A shoal running out into the sea, which is not an entrance to a bay, inlet, river, harbor or port, though within the cruising ground, is not pilot's water, unless it has been made so by law. If a vessel has been run aground upon such shoal, and is in danger of shipwreck, and a pilot volunteers to extricate her from peril, and by getting her into deep water places her in safety, the service is not pilotage, and he is entitled to salvage.

[Cited in The Whistler, 13 Fed. 298.]

4. Pilots cannot be salvors for any service they may render in the performance of their ordinary duty. But they may become salvors when they render services not in the line of their duty, by which a vessel is relieved from danger, threatening shipwreck. They may be salvors even after the relation of pilot to a particular vessel has been begun; and the service, without regard to the place where it is rendered, will determine whether a pilot is or is not a salvor. They must, however, in all cases, before they can be salvors, go to the extreme point of their duty.

[Cited in The Cachemire, 38 Fed. 522.]

5. A pilot in a proper case will be entitled to salvage, notwithstanding the ordinance from which he derives his commission to act as pilot, makes it his duty to go to vessels in distress.

[Cited in The Susan, Case No. 13,630.]

[Appeal from the district court of the United States.

[Libel by William P. Lea against the ship Alexander and her cargo for salvage.]

John L. Wilson and George W. Cross, for appellants.

M. King, for appellees.

WAYNE, Circuit Justice. This is a case in which a valuable ship and cargo were, in all probability, saved from total loss, by the skill and knowledge of a branch pilot, who promptly went to her assistance when told of the ship's peril. There was no risk of

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

[2] [District and date not given. 2 Paine includes cases decided from 1827 to 1840.]

life, no expenditure of money, nor application of extraordinary means to effect it; and the time taken to render the service did not exceed four hours. It is exclusively a case of skill, combining good seamanship, in sailing the ship, with a knowledge of the shoals upon which she had been run aground, when in the charge of her captain. The case is purposely presented in such a light, that it may be viewed at the lowest point of merit. Does it present a case for salvage? I think it does. It is so upon the principle, that whenever a vessel has been run aground upon a shoal on the high seas, in the charge of her officers, and she is relieved from imminent peril by other persons, it presents a case for salvage, whether the service has been rendered by pilots or by other persons. The term "high seas" is used to distinguish cases occurring on them from such as happen in bays, inlets, rivers, harbors and ports. In the latter, the principle will be modified in its application, according to the circumstances of each case, and the laws under which pilots act. So, also, the principle will be varied in its application, when the congress of the United States shall exercise its constitutional power, by regulating the pilotage of vessels on the coast, within the distance to which a nation may extend its legislation over the sea—when it shall designate the locality of pilot's waters beyond the fauces terrae, and shall fix a compensation or salvage to be given to pilots for aiding vessels in danger of being wrecked on the coast. I have said when congress shall do this, because, by the act of the 7th August, 1789, it has only adopted the laws of the states, regulating pilots in the bays, inlets, rivers, harbors and ports of the United States; and congress alone has the power to regulate pilotage upon the coast out of the enumerated places, and beyond the jurisdiction of the states. This case was argued by the respondent's counsel, as if the ordinances of the city council of Charleston had regulated pilotage on the coast, out of the bays, inlets, rivers, harbors and ports in South Carolina. I then suggested a doubt as to the existence of such a power in the states, and would have urged an argument on the point more than I did, if I had not found, upon examination, that the ordinances of Charleston regulating pilotage had not gone beyond bays, inlets, rivers, harbors and ports. This view of the case disposes of the objection urged against the allowance of salvage to the libellant, because the service was rendered within his cruising ground. I understood the counsel making the objection, to use the term "cruising ground" as synonymous with "pilot's water" or "pilotage ground." They are not the same, however. By pilot's cruising ground, is meant that distance out in the sea along a certain extent of coast that pilots cruise for vessels bound to ports, inlets, harbors, rivers or bays into which a pilot may take them by his commission. By pilot's water or pilotage ground, is meant the access to a bay, inlet, river, harbor or port, beginning at the exterior point, where a pilot may take leave of an outward-bound vessel, and extending to the places fixed upon by law or usage for the anchorage or mooring of inward-bound vessels. A shoal running out into the sea, which is not an entrance to a bay, inlet, river, harbor or port, though within the cruising ground, is not pilot's water, unless it has been made so by law. If a vessel has been run aground upon such shoal, and is in danger of shipwreck, and a pilot volunteers his aid to extricate her from peril, by getting her again into deep water, and does place her in safety, the service is not pilotage in the proper acceptation of the term. It is a service rendered by a pilot, but one out of the line of strict legal obligation, and beyond his ordinary duties.

But it was urged, that the service rendered by the libellant was a case of ordinary pilotage. That if more than one of ordinary pilotage, it was one of that class of cases for which pilots have been allowed extraordinary pilotage compensation for extraordinary services, as contradistinguished from ordinary services, and not a case for salvage. It was also urged, that a pilot could not be a salvor in any case; and if the law was otherwise, that then the libellant could not be a salvor, as his services had been given to a vessel in distress, only as he was bound to give them by the ordinance from which he derived his commission to act as a pilot. What is salvage? It is an allowance for saving a ship or goods at sea, or both, from dangers, fire, pirates or enemies. Lord Chief Justice Abbott, in his treatise on Shipping, 397, defines salvage, "a compensation that is to be made to other persons by whose assistance a ship, or its loading, may be saved from impending peril or recovered after actual loss." Holt, in his System and Navigation Laws of Great Britain, says it is "a compensation for the safety of a ship or cargo, paid to those by whose labor and courage they have been preserved from wreck, or recovered after capture." Test this case by these definitions, without regard to the objection that a pilot cannot be a salvor, and it is clearly a case for salvage. Here was a ship making her first land fall, aground upon a shoal, between breakers, without sea-room to perform common nautical operations without danger of shipwreck, from which her officers and crew could not extricate her, but from which she was relieved by the skill and knowledge of others, and saved from inevitable shipwreck. It will not be contended that such services, rendered by one not a pilot, would not make him a salvor. Is the libellant excluded from being a salvor, because he was a pilot of the bar and harbor of Charleston? The objection that pilots cannot be salvors, has been repeatedly overruled in the courts of

this country, and in the admiralty courts in England. The contrary doctrine was early affirmed in Carolina, in the case of Dulany v. The Peragio [Case No. 4,123]. The language of that authority is, that pilots, like other persons, may entitle themselves to salvage, by performing services beyond the mere line of their duty. The law is, that a pilot cannot be a salvor for any service he may render in the performance of his ordinary duty. But in the case of The Joseph Howey, 1 C. Rob. Adm. 306, it is said, "In extraordinary cases the safe conduct of a ship under circumstances of extreme personal danger and personal exertion, may erect a pilotage service into something of a salvage service." Lord Alvanley, in the case of Newman v. Walters, 3 Bos. & Pul. 616, puts a case which shows it was his opinion, and that of Lord Stowell, that pilots may be salvors. He says: "Suppose a tempest should arise while the pilot is on board, and he should go off in a boat to the shore to fetch hands, and should risk his life for the safety of the ship in a manner different from that which his duty required; in such a case, it seems to me that he would be entitled to a compensation in the nature of salvage; and I am glad that Sir William Scott appears to entertain the same opinion." Mr. Justice Washington, in the case of Le Tigre [Case No. 8,281], after stating that ordinary official duties were not to be compensated by salvage, adds: "Of this class of cases is that of a pilot who safely conducts into port a vessel in distress at sea. He acts in the performance of his ordinary duty, imposed upon him by the law, and the nature of his employment, and he is therefore not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment." In the case of The Elvira [Case No. 4,423], a dismasted vessel, Judge Hopkinson, of Pennsylvania, allowed salvage to pilots for towing into port, expressly overruling the objection that pilots could not be salvors for services rendered to vessels in distress, beyond their ordinary duties. The law then is, that pilots may become salvors when they render services not in the line of their duty, by which a vessel is relieved from danger, threatening shipwreck. They may be salvors, even after the relation of pilot to a particular vessel has been begun, and the service, without regard to the place where it is rendered, will determine whether a pilot is or is not a salvor. They must, in all cases, before they can be salvors, go to the extreme point of their duty; and the circumstances of the case in which they may claim to be considered as salvors, must obviously be such as require efforts, perils to be encountered, labor or skill out of the line of their duty, and the inferences drawn from them are sanctioned by the supreme court, in the case of Hobart v. Drogan [10 Pet. (35 U. S.) 108], decided at its last term.

But, further, let the objection against a pilot being a salvor be tested by Lord Stowell's definition of a salvor, given in the case of The Neptune, 1 Hagg. Adm. 236, 237, which was adopted by the supreme court in the case of Hobart v. Drogan. A salvor is "a person who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship. The supreme court had said this rule is founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate." But the court did not consider the rule as excluding a pilot from being a salvor, on account of his covenant to aid vessels in distress, in a case where the pilot had no official connection with the ship before she was in imminent peril. By citing, too, Lord Alvanley's supposed case with approbation, the court affirms that pilots may be salvors in cases after a pilot's official connection with a ship has commenced. The relation which a pilot may ultimately bear to a vessel which he boards is not determined by the character in which he goes on board or in which he has been received, but by the services he may be called on by the exigence of the vessel to perform. The pilot's obligation to the public is to cruise off the port for which he is commissioned—to offer his services to vessels which he may suppose bound inwards—to a vessel in distress first, though she may be more distant than another—and in many cases of distress, his relation begins and ends with no more than the service of a pilot. Where the ship is in distress, being dismasted, sprung a leak, or from any other casualty, but can still be navigated with whatever may be her draft of water, it will be a case of ordinary pilotage. But if a vessel already upon a shoal, in danger of shipwreck, is boarded by a pilot, whose services are accepted to take her out of her peril, and he saves her from probable loss, his particular relation of pilot does not begin until the contingency of the vessel's shipwreck has passed, by her being again in deep water, as off the shoal; and then it will not occur unless the vessel is bound into the port for which the pilot is commissioned to act, or unless the injury she has sustained makes it necessary to carry her into such port. Suppose the Alexander had not been bound for Charleston, but had pursued her voyage to some other port, after she had been extricated from Roman Shoals by the libellant, what fee would he have been entitled to for his services, under the ordinances of Charleston? The ordinance does not provide for such a case. The libellant would not have been entitled to pilotage for taking her into port, for that would not have been done.

Would the offer of such a fee have been a lawful and adequate compensation for such a service? He being bound to Charleston can make no difference in the merit and character of those services which placed her in a condition out of imminent peril, to be piloted into her destined port. The original service, then, was neither a case of ordinary or extraordinary pilotage, but a service which saved a vessel from impending wreck; and it is this feature in the case which makes it one for salvage. The 14th section of the ordinance does not apply, by which the compensation in such a case can be measured; for that is a daily compensation of four dollars for every day a pilot is on board a vessel of which he takes charge ten leagues from land.

The remaining objection urged against salvage in this case is, that the ordinance from which the libellant derived his commission to act as pilot makes it his duty to go to vessels in distress; and being a duty, he cannot have salvage for performing it. It is a pilot's duty to go to vessels in distress, and for not doing so he may be mulcted in the penalty of the ordinance, and be deprived of his commission. But for such a service the ordinance fixes no compensation; nor can one be fixed which would be just in all cases, or which could impose upon a pilot the obligation to do more than a pilot's duty in bringing the vessel into port. The circumstances attending each case of distress must determine whether the service rendered by a pilot is one of ordinary or extraordinary pilotage, or a case for salvage.

In the consideration of this case I have carefully examined all the laws of England, France and Holland regulating the pilotage of vessels upon the coast, to ascertain the views of the legislators of those nations as to the character of services rendered by persons saving vessels from shipwreck upon the coast. I find them always considered as salvage services, only varying in the mode and tribunals by which the salvage is to be assessed. They are not authority to bind my judgment, but I hope they have aided to instruct it to a right conclusion in this case. I find them coinciding with the judgment of our own courts in such cases, and sustained by reason ing which deliberate examination and thought convince me is correct.

Upon the whole, then, my conviction is that the ship Alexander would have been shipwrecked upon the shoal upon which she was aground, if she had not been extricated by the timely arrival and skill of the libellant. I think the service makes the libellant a salvor, and the ship being at least of the value of fifteen thousand dollars, one thousand dollars is decreed to the libellant as salvage, exclusive of his pilotage fees for carrying the vessel into port, and costs. The judgment of the court below is reversed, and the cross appeal of the respondent is ordered to be dismissed.

NOTE. In the case of The Emulous [Case No. 4,480], Judge Story said:—"I take it to be very clear, that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt; in either case, it does not alter the nature of the service, as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract, and a salvage compensation. It is true that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved, unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract unjust, oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty, into a traffic of profit which would outrage human feelings, and disgrace human justice." In the case of Clarke v. The Dodge Healy [Id. 2,849], Washington, J., said:—"It may confidently be laid down, as an undisputed principle upon which a claim for salvage at all times rests, that unless the property be in fact saved by those who claim the compensation, it cannot be allowed, be their intention however benevolent, and their conduct however heroic. If Providence kindly aids their exertions, by which the object is attained, so much the better for them; nor would that circumstance deprive them of merit, although it might diminish the rate of compensation; but exertions must be made, and the probability that they contributed, or might contribute to save the property, should appear by some proof, although, from circumstances, slight proof only could be expected. I will not say that where the danger is proved, and the vessel is conducted by the asserted salvors into a place of safety, every presumption, in the necessary absence of other evidence, may not be made in their favor. But where it is proved by other evidence, as it is in this case, that no human force could have averted the danger unless a particular act was done, which act the same evidence shows was nearly impossible to have been accomplished, the court cannot say that the vessel was saved by the exertions of these libellants. The general principle before stated is too firmly established by authorities to admit of controversy. 'Salvage,' says the court in the case of The Amelia, 1 Cranch [5 U. S.] 1, 'is a compensation for actual services rendered to the property charged with it.' And in the case of The Alerta, 9 Cranch [13 U. S.] 367, it is said, 'Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved.' It is also stated in the first of these cases, that not only must the service rendered be meritorious, but the possession taken of the thing saved must be lawful."

Case No. 8,154.

LEA et al. v. DEAKIN.

[11 Biss. 23; [1] 18 Am. Law Reg. (U. S.) 322; 7 Reporter, 261; 11 Chi. Leg. News, 152.]

Circuit Court, N. D. Illinois. Jan., 1879.

TRADE MARKS—"WORCESTERSHIRE SAUCE" A GENERIC TERM—RES JUDICATA—FORMER DECREE IN ENGLAND.

1. The term "Worcestershire Sauce" has become generic as applied to a certain kind of table sauce, and cannot be exclusively appropriated by the complainants simply because they reside in Worcestershire, England.

2. A decree rendered by the master of the rolls in England, refusing an injunction and dismissing a bill in equity to restrain the infringement of an alleged trade mark, and which was not appealed from, is a complete bar to a suit brought in this country for the same purpose by the same complainants against the agent of the defendant in the English suit.

[Cited in Faust v. Baumgartner, 113 Ind. 141, 15 N. E. 337.]

[This was a bill in equity by Charles W. Lea and others against Frank Deakin for the infringement of an alleged trade-mark.]

Rogers & Appleton and Henry M. Collyer, for complainants.

Charles E. Pope and George C. Christian, for defendant.

DRUMMOND, Circuit Judge. This case has been ably and fully argued by the counsel of the respective parties, and as it has been pending for a long time, although I have not had, from other engagements, the opportunity of considering it so thoroughly as I could wish, I may state now the conclusions at which I have arrived, without going into any special detail of the reasons leading to such conclusions. The plaintiffs are, and have been for a long time, the manufacturers of what has been called "Worcestershire Sauce," in Worcestershire, England. It is at present, and has been for some time, known as "Lea & Perrins' Worcestershire Sauce." The defendant is a resident of Wisconsin, and has been in the habit of receiving from England a sauce somewhat similar to that of the plaintiffs which is called the "Improved Worcestershire Sauce," prepared by Richard Millar & Co., of London. The defendant is their agent for the sale of this latter sauce in this part of the country. I think the proof establishes that there has long been known in the market a certain kind of sauce used for the table, on fish and meats of various kinds, as "Worcestershire Sauce;" that it is a sort of generic term given to this kind of sauce from the fact that it was originally manufactured in Worcestershire, England. It seems to have been manufactured also in other places, and the term "Worcestershire Sauce" seems to have been applied to that species of sauce. Under the circumstances, therefore, it can hardly be claimed that the plaintiffs, simply because they reside in Worcestershire, and manufacture a sauce which they call "Worcestershire Sauce," have the sole right to the application of the term to that species of sauce. I think that the proof also shows that the plaintiffs have been cognizant for many years of the fact that there was this kind of sauce manufactured to which the term was applied; that for many years they took no steps to prevent the parties from manufacturing the sauce; and that, therefore, there may be said to have been something in the nature of an acquiescence in the manufacture of the sauce.

The proof also shows that the plaintiffs filed a bill in chancery in England against the principal of the defendant, Millar, of London, on the ground that he or his company were manufacturing the very species of sauce which is the subject of controversy in this case, asking for an injunction to restrain him from such manufacture, and from using the term "Worcestershire Sauce," they claiming that they had the right to it as a trade-mark, and that no one else could use it without their consent, and also asking for an accounting from the defendant. The case was heard by the master of the rolls, Sir George Jessel, and fully considered by him in 1876, and the injunction was refused and the bill dismissed. See Sebast. Trade-Marks, 305; Seton, Dec. (4th Ed.) 242. There was no appeal from this decree; on the contrary, it seems to have been acquiesced in by the plaintiffs. I see nothing in the record to raise a doubt that the case was decided on its merits. I think, therefore, that case is a bar to the action of the plaintiffs. They brought the suit against Millar, the principal of the defendant in this case, on the very subject-matter of controversy here; they asked for an injunction for the same reasons that the injunction is asked here, and for substantially the same general relief. It was refused by the master of the rolls, and the bill dismissed. Deakin, the defendant here, has acted for Millar, the defendant in that case. It would be an anomaly if it were true that Millar could manufacture and sell his sauce in England, and at the same time Deakin, who sells it here, and obtains it from him, could be restrained here at the instance of the plaintiffs from selling it.

By agreement between the parties, and the order of the court, many of the questions on the admissibility of evidence were submitted to the master, and he made his report thereon to the court, and exceptions have been taken to his report. It is unnecessary for me to consider these various exceptions. It is sufficient to say, I think, there is evidence in the case which ought to be admitted, and from which these conclusions can be deduced. The result will be, therefore, that the bill will be dismissed.

NOTE. A name which has become generic in meaning cannot be appropriated as a trade-mark. Canal Co. v. Clark, 13 Wall. [80 U. S.] 311, 323; Thomson v. Winchester, 19 Pick. 214; Wolfe v. Goulard, 18 How. Pr. 64; Sherwood

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

v. Andrews [unreported]; Candee v. Deere, 54 Ill. 439; Singer Manuf'g Co. v. Wilson, 2 Ch. Div. 434; Cocks v. Chandler, L. R. 11 Eq. 446; Ford v. Foster, 7 Ch. App. 611; Burke v. Cassin, 45 Cal. 467; Burnett v. Phalon, 9 Bosw. 192; Bininger v. Wattles, 28 How. Pr. 206; Singleton v. Bolton, 3 Doug. 293; Canham v. Jones, 2 Ves. & B. 218. But see Newman v. Alvord, 49 Barb. 588; Congress & E. Spring Co. v. High Rock C. Spring Co., 45 N. Y. 291; Dunbar v. Glenn, 42 Wis. 118; Wotherspoon v. Currie, L. R. 5 H. L. 508. There can be no trade-mark in the name "Singer Sewing Machine." Singer Manuf'g Co. v. Larsen [Case No. 12,902]. The word "Parabola" used as the name of needles, not being descriptive of any peculiar quality of the needles, is a valid trade-mark. Roberts v. Sheldon [Id. 11,916]. So the term "Yankee," applied as the name or label upon soap, is a valid trade-mark. Williams v. Adams [Id. 17,711].

[For other cases involving this litigation, see Cases Nos. 3,695, 3,696, and 3 Fed. 435, and 13 Fed. 514.]

LEA (DEAKIN v.). See Cases Nos. 3,695 and 3,696.

LEA (FARLOW v.). See Case No. 4,649.

LEA v. LEEDS. See Case No. 2,862.

Case No. 8,155.

Ex parte LEACH.

[3 App. Comr. Pat. 267.]

Circuit Court, District of Columbia. March 1, 1860.

PATENTS—PATENTABLE NOVELTY—WEATHER STRIPS.

[Leach's claim of invention of weather strips of India rubber or other flexible material of a semi cylindrical shape, with flanged sides or edges for tacking against the door or window frame, possesses patentable novelty, and is not anticipated by inventions of weather strips which require grooves in the doors, etc., for fastening them.]

[Appeal by Phineas Leach from the decision of the commissioner of patents, rejecting his claim for a patent for an improvement in weather strips for doors, etc.]

MERRICK, Circuit Judge. The claim in this case is for an improvement in weather strips for doors and windows, which consists in making the strips of India rubber or like flexible and elastic material moulded into a semi-cylindrical shape with flanged sides or edges, so that, when fastened by tacks driven into the door at suitable intervals along the flanged sides, it shall form a semi-cylindrical tube, fitting the crevice between the door and its frame, and by its elasticity, adapting itself to any irregularities in the dimensions or shape of the crevice, thereby completely exclude air, etc. If the claim be regarded as a device for excluding air, etc., from the crevices at the sides of doors and windows by adjusting to them strips of elastic rubber, or strips of rubber rendered specially flexible and elastic by reason of their tubular form, the invention of the applicant is clearly anticipated by the references to Alvord's, Hackett's, and Burstadt's rejected claims. But the amended claim of Leach does not rest upon the principle involved in those cases. The merit of his invention consists in the ease and simplicity with which the attachment is effected of an elastic tube to the cracks and openings around a door; which, while it secures the tube firmly in its place, dispenses with the troublesome and expensive construction of a groove in the door or against the door post, which is essential in the invention of Alvord and Hackett, where an entirely cylindrical tube is used. The invention of Leach is, then, a substantial change in the shape and construction of elastic tubular strips, by means of which change of construction the strips can easily and cheaply be applied to doors without injury thereto, not requiring the aid of a carpenter, and demanding no other expenditure of time or money in the adjustment than a few moments of the house maid's leisure, and the cost of thirty or forty carpet tacks. This degree of utility and economy appearing from the claim, although it may not place the inventor upon a very lofty pedestal of fame, affords sufficient evidence of the exercise of the inventive faculty to entitle him to the protection of the patent laws.

Now, for the reasons aforesaid, I am of opinion, and accordingly certify to the Hon. Philip F. Thomas, commissioner of patents, that there is error in the decision of the office rejecting the claim of the applicant; and said judgment is hereby reversed, and a patent directed to be issued to Phineas Leach upon his amended application as prayed.

Case No. 8,156.

LEACH v. COYLE.[1]

Circuit Court, D. Connecticut. Dec. 24, 1878.

LIMITATION OF ACTIONS—NEW PROMISE.

[A promise by a debtor to a bankrupt creditor, acting in behalf of the assignee of an account, to settle the same, is sufficient to take a suit thereon by said assignee out of the statute.]

[Action of assumpsit by Nathan W. Leach, assignee of certain assets of William E. Brockway, against Patrick Coyle.]

SHIPMAN, District Judge. This is an action of assumpsit, which was tried by the court, in pursuance of a written stipulation of the parties waiving a jury trial. The facts which are found to be true are as follows: William E. Brockway was a brewer in the city of New York from 1856 to 1871, and sold ale in barrels to the defendant, a merchant in Waterbury, Connecticut, from August, 1858 to April, 1869. The agreement between the parties was that the defendant should return the barrels when empty, or pay for them. If not returned, they were bought by the defendant. In 1871, Brock-

[1] [Not previously reported.]

way was adjudicated a bankrupt in the Southern district of New York, having an unsettled account and claim upon his books against the defendant. John M. Guiteau and John Gordon were appointed assignees upon his estate, who sold and assigned the account against the defendant to the plaintiff, a citizen of the state of New York.

The plaintiff brought an action of assumpsit against the defendant on April 10, 1874, for a balance claimed to be due on the ale. and also on the barrel account. The bill of particulars was in brief:

For ale	$ 82 87
For 325 half casks, @ 4.50	1,462 50
For 74 quarter casks, @ 3.50	259 00
	$1.804 37

The barrels were the number of unreturned barrels which had been delivered during said years. No settlement of barrel account had ever been made. The ale balance was claimed to be an amount which was due for ale sold in 1866, and which had been carried along in the ledger for a time, and finally was overlooked on the ledger, and had been overlooked in the settlement of the ale account. The defendant paid in January, 1868, the amount supposed by both parties to be due for ale, and took a receipt in full. There was no sufficient affirmative evidence of mistake to justify a finding that a balance is due on ale account, and I find that nothing is due thereon. In May, 1872, said Brockway called upon the defendant in Waterbury, and on behalf of the plaintiff made demand of the barrels and of the amount due on ale account. Defendant replied that he would look up the "empties," go to New York the succeeding month, take down his account, and have a settlement. He did not see the plaintiff or Brockway afterwards.

I find that 325 half barrels and 74 quarter barrels have never been returned by the defendant to Brockway or to the plaintiff. The market price of new half barrels and of quarter barrels was $5.00 and $4.00 respectively. Very little satisfactory evidence of the market price of old barrels was given. I find that they were worth in market respectively half the market price of new barrels. All the barrels which were delivered to the defendant within six years prior to the date of the suit were returned. The barrel account was a running account with charges and credits from 1858 to September, 1878.

It seems under Connecticut decisions, though not perhaps in accordance with the decisions of some other courts on similar statutes, that the account for the barrels not returned prior to six years before the date of the suit is barred by the statute of limitations, in the absence of a new promise or acknowledgment of a subsisting debt. As matter of law, I am of opinion that the conversation had by the defendant in May, 1872, is a sufficiently clear and definite acknowledgment of a subsisting debt for barrels, and promise to pay the amount due therefor, to take the case out of the statute of limitations.

I find that the amount due by the defendant to the said Brockway upon the account which was sold and assigned to the plaintiff was:

For 325 half barrels	$ 812 50
For 74 quarter barrels	148 00
	$ 960 50
Interest from Jany., 1871, to Dec., 1878, 7 years & 11 months	456 23
	$1,416 73

—For which amount let judgment be entered for the plaintiff against the defendant.

LEACH (JONES v.). See Case No. 7,475.

Case No. 8,157.

In re LEACHMAN.

[1 N. B. R. 391 (Quarto, 91);[1] 1 Am. Law T. Rep. Bankr. 48.]

District Court, D. Kentucky. 1868.

BANKRUPTCY — EXAMINATION BEFORE REGISTER — CROSS-EXAMINATION.

A bankrupt on examination may be cross-examined by his own counsel.

[Cited in Re Collins, Case No. 3,008.]

[In the matter of Stephen B. Leachman, a bankrupt.]

BALLARD, District Judge. In this case the bankrupt had submitted to an examination before the register by a creditor. The counsel of the bankrupt claimed the right to cross-examine him, and was proceeding to do so, when the counsel for the creditor objected, insisting that the bankrupt cannot examine himself, and that he may only "correct any statement made during the course of his examination" in the manner prescribed in general order No. 34. The register has certified the question thus raised for decision here. I have already decided, in Re Dean [Case No. 3,699], bankrupt, that the "examination" of the bankrupt is a "deposition" within the meaning of the bankrupt act [of 1867 (14 Stat. 517)]. Section 26 prescribes how his attendance before the register may be procured; the matters in respect to which he may be examined; that the examination shall be in writing, and how it shall be disposed of. It then provides that in a like manner the attendance of any other person as a witness may be required. Form No. 46 is the caption of the examination, whether of the bankrupt or of the witness. General order No. 10 provides how the examination of witnesses is to be conducted; and if it does not prescribe the mode of conducting

[1] [Reprinted from 1 N. B. R. 391 (Quarto, 91), by permission.]

the examination of the bankrupt, there is no rule or order relating to the subject. In my opinion the bankrupt, when examined, is a witness, so far at least as the mode of conducting his examination and cross-examination are to be conducted as provided in general order No. 10. It certainly would be very hard and unreasonable to require a bankrupt to answer only the questions of a creditor or assignee, and deny him the opportunity of offering as a part of his examination any explanation which he may have to make; and as he cannot be denied the benefit of counsel, I do not see how such explanation could be more appropriately made than in answer to questions propounded by his counsel. Whether the bankrupt when examined is for all legal purposes the witness of the assignee or creditor, or whether his cross-examination is to be conducted precisely as that of other witnesses, are questions not presented by the certificate, and cannot be decided. The clerk will certify this opinion to the register.

Case No. 8,157a.

LEADBETTER v. KENDALL.

[Hempst. 302.] [1]

Superior Court, Territory of Arkansas. Feb., 1836.

JURISDICTION OF JUSTICE OF PEACE—PROCESS OUT OF JURISDICTION—ACTION AGAINST CONSTABLE.

A justice of the peace cannot issue process beyond the limits of his township, except in two cases indicated by statute; and process so issued, not falling within the exceptions, is utterly void, and an officer cannot justify under it.

Error to Pulaski circuit court.

[This was a suit by Benjamin M. Leadbetter against Ephisditus T. Kendall for recovery of certain goods belonging to the plaintiff which were alleged to have been illegally seized.]

Before CROSS and YELL, JJ.

CROSS, J. The plaintiff in error brought suit in trespass against the defendant, for forcibly seizing and taking his goods. In justification, the defendant in error alleges that Jesse Brown, an acting justice of the peace in and for Big Rock township, issued a writ of execution, directed to the constable of Saline township, and that as such constable, in virtue of said writ, he seized and took the goods. Both townships are within the county of Pulaski, and the only question we deem it material to decide grows out of the construction to be given to the act of 1829 in relation to the jurisdiction of justices of the peace. The act referred to is in these words: "Hereafter, all justices of the peace in this territory shall be commissioned for their respective counties; and the township in which they severally reside shall confine or be the extent of their jurisdiction, except in criminal cases, and in cases under the statutes of this territory where it may require two justices of the peace to form a court; and in that case, where there shall be only one justice of the peace in such township, or the justices of the peace are concerned or interested in the suit, any justices of the peace, of the next adjoining township, are at liberty, and shall have power, to issue process and try said cause, the same as though they were resident in said township, any law to the contrary notwithstanding." Ark. Ter. Dig. p. 355. Anterior to the passage of this law, under the provisions of an act passed in 1814, a judgment creditor was allowed to suggest that the defendant resided out of the township where the judgment was rendered, and that no goods or chattels could be found in the township where the justice resided to satisfy the same, whereupon it became the duty of the justice to issue execution, directed to the constable of the township where the defendant did reside, or where his goods and chattels could be found, and the constable was authorized and required to execute the same. Ark. Ter. Dig. p. 378. The act of 1829 expressly limits the jurisdiction of a justice of the peace to the township in which he resides, except in criminal cases and cases where, by statutory provisions then in force, two justices were necessary to form a court. In this it conflicts obviously with the prior act of 1814, and, by a well-settled rule, repeals it to the extent of the confliction. A justice, therefore, cannot now issue process beyond the confines of his township, except in the two cases indicated by the statute. When he does, the act is wholly unauthorized and absolutely void. As well might he issue process to a constable residing in a different county, as to one residing in a different township in the same county. In either case, there would be an entire want of jurisdiction. The law restricting the jurisdiction of justices of the peace being a general one, the defendant in error was bound to have noticed it. We think, therefore, that the demurrer to the plea of justification was improperly overruled. Judgment reversed.

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

Case No. 8,158.

LEADVILLE CO. v. FITZGERALD et al.

STEVENS et al. v. MURPHY et al.

[4 Morr. Min. Rep. 380; Carp. Min. Code, 73.]

Circuit Court, D. Colorado. 1879.

MINES AND MINING — LODES AND VEINS —"ROCK IN PLACE"—RIGHT TO FOLLOW DIP—CONTINUITY OF VEIN—PRESUMPTIONS.

[1. "Rock in place," as used in Rev. St. 2320, means that the lode or vein must be inclosed by the fixed and immovable rock forming the general mass of the mountain. There must, therefore, be a hanging as well as a foot wall; but, if the principal part of the rock above the mineral is in its original position, the lode is in place, although some masses of rock or boulders may be mixed with the ore. If, however, the ore is upon the top

of the immovable rock, and covered only by loose material and debris, the section does not apply.]

[See Stevens v. Williams, Case No. 13,414.]

[2. There can be no right, under this section, to follow the vein outside the surface lines, unless the vein can be traced continuously from one claim to the other. If the mineral is not continuous, then it must be ascertained whether there are continuous boundaries inclosing the vein.]

[3. A vein or lode does not come within this section if it lies horizontally, but if it departs from a horizontal position at all the degree of departure is immaterial.]

[4. There is a presumption of ownership in favor of every locator as to the territory covered by his location, and within his own lines he is to be regarded as the owner of all valuable deposits until some one else shall show, by a preponderance of testimony, that such deposits belong to another lode, having its apex elsewhere.]

[Cited in Consolidated Wyoming Gold-Min. Co. v. Champion Min. Co., 63 Fed. 551.]

[These were suits by the Leadville Mining Company against Fitzgerald and others, and by Stevens & Leiter against Murphy and others, to enjoin defendants from taking ore from within the limits of complainants' claim, and to recover damages for ore already taken. Applications have been made in each case for an injunction.]

Hugh Butler, T. M. Patterson, C. S. Thomas, and E. O. Wolcott, for plaintiffs.

J. B. Belford, J. D. Ward, and James Y. Marshall, for defendants.

HALLETT, District Judge. These cases are so far similar that what is said in respect to one may be taken to be applicable to both of them. Until the discovery of mineral deposits near Leadville, no controversy had arisen in this state as to whether a lode or vein is in place within the meaning of the act of congress. The mines opened in Clear Creek, Gilpin, Boulder and other countries, descend into the earth so directly that no question could arise as to whether they were inclosed in the general mass of the country. Whatever the character of the vein, and whatever its width, it was sure to be within the general mass of the mountain; but the Leadville deposits were found to be of a different character. In some of them, at least, the ore was found on the surface, or covered only by the superficial mass of slide, debris, detritus, or movable stuff, which is distinguishable from the general mass of the mountain, while others were found beneath an overlying mass of fixed and immovable rock, which could be called a wall as well as that which was found below them. It then became necessary to consider very carefully the meaning of the words, "in place," in the act of congress, in order to determine whether these deposits were of the character described in that act. Section 2320, Rev. St., refers to veins and lodes in "rock in place," and of course no other can be brought within the terms of the act. After careful consideration, it was thought that a vein or lode could not be in place, within the meaning of the act, unless it should be within the general mass of this mountain. It must be inclosed by, or held within, the general mass of fixed and immovable rock. It is not enough to find the vein or lode lying on the top of fixed or immovable rock, for that which is top is not within, and that which is without the rock in place cannot be said to be within it. This conclusion was reached in the application by the owners of the New Discovery claim against the owners of the Little Chief claim. The same idea was advanced in the trial before a jury in which the ownership of the Iron mine was involved. The attention of the jury was especially directed to that matter, and they were directed to inquire upon the evidence, whether the lode was inclosed within the general mass of country rock,—in other words, whether there was a hanging as well as a foot wall; and the jury ascertained and determined that the lode was so inclosed in the general mass of the mountain. To apply this principle in the present cases, we are led to inquire whether the veins or lodes are so inclosed in the general mass of the mountain, or lie only on the surface of the fixed and immovable rock, with no other covering than the superficial mass to which reference has been made.

In the first of these cases, in which the Leadville Mining Company is plaintiff, it seems that in the plaintiff's own ground the lode is well enough defined. There, there is an overlying mass of country rock which may be called a hanging wall; but when we come to the ground in dispute, which is claimed by the defendants, and is called by them the Little Giant claim, the testimony is not satisfactory on that point. Only one of the witnesses for plaintiffs has examined the shaft sunk by defendants, and although he testifies that the valuable ore at the bottom of the shaft is found between walls, his testimony is overborne by numerous witnesses on behalf of defendants. In all the affidavits filed by defendants, which are very numerous, it is stated that the shaft sunk by the defendants penetrated only loose material, and that nothing like solid or fixed and immovable rock was found in its course. In this state of the evidence, it is almost undisputed that what is called a lode or vein at the point in controversy is not within the general mass of country rock. Whatever its character may be to the eastward from that point, if at the very place in controversy the upper or hanging wall cannot be found, it cannot be called a lode, within the meaning of the act. These deposits are very irregular, and, if for any considerable distance they come to the surface and pass out from the rock in place, they cease to be lodes within the meaning of the act. At all events, the rule must be so as to one who seeks to pursue them beyond the side lines of his claim. To establish a right of

that kind, he must be able to show that the lode is continuous and in place throughout its whole course from its origin in his own ground to the place in which he claims it. In this respect the showing was very different in the case to which reference was made by counsel between the owners of the Bull's Eye and the Silver Ware claims. In that case many witnesses testified that the vein was continuous and in place throughout its course between the two claims. There may have been some opposing testimony, but it was a contested point, and the testimony went strongly to show that the vein was continuous as alleged in the bill of complaint. But here the fact that the lode at the point in dispute is upon the top of the rock in place and covered only by loose material and debris, is almost undisputed. Upon that ground, it is thought that no injunction can be allowed. The plaintiffs must show that the vein is in place and that it extends continuously from their ground and into that claimed by the defendants, before they can be entitled to such relief.

In the other case the question presented is not the same. It is not denied that there is at the place in controversy an overlying mass of country rock, but defendants allege that within the limits of the Iron claim and eastward from that point in the openings made by plaintiffs, there is no continuous vein or lode; that in that territory there are only irregular deposits, having no connection with each other. The plaintiffs, on the other hand, contend that there is, in all the ground opened by them, a continuous vein or lode which may be traced throughout all their workings. The point is strongly contested on both sides. Many affidavits have been filed by each party to establish the fact, and it seems to be a question which should be submitted to a jury. Upon principles heretofore announced, we may interfere by injunction to preserve the property pending the controversy. If, as in the other case, it was clearly shown that the fact is as alleged by defendants, the plaintiffs could not be entitled to such relief; but as they have made a strong showing as to the regularity and continuous course of the vein, it is proper to preserve the property until the result of the trial shall be known.

As to what was said by counsel with reference to the position of the vein or lode, I am still of the opinion that, if it descends from the plane of the horizon, it is to be regarded as a departure from the perpendicular. It is conceded that if the vein be exactly upon the plane of the horizon, it is not within the act. In every position, however, from the horizontal to the perpendicular, it must be said that it has departed from the perpendicular. And here, if the evidence is to be believed, the lode is somewhat below the plane of the horizon, and so within the meaning of the act, as one which may be pursued beyond the side lines of the claim in which its outcrop may be found. In the first case the injunction will be denied, and in the second the motion will be allowed.

In the case of the Leadville Company, the plaintiffs took leave to amend their bill, and in the other case the defendants took leave to amend their cross bill. Both cases were afterward tried by jury.

[The charge of HALLETT, District Judge, in the case against Fitzgerald, is as follows:]

HALLETT, District Judge (charging jury). You have learned, gentlemen, from the evidence, that there is no controversy between these parties as to the surface of their several locations. The plaintiff claims to own the Carbonate location, as laid down upon the maps, and defendants claim to be the owners of the Little Giant claim, or to the surface of those locations. It may be assumed, for the purposes of this controversy, that each party is the owner of their own location, as claimed by them. The controversy relates to ground which is reached by a subterraneous course from the plaintiffs' ground, and in which they claim that it is their lode, originating in their territorial lines, and they claim to have followed this lode from their own ground into that of defendants', in pursuance of the act of congress which gives them, as they say, that right. This act of congress provides, whenever a location shall be made upon a lode, according to local law, the locator shall be entitled to the surface ground to a certain extent on each side of the top or apex of the lode, and that he shall have, not only that lode, but all others which have their tops and apexes in the same territory,—that is, in the ground covered by his location,—and he shall have these lodes in such a way that he may follow their dip or inclination to any depth to which they may extend. It has sometimes been contended that the lode must have a certain position in the earth,—that is to say, it must be more or less vertical,—before this rule, which is given in the act of congress, can be applied; but we have heretofore held, and are still of the opinion, that it applies to all lodes which have an inclination below the plane of the horizon, whatever it may be; that is to say, whether the lode stands at an angle of twenty, thirty, forty, seventy, or eighty degrees, that it is still within the terms of the act of congress. If it be a lode, and one that may be followed, with such boundaries as to enable the locator to identify it beyond his own territory, that, whatever its inclination may be below the horizon, that he may follow it. So that, to state the point so it may be applied to the present case, the inclination of the lode, if it should be, for instance, twenty or twenty-five degrees below the horizon, it is the same as if it were more; if it originated in the plaintiff's

ground, and extends into that beyond, the territory of the defendants, the plaintiff is entitled to it, although it may have no greater inclination than twenty or twenty-five degrees. Having stated to you that the controversy relates to the lode beneath the surface, as extended from the territory of the plaintiff's claim into that of the defendants, I have written here what I regard as the practical questions for your consideration, as well as directions regarding these questions. As a starting point in the evidence before you, the fact appears to be established that large quantities of valuable ore have been found in the Carbonate claim. This may be taken to show that a lode exists in that locality in so far as the question relates to the boundaries of that claim; that is to say, if the question for present consideration related to the ownership of the ore within the surface limits of the Carbonate claim, it would not be necessary to consider very carefully the position of the ore in the earth, because within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in another territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one shall show, by a preponderance of testimony, that such deposits belong to another lode, having its top or apex elsewhere. If, however, it is not important to examine the situation of the ore within the lines of the location, with reference to the question of ownership, it may be of some value to consider that subject for the purpose of ascertaining whether there is a lode in that ground extending thence eastward into adjoining territory. Upon that point it may be said that the mineral must be in place, within definite boundaries; that it must be practically continuous from the plaintiff's ground into defendants' ground; and that the top and apex of the lode must be in plaintiff's ground. As to the first question, if the lode is in the general mass of the mountain, as distinguished from the slide, debris, or "tumble stuff" of the surface, it is in place, within the meaning of the act of congress. If the rock above the lode is in its original position, although somewhat broken and shattered by the movement of the country, or other causes, it is in place. And in this kind of deposits it may be said that the lode is in place whenever the rock above is in place. The concurrence of detached masses of rock, whether called boulders or by some other name, and whether they are of lime or other formation, in proximity to the ore, is not, in itself, conclusive evidence that the overlying mass of rock is not in place. That fact, if it is a fact, may tend to prove that some or all of the overlying mass is of the same character. But if there is evidence to show that the overlying mass is not the same, but of original structure, the concurrence of boulders or detached masses of rock with the ore is not significant. If the principal part of the rock above the mineral is in its original position, according to the present structure of the mountain, the lode is in place, although some masses of rock or boulders may be associated with the ore.

Upon another question, the same circumstance, if it is proven, may be of some weight, and that question is, as to the boundaries of the lode. If the ore is found in general, within boundaries of porphyry and lime, although some fragments of each may occur with it, the lode is well defined. If, however, the ore occurs in porphyry and lime, or in both, or either, in such confused and irregular way as shows no line of demarcation for the ore body, the lode is not so defined as that it may be followed beyond the lines of plaintiff's location. The physical structure of the earth at and within the ground in controversy, and immediately west of the dividing line between the claims in plaintiff's ground, is to be considered in that view. If it is broken up and jumbled in such a way that from plaintiff's ground over the line and beyond, through defendants' workings, it seems to be unreasonable to say that there are boundaries of porphyry and lime to the mineral body, the plaintiff cannot recover. If there are such boundaries, the evidence is sufficient on that point. Intimately connected with this is the second question before suggested, whether the lode is practically continuous from plaintiff's ground into defendants' ground. Of course, if there is a continuous and unbroken sheet or body of ore extending from one claim into the other, there can be little doubt as to the boundaries, subject to the explanation already given relating to the position of the overlying rock; whatever may be above and below such a sheet or ore body, may be regarded as walls or boundaries. But if the mineral is not continuous, upon the facts here shown, we must look to the matter of boundaries to ascertain whether the lode extends from one claim to another. There may be such interruptions in the course of an ore body as to lead to the inference that there can be no connection between the separate parts, although the "contact," as it has been called, may continue from one to the other. But if you find from the evidence that there is a body of ore in plaintiffs' ground, near to their east line, and there are other bodies of ore in defendants' ground, and that there are well-defined boundaries to both and all which are the same as to both and all, and such boundaries extend from one to the other, you ought to find that they are parts of the same lode;

so that if the mineral is not continuous from one claim to the other, the question turns upon the matter of boundaries, and that is to be decided by the preponderance of testimony,—not the number of witnesses merely, but upon what you may regard as the weight of testimony, after giving due credit to each and all. These are the important questions. There is another that was referred to in the course of the argument. It is also mentioned in this instruction, but I have not commented on it,—as to the position of the top or apex of this lode. I have not heard any evidence which is sufficient to establish the fact that it lies below this claim,—to the west of it. You will remember that it was contended on the part of the defendants,—that as to this portion of the lode, if there is any within this ground,—that as to this portion which extends into the Little Giant ground, that it has its top or apex in the Aetna location, which is immediately west of the Carbonate location, and upon that hypothesis, that it would be owned by the Aetna people; that there was a lode beginning in their ground, having its top there, and extending clear across the Carbonate claim, and into the Little Giant claim. That would be a tenable position if there were evidence sufficient to establish the fact, but I do not regard the evidence of very great weight upon that point, and therefore I have not said much about it. But it is a question for your consideration, and if you find, as a matter of fact, that the top and apex of the lode, or such parts of it as are claimed by the plaintiffs against the defendants, that it lies in the Aetna ground and not in the Carbonate ground, but down to the west of the Carbonate claim, then, of course, the plaintiffs cannot recover in this action. Upon that theory or hypothesis the lode would belong to the Aetna people and not to the plaintiffs in this case.

The matter in controversy here relates only to that portion of the Carbonate claim or the Carbonate lode, if you find there is one, which extends from the northwest down as far as the Shamrock location. The evidence that was given in respect to all the working below that point, or southward from that point, is only to show the character of the deposit—to show what it was generally, and how it was found in all that territory. It is sufficient to say, if you find the issue for the plaintiffs, that they are the owners in fee so far as the claims adjoin each other. As to the question of damages, if you find for the plaintiffs, there is some evidence here tending to show that a certain amount of ore was taken from the ground, that is, from the territory covered by the Little Giant location. If you find for the plaintiffs, they are entitled to the value of that ore, whatever it may be. You will, perhaps, remember better than I, the testimony. I believe there is some evidence to show that something like $2,000 was taken out, or something of that kind. I do not think of anything more that may be necessary to say to you, gentlemen, except that the burden of proof is upon the plaintiffs,—that it rests with them, as they are holding the affirmative in this action, to show by a preponderance of testimony every fact which is necessary to support a finding in their favor; that is to say, that there is a lode in their ground, and that it has the top or apex of it, and that it extends in well-defined boundaries from their territory into that of the defendants. It is upon them to prove it by a preponderance of evidence. If you find the testimony to be evenly balanced, your verdict will be for the defendants; if there is a preponderance of testimony for the plaintiffs, it will be for the plaintiffs, of course.

[See Iron Silver Min. Co. v. Murphy, 3 Fed. 368.]

Case No. 8,159.

LEAGUE v. SMITH.

[Nowhere reported; opinion not now accessible.]

LEAH H. MILLER, The (ELLIOTT v.). See Case No. 4,393a.

LEAHY (WHITE v.). See Case No. 17,551.

Case No. 8,160.

LEAK v. ISAACSON.

[Abb. Adm. 41.] [1]

District Court, S. D. New York. July, 1847.

SEAMAN'S WAGES — RECEIPT IN FULL — DEMAND NOT SATISFIED—RECEIPT EXPLAINED—EFFECT OF RECEIPT.

1. A receipt in full of all demands given by a seaman to the master or owners, is open, in a court of admiralty, to explanation by proof that at the giving of the receipt there existed a demand in favor of the seaman which was not in fact satisfied by the payment made.

2. When so explained, the receipt does not bar the seaman from recovering upon such outstanding demand.

3. To free a demand from the operation of a receipt in full of all demands, in a court of admiralty, it is necessary that the evidence that there was a valid demand existing when the receipt was given, and that it was in fact not satisfied by the payment made, should be clear and convincing.

This was a libel in personam, by George Leak against Michael Isaacson, owner of the steamboat Proprietor, to recover a balance of wages earned as engineer. The facts were substantially as follows: The libellant was hired by the respondent in New York to go to Charleston, and there to go on board the Proprietor as engineer. No wages were agreed upon; but the value of the services for the time for which the libellant was at-

[1] [Reported by Abbott Brothers.]

tached to the boat was shown to be $70. The libellant went to Charleston at his own expense,—a service shown by the testimony to be worth $25, exclusive of travelling expenses. He also boarded for some days in Charleston. On the termination of libellant's service on the boat, the crew were paid off by Martin, the master, the libellant receiving the sum of $70. Upon that occasion, he, in common with the rest of the crew, signed a receipt in the following terms: "This is to certify, that the undersigned have this day received, from Mr. Michael Isaacson, the full amount of our and each of our claims or demands, of every nature, against the steamboat Proprietor or her owner. Dated New York, May 31, 1847." Prior to this time, the libellant had received at Charleston the sum of $19; but it did not appear whether this was for services or travelling expenses. The respondent now relied upon the receipt as being conclusive against the claim. The libellant offered evidence in explanation of the receipt as follows: Three witnesses, who were present when the receipt was signed, testified that Leak then claimed a balance due him, over and above the $70 earned upon the boat. A fourth witness testified that the respondent had told him, that he, the respondent, had agreed to pay the libellant $25 for his journey to Charleston, and that Captain Martin was to pay the rest. The principal question was as to the conclusiveness of the receipt.

Alanson Nash, for libellant.
J. Townsend, for respondent.

BETTS, District Judge. A receipt in full may form an exception to the familiar principle of law which permits receipts to be explained by parol evidence. The receipt of a sum in full of a debt is something more than simple evidence of the payment of the sum specified. Such a receipt betokens a controversy between the parties as to the amount due, a difference of opinion upon that point, and a mutual compromise and adjustment of a disputed indebtedness at the precise sum mentioned in the instrument. The receipt in full may well be regarded as embodying a compromise; and although fraud or serious mistake will sometimes authorize it to be disregarded, yet, under the municipal law as it prevails throughout all our states, such an instrument can only be avoided by clear evidence of a deceit, or gross mistake as to the rights concluded by it. The fact that the sum received is inadequate compensation for the claim, does not constitute a case which authorizes the disregard or opening of a formal and final receipt in writing; it is necessary, further, that the party should show that he acted under ignorance or misapprehension as to the nature or extent of his rights involved therein. Lawrence v. Schuylkill Nav. Co. [Case No. 8,143]. Thus, if the rights in claim are questionable, and honestly resisted, and time is given the creditor to consider the proposed payment, his receipt, given for less than his true demand, will not be set aside. It will be regarded as meaning deliberately to accept a lesser sum in payment in full of all demands; and cannot be easily opened to admit proof that unspecified particulars were intended to be excepted.[2]

In the view of admiralty, however, there is reason for imposing a more restricted rule in respect to receipts passed by seamen to masters, owners, or shipping agents. The parties in these settlements do not usually deal with each other upon equal terms. The seaman stands in a position which exposes him to be coerced or deluded into giving a receipt of this character, upon the temptation of a little ready money in hand, when no bonâ fide settlement has been made; and upon the ground of this inequality, and as a measure of protection to parties who are seldom qualified to protect themselves, admiralty will admit evidence in explanation of a receipt, no matter how clear, explicit, and conclusive its terms and solemnities may be. The doctrine of the maritime law on this subject is fully stated in the case of The David Pratt [Case No. 3,597]. In that case, in answer to a demand for wages, the defendant set up a receipt, under seal, signed by the libellant and others of the crew, of specified sums, "in full for our services in wages on board said vessel; and in consideration whereof, and of one cent to each of us paid, we have released, and do hereby release and discharge forever, the master, officers, and owners of said vessel, and each

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2 The case of Cash v. Freeman, 35 Me. 483, illustrates this principle. That was an action upon a note for $12, due July, 1851. The defence relied on a receipt given May, 1851, for $1.50, in full of all demands. Although the note was not surrendered at the time of giving the receipt, it was held to be within its operation. See, also, Cunningham v. Bachelder, 32 Me 316, where the principle that promissory notes, although left in the hands of the payee, are within the legitimate operation of a receipt in full, is also laid down. In confirmation of the general doctrine laid down in the text respecting the operation of the receipt in full, in the courts of law, see Paige v. Perno, 10 Vt. 491; Reid v. Reid, 2 Dev. 247; Emrie v. Gilbert, Wright, N. P. 764; Bailey v. Day, 26 Me. 88; Palmerton v. Huxton, 4 Denio, 166; Thompson v. Faussat [Case No. 13,954]; Bristow v. Eastman, 1 Esp. 173; Alner v. George, 1 Camp. 392; Eve v. Mosely, 2 Strob. 203; Holbrook v. Blodget, 5 Vt. 520; McDowall v. Lemaitre, 2 McCord, 320. To learn what grounds have been held sufficient to authorize the opening of a receipt in full by evidence of fraud or mistake, consult Thomas v. Austin, 4 Barb. 265; Patterson v. Ackerson, 1 Edw. Ch. 101, 2 Edw. Ch. 427; Derrickson v. Morris, 2 Har. [Del.] 392; Dibdin v. Morris, 2 Car. & P. 44; Trisler v. Williamson, 4 Har. & McH. 219; Sessions v. Gilbert, Brayt. 75; Benson v. Bennett, 1 Camp. 394, note; Snyder v. Findley, Coxe [1 N. J. Law] 48; Hogg v. Brown, 2 Brev. 223; Middleditch v. Sharland, 5 Ves. 87.

of them, of and from all suits, claims, and demands, for assaults and battery and imprisonment, and every other matter and thing, of whatever name or nature, against said schooner David Pratt, the master, owners, and officers, to the day of this date."

It was conceded by the court that this instrument was primâ facie evidence of payment, and sufficient, until falsified by positive proof, or strong presumption; and this is undoubtedly correct. But the notion that such an instrument, formal and solemn though it was, must be accepted as in itself conclusive against the claim, was justly repudiated as contrary to the free and equitable spirit of admiralty jurisprudence, however consonant it might be with the more rigorous doctrines of the common law.

A very analogous decision was made in the supreme court of New York, in the case of Thomas v. McDaniel, 14 Johns. 185. The decision in that case rested upon the indicia of fraud observable in the facts shown, rather than upon any general principle of protection to seamen; although the latter consideration is distinctly adverted to in the opinion of the court. The action there was by a seaman against the master for an assault and battery, committed during the voyage. The defendant offered a receipt, signed by the plaintiff, acknowledging to have received $60.50, "in full of all demands against the ship Independence, her officers and owners, for wages; also, $1.00, as a full compensation for every thing else."

A witness testified, that upon the settlement he explained the receipt to McDaniel, by stating that the one dollar was intended as a full compensation for all other claims except wages; and that the plaintiff at first refused to sign the paper, and waited three or four days. The master then put the money and the receipt upon the table, and told the seaman that he might sign or not, as he pleased. The plaintiff read over the paper and signed it, and received the money, nothing being said about assault and battery. The judgment in the court below was for the plaintiff, and was affirmed on appeal.

"There is strong ground to infer," say the court, "that the receipt was unfairly obtained. It was coupled with a receipt for the wages of the seaman, and the evidence shows that his wages, after being liquidated at $60.50, were withheld by the captain during three or four days, because the plaintiff refused to sign the double receipt. To a person in the situation of a seaman just arrived in port, after a long voyage, and probably without a cent of money, this was a fraudulent constraint on the part of the captain, from which the law will protect the seaman. It cannot be doubted, that if the wages had been unconditionally paid, the plaintiff would peremptorily have refused to sign the receipt for one dollar for every thing else."

The receipt in this case is, therefore, not to be regarded as absolutely concluding the libellant, while it is primâ facie evidence of payment in full. It is open in this court to explanation, not only by evidence of fraud or of ignorance of the outstanding claim, but also by clear and distinct proof, that at the time of the settlement there was a valid outstanding claim which was not in fact embraced in the payment actually made. This would not be sufficient at common law, unless it were also shown that the rights of the party in respect to such outstanding claim were in some respect unknown or misunderstood by him, and this through no fault or neglect of his. In admiralty, however, it is enough that a valid outstanding claim be shown, if the proofs are such as to put its existence and validity beyond question. I have, therefore, received and considered the evidence offered by the libellant upon this point.

The evidence does not appear to me of that clear and explicit character which will justify the court in disregarding the receipt. It is denied by the answer, and is at least equivocal upon the proofs, that the libellant was entitled to any wages antecedent to the time when he joined the boat at Charleston. The libellant claims to regard the payment made to him in Charleston as having been made only upon account of his demand both for wages and expenses accrued during the journey; but I think it may be fairly regarded, under the proofs as they stand, as intended for a satisfaction of all claims preferred by him upon the score of his employment prior to his joining the steamboat; particularly as it is equivocal whether he was entitled to demand any thing beyond the reimbursement of his expenses. In that view of the case, the receipt of the 31st of May, in my opinion, closed the whole transaction, and the respondent is accordingly entitled to a decree dismissing the libel. Decree accordingly.

NOTE. A rehearing of the cause was had before a commissioner in August, 1847, for the purpose of taking additional proof. The commissioner reported that $25 was due to the libellant. The cause came again before the court in January, 1848, upon exceptions to the report, when the following decision was made:

"BETTS, J. The additional evidence adduced before the commissioner in explanation of the receipt relied upon by the respondent in this case, consists in the testimony of a witness, who states that the usual charge for a passenger on board the steamer Southerner to Charleston was $25. He also states that mariners employed for other ships were not taken gratuitously on board that vessel. Upon this the commissioner reports $25 to the libellant. I have reviewed all the pleadings and proofs to see whether any reasonable evidence is furnished tending to show that the libellant was not paid to his satisfaction for all the services and expenditures rendered by him under his engagement with the respondent. I do not think the suppletory testimony taken before the commissioner in any respect strengthens the libellant's case. It is not additional to that produced on the hearing, further than that it fixes the usual price of a passage to Charleston. It does not show that

the libellant paid that amount, nor that the $19 paid him in Charleston was not advanced to cover that disbursement. If any thing could be presumed to be due, it would not exceed $6, the difference between $19 and $25, and it is wholly conjectural whether or not the libellant ever disbursed that sum. The claim is a very small one, and does not merit the protracted litigation it has generated. The libellant ought to have remained silent after his full and solemn receipt in writing, unless he was able to give convincing proof that other demands were due him, and were reserved out of that full settlement. I am not satisfied that this was so, and shall accordingly allow the exception taken to the report, with the costs accruing upon the exception."

LEANDER, The (FLINN v.). See Case No. 4,870.

Case No. 8,161.

LEANING v. STANDISH.

[N. Y. Times. May 4, 1864.]

District Court, S. D. New York. 1864.

CARRIERS—DELIVERY OF CARGO—SHIPPING—DEMURRAGE—EVIDENCE OF PARTY IN INTEREST.

[1. The carrier fulfills his undertaking by bringing the cargo to the appointed port with notice to the consignee of that fact and the readiness of the ship to deliver it at a convenient and proper place.]

[2. The testimony of the clerk of the respondent will overcome that of libelant testifying for himself.]

[Libel by Matthew Leaning against William Standish for freight and demurrage.]

Mr. Donovan and Judge Whiting, for libelant.

Mr. Lyons and Mr. Benedict, for respondent.

BETTS, District Judge. This was a libel for freight and demurrage. The libelant was master of the barge Anthracite. The coal was shipped at Swatara Collier, to be delivered at New York, "unto Hiram Tocht or his assigns, he or they paying freight at $2.70 per ton, and demurrage at the rate of $10 per day for any detention over three days after notice of arrival has been given to the consignee." The libelant at New Brunswick received instructions to deliver his coal to the respondent at the foot of Delancy street. On the 18th of December the arrival of the vessel was reported, and on the 24th of December the libelant signed a receipt for "$25 of Hiram Tocht, on account of the freight." The vessel was not able to get to a berth for several days. The respondent's clerk testified that after the barge had arrived, he told the libelant the respondent would take the coal at the foot of Stanton street, where there was a berth; but this the libelant denied. He finally got a berth at the foot of Delancy street, and after that there was no delay in receiving the coal. The libelant claimed to recover the freight and demurrage for ten days. The respondent did not contest the freight, but denied his liability to pay demurrage.

HELD BY THE COURT. That the carrier fulfills his undertaking expressed in a bill of lading of the purport of this one by bringing the cargo to the appointed port, with notice to the consignee of that fact, and the readiness of the ship to deliver it at a convenient and proper place. The duty of the consignee is to designate the place of delivery, and to be ready to receive the cargo as it comes from the ship. Whether that shall be from her side in the stream, or landed on a quay, must be a matter depending upon the condition of the port in means and facilities of commercial accommodation, or arrangement between the parties. That in this case the delivery was to be made at a dock acceptable to the consignee. That the evidence of the claimant on the question of his readiness to receive the coal at Stanton street is the stronger; the libelant testifying for himself against the clerk. That the respondent is entitled to a decree on the claim for demurrage.

LEAP (VIRGINIA v.). See Case No. 16,964.

LEAR, The (DENNIS v.). See Case No. 3,796.

LEAR (JONES v.). See Case No. 7,476.

LEAR (WAGER v.). See Case No. 17,034.

LEARNED v. BURLINGTON. See Case No. 14,687.

LEARNED (UNITED STATES v.). See Case No. 15,580.

Case No. 8,161a.

LEARS et al. v. ONE CASK OIL.

[2 Betts, D. C. MS. 94.]

District Court, S. D. New York. Jan. 6, 1842.

FINDING LOST GOODS—CONCEALMENT—PROOF OF OWNERSHIP—CLAIM—RIGHT TO SALVAGE.

[1. Evidence that libellant's whaling vessel was recently wrecked in the vicinity where a cask of oil was picked up at sea; that similar casks of oil were picked up and delivered to libellant; and that the currents were such as to drift casks in that direction from the wreck is sufficient prima facie proof of ownership as against the finder who conceals it.]

[2. Where a master conceals a cask of oil which he has picked up at sea and sells it at a secret sale after claim of ownership is made, he is not entitled to salvage compensation, or to be refunded duties paid by him.]

[This was a libel in rem and in personam by Prince Sears and others against one cask of oil and Samuel Banker.]

D. Lord, for libellants.

Mr. Campbell, for claimant.

BETTS, District Judge. The libel seeks to recover the value of a cask of spermacetta oil, picked up at sea by the claimant. The process was in rem and in personam and was only served upon the defendant, the

oil not being attached. The claimant is master of the British ship Sir Lionel Smith, and after taking on board a pilot about the middle of May, and within 40 miles of this port, they fell in with the cask of oil in question floating at sea, secured it, and brought it to this port. The master entered it at the custom house as found at sea, and paid duties on it. He was informed by the pilot when the cask was first discovered, and after it was secured, that the whaling ship Forrester had been recently wrecked about the 20th of April, on the S. E. side of Long Island, and that similar casks of oil had been picked up by his boat and delivered to Grinnell, Minturn & Co., in New York, the agents of the owners of the Forrester. The pilot further stated that the courses of the currents were such as to drift casks in the direction from the wreck this one was found. On the arrival of the Sir Lionel Smith here, demand was made on board her by Grinnell, Minturn & Co. in behalf of the owners of the Forrester to deliver to them the cask of oil, proffering to the master indemnity against all other claims, and a reasonable reward for his services. The claimant declined delivering it up, on the allegation that the ownership was not proved to him, and subsequently, when repeatedly called upon refused to allow the cask to be seen and examined, with a view to identifying it or ascertain the quantity of oil and removed it from the vessel and placed it for sale in the hands of an agent of his own.

Although the proof is not very direct or full to the fact that this cask was one of the cargo of the Forrester, yet the circumstances all conduce strongly to that conclusion and would well warrant a jury in the absence of all other evidence in so finding it. A court of admiralty ascertains and adjudges facts upon the same principles that obtain with juries, and I shall accordingly hold that the evidence is sufficient to establish prima facie the ownership of this property in the libellants. The course of the claimant in respect to it was most unjustifiable and inequitable. If his motive had been to exonerate himself from responsibility, he would have deposited the property in the public stores, with his consignee and the consul of his country, and caused public notice to be given of the fact and of the finding. On the contrary, he studiously concealed and abstracted the property from all public observation or examination and evinced a purpose to appropriate it to himself, offering it at private sale, &c. He did not even advertise it in any paper, until proceedings were on foot to commence this action and as he was on the eve of sailing from the port, and does not now surrender the property to be sold for the benefit of whomsoever may show title to it, but interferes and claims it now as having a better right to it than the libellants. Whilst the court would be most ready to protect and remunerate the claimant in his agency in this matter if he had manifested a disposition to discharge fairly the trusts of a casual bailee, yet it will in no way countenance an effort to make his own, the property of others, which came into his possession under circumstances calculated to inspire the deepest anxiety with every upright mariner to effect its restoration to those from whom it was taken by the disasters of the sea. I think the studious efforts of the claimant to conceal this oil and effect a secret sale of it, knowing the claim of property by the libellants, deprives him of all title to compensation for his services in rescuing it and bringing it in, and for the duties he gratuitously and unnecessarily paid on its entry, and also most justly exposes him to the payment of the costs the libellants have incurred in recovering their property.

I shall accordingly decree that the libellants recover $^{85}/_{100}$ per gallon, the value of the oil at the time it was brought in, and costs of suit to be taxed. The quantity of oil is to be regarded as 168 gallons, but if the claimant desires it, the cask may be gauged at his own expense; and the quantity returned be received as the true amount on which the computation is to be made.

Case No. 8,162.

In re LEARY.

[10 Ben. 197.] [1]

District Court, S. D. New York. Jan. 1879.

EXTRADITION—HABEAS CORPUS—PRACTICE — CONCLUSIVENESS OF WARRANT—EVIDENCE.

1. On habeas corpus, where the prisoner is held under an extradition warrant of the governor, which recites that it was issued upon the requisition of the governor of another state, accompanied by a copy of an indictment for burglary, certified as duly authenticated, the warrant is conclusive evidence that the person named therein stands charged with crime in such other state within the meaning of the constitution and of U. S. Rev. St. § 578 (Act 1793, c. 7, § 1 [1 Stat. 302]).

[Cited in Ex parte Brown, 28 Fed. 654.]

2. Although by his traverse to the return the prisoner denies that any such charge of crime was made or that there is any such indictment against him, and craves oyer of the same and demands that the respondent be put to the proof thereof, it is not necessary for the respondent to produce a copy of such indictment or of the requisition of the governor of the demanding state, nor is the prisoner entitled to a writ of certiorari or other process against the governor to compel the production of the papers on which the warrant issued, nor is it necessary that copies of said papers should be annexed to the warrant, nor that a copy of the indictment authenticated in the mode provided by act of congress for the authentication of records of one state to be used in another state (Rev. St. § 905), should be produced to the governor before the issue of the warrant.

3. Where the petition for habeas corpus and the traverse to the return denied that the prisoner was a fugitive from justice, or the person named in the warrant, and the respondent produced a witness who testified that he attended the session

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

of the grand jury in the county in which by the warrant it appeared that the crime of burglary was charged to have been committed, and that the subject of inquiry was the said burglary, and that he was sworn as a witness, and that his testimony related to J. L. and others, and the meetings of said persons, and that the J. L. referred to in his testimony was the prisoner, and that he procured the warrant from the governor: *Held*, that this was sufficient evidence, at least prima facie, that the prisoner, whose name was J. L., was the same person named in the warrant and a fugitive from justice, although the witness testified on cross-examination that he never saw the prisoner in such other state.

4. Whether in all cases the warrant is conclusive evidence on habeas corpus that the person named therein is a fugitive from justice, quere.

5. The word "crime," in the article of the constitution relating to inter-state extradition and the statute (Rev. St. § 5278), includes every act made criminal by the law of the demanding state, whether it was so at common law or not, and even though made so by a law subsequent to the adoption of the constitution and the passage of said act of congress.

6. Under U. S. Rev. St. § 760, no pleading is required after the traverse to the return. The new matter averred therein is to be deemed at issue.

7. On habeas corpus the question of the identity of the prisoner with the person named in the warrant is always open.

8. A court of the United States has jurisdiction of a petition for habeas corpus by a person alleged to be illegally restrained of his liberty under or by color of the authority of the United States, although a proceeding by certiorari is pending in a state court at his suit for the review of a decision of an inferior court dismissing the writ of habeas corpus issued on his petition.

9. On habeas corpus before a court of the United States sued out by a prisoner held under a warrant of the governor as a fugitive from justice, it is not necessary that notice of the proceeding be given to the attorney-general of this state.

At law.

Peter Mitchell (A. S. Sullivan, of counsel), for petitioner.

H. W. Bookstaver (W. Britton, of counsel), for sheriff.

CHOATE, District Judge. The petitioner, John Leary, by his petition sworn to the 21st day of December, 1878, applied to this court for a writ of habeas corpus, averring that he was held in custody by the sheriff of the city and county of New York; that the pretence of his imprisonment was a warrant issued by the governor of New York directing the sheriff to arrest said Leary and deliver him over to the custody of one Pinkerton, to be taken to the state of Massachusetts, upon a requisition of the governor of Massachusetts to the governor of New York, charging him with the commission of a felony in the state of Massachusetts and with being a fugitive from justice from said state; that the petitioner denied that he was the person named and mentioned in said requisition or in said warrant of extradition or that he ever fled from the said state of Massachusetts to the state of New York.

The writ was allowed, and the sheriff produced the prisoner and made return that he arrested and held him under a writ or requisition directed and duly issued to him as such sheriff by the governor of New York, of which writ he annexed to his return a copy and the original of which he produced, and secondly, that, while he so held the petitioner in custody, a writ of habeas corpus was served upon him issuing out of the supreme court of the state of New York, requiring him to produce the petitioner before one of the justices of that court; that in compliance with the writ he had produced the petitioner before said justice, that a hearing was had on said writ of habeas corpus and finally determined by an order dismissing the writ and remanding the prisoner; that afterwards the prisoner sued out a writ of certiorari to review said determination, upon which writ a justice of said supreme court had made an endorsement allowing the same and directing that said writ operate as a stay of proceedings until the decision of the general term of said court thereon, and directing that the sheriff in the meanwhile keep the prisoner in his custody. The relator filed his answer or traverse, wherein he denied that he was the person mentioned or described in the alleged requisition, if any was made by the governor of Massachusetts, or that he was the person mentioned in the warrant of arrest, or that a copy, certified as authentic by the governor of Massachusetts, of any indictment found or affidavit made before any magistrate of said state of Massachusetts, charging him with having committed any crime in Massachusetts, was produced by the executive authority of Massachusetts to the governor of New York in connection with any such alleged demand, or that any charge of any crime under the provisions of the constitution of the United States, or of the acts of congress in such behalf, had ever been made in the state of Massachusetts against him, on which the arrest and detention were founded, or that any such pretended charge in the form of an indictment or affidavit had been produced before, furnished or exhibited to him the relator as the basis of said proceedings for extradition. And he craved oyer of said pretended charge, if any, and that the respondent should be put to his proper and necessary proof. He also denied that, at the date of the alleged demand by the governor of Massachusetts, the governor of that state had before him any facts showing that the petitioner then was, or ever had been, a fugitive from the justice of that state, and he denied that he was such fugitive, or that any facts or evidence were shown or produced to the governor of New York, sufficient to show that he was such fugitive from justice. He also denied the commission of any offence in the state of Massachusetts, or that he was ever in the county of Hampshire where said crime was alleged to have been committed. He further alleged that he was a

citizen of the state of New York and had been a resident thereof for the last five years; that he was not in the state of Massachusetts at the date when said alleged crime was committed nor for five years prior thereto nor at any time since; that the said requisition was procured and his arrest and extradition promoted for some hidden and ulterior motives, and that the whole proceeding was a misuse and abuse of the provisions of the constitution and laws of the United States in which the governors of Massachusetts and New York had been unwittingly misled.

The writ or mandate issued by the governor of New York, recited that "whereas, it has been represented to me by the governor of the state of Massachusetts that John Leary, James Brady, James Draper and James Grier, stand charged with the crime of burglary and entering the Northampton National Bank and stealing the moneys thereof, committed in the county of Hampshire in said state, and that they have fled from justice in that state, and have taken refuge in the state of New York; and the said governor of Massachusetts having in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said John Leary, James Brady, James Draper and James Grier to be arrested and delivered to Robert A. Pinkerton, who is duly authorized to receive them into his custody and convey them back to the said state of Massachusetts; and whereas, the said representation and demand is accompanied by a copy of this indictment, whereby the said John Leary, James Brady, James Draper and James Grier are charged with the said crime, and with having fled from said state and taken refuge in the state of New York, which is certified by the said governor of Massachusetts to be duly authenticated, you are therefore required to arrest and secure, etc., etc."

Upon the return day of the writ, besides the sheriff, who appeared in person and by counsel, the state of Massachusetts appeared by counsel.

The petitioner having filed his traverse or answer to the return, it was held that the statute required no further pleading, but that the averments of the answer would be taken as denied by the respondent.

The return having been filed, the counsel for the state of Massachusetts moved that the writ be dismissed or that the prisoner be remanded pending the proceedings in the state court on the writ of certiorari, on the ground that the prisoner was to be regarded as constructively in the custody of the state court and that therefore this court would not, on principles of comity, proceed with a matter which might involve the taking of the prisoner out of the custody of the state court. But it was held that the proceeding pending in the state court, in the nature of a review on appeal from the decision of the justice, did not prevent this court from proceeding with the cause, and the motion was denied.

The counsel for Massachusetts then and before the traverse was filed, by leave of the court withdrew his appearance.

The counsel for the prisoner moved that notice be given of these proceedings to the attorney-general of the state of New York. But it was held that the statute required no such notice and the motion was denied.

The respondent then called as a witness one Robert A. Pinkerton, who testified that his occupation was that of a detective, that he had known the prisoner for four or five years in several cities; that he was present at proceedings before the grand jury of Hampshire county in Massachusetts in June, 1877, and was sworn as a witness; that the subject of inquiry was the robbery of the Northampton Bank, that his testimony related to John Leary, James Brady, James Draper and James Grier, and in relation to meetings between those four persons; that the John Leary, to whom his testimony related, was the prisoner; that he caused this mandate of the governor of New York to be procured and that it was sent to him by the governor. On cross-examination he testified that he never saw the prisoner in Massachusetts.

The mandate of the governor was then read in evidence.

Upon this evidence, the respondent having rested, the counsel for the prisoner moved for his discharge, on the ground that there was not sufficient evidence that he was the person against whom the mandate issued, nor that he was a fugitive from justice, nor any competent evidence that he was charged with crime. This motion was denied and it was held that there was sufficient evidence for the respondent on these issues, at least prima facie.

The counsel for the prisoner offered to read in evidence as an affidavit the petition for the writ of habeas corpus. The prisoner was in court. The motion was denied on the ground that it would not be a proper exercise of the discretion, with which the court is vested to receive affidavits in evidence on proceedings of this character, to receive this affidavit, the affiant being present and able to testify in person.

The counsel for the prisoner claimed that the burden of proof as to a charge of crime was upon the respondent; that the petitioner having denied that he was charged with crime, the respondent should be held obliged to produce a copy of the indictment, if any there was, duly authenticated according to the provisions of the act of congress regulating the authentication of the judicial records of one state that are offered in evidence in another state, that is, a copy certified by the clerk of the court under its seal with the certificate of the judge to the genuineness of the clerk's attestation; that the re-

spondent was also bound to produce proof that a requisition had been made by the governor of Massachusetts in the form and with the accompanying documents required by the constitution and act of congress, and that these papers on which the governor of New York issued his mandate, or authenticated copies of them, should be produced before the court, so that the court might pass judicially on the question whether those papers contained a charge of crime and justified the issue of the warrant. And the counsel for the prisoner claimed further, that even if the recitals of the mandate are prima facie evidence of the existence and sufficiency of these papers, that the prisoner has a right to produce them, and in case they, or copies of them, are not on his request furnished by the governor, that he should have the process of the court to compel their production.

The prisoner has shown that he has applied to the governor of New York for these papers or copies of them, and that the governor has declined to furnish them. He has also used due diligence to obtain copies of them from the governor of Massachusetts, but he has declined to furnish them. And the counsel for the prisoner has applied to the court for its aid by some compulsory process to obtain this evidence. And upon the case, as it stands, if these papers would, when produced, be competent evidence in his behalf, and if the court has the power to compel their production, a case has been made out for a postponement of the cause for the issue and return of process for this purpose.

On the other hand, it is contended by the respondent that the mandate of the governor is not only prima facie but conclusive evidence in these proceedings of the fact that the prisoner is "charged with crime" within the meaning of the constitution and the act of congress; that the papers on which the governor acted would not be, if produced, competent evidence, and that there is no power in the court to compel their production.

This question depends upon the construction of the clause of the constitution relating to fugitives from justice and of the act of congress which was passed to carry it into effect. The clause of the constitution is as follows: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." And the act of congress passed in 1793 to carry this constitutional provision into effect and to provide a mode of procedure under it (1 Stat. 302) is as follows: "Section 1. That whenever the executive authority of any state in the Union, etc., shall demand any person as a fugitive from justice, of the executive authority of any such state, etc., to which such person shall have fled, and shall moreover produce the copy of an indictment found or an affidavit made before a magistrate of any state, etc., as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state, etc., from whence the prisoner so charged fled, it shall be the duty of the executive authority of the state, etc., to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Section 2 authorizes such agent to transport the person so delivered to him to the state from which he shall have fled.

For the proper understanding of these provisions, it is necessary to consider the nature of the subject matter thus regulated and the existing state of affairs at the time of the adoption of the constitution and the passage of this statute. The duty of delivering up fugitives from justice as between independent states and nations, unless affected by treaty, that is, by express contract between them, rests wholly on principles of comity, that is, upon the natural inclination of states on terms of amity with each other to concede to each other such reasonable favors on request as shall not be inconsistent with their own interests or the rights and interests of their own subjects or citizens, and to secure for themselves a reciprocity of benefits by the exchange of such friendly offices. And while some continental jurists have claimed that the surrender of fugitives from justice in cases of atrocious crime may be demanded as a right by one state of another, this right has in England and this country been denied to have any existence. Story, Confl. Laws, § 628, and authorities cited; Opinions of Jefferson, Monroe and Clay, cited in Hurd, Hab. Corp. (2d Ed.) pp. 578, 579. And see Holmes v. Jennison, 14 Pet. [39 U. S.] 540.

It has been said that "prior to the American Revolution, a criminal flying from one English colony into another, found no protection, but was arrested by the authorities of the territories into which he fled and delivered up for trial within the jurisdiction where the offence was committed, and this because the several colonies formed but parts of the same empire, under a common sovereign, and therefore presented no opportunities for the conflict of the rights and duties of independent sovereigns." Letter of Judge Bell to the governor of Penn., 2 Pa. Law J. p. 150.

It appears, however, that the practice of returning such fugitives as between the American colonies, rested partly at least on treaties

between the several colonies. Treaty between the colonies of Mass., New Plymouth and Conn., referred to by Chief Justice Taney in Kentucky v. Dennison, 24 How. [65 U. S.] 101. But whatever may have been the practice in this respect between the colonies, and on whatever basis of law or treaty it rested, there is no doubt that when the colonies achieved their independence they stood towards each other, as regards this matter, in the position of independent states, and the surrender of fugitives from justice became, as with other sovereign states, purely a matter of comity, except so far as it was or should be regulated by treaty or compact between them. And yet from the manner in which the country had been settled, and from the artificial character of the state boundaries, the dividing lines between them having been fixed with little or no regard to natural barriers or lines of defence, running in some cases in the close vicinity of cities or large towns, being, in fact, such boundaries as could only have been produced or continued during a long period of peace between the colonies, the escape of fugitives from one of the states to another was peculiarly easy, and the mischiefs thus resulting threatened not only the domestic peace of the states, but also their friendly relations with each other, unless some reasonable regulation thereof was effected. And when the articles of confederation were adopted, a provision was made for the surrender of fugitives from justice almost identical with that afterwards incorporated into the constitution of the United States. The language of the constitution is, as regards the nature of the duty to deliver the fugitive, imperative and unequivocal. "A person charged with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand, etc., be delivered up." And the great weight of authority, as well as the obvious import of the language used, is that the constitution established an absolute right to the surrender, when the case was one coming within the terms of the constitution—that is, the case of a person charged with crime—who had fled from justice—and whose surrender was demanded by the proper authority. It is true that the duty has been by the governors of some of the states treated as discretionary, but the authorities are clearly against this view. Kentucky v. Dennison, 24 How. [65 U. S.] 66. It has been well remarked in reference to the case last cited, that although the court finally came to the conclusion that they had no jurisdiction to grant the mandamus prayed for, yet the views expressed in that decision as to the construction of this clause of the constitution possess but little less than the force of absolute authority. In re Voorhees, 32 N. J. Law, 149. And it is now settled by a great preponderance of authority, state as well as federal, that the word crime in this clause of the constitution embraces every species of offence made punishable as a crime by the laws of the state making the demand, even though it were not a crime by the common law or the laws of other states, and even though for the first time made a crime by a law passed subsequently to the adoption of the constitution and the passage of this act of congress.

Therefore, it appears that the right to demand the surrender of a fugitive from justice, as between these states, is no longer an imperfect right to be conceded as matter of favor or comity, or refused, if the state in which he has taken refuge may so determine, on consideration of its interest or policy, or its view of international law, nor a right resting in the obligation of a contract alone, as by treaty, but a constitutional and legal right, having fixed and well-ascertained conditions. And the same instrument or frame of government, which for national purposes welded the several states into a single country, brought this matter and this obligation within the purview and jurisdiction of the federal authority. As the constitution is more than a compact between the states, so this right and this obligation, as secured by the constitution, became something more than an obligation and a right resting in contract or treaty.

But the constitution did not provide means for carrying into effect this provision, and soon a case arose between Virginia and Pennsylvania, in which the return of a fugitive was denied, because congress had passed no law pointing out the means for enforcing this provision,—determining how and on what officer the demand should be made, and by what evidence it should be supported. Then followed the act of 1793, now in question. By that act the demand is required to be made on the governor of the state, and to be accompanied by a copy of the indictment found, or affidavit before the magistrate, charging the crime, certified by the governor of the state making the demand as authentic.

Independently of all constitutional and legislative provisions, the surrender of fugitives from justice has, between nations, been treated as an executive power lodged in the supreme executive authority of the state. It was an international concern, and the executive is the organ of communication between one state and another, and under the first treaty with Great Britain, in the case of Robbins, the power of the president to surrender a fugitive from justice, whose extradition was claimed under a treaty which is declared by the constitution to have the force of law, was held by the concurring authority of the executive department of the government, the house of representatives and the district court of the United States for the district of South Carolina to be exclusively an executive power and duty in the absence of any legislative regulation. See statement of this case in Hurd, Hab. Corp. (2d Ed.) pp. 582-588. See, also, Holmes v. Jennison, supra. Although this case provoked great

discussion, yet the result shows how strongly, at that time, the opinion prevailed that this was essentially an executive power. While congress had a considerable latitude of choice as to the means to be employed to enforce this constitutional obligation and right, it saw fit to preserve, as nearly as possible, the existing methods as to dealing with the subject, devolving the duty of performing the obligation on the supreme executive authority of the state where the fugitive might be found. As to the evidence to be produced to him that the party demanded is charged with crime, the mode of proof is particularly prescribed and limited by the act itself. It must be by a copy of an indictment or affidavit certified by the governor of the state making the demand as authentic. Under this statute clearly no other evidence is sufficient, or can be received by the governor on whom the demand is made as sufficient in proof of the fact that such indictment or affidavit exists as the basis of the charge of crime. The constitution provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and congress may, by general laws, prescribe the manner in which acts, records and proceedings shall be proved, and the effect thereof." Congress has, by general laws, provided the mode of proving in one state the judicial records of another state, but it was clearly competent for congress, by a general law, to provide what should be the mode of proving an indictment, or other judicial proceeding, for the purpose of these extradition proceedings, and congress having legislated thereon, the authentication by the governor of the copy is clearly the mode provided by general law for this purpose, and such authentication imports absolute verity, and no other authentication is necessary to enable the governor to act under the statute, although for other purposes congress has provided a different mode of proving state records. This disposes of the claim that a copy of the indictment certified by the clerk of the court with the accompanying certificate of the judge, must be produced either to the governor or to this court in proof of the fact that the party is charged with crime.

And upon the question whether the warrant of the governor is conclusive evidence in this proceeding that the party named in the warrant stands charged with crime in the state demanding his surrender, I am of opinion that both on reason and authority the warrant is conclusive. The statute itself especially provides, that the governor shall cause the party to be arrested and delivered up. It makes no provision for any other proceedings whatever subsequent to the issue of the mandate of the governor except the delivery of the party and his removal by the agent of the demanding state. It may well be assumed that in devolving this duty and responsibility on the highest executive officer of the state, congress understood that they were making a suitable provision for securing the careful execution of the duty under circumstances calling for great caution and circumspection. The governors of these states were the representatives of the sovereignty of the states, so far as it still existed in a qualified form. They were aided in their positions by high legal officials, and in some of the states had the constitutional right to call on the highest court in the state for its opinion on doubtful questions of law. They were especially charged with the execution of the laws of the state and might be assumed to be naturally jealous of any attempt to abuse this particular right of demanding fugitives, since it was a demand for the surrender of their own citizens or persons found within the protection of their own laws. Not only is there nothing in the act to show that any proceedings subsequent to the issue of the warrant were contemplated to give full authority for the arrest and removal of the party, but there is nothing in the act requiring the governor issuing the warrant to attach thereto the evidence or copies of the evidence on which he acted, nor since the passage of the act has the practice obtained, so far as appears, of attaching such copies. This uniform practice of eighty-five years is strong proof that no such copies are necessary to accompany the warrant. Moreover, neither by this act, nor by any other, is any process given for compelling the governor of a state to perform a federal duty or obligation devolved upon him by a federal law. In this very matter the supreme court of the United States have held that while the duty of surrender is absolute and a mere ministerial duty, yet that, especially in view of the nature and dignity of the office of governor and the great public mischiefs that would result from the exercise of such coercive powers against him, the federal government has not in any of its departments the power to issue the writ of mandamus against him to compel the issue of the warrant. Kentucky v. Dennison, ut supra. It is suggested in the present case that this court can issue a writ of certiorari against the governor, to compel the production of this record, but the objections stated in the case last cited against a mandamus apply with equal or still greater force to the exercise of such a power by this court. Nor can the governor of the state be regarded as in the position of an inferior tribunal or magistrate to whom the writ of certiorari will issue in aid of a writ of habeas corpus. In the performance of this duty, he does not act as an inferior magistrate, but as the representative of, and the officer vested with, the executive authority of the state, and not as a federal officer or magistrate. Speaking of the governor's duty to issue the warrant, Chief Justice Taney says: "The act does not provide any means to compel

the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution, which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the federal government, under the constitution, has no power to impose on a state officer as such any duty whatever and compel him to perform it; for if it possessed this power it might over-load the officer with duties, which would fill up all his time and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state." "But if the governor of Ohio refuses to discharge this duty (i. e., "the obligation on the state to carry into execution" this law) there is no power delegated to the general government, either through the judicial department or any other department to use any coercive means to compel him." And if it was not within the contemplation of congress that any coercive measures should be used against the governor to compel the performance of the principal duty involved, namely, the issuing of the warrant, it is not supposable that it was within their contemplation that any coercive measures would or could be used to compel the performance of any other duty that might devolve upon him as an incident to, or result of, the performance of such principal duty. And if the issue of a mandamus by the supreme court against a governor might lead to imposing on him duties inconsistent with the performance of the duties of his office of governor of the state and with the dignity of his position, yet more unseemly and improper would be the attempt of an inferior court of the United States to subject him to the process of certiorari to compel the production of papers, with the consequences which must flow from his refusal, of his being treated by the court as in contempt. The total want of power to compel the production of the papers on which the governor acted, is itself a strong argument against the intention of congress to make the governor's determination subject to review by the courts.

The relations in which the states stood to each other at the time of the formation of the constitution, and the relations which that constitution created between them, as known and understood at the time of the passage of the act, make it not improbable nor unreasonable to suppose, that the warrant of the governor should on this question of the fact and sufficiency of the charge be made conclusive within the intention of congress, even though the effect of it is that the party should, when arrested on the warrant, be deprived of an opportunity to contest that fact on habeas corpus in the state in which he is arrested. The prior relations of the states were friendly. They had recently won their independence by a war in which they had acted together. Their territories were largely settled by people from the same country and in all of them the system of the common law of England obtained, by which all persons restrained of their liberty had free access to the courts on habeas corpus, to inquire into the cause of their detention. And the people of these states had entered by this constitution into "a more perfect union," among the declared objects of which were "to establish justice, insure domestic tranquility and promote the general welfare." The thirteen states thereby became one nation, in all parts of whose territory the citizens of each were to have the rights and immunities of citizens of that common country and were not to be in any of the states in the position of strangers and foreigners. Considering that all the disadvantage that results from the conclusiveness of the warrant of the governor on this point is that the alleged fugitive is thereby removed to another state of the Union where he has open to him still the privileges of habeas corpus, and a trial according to the methods and under the securities of a system of law similar to that prevailing in his own state, and where all his privileges of citizenship remain, and considering the existing relations of the states, there was neither such hardship nor such apparent risk of injustice as to have created any reasonable apprehension that such an arrangement imperilled or put in jeopardy the life or liberty of the citizen, or was liable to subject him to any unreasonable detention or inconvenience beyond what was essential to a proper regard to the public safety and the orderly administration of public justice. The unhappy differences that have since arisen between the several parts of the Union, and which might have suggested danger to life or liberty in this arrangement, did not then exist and cannot have been had in view by the congress which framed this law.

In the treatment of this subject it is not to be overlooked that this is in the nature of a national police regulation, and that the arrest, detention and removal of the alleged offender are not for the purpose of punishment, but for purposes preliminary to trial, and for the securing of persons against whom there is probable cause to believe that they are offenders against the laws, and that this provision of the constitution and this act of congress are based upon the theory that as between these states the proper place for the inquiry into the question of guilt or innocence is the state where the offence is alleged to have been committed.

In view, then, of the nature of the right and obligation sought to be enforced by this

statute, of the prior history of the subject matter, of the terms of the law itself and the practice under it, of the character and dignity of the office of the governor on whom the duty of determining the question prior to the issue of the warrant devolved, of the security against abuse afforded by his position, responsibility and surroundings, of the evident impossibility of issuing process to review his decision, and of the relation between the states before and at the time of the enactment of the law, and of the purpose and effect of the warrant of removal, I think that the recital of the warrant was intended by congress to be conclusive as to the charge of crime made against the alleged fugitive and that the refusal of Governor Robinson to furnish to the petitioner the requisition and accompanying copy of indictment for the purpose of the proposed review of this decision by this court was in entire accordance with the proper view of his official duty, under the act of congress in question.

As a question of authority, the decisions of the courts are conflicting. In State v. Buzine, 4 Har. (Del.) 572, Chief Justice Booth held the warrant conclusive, disposing of the matter in the following language: "These matters are entrusted to the judgment of the executive upon whom the demand is made; and if his mind is fully satisfied in regard to them, the act of congress makes it his imperative duty to cause the fugitive to be arrested and delivered up to the regularly constituted agent of the state from which he fled. The warrant of the executive under the great seal of the state, reciting the facts necessary, under the act of congress, to give him jurisdiction of the case, would, in my opinion, at the hearing of the habeas corpus, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the constitution of the United States and the act of congress. No investigation, therefore, in such a case, can be made beyond the warrant of the executive, and no examination into the facts and circumstances of the alleged offense with which the party stands charged." "In the present case, the return sets forth copies of all the documents transmitted by the governor of Pennsylvania to the executive of this state, and the appointment of Schremer as the agent of the state of Pennsylvania to receive the petitioner as a fugitive from justice and to carry him to that state. It appears that all the requisites of the act of congress have been complied with. No suggestions or exceptions have been made to the return. It is therefore admitted to be true. And although my belief is, that the alleged offence with which the petitioner is charged is the same which, upon examination of witnesses at the hearing of the former habeas corpus, clearly appeared to be a breach of trust and not a larceny, he must be remanded because the return in this case is conclusive. When taken to Pennsylvania, he can obtain relief, if the circumstances of his case entitle him to it, by suing out the writ of habeas corpus."

The same view of the nature of the obligation and the imperative duty to make the surrender is declared in the following cases, in which, however, the exact point now in question was not directly involved, but from the views therein expressed the conclusiveness of the governor's determination is properly to be inferred. Kentucky v. Dennison, 24 How. [65 U. S.] 66; Johnston v. Riley, 13 Ga. 98; In re Voorhees, 32 N. J. Law, 141. In the case of the People v. Brady, 56 N. Y. 182, the majority of the court of appeals of New York do indeed express the opinion that on habeas corpus against the sheriff holding an alleged fugitive under the governor's warrant, it is competent for the court to go behind the warrant, and inquire into the fact and sufficiency of the charge of crime upon the evidence presented to the governor, that is to say, the requisition of the governor of the demanding state, and accompanying papers, and in that case they discharged the prisoner on the ground that such papers did not show that the facts alleged in the affidavit accompanying the requisition constituted a crime by the law of Michigan, the demanding state; but it weakens the force of this authority, that the point of the conclusiveness of the recitals in the warrant was not urged upon the court on the argument, and that the case was submitted by counsel as turning upon the question whether the affidavit did charge a crime by the law of Michigan. See argument of the district attorney, p. 185. The court says (page 186): "It was not claimed by the counsel for the people, that if the papers were defective and insufficient, it was not competent for the court to take cognizance of the question and discharge the prisoner." It is noticeable also that by the pleadings, the papers on which the governor acted were voluntarily brought before the court, and by the demurrer to the traverse their insufficiency appears to have been admitted. The court also alludes to the fact that there was no indictment against the prisoner, but an affidavit only (page 188). Now in some of the cases a distinction has been taken between a case based upon affidavit and one based upon indictment; that in the latter case the authentication of the demanding governor is evidence that the facts charged constitute a crime in the demanding state, and in the former case it is not. This distinction seems to be based on the circumstance that an indictment is everywhere recognized as the proper mode of proceeding for a crime, and therefore that the fact that the charge has been made in that form is to be taken in itself as showing that the facts constitute a crime, that is, an indictable offence. How far this dis-

tinction may have influenced the court of appeals in reaching the conclusion they came to in that particular case, and whether they would hold the same rule in case it appeared that an indictment against the party duly authenticated accompanied the requisition, cannot with certainty be gathered from their opinion. Judge Grover dissented from the conclusions of the court. The court says: "Courts have exercised the right to interfere and to examine the grounds upon which the executive warrant in such cases has issued, and the jurisdiction is justified both by reason and authority." They, however, do not give the reasoning by which they claim to justify it, and they refer for the authority relied on only to the cases of Ex parte Smith [Case No. 12,968], and Ex parte Clark, 9 Wend. 219. The case of Ex parte Clark does not, in my judgment, support the position taken by the learned court. It is true that in that case the court examined and found sufficient the facts alleged in the affidavits accompanying the requisition, as charging a crime under the laws of Rhode Island; the court did not discuss nor decide the point now in question, and so far as its opinion on that point can be inferred from the language of Chief Justice Savage, it would seem to be adverse to the position taken by the learned counsel for the petitioner. The papers were voluntarily laid before the court and it is to be observed that the charge was by affidavit and not by indictment. And it certainly is not so well settled by authority that the authentication by the governor of an affidavit charging the party is under the statute to be taken as conclusive proof that the facts charged in the affidavit constitute a crime in the demanding state, where those facts do not constitute a crime at common law, as it is in the case of an indictment so authenticated. That question, however, does not arise in this case, since the offence charged here is by indictment for burglary, an acknowledged felony at common law. The case of Ex parte Smith [supra], undoubtedly gives some support of authority to the position, that this court may go behind the warrant and inquire whether the prisoner is a fugitive from justice. There was, however, this peculiarity about the offence charged: It was a charge against Smith, the Mormon prophet, for being accessory before the fact, to a murder committed in Missouri, and it was not alleged in the affidavit that he was in Missouri at the time of the commission of the offence; nor was his presence at the time and place of the alleged offence necessarily to be inferred from the nature of the charge, if the charge itself was true. Whether the question of the party demanded having in fact fled from the justice of the demanding state is under the act of congress submitted to the conclusive determination of the governor on whom the demand is made, or whether he can receive any evidence on that point outside of the papers submitted to him by the governor of the demanding state, are questions, however, that do not arise in the present case, since the offence charged is one which necessarily implies the actual presence of the party indicted within the jurisdiction of the demanding state at the time of the alleged offence, and the better opinion seems to be that where such a charge by indictment is duly authenticated by the demanding governor and the party indicted is in fact found in another state, this is certainly sufficient prima facie evidence of his having fled from justice within the meaning and for the purposes of this statute, perhaps conclusive on the court upon habeas corpus if not on the governor. And in this case the prisoner has not overcome this prima facie case. So far as the cases of People v. Brady and Ex parte Smith are opposed to the views above expressed, I think they are not sustained by reason or by the weight of authority. People v. Brady, though followed by the general term of the First department, was in conflict with the view of the judges of the supreme court in that department, and its correctness on this point is still questioned by them. People v. Reilley, 11 Hun, 94. The case of Senator Patterson before Judge Humphreys of the supreme court of the District of Columbia, also referred to, seems to have turned on the question whether a person sent by a state to congress as its senator can be held to have fled from that state within the meaning of the act of congress. How that fact was brought before the court does not appear in the copy of the opinion furnished me. Other cases were cited upon the argument which it is unnecessary to discuss in detail. In re Heyward, 1 Sandf. 702; In re Soloman, 1 Abb. Pr. (N. S.) 347; In re Washburn, 4 Johns. Ch. 106; In re Leland, 7 Abb. Pr. (N. S.) 64; State v. Howell, R. M. Charlt. (Ga.) 120; Kingsbury's Case, 106 Mass. 223; Brown's Case, 112 Mass. 409; Dow's Case, 18 Pa. St. 37; Com. v. Deacon, 10 Serg. & R. 125; Vallad v. Sheriff, 2 Mo. 26; In re Greenough, 31 Vt. 279. See also a discussion of this statute 6 Pa. Law, J. 417. It is not intended in this opinion to pass on the question whether the requisition itself is sufficient evidence to the governor of the state on which the demand is made that the party charged has fled from justice, where the indictment or affidavit does not expressly or by necessary implication charge that the party accused was within the jurisdiction of the demanding state at the time of the commission of the alleged offence. There is a class of cases of which Ex parte Smith was one, apparently wholly outside the purview of the constitution and act of congress, inasmuch as the party cannot be said to have fled from the state making the demand. These cases are those in which a state has assumed jurisdiction to make an offence indictable, although the party charged was not then, and perhaps never was, within the

state, as, for instance, for murder where the fatal blow was struck outside the state but the injured party died within the state. Perhaps the only and the proper remedy of a party arrested under such a warrant in such a case is to apply to the governor for a revocation of the warrant. All that is necessary to hold in this case as to this point of the party having fled from justice, is that where it appears by the recitals in the warrant that the governor had before him a duly authenticated copy of an indictment against the party for an offence, the commission of which necessarily implies the presence of the party at the time and place of the alleged offence, and, as was the case here, no evidence is offered tending to show that the party is not a fugitive from justice, he is properly held under the warrant. It is not intended to be intimated that evidence that the party never was within the jurisdiction of the demanding state, would, if offered, be admissible on habeas corpus after the arrest on the warrant. One obvious objection that might be urged to the admission of such evidence is, that it would be apparently trying the question of an alibi, one of the possible defences of the party on his trial for the crime alleged, which, as involved in the question of his guilt or innocence, it may have been the design of the constitution and the act of congress to remit for trial exclusively to the state in which the party stands charged with having committed the offence. And another objection might be urged, that congress has apparently submitted the question whether the party charged has fled from justice to the determination of the governor alone.

The question of the identity of the party arrested with the party described as the alleged fugitive in the mandate of the governor is, of course, always open to inquiry on habeas corpus, since that is simply the question whether the mandate has been executed against the party named therein; but on this question the fact has been determined against the petitioner on the evidence. The writ must be dismissed and the prisoner remanded.

LEARY (CASEY v.). See Case No. 2,497.
LEARY (DODGE v.). See Case No. 3,952b.

Case No. 8,163.

LEATHERBERRY v. RADCLIFFE.

[5 Cranch, C. C. 550.] [1]

Circuit Court, District of Columbia. March Term, 1839.

PRACTICE AT LAW—WITHDRAWAL OF PAPER WITHOUT OBJECTION—DEPOSITION OF WITNESS ABOUT TO LEAVE DISTRICT.

1. By the leave of the court, if no objection be made by the opposite counsel, a party may withdraw from the files of the court a deposition, in order to get the magistrate to amend his certificate according to the truth of the case; and such withdrawing and amending are not sufficient ground for rejecting the deposition.

[Cited in Borders v. Barber, 81 Mo. 642.]

2. If a deposition be taken de bene esse because the witness is about to go out of the district and to a greater distance than one hundred miles from the place of trial, and he goes accordingly, it is not necessary that a subpoena should have issued to the marshal of this district, in order to enable the party to use the deposition; it is sufficient for him to prove to the satisfaction of the court that the witness at the time of the trial is gone to a greater distance than one hundred miles from the place of trial, although the witness may have been within the district between the time of taking the deposition and the time of trial.

The plaintiff [Jessee Leatherberry] had taken a deposition under the act of congress, 1789, § 30 (1 Stat. 73), before the mayor of the city of Washington, to be used in this cause, and there being some informality in the certificate of the mayor, Mr. R. J. Brent, for the plaintiff, moved for leave to take the deposition from the files to get the certificate amended according to the truth of the case. The defendant's counsel did not object to the withdrawing of the deposition; which was done; and the certificate having been amended, the plaintiff's counsel offered to read it to the jury.

The defendant's counsel, Mr. Marbury and Mr. Bradley, objected, because the deposition, having been opened in the court, must be considered as published, and cannot be amended in any respect. They also objected that it was taken de bene esse, and no subpoena had been issued for the witness. The witness, in his deposition, had stated that he lived more than one hundred miles from the place of trial; that he was about to leave the District of Columbia, and not to return before the time of trial; and this was also certified by the mayor as the reason for taking the deposition. The plaintiff proved that the witness did leave the district immediately after the taking of the deposition, and was not then, at the time of trial, within the jurisdiction of this court.

The defendant [Joseph Radcliffe] then proved that the witness had returned to this district in the intermediate time, although not then in the district. The defendant's counsel contended that it was necessary for the plaintiff to have taken out a subpoena to the marshal of this district, to entitle him to read the deposition, and cited Penns v. Ingraham [Case No. 10,944], and Banert v. Day [Id. 836].

But THE COURT overruled the objections, and permitted the deposition to be read, being of opinion that it was sufficient for the plaintiff to show, at the time of trial, that the witness was "gone" "to a greater distance than one hundred miles from the place of trial;" and that the return of a subpoena, non est, is only one means of making that fact appear to the satisfaction of the court, but not the only means.

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

LEATHERS, The (CARROLL v.). See Case No. 2,455.

Case No. 8,164.

LEATHERS v. SALVOR WRECKING, ETC., CO.

[2 Woods, 680.] [1]

Circuit Court, S. D. Mississippi. May Term, 1875.

WAR—OWNERSHIP OF CONFEDERATE STATES' PROPERTY—EVIDENCE—PHOTOGRAPHIC COPIES OF PUBLIC DOCUMENTS.

1. A steamboat, while under impressment by the Confederate States, was sunk, and was afterwards paid for in full by the Confederate government. *Held*, that the wreck thereby became the property of the Confederate government, and in the surrender of the Confederate forces to the Federal forces, became the property of the United States.

2. Photographic copies of public documents on file in the departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way, by proof of handwriting.

[Cited in Eborn v. Zimpelman, 47 Tex. 503; Crane v. Dexter, Horton & Co. (Wash.) 32 Pac. 224.]

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

The libel was filed [by Thomas P. Leathers] to recover damages of the respondent [the Salvor Wrecking & Transportation Company] for wrecking and dismantling the steamboat Natchez, which was sunk in the Yazoo river, and which the libelant claimed to be his property. The defense was, that the Natchez was sunk while under impressment in the service of the Confederate States, and was paid for in full by the Confederate government, and thereby became the property of that government, and upon the surrender of the Confederate forces to the Federal forces, she became the property of the United States, and that she was raised and dismantled by the respondents under a contract with, and by authority of the United States.

J. W. M. Harris, for libelant.

W. B. Pittman, for respondent.

BRADLEY, Circuit Justice. The respondents show that the machinery of the steamer Natchez was rescued from the Yazoo river after the close of the late war, under authority from, and by contract with the government of the United States, by which the salvors were to have one-half of all that should be realized after the payment of expenses. If the steamer Natchez was impressed into the service of the Confederate States government, and was burnt and sunk whilst in that service, and if full compensation for the vessel's loss was paid to the libelant by that government, the property of the wreck thereafter belonged to it; and at the close of the war, became the property of the government of the United States, which thereupon acquired a right to dispose of the wreck as it saw fit. It is evident that the government of the United States acted on the supposition that it was the owner of, and entitled to the control of the wreck. The authority given to the wreckers, and the contract made with them, are evidence of this. The latter got only one-half of the net proceeds of the property. The balance was retained by the government.

Without stopping to inquire whether thus acting under the authority of the government of the United States would or would not be a full defense for the wreckers, and for the respondents in this suit, it is clear from the evidence that the libelant's transactions with the Confederate States government bear out the hypothesis that he obtained therefrom the full value of the steamboat, and that whatever was left of her hull and machinery belonged to that government, and, by consequence, became the property of the United States.

The libelant, however, testifies, no doubt sincerely, that the amount received by him from the Confederate government, was received as compensation for the services of the steamboat. But a long period of time has elapsed since the events occurred; and an examination of the documents themselves is conclusive that the said amount was the valuation of the vessel itself, and was so understood by the libelant at that time, and received by him as such. It is unnecessary to go into a minute examination of the papers for the purpose of showing the truth of this proposition; it is too apparent for argument.

It is objected by the counsel for the libelant, that the documentary evidence in question is not properly authenticated. We think it is sufficiently authenticated to make it competent. The original papers are on file in the war department, and cannot, without public detriment and inconvenience, be removed. Photographic copies are the best evidence that the case admits of. The wonderful art by which they are reproduced gives us, as we may say, duplicate originals; and in the case of public records or documents properly deposited in the public archives of the country, and which the public interest requires should be there kept and preserved, no better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies, and an authentication of their genuineness in the usual way, by proof of handwriting. We think the evidence entirely competent and entirely conclusive. We come to the conclusion, therefore, that the libelant had no interest in the wreck at the time of its recovery, and that he cannot recover in this suit. The conduct of the libelant, since the war, is corroborative

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

of this conclusion. He lay by for almost or quite six years after he says he saw the machinery at Vicksburg, on the vessel now attached, before bringing his suit. This is a period which of itself would present strong evidence of laches, and a stale demand, which is a defense in admiralty proceedings. These views render it unnecessary for us to consider more fully the objection as to the validity of the amendment made in the libel, concerning which grave doubts may well be entertained. The decree of the district court must be reversed, and the libel dismissed, with costs.

LEATHERS (UNITED STATES v.). See Case No. 15,581.

LEATHERS (WERK v.). See Case No. 17,415.

LEAVENWORTH (JEWETT v.). See Case No. 7,312.

LEAVENWORTH (PACIFIC RAILROAD CO. v.). See Case No. 10,649.

LEAVENWORTH (RANLETT v.). See Case No. 11,569.

LEAVENWORTH, L. & G. R. CO. (UNITED STATES v.). See Case No. 15,582.

Case No. 8,165.

In re LEAVENWORTH SAV. BANK.

[4 Dill. 363;[1] 14 N. B. R. 92; 3 Cent. Law J. 207.]

Circuit Court, D. Kansas. March 18, 1876.[2]

BANKRUPT ACT—CORPORATIONS—NUMBER AND VALUE OF CREDITORS.

Since the amendatory bankrupt act of June 22, 1874 (18 Stat. 178), the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons.

[Cited in Re Detroit Car Works, Case No. 3,833; Re Oregon Bulletin Printing & Pub. Co., Id. 10,561.]

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

In January, 1876, a petition in bankruptcy was filed by a single creditor against the Leavenworth Savings Bank, alleged to be a corporation organized and existing under the laws of the state of Kansas. An order to show cause was issued and served. On the return day, the bank appeared and moved to dismiss the petition, because it does not show that it is presented by one or more creditors of the bank, who constitute one-fourth in number, and whose debts amount to one-third of the provable debts of the bank. The district court sustained this motion, and dismissed the creditor's petition. [Case No. 8,166.] To reverse this order the petitioning creditor brings the case here by a petition of review.

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

[2] [Affirming Case No. 8,166.]

Clough & Wheat for petitioning creditor. They cited and relied on: In re Oregon Bulletin Printing & Pub. Co. [Case No. 10,558]; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. (Sup. Ct. U. S., October Term, 1875) 91 U. S. 656.

Lucien Baker, for the Leavenworth Sav. Bank.

DILLON, Circuit Judge. There is only one question in this case, but it is an important one. It is whether, under the existing law, the same proportion of creditors must join in the proceeding to force a corporation into bankruptcy that is required in the case of natural persons. Section 37 of the original bankrupt act (section 5122, Rev. St.) made moneyed, business, and commercial corporations subject to its provisions, and provided for voluntary and involuntary proceedings the same as in the case of ordinary debtors, except that no allowances were to be made to corporate debtors, and no discharges granted. And it is to be observed that this section (section 37) refers, by the nature of its provisions, to the sections of the bankrupt act, such as section 11, as to voluntary proceedings, and sections 39 and 40, as to involuntary proceedings, and sections 35 and 39, as to frauds, preferences, etc.

By the original act any one creditor, whose debts exceeded $300, could throw his debtor, whether a natural person, a copartnership, or a corporation, into bankruptcy, if such debtor had committed an act of bankruptcy. The provisions in this respect as to individual debtors, copartners, and corporations, were uniform. In the fall of 1873, what is known as the panic of that year occurred, which resulted in great distress and embarrassment to the monetary and commercial interests of the country. The existing provisions of the bankrupt act, arming a single creditor, in a time of financial stringency, with the terrible power of forcing a debtor into bankruptcy, against the wishes and interests of all the other creditors, and to the ruin of the debtor, were felt to be too severe, and this led congress to pass the amendatory act of June 22d, 1874. This act breathes but one spirit. All its provisions are in one direction: Every part of it is intended to relieve the severity of the act as it then stood. What should be deemed acts of bankruptcy was modified, and in every instance made more liberal towards the debtor. This was done by section 12, which amended section 39 of the original act, by substituting therefor an entirely new section. This new section contained the important requirement, in involuntary cases, that one-fourth, at least, of the debtor's creditors, representing at least one-third of the provable debts, must concur in the proceeding. These provisions were made retroactive in the most comprehensive terms, and the language, in this regard, throws no little

light upon the question now under consideration. "The provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy, commenced since December 1, 1873, as well as to those commenced hereafter. And in all cases commenced since the 1st day of December, 1873, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of the petitioning creditors be denied by the debtor," etc., proceed to determine the same, and if the required proportion do not join, "the proceedings shall be dismissed."

It will be observed that no distinction is made or suggested between proceedings against natural persons and proceedings against corporate debtors, but the sweeping language, twice repeated, is "all cases," which would include cases against both classes of debtors.

Again, there can be no doubt, as it seems to me, that corporate debtors would be entitled to the benefit of the legislation of 1874 as to what constitutes an act of bankruptcy, and as to what is necessary to make or establish a fraudulent preference. The result, then, is that many of the provisions of section 12 of the legislation of 1874 do apply to corporations. It would be singular if one part of that section applied to corporations and other parts did not; and it would require a clear expression of the legislative intent to justify the court in thus construing the act. It is argued that such an intention is manifested by the language of section 5122 of the Revised Statutes. But this is only a re-enactment, with a verbal change, of section 37 of the original act, which, so far as it allows "any creditor" of a corporation, without reference to the number and amount of the other creditors, to throw the corporation into bankruptcy, is inconsistent with the legislation of 1874, and is therefore repealed by necessary implication. While it is true that the amended act and the Revised Statutes were passed on the same day, yet it is expressly provided that acts passed subsequent to December 1, 1873, are to have full effect notwithstanding the Revised Statutes. Section 5601. The amendatory bankrupt act falls within this provision, and there is no ground for claiming that, so far as it is in conflict with the Revised Statutes, the latter must not give way. Indeed, it will be observed that the amendatory bankrupt act does not refer to the Revised Statutes, but to the sections of the original bankrupt act; can it, therefore, be contended that it is void since it referred to sections that were then repealed? Surely not; and it is clear that, so far as there is any repugnance between the new act and the old, the latter must yield.

There is no reason for the alleged difference between the bankruptcy of corporations and natural persons. None had been made in this respect in the original act. Debtors of both classes were within the mischief which the legislation of 1874 was designed to remedy. A large amount of the active business capital of the country is invested in corporate organizations. They largely do business upon credit. Their capital is owned by the shareholders. Creditors as well as stockholders are interested in their successful operation, and bankruptcy is often quite disastrous to both. It cannot readily be believed that congress intended, in a time when it deemed relief from a stringent law necessary, to leave the creditors, and particularly the stockholders in corporations, exposed to its unmitigated severity. It is not the corporation that suffers, but its creditors and the owners of its stock.

Again, the original section 39 applied to bankers, bringing them within the provisions as to involuntary bankruptcy; and the amendatory act of 1874, whose effect is now in question, not only allowed bankers to remain subject to being thrown into bankruptcy, but added, also, for the first time, the words, "any bank," which undeniably means a banking institution owned by a natural person, partnership, or joint stock company, and includes, in my judgment, such an institution when it is incorporated.

This conclusion might be strengthened by other considerations, such as the provisions in the bankrupt act (section 48, now section 5013 of the Revised Statutes) and section 1 of the Revised Statutes, declaring that the word "person" may include and be applied to corporations, but I do not deem it necessary to enlarge the argument. Affirmed.

This case was cited, and its doctrine expressly approved and followed, in Re Oregon Bulletin Printing & Pub. Co. [Case No. 10,561, overruling same case [Id. 10,558]; s. p. Re Detroit Car Works [Id. 3,833].

Case No. 8,166.

In re LEAVENWORTH SAV. BANK.

[14 N. B. R. 82; 23 Pittsb. Leg. J. 196.] [1]

District Court, D. Kansas. March, 1876.[2]

BANKRUPTCY — AMENDED ACT — NUMBER AND AMOUNT OF CREDITORS—CORPORATION BANKRUPT.

Since the amendatory bankrupt act of June 22, 1874 (18 Stat. 178), the same number and amount of creditors must join in the proceedings to force a corporation into bankruptcy, that is required in the case of an individual.

[Cited in Re Oregon Bulletin Printing & Pub. Co., Case No. 10,561.]

Oliver R. McNary filed his petition in bankruptcy, alleging that the Leavenworth Savings Bank is a corporation, organized under the laws of the state of Kansas, and owes debts exceeding the sum of three hundred dollars; and that the petitioner's demand exceeds the sum of two hundred and fifty dollars; and

[1] [Reprinted from 14 N. B. R. 82, by permission. 23 Pittsb. Leg. J. 196, contains only a partial report.]

[2] [Affirmed in Case No. 8,165.]

that said bank made a voluntary assignment of all its property and effects, on or about the 21st day of December, 1875, with intent to hinder and delay the creditors of said bank, and praying that said corporation be adjudged a bankrupt. On the return day of the order to show cause, the respondent filed its motion to dismiss the said petition, on the ground that it did not allege that the said petition is presented by one-fourth in number of the creditors, and the aggregate of whose debts, provable under the bankrupt act, amounts to one-third of the debts provable under said act.

Clough & Wheat, for petitioner.
Lucian Baker, for respondent.

FOSTER, District Judge. The allegations, for the want of which the respondent moves to dismiss this petition, are material and necessary, and the petition must be held insufficient, unless any one creditor who has a debt exceeding two hundred and fifty dollars, may institute proceedings to throw the respondent into bankruptcy. This is admitted by the petitioner, but it is urged that he alone, as a creditor of the bank, and without regard to the number of other creditors, or to the amount of debts, may maintain proceedings to have respondent adjudicated bankrupt. This question involves the construction of several provisions of the bankrupt law, and if there were no precedent on the question, I should have had no hesitation in holding this petition insufficient. So far as my knowledge extends, there has been but one decision made, touching the point at issue. In Re Oregon Bulletin Printing & Pub. Co. [Case No. 10,558], Judge Deady, of the United States district court of Oregon, held that in proceedings against a corporation it was not necessary that the petitioning creditors should constitute one-fourth in number, holding an aggregate of one-third of the provable debts, but that any creditor, however small his debt, could institute and maintain proceedings in bankruptcy against a corporation. The opinion of so able a judge carries with it no little weight in my estimation, and I have carefully studied the reasoning of that case, and brought to this inquiry my best understanding, and am compelled to say, I am not satisfied with the precedent established in the Oregon case.

On several points I fully agree with the learned judge who decided that case; but on the construction of section 37 of the act of 1867 [14 Stat. 535], and the corresponding section (5122) of the Revised Statutes, I reach a different conclusion. It seems apparent to me, that the intent of sections 37 and 5122 was to place the corporations therein mentioned on the same footing with individual debtors, with the exception that no allowance or discharge should be given the corporation. The first paragraph of the section is in these words: "That the provisions of this act shall apply to all moneyed, business, or commercial corporations, and joint stock companies." Among the provisions of the act we find that the respondent must owe debts exceeding the sum of three hundred dollars, and must have committed some one of the acts of bankruptcy defined by the law; and another provision of the act is that any creditor having a debt exceeding two hundred and fifty dollars, may then institute the proceedings. These are all provisions of the act, and section 37 makes them apply to moneyed, business, or commercial corporations, and joint stock companies.

Do the words following limit or modify the comprehensive scope of the first paragraph? The section goes on to provide how the corporation may be put into voluntary and how into involuntary bankruptcy. If the latter, "upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors." The petition is to be made in the manner provided in the case of debtors. Now, it would seem this term implies that the contents of the petition and the form of the petition must be the same as provided with respect to debtors; it must be a creditor who can make a like petition. This construction reconciles the terms with the manifest intent of the first paragraph of the section.

To farther demonstrate that the law-making power intended to make no discrimination as to proceedings against persons and corporations, but rather to place them on an equal footing (always excepting allowance and discharge), it was provided in section 48, Rev. St. § 5013, that the word "person" shall also include "corporation." Now, take section 39, and where it says "person," read it "corporation," and again we have the provisions of the act, applying to corporations.

Again; what possible reason could the congress have had, to discriminate against the corporation, and permit a creditor to the amount of one dollar, to institute proceedings against it, while an individual could not be proceeded against, except by a creditor or creditors holding indebtedness of over two hundred and fifty dollars. There could have been no reason why an aggregation of persons and money, constituting a corporation, and undertaking and carrying on great and important enterprises, such as no one individual could perform, should be thrown supinely in the power of its smallest creditor. In this state (excepting railroad, and religious or charitable corporations), and in many other states, the stockholder is individually liable for debts of the corporation, to an additional amount, equal to the stock owned by him. Then, for the protection of creditors, here is a double liability of the stockholders, together with all the assets and property of the company, and the franchise, which

may be sold as provided in rule 21. Assuming, as I am compelled to, that it was the purpose of the original act of 1867 to place persons and corporations on the same footing, is there anything in the subsequent acts which tends to show an intention to change this rule. The title "Bankruptcy," in the Revised Statutes, re-enacts all these provisions contained in the first act. Section 5122 is the old section 37, word for word, omitting "creditors" and "hereinafter." The reason for omitting the former is explained by reading the first act in the volume. "In determining the meaning of the Revised Statutes, or of any act or resolution of congress, passed subsequent to February 25, 1871, words implying the singular number may extend and be applied to several persons or things." The omission of the word "hereinafter" was necessary, because what had been section 39 had been divided into several sections, 5021, 5022, and 5023, and all coming before, instead of after 5122, as in the original act. As before stated, section 39 was re-enacted in the Revised Statutes without material change of the old section. Section 48 of the old law, making the word "person" include "corporation," was re-enacted without any change in section 5013. On page 1 of the Revised Statutes it is further provided: "The word 'person' may extend and be applied to partnerships and corporations." Then it cannot be maintained that there is anything in the Revised Statutes indicating any purpose to change the law as it before stood on this subject.

This brings us down to the amendatory act of June 22, 1874, and that act having been drafted and passed as an amendment to the act of 1867, which was on the same day repealed by the Revised Statutes, instead of as an amendment of the act in the statutes, has complicated the law, and made quite a muddle. It has left untouched, however, the law as it before stood, in section 37, and re-enacted in section 5122. The amendatory act of June 22, 1874, leads to some speculation, more interesting for novelty than for materiality. On the same day, to wit: June 22, 1874, two acts of congress became laws: the one repealing the old law of 1867, and the other amending it, and inserting and striking out words in different sections.

Now, if the repealing act of the Revised Statutes took precedence over the amendatory act, it would result that congress undertook to amend a law which had already been repealed. On the other hand, if the repealing act was subsequent in time to the amendment, as the repealing act only repeals all acts passed prior to December 1, 1873, it does not carry with it the amendatory and supplemental act of June 22, unless the repeal of the original law would, ipso facto, carry with it all amendments made after the 1st of December. Again, section 5601, the last one in the Revised Statutes, provides that the revision is not to affect or repeal any act of congress passed since December 1, 1873, and when such act conflicts with the revision, it is to be regarded as a subsequent statute, and as repealing any portion of the revision inconsistent therewith. The act of June 22 also has a clause, repealing all acts or parts of acts inconsistent therewith, and it might as well be argued that the act of June 22 repealed the act in the Revised Statutes as to claim the reverse. But as both laws were approved on the same day, it would seem neither took precedence over the other, and if possible should be harmonized, and both be permitted to stand.

This is not difficult to do. The Revision, § 5596, repeals all acts passed prior to December 1st, 1873, any portion of which is embodied in any section of said revision; but further provides, "and the section applicable thereto (in the revision) shall be in force in lieu thereof." Then, by this provision, section 5122 became in force in lieu of section 37. Sections 5021–5023 in lieu of section 39, and section 5013 in lieu of section 48, of the old law.

It seems to me a fair construction of all the provisions would lead the courts to hold that the amendatory act of June 22 in effect modified or amended the bankrupt act as contained in the Revised Statutes, designating inadvertently the sections of the original law, instead of the sections passed in lieu thereof on the same day, in the revision. Certain it is that the courts invariably recognize both acts as being in force, and wherever the amendment has changed any sections of the act of 1867 we apply the change to the corresponding section in the Revised Statutes. The form of adjudication in bankruptcy still refers to the law as the act of March 2, 1867, and the supreme court of Georgia has lately held that such an adjudication was valid. "That the act of 1867, as contained in the Revised Statutes of 1874, and amended by a separate act of congress, passed June 22, is still in force; and a judgment of adjudication which recites the act of 1867 as authority for the proceeding had in October, 1874, is not even irregular, much less void." In re Ferst [Ballin v. Ferst, 55 Ga. 546].

The act of June 22, so amends sections 35 and 39 of the old law or the corresponding sections of the new law, as to require one-fourth in number and one-third in amount of the creditors to join in the petition in bankruptcy, in all cases. It makes several changes as to what constitutes an act of bankruptcy, and in what time suits for a preference may be brought, etc. Now, it would hardly be claimed that a suspension of payment of commercial paper, for fourteen days, by a corporation, would be an act of bankruptcy, while it requires a suspension of forty days by an individual; or that a preference as to a bankrupt corporation could be recovered if made within four months, while as to a person it is two months; and yet the word "person" is used in both those sections,

and a corporation is not mentioned. Surely all subsequent acts, amendatory of the title bankruptcy of the Revised Statutes would come under the provisions of section 5013 of that act, and "person" would include "corporation." And, if this act of June 22 is not an amendatory, but an independent act, it would then come under the provision of section 1 of the Revised Statutes before cited, extending and applying the word "person" to corporations in all acts passed after February 25, 1871. The context, as well as the terms of the act of 1867, and the subsequent acts, so far from showing to my mind that the word "person" was used in a more limited sense, shows quite conclusively that corporations were to be included in the provisions of the law. The motion to dismiss must be sustained.

[This case was affirmed by the circuit court upon review in Case No. 8,165.]

Case No. 8,167.

LEAVIT v. The SHAKESPEARE.

[3 Chi. Leg. News, 156; 13 Int. Rev. Rec. 87.]

District Court, D. Louisiana. 1871.

INTERNATIONAL LAW—THE RIGHTS OF CONSULS—TREATY WITH HANSEATIC LEAGUE — ADMIRALTY JURISDICTION OVER SEAMEN'S WAGES UNDER TREATY.

[The convention of April 30, 1852, between the United States and the Hanseatic League, does not preclude a citizen of the United States, who has served as a seaman on board of a vessel belonging to one of the Hanse towns, from bringing his action for wages for such service, in the admiralty courts of the United States.]

In admiralty.

DURELL, District Judge. Alfred Leavit and others against the ship Shakespeare. The libel sets forth that Leavit, with four others, all citizens of the United States, did, on or about the fifteenth day of August, 1870, ship and hire themselves to serve as mariners on board the Bremen ship Shakespeare, for a voyage from New Port, Wales, to Lafronella, in New Granada, and thence to and ending at the port of New Orleans; that said ship proceeded upon said voyage with libellants on board, at certain specified wages, and did complete the same at the port of New Orleans, on or about the 16th day of December, 1870; that the term for which said libellants had agreed to serve having expired, they, the libellants left said ship, and demanded the wages due them, which wages were by the captain of said ship refused to be paid, etc. In opposition to further proceeding in the case, the captain of said ship Shakespeare and the consul of the North German Union at New Orleans have put on file a plea to the jurisdiction of the court, which plea is based upon article first of a convention made between the United States of America and the free and Hanseatic Republics of Hamburg, Bremen, and Lubeck, the 30th day of April, 1852. Said article is as follows: "Article 1. The consuls, vice-consuls, commercial and vice-commercial agents of each of the high contracting parties shall have the right as such to sit as judges and arbitrators in such differences as may arise between the masters and crews of vessels belonging to the nations whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the master should disturb the order or tranquillity of the country, or the said consuls, vice-consuls, commercial agents or vice-commercial agents should require their assistance in executing or supporting their own decisions; but this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort on their return to the judicial authority of their own country." The plea to the jurisdiction of the court, like a demurrer, admits the truth of the allegations contained in the libel, to-wit: That the libellants are citizens of the United States; that the voyage was as stated; that the voyage ended at New Orleans; and that the libellants earned wages as mariners, serving on board of the Shakespeare during the whole of said voyage. Now the court has come to the conclusion that the differences spoken of in the article cited from the treaty of April 30, 1852, and which are made subject to the judgment and arbitration of consuls, vice-consuls, commercial and vice-commercial agents, are differences of such a nature as might possibly, if aggravated, disturb the order and tranquillity of the country—differences which touch the discipline of the ship. Certainly, the naked question of whether wages are due or not due, is not a difference which can disturb either the order or the tranquillity of the country. Again the court does not consider it to have been the intention of the United States in making the treaty of April 30, 1852, to subject its citizens in a question of wages claimed or earned on board of a foreign ship, to the judgment or arbitration of a foreign consul or commercial agent; and this opinion of the court is supported by the last clause of the article cited, to wit: "But this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort on their return to the judicial authority of their own country." This clause contemplates the return of the complaining mariner to his own country, where he may appeal from the adverse decision given by his consul at a foreign port; thus evidently restraining the application of the provisions of the article to such of the mariners as are subjects or citizens of the country whose flag their ship bears. In the case before the court, the libellants are citizens of the United States. They are already at home, and they have a right to resort to the judicial authority of their own country. Let the plea be overruled and dismissed.

Case No. 8,168.

In re LEAVITT.

[Cited in Re Pratt, Case No. 11,370. Nowhere reported; opinion not now accessible.]

Case No. 8,169.

In re LEAVITT.

[1 Hask. 194.] [1]

District Court, D. Maine. Feb., 1869.

BANKRUPTCY — FRAUDULENT PREFERENCE — DISCHARGE—CO-PARTNERSHIP CREDITORS.

1. A fraudulent preference, given by one member of a co-partnership without the knowledge, authority, or consent of his co-partner, does not debar the latter of his discharge in bankruptcy.

2. A discharge should be denied a bankrupt for fraud, when shortly before his bankruptcy, being insolvent, and possessed of a note against his father, he took animals, exempt from attachment under the state laws, in part payment of the same, and then sold the note to a brother-in-law, and took other animals also exempt from attachment in part payment for the note.

3. Co-partnership creditors are entitled to the individual assets of one co-partner, who has no individual creditors, and may oppose his discharge.

In bankruptcy. Petition for discharge, both from individual debts, and debts of the firm of Nye & Leavitt, in which the bankrupt [Albert Leavitt] was a partner. Sundry creditors objected, because the bankrupt had fraudulently preferred one creditor, and had fraudulently conveyed away property to prevent its distribution in bankruptcy.

Hiram Knowlton, for petitioner.
William L. Putnam, for creditors.

FOX, District Judge. It appears that the firm carried on two stores, one at Skowhegan conducted by Nye, and one at Athens, about ten miles from Skowhegan, under the management of Leavitt. Leavitt was also engaged in operating a mill at Athens, and he does not appear to have had much to do with the partnership affairs at Skowhegan, where the largest amount of stock was kept and the most of the business transacted. They failed in Jan., 1868, and after attempting to effect a settlement with their creditors without success, they filed their petitions in bankruptcy on the 2d day of March.

The first objection charges a fraudulent preference by a payment, on the 2d of March, of $300 to the Second National Bank of Skowhegan on a firm note. The facts respecting this payment are disclosed by Nye, the other partner. He testifies, that having sold goods from the store at Skowhegan on the 2d of March, just prior to going to Augusta to prepare his petition in bankruptcy, he, Nye, paid $300 part proceeds of the sales to the bank, in part satisfaction of an overdue company note for $500. This payment Nye testifies was made by him, without the knowledge or assent of Leavitt, or his having any reason to suppose that it would be made. Nye met Leavitt the same forenoon at Augusta, by appointment, and their separate petitions in bankruptcy were prepared by the same counsel on that day at Augusta, and were then and there sworn to by the bankrupts. Nye's petition stated the amount due to the Second National Bank as $300, through an error of counsel, as it is now said, there being in fact only $200 due the bank, and this statement was so copied onto the schedules of their liabilities annexed to Leavitt's petition.

There can be no doubt that this payment, as now presented, was a fraudulent performance on the part of Nye, which unless explained would deprive him of his discharge; and it is claimed that Leavitt, the co-partner, is accountable for all transactions of Nye in behalf of the firm, and must suffer the like consequences as his partner for the fraudulent acts of his partner. In the aspect of this case as presented, I do not think this result must necessarily follow. Whilst one partner is ordinarily bound by, and responsible for, the doings of his co-partner in behalf of the firm, this principle should not be extended to the fraudulent misconduct of a partner, and render a partner criminally amenable for his co-partner's wrongful conduct, in which he was not personally a participant. A preference or payment, in violation of the provisions of the bankrupt act [of 1867 (14 Stat. 517)], is by the act constituted and declared to be a fraud, and the most serious consequences result from its commission. Each partner ought to be held personally accountable and amenable to its provisions for his own fraudulent misconduct; but I do not think that it was ever the purpose of the framers of this act to punish an innocent partner, by a refusal of his discharge, for a fraudulent preference given by his co-partner without his knowledge, authority, or consent. It is a personal penalty, to which each party is to be made subject only for his own acts and deeds.

If Nye is believed, and there is nothing in contradiction of his testimony, Leavitt was not a party to this payment, knew nothing of it, and the money so paid was realized from the sales of the Skowhegan stock by Nye alone, without any evidence before me, that Leavitt was informed that these goods had been sold, or that Nye was in possession, from any source, of any funds of the co-partnership.

It may be said that the schedule of liabilities subscribed and sworn to by Leavitt, on the day of this payment, shows that he must have then been aware of it. It does show that the demand of the bank was stated at only $300, but it nowhere appears that Leavitt was aware that this note was originally for any larger amount, or that any payment had been made upon it, and especially that any payment had been made that day by Nye.

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

If it had appeared that Leavitt was, at the time of preparing his petition, aware of this payment, as at present advised, I should not, on this account, have been inclined to refuse him his discharge, unless it had also appeared that he had participated in, or originally authorized the payment to be made, and for the reason, that at the time of making his petition the fraud had been committed, the provisions of the law were already violated, the wrong and fraud had been completed and accomplished, not by Leavitt, but by Nye, without Leavitt's knowledge, direction or authority, at the time it was done. He not being an actor, not having taken any part at the time in aid of the guilty conduct of his co-partner, I do not think he should be punished so severely as to be deprived of his discharge, merely for the fact that after the fraud was committed, and he was informed of it, he verified by his oath and signature the schedules as copied by his counsel in his behalf, setting forth the balance only of the claim after deduction of the amount thus paid by his co-partner.

In my opinion, this fact should not, by and of itself, be deemed such a ratification of the fraud of his co-partner, as thereby to render him amenable to the like consequences, as if he had himself personally made the fraudulent payment. Such a view would be carrying the doctrine of ratification far beyond any case I have met with, and does not at present meet with my approval; but I am not required to determine absolutely this question, as the testimony does not satisfy me that Leavitt was actually aware of the payment at the time the schedules were verified by him.

The second specification charges that the bankrupt, "on or about the 15th day of Feb., 1868, was possessed of a note of about $600 against one Caleb Leavitt, and that in contemplation of bankruptcy, he did exchange and dispose of said note for certain articles of personal property, which were exempt from attachment, and for other property, for the purpose of preventing said note from coming into the hands of the assignee, or of being distributed under the bankrupt act in satisfaction of his debts."

It appears, principally from the bankrupt's disclosure, that about the time of their failure, Caleb Leavitt, father of the bankrupt, was indebted to the firm to the amount of $174.54; that the bankrupt credited Caleb Leavitt's account on the firm books with this amount, and charged Caleb Leavitt on his private books the same amount, Caleb being then indebted to him for other transactions; that, as the bankrupt thinks, sometime in February, he received from Caleb Leavitt, in settlement of his account against him, his note on two years, for about $600, and afterwards, in part payment of the note, took from Caleb Leavitt a horse, cow, and ten sheep, for which he allowed him about $200. The balance of the note was sold by the bankrupt to his brother-in-law, Horatio C. Tobey, at a discount of twenty-five per cent., Tobey paying him, in the latter part of February, ten sheep, a hog and heifer, and the balance in money, as I infer, although it is not distinctly stated by the bankrupt in his disclosure. His excuse for selling the note at the time at so great a discount as given by him is, that "he had nothing to live upon."

By the 29th section of the act, a bankrupt is debarred of his discharge "if he has made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property, or has been guilty of any fraud whatever, contrary to the true intent of the act." By the 35th section, "if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, etc., * * * or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to affect the object of, or in any way hinder, impede, impair or delay the operation and effect of, or to evade any of the provisions of this act, the sale, etc., * * * shall be void, and the assignee may recover the property or the value thereof as assets of the bankrupt," and if the same is not made "in the usual and ordinary course of business of the debtor, the fact should be prima facie evidence of fraud."

In my opinion, the dealings of the bankrupt, with this demand against his father were in fraud of the act, and not in the usual and ordinary course of business, but manifestly designed and intended to prevent the demand from coming to his assignee in bankruptcy. The entries on the bankrupt's account books, both day book and ledger, touching this transaction have been manifestly altered, and done with so great skill and adroitness, that it is now impossible either for the counsel or court to determine what the original entry was. The great care bestowed, in so completely concealing the terms of the original entry, is cogent proof that there was something worth while to conceal, and that it would not have proved very favorable to the bankrupt. He states, that he gave his father credit on Dec. 31st for the $174.54 on the company books; but I am not satisfied that the entry was made at that time; on the contrary, I believe it to have been made after the failure of the firm, and when it was well known to all their friends in that vicinity. The amount due the firm from Caleb Leavitt was a part of the assets of the partnership, and any arrangement made by the bankrupt to change the liability from the firm to himself, and make himself the creditor of his father, instead of the firm, after the firm was notoriously insolvent, with a further purpose and design to invest the amount in property ex-

empted from attachment under the laws of Maine, and for his future support, was a fraud on the firm creditors, and as I believe, clearly was so designed and intended by the bankrupt at the time. It has been decided that when partnership assets are not exempted from execution by the state laws, the bankrupt is not entitled to any portion of them.

The bankrupt states that the note given on settlement by his father was about $600. From the alterations on the account books, and certain entries which now appear, I am induced to believe it was for a larger sum, but be that as it may, he receives from his father various kinds of stock, all of which was ordinarily exempted under the state laws, and for which he allows his father, in part payment of the note, about $200. In the latter part of February, just previous to filing his petition in bankruptcy, he sells to his brother-in-law the balance of the note at twenty-five per cent. discount, and $100 of the amount is paid him in stock, likewise exempted, with the exception of ten sheep, which he claimed on his schedules annexed to his petition should be allowed to him under the provisions of the bankrupt act, as he could not hold them exempt under the state law.

The excuse he presents for selling the note at so large a discount is the length of time it had to run, and that "he had nothing to live on." It is true that the note was not payable for two years, but as it seems to me, this was a part of the plan and contrivance for defrauding the creditors of the demand. He was under no necessity of taking the note for that length of time, or in fact of taking any note; his father's rights were all protected if the account was left open and unadjusted, whilst the assignee could much more readily have converted the demand into money, if it had remained an open account liable to suit, if not paid on request. Again, if the bankrupt needed anything for the support of his family, he could have compelled his father, from time to time, to pay him according to his necessities, if he was indebted to him on account; but after he had accepted the note payable in two years, it was then wholly at his father's option to pay anything or not, as he should see fit. In the one case, by allowing matters to remain as they were, the bankrupt, if in need, could control his father, whilst in the other he was wholly powerless to compel his father to do anything for his relief before the note matured. It does not appear from any evidence that his father could not, at the time he gave the note, have paid the entire demand, if the bankrupt had seen fit to require it of him. His credit was certainly good, as his son was ready to trust him for two years for this large amount, increasing the liability by assuming to himself the amount due to the firm from his father.

The excuse that the avails from this note were necessary for the bankrupt's support, I deem equally untenable. The note was sold to Tobey the latter part of February, and the petition in bankruptcy was filed the 2d day of March; during this short period not a large amount could have been actually expended by the bankrupt in the support of his family, and not much was applied to procuring supplies in advance, as the amount of such on hand, as stated in his schedules, is only $40. It further appears that at this time he was in the possession of the remains of the Athens stock in trade, and there was also the stock at Skowhegan, from either of which, he could have obtained all that was necessary for his immediate wants. His examination shows that after Jan. 1st, he collected in cash $322.40 of Wood & Libby, a portion of which he paid on a note held against him by the bank, leaving in his hands more than $80, which he could have applied to his maintenance, and probably did, as he gives no further account of it, and which would have been all that was requisite previous to his petition in bankruptcy.

I am perfectly satisfied that there was no real necessity for his disposal of this note to Tobey, but on the contrary, it was wholly unjustifiable and without excuse, with no other motive or purpose that I can discover, than to appropriate to the bankrupt's own gain and advantage this entire claim, and deprive his creditors of all benefit from it.

That such was the fraudulent purpose and intent of the bankrupt is demonstrated by the course he pursued in converting three hundred dollars of this demand into stock, the larger portion of which would, as he supposed, become exempt under the laws of this state, and all that was not so exempt, he claimed in his petition and schedules should be exempted and allowed to him under other provisions of the bankrupt act. At this time, when he acquired this stock, he was deeply insolvent. Such kind of property he had never before thought it prudent or needful for him to become the owner of when in prosperous circumstances, but after his failure, when he was not the owner of a foot of land for their pasture or sustenance, he finds it necessary to invest $300 in sheep, a cow, horse, yearling heifer, and hog, proving as I think most conclusively, that he designed as far forth as it was possible, to prevent its distribution under the bankrupt law, and its coming to his assignee for his creditors' benefit. His failure was notorious, and I can entertain no doubt, was then well known to his father and Tobey, and that they were also well aware of the purpose and design of their relative in so disposing of his property. His dealing with this demand was certainly not in the usual and ordinary course of business, and is therefore prima facie evidence of fraud.

It is argued, that these proceedings were not in contemplation of bankruptcy, as the firm was endeavoring to effect a compromise with its creditors, and that negotiations with this object continued until Feb. 29th. It is true, that such negotiations were in progress until that day, but so soon as it was discovered that they would not succeed, the parties immediately filed their petitions to be adjudged bankrupt; and I cannot doubt, that during the entire negotiations, it was the purpose of the parties to avail themselves of the bankrupt act, if they did not effect a settlement. If any doubt however existed on this point, it is beyond dispute, the parties were then deeply insolvent, and in that condition these proceedings with the claim against Caleb Leavitt were in fraud of the law, and such as must debar the bankrupt of his discharge, the same as if they had been done in contemplation of bankruptcy, and an amendment of the specifications to this extent, would not be unreasonable.

The bankrupt claims, that the property thus converted by him to his own use was his individual estate and not partnership assets, and however fraudulent his conduct and dealings with it may have been, the objecting creditors cannot avail themselves of it, as they are partnership and not individual creditors; that the latter only can object on this ground to his discharge, as they are alone injured and defrauded.

In the first place, it appears that nearly $200 of this amount was originally due to the firm from Caleb Leavitt, and of this sum, by these proceedings, the firm creditors have certainly been defrauded. Secondly, there is no evidence before me that there existed any individual liabilities of this bankrupt, and if he was not thus indebted, his firm creditors were entitled to the benefit of this claim. So that, without further answers to the objection which could be suggested, I am quite clear on the proof, that the creditors now present have a right to insist on their objection to his discharge, notwithstanding they are co-partnership and not individual creditors.

For thus attempting to appropriate and absorb so large a portion of his estate, after he had become notoriously insolvent, this bankrupt must be denied his discharge; and I shall not hesitate, whilst I am called upon to administer the bankrupt law, so to determine in all attempts as flagrant as the present appears to be to me. Such persons will find, when they have become insolvent, that it will not prove for their benefit and advantage to devote their whole attention to the provisions of the exemption laws of the state, and to ascertaining in what way they may contrive to keep the remnants of their property, and still avail themselves of the benefits of the bankrupt act. On the contrary, it should occur to the bankrupts that their creditors have still certain claims and rights, and that in granting them so great a boon as an absolute release from all their liabilities, the law in turn demands of them to surrender to their assignee their estate without any fraudulent diminutions, trusting to the discretion and liberality of the assignee and the court to make them such further allowances beyond the property already fairly exempted to them under the state law, as in their peculiar circumstances, they shall be found entitled to under the liberal provisions of the bankrupt law. By endeavoring to grasp the whole estate they may fail to obtain the greater prize, their discharge. Discharge denied.

Case No. 8,170.

LEAVITT et al. v. CONNECTICUT PEAT CO.

[6 Blatchf. 139.] [1]

Circuit Court, D. Connecticut. June 1, 1868.

NOTES—CONSIDERATION—VALUE OF PATENT—CONTRACT — CONDITIONAL GUARANTIES — CORPORATIONS—BY-LAWS—PROPER OFFICER TO ENDORSE NEGOTIABLE PAPER.

1. What is sufficient value, in letters patent for a machine for condensing and moulding peat into convenient blocks for fuel, to constitute a consideration to support a contract in reference to the use of machines made according to the patent, discussed.

2. What amounts to an acceptance of the fulfilment of conditional guaranties and promises contained in a contract, discussed.

3. Where the by-laws of a corporation required the endorsement of its secretary on a promissory note belonging to it, payable to its order, to pass its title to such note, an endorsement by its president was held not to pass the title, where the endorsee was chargeable with knowledge of the fact that the endorsement was not made by the authority of the corporation.

[Cited in Smith v. Lawson, 18 W. Va. 228.]

This was an action of assumpsit upon two notes held by the plaintiffs [Thomas H. Leavitt and Francis Hunnewell]. One was for the sum of $5,000, drawn by the Tolland County Peat Company, June 27th, 1866, payable to the order of the defendants, four months after date, and purported to be endorsed by the latter. It was payable at the First National Bank of Rockville, and was duly presented, payment refused, and protested. On this note the suit was against the defendants as endorsers. The other note was for the sum of $3,251, drawn by the defendants, and payable to the plaintiffs. On this note the suit was against the defendants as principals. In addition to the counts declaring on these two notes, the declaration contained the common counts in assumpsit. To this declaration the defendants pleaded the general issue, and gave notice of special matter. A stipulation was duly filed, waiving a trial by jury, and the cause was tried by the court. Upon the evidence presented, the court found the following facts: First. That the plaintiffs are citi-

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

zens of the state of Massachusetts, residing at Boston, and doing business as partners, under the name of Leavitt & Hunnewell, and that the defendants are a corporation, duly organized under the laws of the state of Connecticut, and located at Hartford, in the latter state. Second. That Thomas H. Leavitt, one of the plaintiffs, was the patentee of a machine for condensing and moulding peat into convenient blocks for fuel, which patent [No. 53,011, granted March 6, 1866] was, prior to the 19th of April, 1866, owned by the plaintiffs. Third. That, on the 19th of April, 1866, the plaintiffs and defendants entered into a written contract, in substance as follows: (a) The plaintiffs agree to convey to the defendants, their heirs, or to whom they or their heirs shall direct or demand, the right to manufacture peat fuel for themselves, their heirs or assigns, by the use of Leavitt's Peat Condensing and Moulding Mill, or sets of machinery, constructed for that purpose, in all the territory embraced in the state of Connecticut, except the counties of Hartford and New Haven, and the towns of New London and Waterford in the county of New London. (b) The plaintiffs agree, further, to convey to the defendants, or to whom their heirs shall direct, on demand, and without further cost or charge to them, all the improvements in the manufacture or in the machinery to manufacture peat fuel, that shall be made by T. H. Leavitt, or of which the plaintiffs shall become possessed, for the territory aforesaid. (c) The plaintiffs agree to furnish condensing and moulding mills of the character named, to the defendants, for the use of the latter, at $600 each, and to the defendants, for sale to others, to be used in said territory, at $400 each, the same to contain all new improvements, at an additional cost not exceeding the cost of constructing each improvement, the defendants in no case to sell to others such mills at a less price than $600 for each. (d) The plaintiffs agree to protect the defendants in the exclusive use of such mills, either by themselves or their assigns, in the territory named. (e) The defendants agree to pay to the plaintiffs "one thousand dollars within ten days after the execution of this instrument, and if, on full and fair trial, to be made within ninety days from the date hereof (April 19, 1866), of a mill or set of machinery, which is now being constructed by the plaintiffs for the defendants, for the manufacture of peat fuel, it shall be found that said mill is capable of turning out forty tons of wet peat per day, yielding, ordinarily, when taken from a well-drained bog, from ten to twelve tons of hard, dry fuel, and will generally accomplish all, or substantially all, which is claimed and set forth in a certain pamphlet, entitled 'Leavitt's Condensing and Moulding Mill for the Manufacture of Peat Fuel,' which statements therein contained are signed 'Leavitt & Hunnewell, agents of the Boston Peat Co.,' then, by the conveyance by the plaintiffs to the defendants, by good and valid deed of assignment, of the territory aforesaid, (and which shall be conveyed on demand,) the defendants shall and will pay to the plaintiffs in cash, or good approved paper on interest, the sum of $11,500, with interest from the date hereof, and will further pay over to the plaintiffs the one-half the cash receipts from the sale of territorial rights hereby agreed to be conveyed, and from the profits accruing from the development of this enterprise, so fast as the same shall be collected, until the plaintiffs shall have been paid the additional sum of $12,500 more." (f) The defendants agree to convey, on demand, to the plaintiffs, the exclusive right, outside of the state of Connecticut, to the use of all improvements in said machine, or in the manufacture of peat, which the defendants shall invent or become possessed of. (g) It is further agreed, mutually, that if, on said trial of said set of machinery, as aforesaid, it shall fail to accomplish substantially the work as claimed for it in the pamphlet above referred to, then, in that event, the plaintiffs will, on demand, refund and pay back the one thousand dollars, paid as stipulated herein, and this agreement shall become void. Fourth. That, among other material representations contained in the pamphlet referred to in the above-named contract, and upon which the defendants relied, was this, that the set of machinery for condensing and moulding peat, referred to therein, was capable of turning out forty tons of wet peat per day, yielding ordinarily, if cut from a well-drained bog, a result of about ten or twelve tons of hard, dry fuel, at a cost, for labor, of less than two dollars per ton. Fifth. That the defendants paid the first installment of $1,000, as provided by said contract, and received from the plaintiffs a set of said machinery, as provided for in said contract, soon after the same was entered into, and proceeded to give it a trial, and that they experimented with it, from time to time, for several months, and down till some time in the month of October, but the machinery failed to turn out forty tons of wet peat per day, when cut from a well-drained bog, capable of making ten or twelve tons of hard, dry fuel, at an expense for labor of less than two dollars per ton; and that, on the contrary, said machine, though worked with adequate power, and under reasonably favorable circumstances, such as the parties in their contract understood to be necessary, proved wholly incapable of accomplishing the above result, both as to the quantity of wet peat produced, and the quantity of hard, dry fuel resulting therefrom, and also as to the expense of production. Sixth. That, though the aforesaid trial of said machine wholly failed to accomplish the results which the plaintiffs represented in their said contract and pamphlet it was capable of performing, said representations were not made by the plaintiffs fraudulently, or with intent to deceive the defendants. Seventh. That the defendants did not, within the ninety days named in said

contract, nor at the expiration thereof, nor at any time, revoke said contract, or demand back the one thousand dollars paid thereon; nor did the defendants, within said ninety days, or at the expiration thereof, or within any reasonable time, notify the plaintiffs that they, the defendants, refused, or should refuse, to complete said contract according to its terms. Eighth. That, on the contrary, the president and secretary of the defendants, on the 13th of July, 1866, delivered to the plaintiffs notes to the amount of seven thousand seven hundred and forty-nine dollars, ($7,749,) as part payment on said contract, upon which notes the plaintiffs subsequently realized cash to their full amount; that the defendants have ratified such payment; and that other payments were made prior to the last-mentioned date, in addition to the first $1,000. Ninth. That, on the 9th of August, 1866, the defendants paid the plaintiffs the further sum of $2,000, in cash, on said contract, and delivered the note for $3,251, embraced in this suit. Tenth. That, on the 9th of August, 1866, there was due to the plaintiffs, on the $12,500 to be paid them absolutely under the contract, in case the trial of the machine, to be made within ninety days, proved satisfactory, as set forth in the contract, the sum of $2,251, and no more; that there was then nothing due to the plaintiffs on account of cash received by them for the sale of territorial rights, or on account of "profits accruing from the development of this enterprise;" that there is nothing now due to the plaintiffs from the defendants on any account whatever, except the said $2,251, with interest thereon; and that the note in suit, for $3,251, was made for that sum through error, and should have been for only $2,251. Eleventh. That the note of $5,000, upon which the defendants are sued in this action as endorsers, was, with several other notes, drawn by third parties, and made payable to the order of the defendants, and endorsed by James H. Ranney, the president of the defendants, and endorsed in no other way; that the said Ranney had no authority from the defendants, either express or implied, to make said endorsement; that the defendants have never ratified such endorsement, and never knew of it until the trial of this case; that said note was received by the plaintiff Thomas H. Leavitt, from the hands of said Ranney, on the 13th of July, 1866; and that, by the by-laws of the defendants, the secretary alone was authorized to endorse the paper of the company, or that held by them. Twelfth. That, from time to time, in May and June, 1866, the defendants entered into contracts with third parties, underselling territorial rights for parts of the territory embraced in the contract between them and the plaintiffs of April 19th, 1866; and that, on the 13th of August, 1866, the plaintiffs received and accepted from the defendants the conveyance of the territorial right, according to the provisions of the contract of April 19th, 1866. Thirteenth. That, before the execution of said contract of April 19th, 1866, the plaintiffs were, and ever since have been, stockholders of the defendants, the Connecticut Peat Company, and, before said last-mentioned date, and down to the month of December, 1866, the said Thomas H. Leavitt, one of the plaintiffs, was a director of said company. Fourteenth. That, on the trial of said cause, the plaintiffs proved the execution and delivery of said note for $3,251, and the delivery by James H. Ranney of the said note for $5,000, with his endorsement thereon, and that the latter was duly presented for payment, payment refused, and the same duly protested, and then rested their case; that, at a subsequent stage of the trial, and after the defendants had proceeded with their evidence, the plaintiffs further claimed a recovery for two machines, alleged to have been delivered by the plaintiffs to one Lewis, on the order of the defendants; and that, if said delivery of said machines to Lewis was ever made on the order of the defendants, the plaintiffs, before the bringing of this suit, revoked the same, and claimed said two machines as still their own property. Fifteenth. That the consideration of said purchase of the right for the territory named in said contract did not wholly fail; that, though the patent which the plaintiffs sold to the defendants was of small value, yet it was worth something, and, therefore, constituted a valid consideration upon which the contract must be supported; and that, though the plaintiffs greatly overrated the value of their machine and patent, there is not sufficient evidence to support the charge of fraud in the original sale, as set up by the defendants. Sixteenth. That the charge set up by the defendants, that the plaintiffs made other fraudulent representations, such as that they falsely stated that they were in receipt of letters from other parties, assuring them that the machines were working successfully, and performing all that the plaintiffs had promised, and more, is not proven; and that the charge of conspiracy is not proven. Seventeenth. That, though the plaintiffs signed the contract of April 19th, 1866, as agents of the Boston Peat Company, yet the defendants, in fact, dealt with them as principals.

SHIPMAN, District Judge. The transactions out of which this controversy has arisen, had their origin in the facility with which mankind embrace the most delusive schemes for the sudden accumulation of wealth. The community at large, as well as courts of justice, are kept familiar with the fact, that experiments of the most imperfect and inconclusive character are constantly made the basis of extravagant expectations of pecuniary advantage, which are never realized. Men whose good sense, integrity, and sound practical judgment for a long course of years, command the respect and confidence of the community, and the rewards of successful business prudently conducted, are

induced, not unfrequently, to suddenly engage in enterprises based upon untried theories. The imagination becomes inflamed with apparent prospects of boundless wealth; and solid capital, the fruit of hard toil and strict economy, is credulously ventured in the prosecution of schemes which prove as unsubstantial as a dream. The parties awake sooner or later, to find the reality in the presence of the bailiff and in dismal accounts of debts incurred and money gone never to return. The histories of John Law, of the South Sea bubble, of the tulip-mania, and of the morus multicaulus fever, have been written in vain. Each generation has its own El Dorados, wherein it invests a portion of its capital and hopes, and in exploring which it learns, by costly experience, the lessons which recorded examples have failed successfully to teach. The record of past delusions did not prevent one relating to peat from taking possession of not a few minds, as the disclosures of this trial have shown.

It appears, from the evidence, that one of the plaintiffs in this suit, after having made the subject of the preparation of peat for fuel a matter of study and experiment for a considerable time, invented, in 1865, a machine for grinding the article and forming it into blocks or bricks, of convenient size to be dried, handled, and used for fuel. This machine was to be operated by steam power. He put it into operation near a peat meadow or bog, in Lexington, Massachusetts, for the purpose of experimenting and testing its value. He evidently thought it was eminently successful, and obtained a patent for his invention. So well satisfied was he with the result of numerous trials made during the summer and autumn of 1865, that though, as he testified on the stand, the machine could be run, under favorable circumstances, at a net profit of from fifty to one hundred dollars per day, the manufacture of fuel became a matter of minor importance to him individually, and he turned his attention to the sale of rights under his patent and to furnishing machines to others. He expected to realize large gains in the sale of his rights and machines, and no doubt thought that others would share, to some extent, in the profits of what he termed, in one of his letters to the plaintiffs, the "grand movement in peat." In some way he was brought into communication with gentlemen residing in this state, and, by elaborate printed statements, and in other ways, set forth to them the value of his invention. The result was the formation of the Connecticut Peat Company, the defendants in this suit, to whom the territorial right for the patent for the whole state, except the counties of Hartford and New Haven, and the towns of New London and Waterford, was sold for the sum of $25,000, one-half to be paid on a successful trial of the machine, to be made within ninety days, and the other half out of the cash receipts coming from the sale of territorial rights which the Connecticut Peat Company might sell within the state, or out of profits. In addition to this, the defendants were to have the privilege of purchasing machines of the plaintiffs, for their own use, at $600 each, and for sale to others to use within the state, at $400 each, but were to sell the same only at an advance of $200 or more. Through statements put forth in correspondence, in pamphlets, and in the public journals, by the spring or early summer of 1866, public expectation was raised so high, that rights under the plaintiffs' patent were eagerly sought for. The defendants secured the right for the remaining counties, Hartford and New Haven, at a considerable advance in price over what the plaintiffs had sold the same for. The defendants also sold to one or two persons in Tolland county the right for that county, for $9,500, which was, in a very short time, resold to the Tolland County Peat Company, for the sum of $35,000. Corporations were organized for the manufacture of peat fuel, in various places in the state, in a number of which works were erected and equipped with sheds, steam engines, tramways, crates, &c., for the successful prosecution of the business. The capital stock of these corporations ranged from $25,000 to $100,000. Peat morasses suddenly assumed a new value, and swamps which had hitherto been left in the undisturbed possession of frogs and turtles, were about to prove equivalent to coal mines, and to become sources of great profit to those who should work them. It was under the influence of this delusion that most of the facts enumerated in the finding of this court in the present case occurred. Justice to both parties requires this brief statement of the condition of things at the time, in view of the fact that not only has no money been made in the business, but thousands of dollars have been lost in demonstrating that none could be made by the use of this machinery, in the present state of practical knowledge on the subject, in Connecticut. The whole thing in this state seems to have been abandoned as a failure, after repeated experiments, by which the cost of manufacture has been proved to greatly exceed the value of the article produced.

The legal questions arising out of the finding of the court can be easily disposed of. The charges of fraud and conspiracy are negatived. The allegation of total failure of consideration is also negatived. Though the value of the patent right was grossly exaggerated, yet it had, in the hands of the defendants, at least a market value, as is proved by their sales and the sales of others. There is, also, some little evidence tending to show that those thoroughly acquainted, by experience, with the working of peat into fuel, may derive some advantage from the use of this machine, when it is employ-

ed under the most favorable circumstances. There is, therefore, a consideration to support the contract.

The question of warranty was discussed at length on the argument, but it is sufficient to say that, assuming that the representations made by the plaintiffs amounted to warranties, they were, by the terms of the contract, conditional and limited. The trial was to be made in ninety days from the date of the contract, and the defendants made that trial in such manner as they saw fit. If they were dissatisfied with the result, they should have notified the plaintiffs, or at least ceased to proceed any further in the execution of the contract. Instead of that, they continued their experiments, received, without objection, the transfer of the right, which they never tendered back, and, even after a majority of the directors had knowledge, in August, 1866, that the first $12,500 had been overpaid, through their secretary, in cash and a note of the company payable on demand, they took no steps to disavow his acts to the plaintiffs. At least, they are fairly chargeable with this knowledge, for they had then discovered that the president and secretary had delivered a large amount of notes to the plaintiffs, besides the cash payments which had been made, and that the secretary, as they supposed, had endorsed notes to the amount of $25,000 more, or thereabouts, in which the company had no real interest. They were, therefore put on enquiry, and it would be imputing to them gross negligence and inattention to their own interests, which were involved in the interests of the company, not to assume that they made themselves acquainted, at that time, with the financial condition of the latter. It may seem strange that, with the result of their experiments before them, they did not then endeavor to revoke their contract, or relieve themselves from any further obligations under it. But, perhaps, a solution of this mystery may be found in the remark of one of the directors on this trial, who testified, in answer to the question put by the court, why they did not take immediate steps to disavow the acts of their secretary, and repudiate the contract, that "they did not wish to make a noise, as they were selling rights; and must keep up appearances." The defendants must, therefore, in judgment of law, be deemed to have accepted the result of their trial of the machine, as a fulfilment of the promises implied in the conditional guaranties of the contract. They not only paid large sums on the contract after the ninety days had expired, but were in the market with rights for sale, and, on the 13th of August, received from the plaintiffs the final transfer of the patent, as provided for by the contract. True, it appears that the defendants did not fully realize their condition till near the last of August, but, even then, when they had ascertained the state of affairs, they made no attempt to rescind the contract, or relieve themselves from its obligations. From the facts formally found by the court, the deduction is irresistible, that they accepted the contract as fulfilled on the part of the plaintiffs. The law can put no other construction upon their acts. They are, therefore, legally bound to pay the $2,251 found by the court to be due on the first $12,500. The plaintiffs must, therefore, recover to that extent on the note for $2,251.

The note for $5,000 stands upon different ground. This was given by the Tolland County Peat Company to the defendants, payable to their order. It was endorsed by Ranney as president, and by him only. According to the by-laws of the defendants, this note could only be endorsed by the secretary; and the plaintiff Leavitt, as a director of the company at the time he received the note from Ranney, is chargeable with knowledge of the fact that it was not endorsed by the defendants, or by their authority, and his co-plaintiff is chargeable with this knowledge of his co-partner. This attempt of Ranney to endorse the paper of the company was not known to the defendants till this trial. They have, therefore, never ratified his act. It follows, that the plaintiff has no legal title to this note, and cannot subject the defendants as endorsers thereon.

Neither can the plaintiffs recover the amount of the note, or any portion of it, under the count for money had and received, the only one appropriate to the claim made. There is nothing due to them for cash received by the defendants, either for territorial rights sold, or for "profits accruing from the development of this enterprise." They have paid over one-half of the cash received for rights, and there are no profits. If the note were cash in the hands of the defendants, the plaintiffs would be entitled to only one-half of the amount, by the terms of the contract. But it is not cash, and neither the directors of the company nor the plaintiffs have any right to treat it as cash. Whether this note is collectable by the defendants, and it is, therefore, their duty to enforce its collection, does not appear clearly, and cannot be determined in this suit.

The claim of $800 for the machines alleged to have been delivered to Lewis, on the order of the defendants, is rejected. It was not put in evidence by the plaintiffs in their original proofs. Besides, if the sale to Lewis was made on the order of the defendants, the plaintiffs have revoked that sale, and set up their own title to the machines. Let judgment be entered for the plaintiffs, to recover the sum of $2,492.94, with costs.

Case No. 8,171.

LEAVITT et al. v. COWLES et al.

[2 McLean, 491.] [1]

Circuit Court, D. Illinois. June Term, 1841.

COURTS—JURISDICTION—CITIZENSHIP AVERMENT—REPUGNANT AVERMENTS—LOST NOTE ASSIGNED—RIGHT OF PROMISEE TO BRING SUIT — LEGAL RIGHT TO NOTE AFTER ASSIGNMENT.

1. The citizenship of the party, which is to give jurisdiction to the court, must be specially averred.

2. That the plaintiffs are citizens of New York, to wit, of Illinois, where the suit is brought, is a repugnant averment.

3. On a lost note which has been assigned, suit must be brought in the name of the assignee. The promisee being in possession of the note, and having assigned it merely for the purpose of collection, may strike out the assignment, and sue in his own name.

[Cited in Parks v. Brown, 16 Ill. 456.]

4. The legal right is vested in the assignee, and can only be divested by striking out the assignment as above, or by reassignment. Counts before verdict may be discontinued.

At law.

Mr. Davis, for plaintiffs.

Mr. Krum, for defendants.

OPINION OF THE COURT. This action is brought on two promissory notes. The first count states one of the notes, and alledges the plaintiffs made the following indorsements: "Pay J. J. Fish, Cashier, or order;" J. W. and R. Leavitt. "Pay J. Smith Homar, Esq., or order;" John J. Fisk, Cashier. "Pay to the order of J. H. Lee, Esq., Cashier;" John B. Camden, President, —and that the same indorsements made were merely for the purpose of collecting the notes, &c., and that the property in the note is now and ever has been in the plaintiffs. That the note was casually lost, &c. The second count differed only from the first in stating that the note was lost in the mail, and that the plaintiffs tendered a bond of indemnity. The third count is on a different note, payable as the first one was, at the Alton Branch Bank, &c., indorsed as above, and was presented at the bank for payment. The fourth and fifth counts were general for money had and received, &c. In the last count the plaintiffs aver, that at the several and respective times when the various causes of action accrued in the several counts, &c., they were citizens of the state of New York, to wit: At New York, in the state of New York, to wit: At Springfield, in the state and district of Illinois, aforesaid, and within the jurisdiction of this court. To the declaration a general demurrer was filed.

The court remarked that there was a repugnancy, as to the averment of citizenship of the plaintiffs, in stating that they were citizens of New York, to wit, of Illinois. This is the form used in declaring on a note, dated at a particular place, and payable there, in order to bring the cause of action within the jurisdiction of the court. But the citizenship of the plaintiffs being in this case the ground of jurisdiction in the federal court, it should be averred positively, and not as in this declaration. They, therefore, suggested the propriety of an amendment of the declaration in this particular. And as regards the assignments of the lost note, set out in the first and second counts, the court remarked—the title of the note did not appear to be in the plaintiffs. A note having been assigned, as they alledge, for the mere purpose of collection, being in the hands of the promisee, he may strike out the assignments and sue in his own name. This striking out makes the note conform to the declaration; and the possession and property of the note being in the promisee, he has a right to strike out the indorsements; but the present note is not in possession of the plaintiffs. The indorsements remain, and the plaintiffs seek to recover by stating the indorsements, and alledging that they were merely made for the purpose of collection. For whatever purpose they were made, no one can doubt that they authorized the last indorsee to bring the action in his own name. The legal right was then vested in him, and this right can not be divested except by reassignment, or by being stricken out. And when stricken out it is never necessary, or, indeed, proper, to state the indorsements in the declaration. It was formerly the English practice to insert a special count on a lost note, in order to let in evidence of a secondary character, but this is not necessary. Benner v. Bank of Columbia, 9 Wheat. [22 U. S.] 581. There can be no doubt that a note indorsed merely to enable the assignee to collect it, and which has become lost, may be recovered for the benefit of the original promisee, in the name of the assignee. And we suppose that this is the proper form of bringing the action under the circumstances of this case. The plaintiffs asked leave to discontinue the first and second counts, which was granted. Counts before verdict may be discontinued. Hughes v. Moore, 7 Cranch [11 U. S.] 176.

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

Case No. 8,172.

LEAVITT et al. v. JEWETT et al.

[11 Blatchf. 419.] [1]

Circuit Court, S. D. New York. Dec. 31, 1873.

COLLISION—STEAM AND SAIL VESSELS — PRESUMPTION—IRRECONCILABLE TESTIMONY.

Where, in a suit by the owners of a schooner against a steamer, to recover for the damage done to the former by a collision with the latter, the testimony is irreconcilable, and is nearly evenly balanced on the question as to whether the

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

schooner changed her course, the rules must be applied that it was the duty of the steamer to keep out of the way of the schooner, that the steamer is presumptively responsible for the collision, that the burden of excusing it rests upon her, and that, where the only excuse set up is, that the schooner changed her course, so as to defeat measures taken by the steamer to avoid the schooner, it is not enough for the steamer to create a doubt on the question, but she must establish such excuse satisfactorily.

[Cited in The Herbert Manton, Case No. 6,399; Farr v. The Farnley, 1 Fed. 637; The Florence P. Hall, 14 Fed. 417; The J. D. Peters, 42 Fed. 269.]

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

[This was a libel by Francis W. Leavitt and others against George W. Jewett and others to recover for damages sustained by a collision.]

Robert D. Benedict, for libellants.

Charles Donohue, for respondents.

WOODRUFF, Circuit Judge. The testimony in this case is utterly irreconcilable, and any conclusion founded solely upon a weighing of the testimony on each side is very difficult, if not impossible. The fact, however, that the libellants' schooner was, before there is any claim or pretence that she changed her course, on a course north by east, up the bay, is not only testified by the witnesses on board, but is expressly admitted by the answer of the respondents. She was bound for Jersey City, or the flats in that vicinity, from the easterly side of the channel, as she passed the Narrows. This would make her proper course slightly across the channel and in the direction so stated and admitted. The respondents' steamer came out of the East river, down the bay, and rounded Governor's Island. It seems inevitable, notwithstanding the testimony of her witnesses, that, as the bay below Governor's Island opened to her view, the green light of the schooner must have been visible; and yet none of those navigating the steamer, according to their testimony, saw it. They could not see her red light unless nor until the steamer had passed to the westward of the course of the schooner, and had actually crossed her bows. That they saw the schooner off their port bow is quite possible; and it is quite possible that by that fact they were misled in their judgment that the schooner would pass them on their port side; but, her being seen on their port side would not enable them to see her red light until they had crossed her course, before which, for a decided interval, they ought to have seen her green light. If, on the other hand, the steamer did cross the schooner's course, so as to bring her red light into view, and did, as the steamer's witnesses say, continue on the same or a still more westerly course thence onward till the collision, the schooner must not only have changed her course, but must, when there was no danger of collision, have run away from the point to which she was bound, left her proper course towards that point, and, wholly without cause, not even in any sudden exigency or alarm, have thrust herself into extreme peril. These considerations may not be conclusive of error on the part of the witnesses from the steamer, nor do they conclusively establish fault in the steamer, but they tend in that direction, and are of some significance when, upon the face of the testimony, the witnesses so decidedly contradict each other, and produce so nearly an even balance, if the witnesses on either side were entitled to equal credit.

In circumstances of doubt like those here exhibited, I am compelled to apply the rules which are suggested in the opinion below. It was the duty of the steamer to keep out of the way of the sailing vessel, which was seen by her, or ought to have been seen by her, at a sufficient distance, and where the room was abundant for any movement which the steamer desired to make for the purpose. She did not avoid the schooner. For the collision which ensued she is presumptively responsible. The burden of excusing the collision rests upon her. She has attempted such excuse by imputing to the schooner a change of course, defeating her own measures, claimed to have been properly taken. Such change of course is denied by the witnesses from the schooner, one of whom testifies from the compass of his vessel. It is not enough that the steamer has created a doubt upon this sole ground of defence.

I admit that there is room for hesitation, but, after a very anxious consideration of the case, upon all the testimony, I am constrained to conclude that the defence is not satisfactorily established. The libellants must have a decree, in affirmance of the decision of the court below, with costs of the appeal.

Case No. 8,173.

LEAVITT v. LOGAN.

[3 Wall. Jr. 184;[1] 19 Leg. Int. 404.]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1855.

CONSTRUCTION OF WILL—LIFE ESTATE—REMAINDERS.

A devise to A., for her maintenance and support during life, and at her decease to became the property of B., not to be subject to sale or mortgage, but to descend to his children free and unencumbered; but in case he has none living at his death, to become the property of C., in fee simple, or of her heirs, if she be not then living. *Held*, to give 1st. A life estate to A. 2d. A similar estate to B. 3d. Remainder in fee to B.'s children, vested as to those born at the testator's death, and opening to let in others as they were born. And 4th. A contingent remainder to C. in fee.

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

Logan made his will as follows: "I devise to my wife Julia Logan, for her maintenance and support, my house and lot, &c., during her life, and at her decease to become the property of Joshua Logan; the said property not to be subject to sale or mortgage, but to descend to his children, free and unencumbered; but in case he has no children living at his death, then and in that case to become the property of my daughter, Julia Richardson, in fee simple, or of her heirs, in case she be not then living."

The question was, what estates did these parties take respectively in the premises?

Mr. Shaler and Mr. Loomis, for complainant.

Mr. Williams, for defendant.

GRIER, Circuit Justice. If the will had made no farther provision, than that on the decease of Julia Logan, the premises should become the property of Joshua Logan, it might well be construed as a gift of the remainder in fee to Joshua. But such an intention is manifestly inconsistent with the provision that the property, while in his hands, was not to be subject "to sale or mortgage." The words "descend to his children," might seem to imply that according to their strict legal meaning his children were to take by inheritance from their father. But such a construction would not fulfil the intention of the testator. Unless the children take as purchasers a remainder in fee, their title would be liable to be defeated by the father.

To fulfil the intention as clearly expressed, the will must be construed as giving, 1st. An estate for life to Julia Logan. 2d. To Joshua for life. 3d. Remainder in fee to the children of Joshua; vested as to those then born, and opening to let in the other children as they shall successively come into existence. 4th. And lastly, a contingent remainder in fee in Julia Richardson. Decree accordingly.

Case No. 8,174.

LEAY et al. v. WILSON.

[1 Cranch, C. C. 191.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

EVIDENCE — PROCEEDINGS OF ENGLISH BANKRUPT COMMISSION — ADMISSIBILITY UNDER VIRGINIA ACT.

A copy of the proceedings of the commissioners of bankruptcy, in England, certified by a notary and the American consul, or by a notary and the mayor of Liverpool, is not evidence admissible under the act of assembly of Virginia, because not recorded in England, so as to make them evidence there.

Assumpsit [by Leay & Gladstone, assignees of Adam Stewart, an English bankrupt]. A copy of the proceedings of the commissioners of bankruptcy, was offered in evidence by the plaintiffs' counsel, Mr. C. Lee, certified by a notary-public at Liverpool, with a certificate of the American consul, that he was a notary-public. He also offered another copy, certified by a notary-public and the mayor of Liverpool.

Mr. Taylor, for defendant [James Wilson], objected that neither copy was admissible under the Virginia act (Old Rev. Code, 168), because it had no seal of state, and because the deed of assignment was not acknowledged or proved by witnesses, according to the act, nor registered according to the laws of England.

Mr. Lee, contra. The act prescribing one mode of authentication does not preclude the court from receiving papers authenticated in a different manner.

Mr. Taylor, in reply. The deed of assignment is not proved or acknowledged according to the act of assembly. The proceedings ought to be certified by the register of the court of chancery, or the lord chancellor, under the great seal of England. By St. 5 Geo. II. c. 30, § 41, the proceedings may be entered of record, and copies of such record are made evidence.

THE COURT refused to permit either of the copies of proceedings to be given in evidence, because not recorded in England, so as to make them evidence there, to bring it within the act of assembly; and because it was not a sworn copy.

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

LEBERING (KETLAND v.). See Case No. 7,744.

LECKIE (FOYE v.). See Case No. 5,023.

LECKIE (UNITED STATES v.). See Case No. 15,583.

LECLERCQ (BENN v.). See Case No. 1,308.

Case No. 8,175.

LEDGERWOOD et al. v. PICKETT'S HEIRS.

[1 McLean, 143.] [1]

Circuit Court, D. Kentucky. Nov. Term, 1831.

ERROR CORAM NOBIS — DEMISE EXTENDED AFTER JUDGMENT — NOTICE TO THOSE IN POSSESSION — COMMON FORM OF REMEDY.

1. A writ of error coram nobis is issued by a court, to reverse its own judgment.

2. A demise may be extended after the judgment in the ejectment, so as to enable the plaintiff to realize the benefit of his judgment. But this should never be done without notice to the persons in possession, who may show cause why the amendment should not be allowed.

3. If a demise be extended without notice, those who are prejudiced by the order, should be heard on a writ of error or by motion, and the amendment should be set aside if injurious to their interests.

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

4. This remedy is generally given on motion, a notice having been served on the opposite party.
[Cited in Shuford v. Cain, Case No. 12,823.]

[This was an action at law by Samuel Ledgerwood and others against Pickett's heirs.]

Mr. Mills, for plaintiffs.
Mr. Wickliffe, for defendants.

OPINION OF THE COURT. In 1798 a judgment was obtained in favor of Pickett for a certain tract of land, but no writ of possession was issued on the judgment. The demise in the declaration was laid at ten years, and expired in 1808. Twenty-two years after this, a notice was served by the attorney for the devisees of Pickett on William Mitchell, that the court would be moved to amend the demise by inserting a new one; and at the ensuing May term, 1830, the demise was amended, on motion, by extending it to fifty years. Mitchell on whom the notice was served had no interest in the premises, and they had passed to the present occupants by sundry conveyances, none of whom hold as the heirs of Pickett. After the extension of the demise a writ of possession was taken out, and the terre tenants were about to be turned out of possession, without notice. To arrest this proceeding and reverse the order to amend the demise, this writ of error was brought. This writ which is issued by a court to reverse its own judgment, is called in England a writ of error coram nobis, and such is its title as used in the state courts of this state; but when used in the circuit courts of the United States, it may properly be denominated a writ of error coram vobis; as the writ is issued in the name of the president of the United States, and is tested in the name of the chief justice. The writ has grown out of use in England, and is seldom issued in the practice of the state courts. In this state, however, its use is still continued, and for the purposes of the present case, may be considered as bringing the question of the amendment of the demise before the court. Indeed it is a matter of no importance whether this proceeding be considered, technically on a writ of error or on motion. The latter would conform more to the modern practice, and would seem to be a less objectionable mode than by a writ of error, where the object is not to reverse a formal judgment, but an order of the court. This extension of the demise was permitted without opposition, and as a matter of course under the practice which has been observed in this court since the opinion of the supreme court in the case of Walden v. Craig, 9 Wheat. [22 U. S.] 576. In that case the demise was laid at ten years from August, 1789; in 1800 judgment was rendered for the plaintiff in the ejectment, and a writ of possession was awarded. Injunctions were obtained from time to time until April, 1813. At November term, 1821, Walden moved the court to extend the demise, on which motion the judges were divided and the motion consequently failed. A writ of error was prosecuted to reverse this decision. In their opinion, the supreme court say: "There is peculiar reason for the amendment in this case, where the cause has been protracted and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. The cases cited by the plaintiff's counsel in argument are, we think, full of authority for the amendment which was asked in the circuit court, and we think the motion ought to have prevailed." Cro. Jac. 440; 1 Salk. 47; 2 Strange, 307; 2 Burrows, 1159 [U. S. v. The Peggy] 1 Cranch [5 U. S.] 110. But the court dismissed the writ of error, on the ground that it would not lie to a decision of a motion to amend, which was a matter within the discretion of the circuit court.

In pursuance of the practice of this court, sanctioned by the supreme court, there can be no doubt of the power to extend the demise, but it is very clear, that such a power should not be exercised, except on notice to all persons whose interests may be affected by the amendment. The present case is a strong one to illustrate the propriety and indeed necessity of notice. It is probable that some of the persons in possession, may plead the statute of limitations; and others, perhaps, claim under different, if not paramount titles to that of the plaintiff in the ejectment. Indeed it is manifest from the facts in this case, that great injustice will be done, unless this writ of possession shall be set aside. It may be difficult to fix the limit within which the demise may be extended, but it is clear that in this summary way the rights of no individual should be prejudiced, without notice, and an ample opportunity given of showing cause why the amendment should not be granted. And as the amendment complained of was inadvertently granted, without notice, it is reversed and the writ of possession set aside.

[NOTE. The case was taken to the supreme court upon writ of error sued out by the defendants, and was there heard upon motion of the plaintiffs (defendants in the court above) to quash the writ of error upon two grounds, the first of which was merely technical. The second was, as stated by Mr. Justice Johnson, who delivered the opinion, "upon the ground that it is an exercise of jurisdiction in the court below which does not admit of revision in this tribunal; that it is but a different form or mode of exercising the power of the court of the first resort over its own acts, and is therefore subject to the same exceptions which have always been sustained in this court against revising the interlocutory acts and orders of the inferior courts." In speaking of the writ coram nobis, says the learned justice: "In general, and in the practice of most of the states, this remedy is nearly exploded, or at least superseded by that of amending on motion. The cases in which it is held to be the appropriate remedy will show that it will work no failure of justice, if we decide that it is not one of those remedies over which the supervising power of this court is given by law. The writ of error in this case was but a substitute for a motion to the court below to correct an error of its own, in granting improvidently a motion for leave to amend." It is after taking this view of the law

that the learned justice decides the case to come within the rule of Walden v. Craig, 7 Pet. (32 U. S.) 144.]

LEDLEY (PHILIPS v.). See Case No. 11,096.

Case No. 8,176.

Ex parte LEE.

[1 Cranch, C. C. 394.] [1]

Circuit Court, District of Columbia. July Term, 1806.

EXECUTORS — WILL REQUESTING NO SECURITY — WHEN ALLOWED IN VIRGINIA.

The orphans' court of Alexandria county cannot, in any case, grant letters testamentary without security, unless the testator's visible personal estate is sufficient to pay all the debts.

PER CURIAM. Mr. [E. J.] Lee was appointed one of the executors of W. Craik, deceased, who by his will declares, that "it is his wish and desire that his executors, or either of them, should not be required to give security as executors of his will." Mr. Lee applied to the orphans' court of Alexandria county for letters testamentary, which were refused, because it did not appear, to the satisfaction of that court, that there was visible estate enough to pay the testator's debts, and the court having reason to doubt, from its own knowledge, whether the testator's personal estate was sufficient for that purpose. From the judgment of that court Mr. Lee has appealed to this. The right to letters testamentary without giving security is claimed under the will and the act of assembly (page 163) which allows it only in cases where the testator shall have visible estate more than sufficient to pay all his debts, nor even in that case if the court shall see cause, from its own knowledge, to suspect that the testator's personal estate will not be sufficient to discharge all the debts. A second application was made to the court grounded on a statement of debts due from the testator in the county of Alexandria, and a schedule of personal estate in that county, without any estimate of the value thereof. But the court again refused, and from that judgment there is also an appeal to this court.

This court can see no error in either of those decisions, and is of opinion, that that court was bound by law to decide as it has decided. The appeal must therefore be dismissed.

Case No. 8,177.

Ex parte LEE.

[4 Cranch, C. C. 197.] [1]

Circuit Court, District of Columbia. April Term, 1832.

CLERK OF COURT—FEES—FOR CONTINUANCE.

If a case in equity be set for hearing as to some of the defendants, and, as to them, brought upon the docket of the court, and continued at the rules as to other defendants who are absent and who have not answered, the clerk has a right to charge his fees for the continuances at the rules.

Mr. Hewitt objected to the clerk's bill of fees in a chancery attachment, in which he charged continuances at the rules, after the cause was set for hearing as to the resident defendants, and common order of publication as to the absent defendants, and before the order of publication was executed. The cause as to the resident defendants was transferred to the court docket, but as to the absent defendants it remained at the rules.

THE COURT said it was a question of practice, and requested information as to the practice in the courts of Virginia. Mr. R. J. Taylor said the practice was as stated by Mr. [E. J.] Lee. Precedents were also produced in the time of Colonel Deneale; and on this day (3d May, 1832) a letter from Mr. Phillips, the clerk of the court at Fauquier, Virginia, was produced, confirming Mr. Lee's statement of the practice.

THE COURT (THRUSTON, Circuit Judge, absent) decided the point in favor of the clerk.

Case No. 8,178.

Ex parte LEE.

[1 N. Y. Leg. Obs. 83; 4 Law Rep. 486.]

District Court, S. D. New York. 1842.

BANKRUPTCY—WHEN DECLARED BANKRUPT—WHEN DEEMED BANKRUPT.

An applicant for a decree in bankruptcy may be examined before a commissioner prior to his being declared a bankrupt; a petitioner is deemed a bankrupt from the time he applies to the court for a decree.

This was a motion to have the petitioner examined before a commissioner, prior to a decree being passed. It was urged on behalf of the petitioner that until he was declared a bankrupt, he was not subject to examination. Cur ad vult.

BETTS, District Judge. This is an important point, but I think that the counsel for the petitioner is mistaken in his reading of the law [of 1841 (5 Stat. 443)]. He will find by the fourth section, that the bankrupt shall be always subject to examination orally or by interrogatories before the court or commissioners touching all matters relating to the bankrupt, and his acts and doings as the court may think proper. It is said, that congress intended only that he should be subject to an examination after being declared a bankrupt. But in referring to another section of the act, it will be found, that he takes the name of bankrupt before he is pronounced so by the court. On filing their petitions they are deemed bankrupts, and that is the descriptio personae. And though he has still to be declared so by the court, yet on showing cause and giving

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

notice, he is nominally, and for the purpose of enforcing this act deemed a bankrupt from the time he applies to the court. And I have no doubt that congress intended to subject him to examination from the time he applied to be made a bankrupt. But it also appears by another section, that it was intended to subject him to the orders of the court; and that he cannot get his discharge until he complies with all the orders of the court; and one of the orders of the court is, that certain matters shall be sent to the commissioners; and if the court order the bankrupt to go to the commissioners for examination, it is as much an order as it would be to desire him to show his books; and it is an order in strict conformity with the act. But the court is also authorized to proceed summarily as in chancery. And in summary proceedings in equity, it is the ordinary practice to send matters before a master in chancery for examination. In either point of view, he is therefore bound to go before the commissioners for examination, before he is declared a bankrupt. He is bound to go there, because it is one of the orders of the court, which he is bound to comply with, or because it is a proceeding in the nature of equity, and in either of these points of view he is bound to go there, and the court has power to make him do it. The act manifestly intended that the creditor should have the right to go into the whole matter, in order to show, if he can, that the petitioner has not complied with the law, and thus cut him off from a decree.

There can be no doubt, that when the framers of this act first prepared it, they contemplated only the voluntary bankruptcy, but it was afterwards thought better to couple with it the involuntary, and in order to do so this mode of proceeding was provided. It would of course be unjust to let a creditor proceed against a bankrupt, without giving him any remedy, and it is manifest that congress intended to let the debtor come in and show that the creditor had no right to stop his business and take away his property, and it therefore gave him this proceeding to counteract it. But in doing so they have attached to the voluntary proceeding the same privilege as to the involuntary proceeding, and have given to the creditor the same power as to the debtor, and in both cases it is competent for the parties to show, by matter of fact or law, why the proceeding should not go on. It is sometimes the interest of the creditor to prevent the bankrupt getting a decree, as his not doing so might better insure individual debt, and therefore it was his interest to prevent him. Ordinarily it is for the interest of all parties that the proceeding should go on and the property go to the assignee. But the creditors have liberty in this incipient stage of the proceeding to show that the bankrupt is not entitled to a decree.

Case No. 8,179.

In re LEE.

[14 N. B. R. 89; 23 Pittsb. Leg. J. 196.] [1]

District Court, N. D. New York. March, 1876.

BANKRUPTCY—ILLEGALLY PREFERRED CREDITORS—RIGHT TO PROVE DEBT—TWO CLAIMS, ONLY ONE PREFERRED.

1. The amendments of 1874 [18 Stat. 178], so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the bankrupt act [of 1867 (14 Stat. 517)], and in reference to the proof of debts by creditors who have taken a preference, are not retroactive and do not apply where the proceedings in bankruptcy had been previously commenced.

[Cited in Warren v. Garber, Case No. 17,196.]

2. Under the prior law a preferred creditor who did not surrender his preference until he was compelled to do so by the judgment of a court, could not prove his debt.

3. If a preferred creditor has two separate claims and receives a preference on one of them alone, he may prove the other.

[Cited in Re Aspinwall, 11 Fed. 138.]

[In the matter of John F. Lee, a bankrupt.]

WALLACE, District Judge. I am of opinion that the Security Bank is not entitled to prove the claim upon which it received an illegal preference in 1872. This conclusion necessarily involves the decision of two questions against the bank, upon both of which my views conflict with authorities entitled to great respect.

First. The amendments of 1874, so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the bankrupt act, and in reference to the proof of debts by creditors who have taken a preference, are not retroactive, and do not apply where the proceedings in bankruptcy had been previously commenced. If the amendments had merely removed a prohibition in the nature of a penalty upon creditors who had taken a preference, without affecting the substantial rights of others, there would be no difficulty in giving it retrospective effect. But it is to be observed that by the same amendment and in the same sentence two vigorous innovations upon the existing law are introduced, one of which defeats a recovery by an assignee where his right was clear, and the other diminishes a fund for the resort of innocent creditors, by authorizing another class of creditors to share in its distribution, who were theretofore precluded from doing so because of their wrongful acts. The former, in effect, alters a rule of property affecting the validity of all titles derived from bankrupts since the act went into operation; the latter defeats one of the most valuable advantages conferred upon innocent creditors. If one is retrospective, both are; for there is no language in the

[1] [Reprinted from 14 N. B. R. 89, by permission. 23 Pittsb. Leg. J. 196, contains only a partial report.]

section which permits a discrimination in favor of one, and against the other. If retrospective, the legislation disregards the settled doctrine that the character and consequences of particular acts are to be determined by the law in force, when the acts were done. In reliance upon the statute as it existed, many proceedings in bankruptcy had been instituted by creditors to obtain a distribution of assets in conformity with its provisions, and many actions were pending, brought by assignees upon the faith of those provisions. The injustice of depriving these creditors of the fruits of their diligence and of the benefits of the expenditures which they have incurred, is manifest; and no construction, not required by plain language, should be given to the amendments which would work this result. The general rule is well settled that, in the absence of plain and unequivocal language requiring it, a retroactive operation is not to be given to a statute. While this rule is greatly modified in construing repealing statutes and acts regulating procedure in actions, it has been repeatedly applied to such legislation when substantial rights of action or remedies would otherwise be injuriously affected. Thus, acts changing statutes of limitation, rules of evidence, rights of appeal and of redemption, creating new defenses or modifying previous remedies, have been repeatedly limited in their operation to cases arising after the passage of the act. In the absence of any language in the amendments indicating the legislative intent that these provisions shall apply to pending proceedings, I am clearly of opinion that they should be confined to cases arising after the amendments were passed. By the same amendment, new provisions in the act which relate to the form and requisites of proceedings for involuntary adjudication are made retroactive, and by express language applicable to all proceedings commenced after December 1, 1873; but the rights of parties prosecuting such proceedings are saved by provisions authorizing the proceedings to be conformed to the new requirements. By implication this limits the operation of the amendments to these proceedings only, and affords strong evidence of the legislative intent that the changes should not be otherwise retroactive.

Second. Treating the case as one to be determined by the law in force prior to the amendments, the creditor who has not surrendered a preference until he has been compelled, after contest, to do so by the judgment of the court, is precluded from proving the debt upon which the preferential payment was received. I have held repeatedly that under the terms of the 23d section of the act, prior to the amendment, a voluntary surrender was a prerequisite to the right to prove, and that it was too late for the creditor to avail himself of the privilege after he had elected to contest the assignee's title to the money or property preferentially received. Whether the action of the creditor was in actual fraud of the act, or only a constructive fraud upon it, he is chargeable with knowledge of its illegality, and must be assumed to have made his election with such knowledge. As to the note for one thousand and seventy-three dollars and eighty-six cents, of date of December 13, 1871, it does not appear that any part of the preference, received by the bank, was received upon this note. On the contrary, the payments were made with the intention that they should be applied upon the other obligations upon which the bankrupt was liable to the bank, and they were applied accordingly. The bank is entitled to prove this note against the estate of the assignee. The decision of the court is, that the claim of the Security Bank be disallowed and its proof of debt expunged, except as to the amount due upon this note.

Case No. 8,180.

LEE'S CASE.

[22 Leg. Int. 284;[1] 6 Phila. 96.]

Circuit Court, E. D. Pennsylvania. July 17, 1865.

HABEAS CORPUS—FLIGHT WHILE UPON BAIL—CONTEMPT—RIGHT THEREAFTER TO BE AGAIN LIBERATED—PARDON — NOMINAL PUNISHMENT THEREAFTER.

1. A person accused of a series of crimes, under each of two distinct heads, was, after a regular commitment, liberated upon a regular recognizance of bail, on the usual condition to appear in court to answer any charges, and not depart without leave. Under one of the heads of accusation, three bills of indictment were afterwards found for certain of the offences with which he was charged. He was tried, under one of these indictments, and convicted. Before sentence he absconded. Having been afterwards arrested and brought into court, he was under this conviction, sentenced to pay a fine and undergo a certain imprisonment. By a special pardon, this imprisonment was remitted, on condition that the fine should be paid. The pardon did not apply to the charges in the other two indictments for offenses under the same head of accusation as the offence of which he had been convicted, nor to any of the offences charged under the other head of accusation. The fine having been paid, and his imprisonment under the sentence having been terminated by the pardon, he was in custody under a recommitment to answer the other charges. Upon a subsequent application by him to be admitted to bail, his flight was considered such a wilful breach of the essential condition of his liberation upon bail that his privilege of such liberation had been forfeited.

2. This forfeiture of the privilege was independent of, or collateral to, the contempt of court which had been incidental to the wilful breach of the condition. Therefore, after the contempt was purged, or sufficiently punished, his detention in custody, without admission to bail, might be continued under the recommitment.

3. A renewal of the forfeited privilege of liberation upon bail was not demanded of right, and could not be reasonably asked of grace, nor allowed under an exercise of properly regulated ju-

[1] [Reprinted from 22 Leg. Int. 284, by permission.]

dicial discretion, because it was apparent, from his former flight, that, if again thus liberated, he might probably again abscond.

4. But, beyond the proper duration of imprisonment for the contempt, his detention without admission to bail should not be prolonged, except for the purpose of secure custody till trial or other lawful deliverance from commitment.

5. The forfeiture of the ordinary privilege of liberation upon bail involved no forfeiture of his ulterior privilege of deliverance—either by trial or otherwise—without unreasonable delay. If a new privilege of deliverance on bail arose from delay of trial, the only proper effect of the forfeiture of the original privilege would be upon the amount of bail requirable, and the number of sureties. And if he would otherwise, from unreasonable delay of trial, be entitled to an absolute discharge, the forfeiture of the original privilege might not prevent such discharge.

6. The charges against him under the same head as the offence of which he had been convicted were so complicated with it that all of them had necessarily been considered in determining the measure of the punishment in the sentence to which the pardon applied. The indirect effect of the pardon, therefore, was that, if he should be convicted afterwards of another offence under that head, his punishment would be but nominal. In determining the punishment imposed by that sentence, none of the charges against him under the other head of accusation had been thus considered. But under this other head no indictment had been found for any one of the offences charged; and from the past and inevitable future delay it was apparent that, if hereafter indicted for any of them, he would not be triable under such new indictment until after a longer imprisonment than would be allowed without admission to bail in a case originally not bailable. The circumstances were such that this would have been the case if he had not absconded. He was, therefore, admitted to bail, but in an increased amount, with an addition to the ordinary number of securities.

[Habeas corpus. On the part of Robert M. Lee.]

CADWALADER, District Judge. Persons accused of crime, who have been committed to official custody, are, in ordinary cases, entitled to immediate judicial liberation upon bail. In ordinary cases, and also in other cases, accused prisoners have the less immediate right of speedy trial according to the due course of procedure; and, if their trial is arbitrarily delayed, become entitled to liberation, as justice may require, either on bail or absolutely. A person committed for contempt has none of these privileges in respect of such commitment. His imprisonment in this respect is under an adjudication of contumacy. If the contumacy has occurred in the course of proceedings in which he is charged with crime, the proceeding as to the contempt is, nevertheless, considered as, in this respect, collateral to the proceedings under the original prosecution. The question of contempt, in the present case, will be considered hereafter. In the meantime the case will be considered as if it involved no question of contempt.

Under the laws of the United States, a prisoner accused of crime must be admitted to bail in all cases except where the punishment may be death, and in cases in which it may be death, judicial discretion is exercisable on the subject. This party has not been accused of any offence punishable with death. He was, therefore, when originally committed, entitled, of course, to liberation upon bail. He was admitted to bail accordingly upon the usual condition to appear in the district court to answer any charges, and not depart without leave.

The subjects of prosecution were two, similar in their general character, but entirely distinct as to the series of individual transactions involved in them respectively. One of these general subjects was an alleged enlistment, or spurious enlistment, of eighteen recruits, credited to a certain division of the Seventh Pennsylvania district. An incidental forgery of enlistment papers was alleged. The other general subject was an alleged similar transaction as to twenty-two recruits credited to one of the divisions of the Eleventh district. Here, also, a forgery of enlistment papers was alleged. Every one of the forty alleged enlistments in the two districts, had, or may have had, its own distinct papers; and everyone was apparently the subject of two distinct accusations of crime. One accusation was under acts of congress concerning forgery; the other, under the act against procuring or attempting to procure desertion. It would have been a censurable multiplication of prosecutions to have indicted him under these eighty charges. Three indictments were found by the grand jury at the last February sessions of the district court. These indictments applied severally to each of three of the alleged enlistments of recruits for the Seventh district. One indictment was for forgery of enlistment papers of one of these alleged recruits. The two other indictments were each for procuring the desertion of another alleged recruit for the same district. These three indictments were, in March last, each certified with the recognizance of bail, into the circuit court under the third section of the act of 1842 [5 Stat. 517]. Under that act the recognizance has, in the circuit court, the same effect as it would have had in the district court, if the cases had remained there. No indictment was either found or ignored by the grand jury as in any case of the alleged enlistment of recruits credited to the 11th district. It is therefore presumable that no such indictment was laid before the grand jury. The prosecution as to cases under this head remains, I believe, precisely as it stood when the accused was bound over to answer in the district court.

The certificate to the circuit court was thus exclusively of prosecutions relating to the alleged enlistments, or spurious enlistments, for the Seventh district. At the last April sessions of the circuit court the indictment for forgery was tried. According to the minutes of the court, the defendant was present during the trial, and, the jury hav-

ing retired to deliberate upon their verdict, were returning into court, when he disappeared. He was called, and, not answering, the default was recorded, and a bench warrant for his arrest was issued. The recognizance was also adjudged forfeited. By the verdict, which was then taken, he was convicted under this indictment. This was on the 7th of April. The other indictments have not been tried.

The bench warrant was not executed for more than seven weeks, during which time it is legally presumable that search for him was prosecuted with due official diligence. There was no voluntary return to custody; nor any surrender by bail or otherwise. He was at length, however, found, and taken into custody, where he remained until the 1st of this month. On that day he was brought into court; and under the indictment, which had been tried, was sentenced to pay a fine, and undergo an imprisonment in the penitentiary of the state. On the 10th instant the president, by a special exercise of the pardoning power, remitted the imprisonment on condition that the fine should be paid. This condition having been complied with on the 11th, the defendant was discharged from the penitentiary. There was, apparently, nothing in the pardon to effect the prosecution under the two untried indictments. The attorney of the United States, on the 11th, observing this, moved in the circuit court that the defendant be committed under those indictments. Upon this motion, before his removal from the penitentiary, such an order of commitment was made. He was received from the penitentiary into the custody of the marshal, whose duty it would have been to resume the custody of him if the last-mentioned order of the court had not been made. The marshal's custody, except as affected by this order of commitment, is now the same custody in which the defendant would have remained if he had never been in the penitentiary, but had been acquitted by the jury in the case in which he was convicted and afterwards pardoned. He would then have been detained for trial under the other two indictments. The marshal's custody, or his right of custody, continued during the imprisonment in the penitentiary, though his right of actual detention of the prisoner was qualified or suspended by the detention in the penitentiary. If these points were doubtful, the order of commitment of the 11th instant would make them quite immaterial. Whether this order was a recommitment, or a commitment, would be a trivial inquiry. It was, whichever phrase best applies to it, a "commitment," as distinguished from an "arrest." The commitment, moreover, was not such a one as may occur after hearing under an arrest, but such as may occur in ulterior stages of criminal procedure. The party committed was already subject to the police of the court, and, as the record proves, had broken the condition upon which he had been liberated on bail. No explanation, or excuse, of his absconding—for such appears to have been the character of the breach of the condition of liberation—has been suggested. On the 12th instant, a motion was made on his behalf, in the circuit court, for leave to enter bail. His counsel pressed the motion, upon the ground of the pardon, and upon the general course of practice in those ordinary cases of default, in which the condition of recognizances of bail is always considered as a mere penalty to secure punctual attendance. The general applicability of the special and conditional pardon to offenses not mentioned in it could not be admitted. This pardon cannot apply directly to the charges in the two untried indictments. What may be its indirect application to them will be considered hereafter. I did not think that the course of practice, in the familiar ordinary cases of default which had been mentioned, furnished a rule of decision for an aggravated case of such wilful flight as might, not improbably, occur again, if an opportunity were offered. But the counsel seeming to insist that, even in such a case, a renewal of the privilege of liberation on bail was demandable of right, I suggested that, upon the return to a writ of habeas corpus addressed to the marshal, the question might, perhaps, be more fully developed. The application for this writ was therefore substituted for the motion. The writ having been issued by me, not as judge of the district court, but as a judge of the circuit court, and, having been addressed to the officer of the court, the prisoner has, upon the officer's return, the benefit of every argument which could have been available on the original motion. The return, however, states no fact which does not appear in the records of proceedings already mentioned, and concludes with a general reference to the proceedings of record. Nothing on the part of the prisoner to alter the case exhibited by them has been suggested. The question whether he should be admitted to bail stands, therefore, precisely as it did upon the original application.

The points of inquiry are: (1) Is the renewal of liberation upon bail demandable in this case of right? (2) Should the privilege be renewed of grace, in other words, in the exercise of regulated judicial discretion?

1. The inestimableness of the privilege of liberation upon bail, as a safeguard of the right of personal liberty, is not, nor is the original extent of the privilege, here in question. The question is upon what condition the retention of the privilege by a party who has already been liberated on bail depends of right, or upon what condition his right of demanding a renewal of the privilege depends. The question, as it will soon be narrowed, is, upon what condition may an accused person who, after proper arrest and hearing, has been duly committed to

official custody, demand liberation from such custody? Here two converse propositions may be stated: The first, that persons accused of crime should never, until conviction, be under any personal restraint, except such as is necessary and proper for securing their attendance in court to answer any charges, and for preventing their departure from court without leave; the second, that persons regularly committed cannot reasonably ask liberation, except upon the essential twofold condition that they will thus attend in the proper court or courts, and will not depart thence without leave.

The proposition which is to be considered and applied is the second. It is expressed in the condition of the recognizances usually taken when parties, who have been thus committed, are liberated from official custody. Such recognizances neither create the condition nor define it originally. The recognizance of a prisoner liberated without bail or surety is upon this condition. In such a recognizance he is usually bound in a certain sum of money. But this might be omitted. If he should be simply liberated by a court from the custody of its officer, on condition to appear in the court at the next term, and not depart without leave, the acknowledgment of this on record would have the same effect as in a recognizance of the usual form. The condition is that prescribed by law,—or that which may be lawfully prescribed,—in every case of liberation from such commitment.

When sureties of the party liberated are bound of record for his fulfilment of the condition, the record of their engagement on his behalf becomes a recognizance bail. He is then, in legal phraseology, delivered to his friends, who thus engage that he will fulfil the condition. That he may be relieved from the personal restraint which is unavoidable under an official custody, they become, as it were, his private jailors. They are so designated in books of authority. Though there cannot be a lawful private prison, understood as a place of compulsory detention, there may be such private jailors of a prisoner's own choice. This designation applies practically to the bail so far, at least, that they may, at any time, surrender him, and thus relieve themselves of responsibility for his fulfilment of the condition. In cases of such surrender, he commits no breach of the condition, and retains, therefore, unimpaired, his right of liberation upon bail. He may thus avail himself of the privilege as often as occasion may, in this, or in any other manner, occur without his own inexcusable default. His original privilege still subsisting, it is not renewed when he thus, from time to time, avails himself of it anew. But, after an unexcused and unatoned, wilful breach of the essential condition of the privilege of liberation upon bail, the privilege does not continue to exist; nor is a renewal of the privilege then demandable of right. The application of these remarks to the present case must be obvious.

Here a few words on the question of contempt may be proper. That the act of this party was an aggravated contempt of court is indisputable. The police of a tribunal of criminal jurisdiction could not be maintained without an occasional cognizance of contempts less aggravated, consisting in the mere nonattendance of parties. For such contempts, parties who have abused the privilege of liberation upon bail must occasionally be committed. I have had occasion thus to commit a party to temporary custody, where the recognizance of his bail was not forfeited; and this might happen where a forfeiture of it had occurred, and had, as to bail, been respited. If a privilege of renewed admission to bail continued to exist, notwithstanding any breach of the condition of the original liberation upon bail, the commitment for contempt would prevent actual liberation. An absconding party, retaken and committed for the contempt, should not be liberated so long as his detention may be necessary to maintain the police of the court, and prevent him from absconding again before trial. Beyond the detention for these purposes, his imprisonment for the contempt should not ordinarily be prolonged. But he might also, in some cases, properly be fined for it. These are questions which cannot ordinarily arise under a writ of habeas corpus, because a party committed for contempt cannot ordinarily, under this writ, dispute the lawfulness of such a commitment. In the present case, the privilege of liberation upon bail has been forfeited, independently of any question of contempt. When the contempt has been purged or punished, the strict custody of a party who has thus forfeited the privilege, may be necessarily continued in order to secure his presence at a future trial.

2. The second point of inquiry is thus reached. It is whether, through the regulated exercise of judicial discretion the privilege which this party has thus forfeited should be renewed in his favor. In ordinary cases, the renewal of the privilege, when forfeited, or the respite of the forfeiture, is so much, of course, that the form of the question is usually overlooked. Thus the question whether the privilege had been forfeited by an accused party is very seldom even considered, whatever consideration may be given to the question whether his bail should continue pecuniarily liable. The privilege, when the contempt has been purged, ought, upon payment of the official charges incurred, to be renewed in almost every case, and often without any such payment. Perhaps the only case in which the privilege ought not to be thus renewed may be where it is apparent that the party thus asking grace might probably abscond if it were granted. The present is, unfortunately, a case of this kind.

What has heretofore been called, for want of a suitable designation, the indirect effect of the pardon, must, however, be considered. Here the two general subjects of the prosecution, which have already been mentioned, must be considered separately. As the indictments were certified into the circuit court, if the defendant had been acquitted of the forgery of which he was convicted, he might afterwards fairly have been tried for the procurement or attempted procurement of desertion. But, after a conviction under the former charge, he probably would not have been tried under the latter. In the sentence of the first instant, the measure of his guilt, in all the eighteen cases of alleged enlistments credited to the Seventh district was considered by the court. The remission of his imprisonment under that sentence ought, I think, to have the same effect as if he had undergone the imprisonment. Should he be convicted hereafter under either of the two untried indictments, I, therefore, doubt if any other than a nominal punishment would be imposed. Therefore, if accusations relating to alleged enlistments for this district were alone in question, the propriety of detaining him in strict custody would be so doubtful that I would probably at once admit him to bail, and, if he should not be tried at the next term, would then probably discharge him absolutely.

The question is different as to the twenty-two cases which compose the second of the two general subjects of accusation. These, it will be recollected, were cases of alleged enlistments of recruits for the Eleventh district. The certificate to the circuit court included no indictment under this head of accusation. As has already been stated, no such indictment has been as yet found. The accusations under this head were not considered in determining the measure of the punishment when the sentence was imposed. In these twenty-two cases he continues liable to prosecution, and I cannot perceive that under this head the prosecution can be directly or indirectly affected by the special pardon. His recognizance applied not less to these than to those upon which indictments were found and certified into the circuit court. The transmission to that court of the recognizance did not alter its effect as to the district court. If a recommitment were necessary, the fact that when liberated upon bail he had broken the condition of such liberation would appear of record, and would be the cause of recommitment. Independently of any question of contempt, a party who, having thus forfeited his original privilege of liberation upon bail, is detained in strict custody, does not forfeit certain ulterior privileges, which have been mentioned. Thus, he may still demand a speedy trial; and, if trial is refused after the latest proper time for it, may then obtain liberation upon bail, or may, through the course of jail delivery or otherwise, obtain absolute liberation. Admission to bail, as the means or mode of deliverance from detention unduly prolonged, may thus be demandable as of right, though the primary privilege has been forfeited. In taking bail in such a case, extraordinary caution as to the amount and as to the number and sufficiency of the securities may be necessary. But these would be merely incidental subjects of consideration.

On the whole case of this party, he should not be admitted to bail unless it appears that he cannot have a trial without greater delay than is incidental to the regular course of procedure. If an indictment had been heretofore found as to any one of the last-mentioned twenty-two cases, whether it had been certified into the circuit court or not, I would not admit him to bail, but would hold him for trial at the August sessions of the district court, or October sessions of the circuit court. Afterwards, if the case should not have been tried, the question of admitting to bail might arise. But, as no such indictment has been found, the past as well as probable future delay must be considered. For such delay the law officers of the United States who have conducted the prosecution cannot be censurable, because it may be assumed that the special pardon was unforeseen by them. But the accused, however otherwise to blame, is not, in this respect, in fault. He ought not to be detained for an extraordinarily long time in strict custody for any reason arising from the fact that he has received the special pardon. In this case the question of past and probable future delay is complicated with peculiar considerations.

The transactions upon which the prosecution is founded occurred in September last. Notwithstanding the unavoidable protraction of the preliminary investigations, bills of indictment might have been laid before the grand jury for either the February or May sessions of the district court. Such bills may be prepared for the grand jury at the approaching August sessions. Should they be found, the course which I might adopt in retaining them in the district court, or certifying them into the circuit court, is perhaps doubtful. This would be immaterial if there could be any definite probability of trial at the first regular sessions of either court. But there cannot, from the character of legal proceedings, be any such definite probability. After two terms, at both of which it has been possible to indict and try an accused prisoner according to law, he, in ordinary cases, becomes entitled to an absolute discharge. See 5 Casey, 135. In this case, no indictment will have been found, at the earliest, until the third term. If the accused party had not abused his primary privilege of discharge on bail, he would now be entitled, not to a mere dis-

charge on bail, but to an absolute discharge. To refuse to admit him to bail under such circumstances would, therefore, perhaps be an excess of strict custody. Should bail be taken, the decision will not be a precedent for any probable case of another party who may, by absconding, have broken the condition of the original liberation upon bail.

I have great doubt of the correctness of the decision which I am about to make. But every doubt which reason cannot remove should be resolved in favor of personal liberty. I will, therefore, admit this party to bail in $10,000, with three sureties, each in $5,000, for his attendance at the next district and circuit courts. The recognizance of bail will be in such form that more than $10,000 in the whole will not in any event be payable by the sureties, and that $5,000 will be the greatest amount payable by any one surety.

Case No. 8,181.

LEE v. AETNA INS. CO.

[3 West. Law Month. 404.]

Circuit Court, N. D. Ohio. July, 1861.

CORPORATIONS—CITIZENSHIP THEREOF—EFFECT OF FILING STATEMENT AND CONSENT TO SERVICE.

1. A corporation, created by or under the laws of a particular state, is a citizen of that state; and a foreign insurance company does not become, for the purpose of an action at law, a citizen of this state, by filing in the office of the auditor the statement, and a consent that service of process, mesne or final, upon an agent of the company, in this state, shall be as valid as if served upon the company according to the laws of this or any other state—as provided by the "act to regulate insurance companies, not incorporated by the state of Ohio."—1 Swan & C. St. 738.

2. The filing of the statement and consent, as authorized by the act above mentioned, renders service of a summons, or other appropriate process, upon such agent, an effectual commencement of an action against such corporation, whether the action be brought in a court of the state or of the United States.

3. An action thus commenced against an insurance company organized under the laws of Connecticut, in a court of common pleas in this state, by a citizen of this state, in which the matter in dispute exceeds five hundred dollars, may, properly, be removed by the defendant into the circuit court of the United States for the district embracing the county, and will not be remanded for want of jurisdiction.

[This was an action on a policy of insurance by David B. Lee against the Aetna Insurance Company. Heard on motion to remand cause to the state court.]

Mr. Spaulding, for plaintiff.

Mr. Conant, for defendant.

WILLSON, District Judge. The plaintiff has filed his motion to remand this cause to the court of common pleas of Portage county, from whence it was removed to this court, on the petition of the defendant, under the provisions of the 12th section of the act of 1789 [1 Stat. 79]. The plaintiff is a citizen of Ohio. The defendant is a corporation, created by the state of Connecticut; and, in legal contemplation, is a citizen of that state. The suit is an action at law upon a policy of insurance; and the matter in controversy exceeds the sum of five thousand dollars. The defendant claims the right to a trial in this court, by virtue of the second section of the third article of the constitution of the United States, and the 11th and 12th sections of the judiciary act of 1789. The section of the constitution referred to, declares, that the federal judicial power shall extend to all cases in law and equity arising between citizens of different states. The 12th section of the judiciary act of 1789, provides, "that if a suit be commenced in any state court against an alien, or by a citizen of a state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial, into the next circuit court to be held in the district, where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall be the duty of the state court to accept the surety, and proceed no further in the cause; and the said copies being entered in such court of the United States, the cause shall there proceed, in the same manner as if it had been brought there by original process." There can be no question that this court has cognizance of the subject matter of the suit, and also jurisdiction over the parties to it, if those parties are properly before us. The 11th section of the judiciary act provides, that no civil suit shall be brought before either of the circuit or district courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The provision of this 11th section, relating to the service of process, is not a denial of jurisdiction, but the grant of a privilege to the defendant, not to be sued out of the state where he resides, unless he shall be served with process in the state where suit is brought. In order to give jurisdiction, it is not necessary that process be actually served upon the defendant, in the state where suit is brought. This exemption from the service of process upon the defendant, may be waived by the voluntary appearance or consent of the party privileged.

The early leading case of Logan v. Patrick, 5 Cranch [9 U. S.] 288, clearly and fully affirms this construction of the 11th section of the act. That was a suit in equity, brought in the United States circuit court

of Kentucky, against a citizen and resident of Virginia, who was not served with process in Kentucky. The supreme court sustained the jurisdiction, and proceeded with the cause, on the ground that the defendant had voluntarily appeared and answered to the suit. This construction of the statute has been adopted and uniformly followed by the federal courts ever since.—Harrison v. Rowan [Case No. 6,140]; Flanders v. Etna Ins. Co. [Id. 4,852]; [Gracie v. Palmer] 8 Wheat. [21 U. S.] 699; [Toland v. Sprague] 12 Pet. [37 U. S.] 300; [Irvine v. Lowry] 14 Pet. [39 U. S.] 293. The question now is, has the Aetna Insurance Company, by legal process or voluntary appearance, come properly into this court, as a party defendant to the suit? The action was originally brought in the court of common pleas of Portage county, by the issuing of a summons against the defendant, which writ the sheriff returned served by delivering a true and certified copy of the same, to Philo B. Conant, agent of said Aetna Insurance Company, at his office and usual place of business in said county. The suit was commenced in the state court, under the authority of the act of the Ohio legislature of April 8, 1856, entitled "An act to regulate insurance companies not incorporated by the state of Ohio" (53 St. 75). And the mesne process was issued and served by virtue of said act, and the written stipulation of said company filed in the office of the auditor of state, duly signed and sealed, consenting that service of process, mesne or final, upon any such agent, should be taken and held as valid as if served upon the company according to the laws of this or any other state.—The state law of April 8, 1856, makes the filing of this stipulation in the auditor's office a condition precedent to the transaction of any business in Ohio, by foreign insurance companies. It was, therefore, competent for the plaintiff to bring suit against the defendant in the state court, upon a policy of insurance for risks taken in Ohio, by virtue of the state law. And it would have been equally competent for the plaintiff to bring a like suit in this court, and serve process upon the company's agent; and this could be done by virtue of the consent of the company, contained in the stipulation filed in the office of the auditor of state.—By that stipulation the Aetna Insurance Company waived its privilege of being sued and served with process in Connecticut; and it made the service of process upon its agent in Ohio, as valid as if served upon the company itself according to the laws of Connecticut; and that stipulation is as effectual to give this court jurisdiction over the foreign corporation, as would be the voluntary appearance of the defendant and answering to the suit. But it is said, the state law can only be operative in the state courts; and that foreign insurance companies, by accepting its terms and transacting business under it, become, in legal effect, domestic corporations, and therefore not subject to the jurisdiction of this court, in controversies with citizens of Ohio. We are unable to see the force of this objection. The Aetna Insurance Company is a corporation created by the state of Connecticut. It has no powers except those conferred by its charter. Those powers can neither be enlarged nor abridged by the legislature of another state. The company is, to all intents and purposes, in law, a foreign corporation, restricted, nevertheless, in its business operations, in Ohio, by certain regulations, prescribed by state authority, which regulations in no way affect its legal existence or its corporate powers and franchises. Its appointment of agents, here, and the business transactions of those agents, can, by no possibility, make the company a corporation of this state. Nor is it in the power of one state, by legislation or otherwise, to change the citizenship of a person who is a citizen of another state, in order to give exclusive jurisdiction to its own courts.

In Hyde v. Stone, 20 How. [61 U. S.] 170, the supreme court expressly held, that the jurisdiction of the courts of the United States over controversies between citizens of different states, can not be impaired by the laws of the states, which prescribe the modes of redress in their own courts, or which regulate the distribution of the judicial power. In many cases, state laws furnish a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the federal courts are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They can not abdicate their authority or duty, in any case, in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. [39 U. S.] 67; Union Bank v. Jolly's Adm'r, 18 How. [59 U. S.] 503.

The proceedings for removing this cause from the state court, being in all respects regular and in conformity to law, the motion to remand is overruled.

LEE (BANK OF UNITED STATES v.). See Cases Nos. 921 and 922.

LEE (BARNES v.). See Cases Nos. 1,017 and 1,018.

Case No. 8,182.

LEE et al. v. BLANDY et al.

[2 Fish. Pat. Cas. 89; 1 Bond, 361; Merw. Pat. Inv. 425.] [1]

Circuit Court, S. D. Ohio. May, 1860.

PATENTS—EVIDENCE—CERTIFIED COPY OF ASSIGNMENT—LICENSE EVIDENCE OF UTILITY—TWO INVENTIONS, ONE PATENT—PATENTABILITY—MEANS DIFFERENT IN PRINCIPLE.

1. A certified copy of an assignment from the patent office is prima facie evidence of the genu-

[1] [Reported by Samuel S. Fisher, Esq.; reprinted in 1 Bond, 361; and here republished by permission.]

ineness of the original, and may be read in evidence to the jury.

[Cited in American Cable Ry. Co. v. Mayor, etc., of New York, 56 Fed. 152. Cited, but not followed, in Paine v. Trask, 5 C. C. A. 497, 56 Fed. 233. Disapproved in Mayor, etc., of New York v. American Cable Ry. Co, 9 C. C. A. 336, 60 Fed. 1,017.]

2. A former license from the plaintiff to the defendant to use the patented machine is evidence of the utility of the invention.

3. There can be no question but that there may be a claim for two inventions in the same patent, if they both relate to the same machine; and an action can be sustained for the infringement of either, when they are claimed as separate and distinct.

4. There are two classes or kinds of combination recognized by our patent laws which are properly the subjects of a patent. The first is one in which all the parts were before known, and where the sole merit of the invention consists in such an arrangement of them as to produce a new and useful result. The second is where some of the parts or elements of the combination are new, and their invention is claimed, but where they are used in combination with parts or elements that were known before. There is no infringement of a combination of the first class unless the defendant has used all the elements; but the second class may be infringed by the use of a part, if it is new and the invention of the patentee.

[Cited in Rowell v. Lindsay, 6 Fed. 293; Washburn & Moen Manuf'g Co. v. Griesche, 16 Fed. 671.]

5. The patentee is protected against any device which involves substantially the same principle as his own; but if another party produces the same result by means different in principle and application, then it is no infringement, for it would be absurd to say that the granting of a patent covers all possible ways of producing the same result.

6. Norcross claimed "the application to circular saw frames, of rocker boxes and a swing frame, as herein set forth, and suspending said frame in position by means of the driving belt, as above described, for the free and successful operation of the saw by the motion before mentioned." *Held*, that this was a claim for a single combination of rocker boxes, swing frame, and suspension of the frame by the driving belt, and not a claim for two separate improvements.

[Cited in Burke v. Partridge, 58 N. H. 353.]

This was an action on the case tried by Judges McLEAN and LEAVITT and a jury, to recover damages for the alleged infringement of letters patent [No. 7,027] for an "improvement in hanging circular saws," granted to Nicholas G. Norcross January 15, 1850, and assigned to plaintiffs March 28, 1856. In his specification the inventor says: "The nature of my invention consists in suspending the saw so that it can have lateral vibration, and when thrown out of line will recover itself by the action of the driving belt, and the arrangement of the parts by which it is sustained, while at the same time the arbor has no lateral play in its boxes, and is made to fit close with shoulders, to prevent the oil from getting out while in operation —a matter of great importance when the motion is so rapid as in circular saws. This is effected by supporting the boxes in which the journals of the arbor run upon standards, to which said boxes are jointed, and which are themselves jointed to the foundation to which they are attached, so that the arbor is kept horizontal, while it is allowed a sufficient lateral play, the motion being a curved line, and of course, inclining downward as the tops of the standards recede either way from a vertical position. To sustain the frame upright, the driving belt passes around the pulley on the arbor, up over a driving pulley above, and thus holds the frame up to the proper point, so that the saw is actually suspended by the belt, while it is kept steady and made to move properly by the frame below. By this arrangement it will be seen, that while the slightest force will cause the arbor to deviate a little laterally the constant tendency of the reacting agent is to bring it back to place again. By this means I am enabled to use a much thinner saw, and save material and power to a great degree. * * * What I claim as my invention and desire to secure by letters patent, is the application to circular saw frames, of rocker boxes and a swing frame, as herein set forth, and suspending said frame in position by means of the driving belt, as above described, for the free and successful operation of the saw by the motion before mentioned." The plaintiffs [Rufus S. Lee and William D. Leavitt] claimed that these specifications described in effect two distinct improvements in the circular saw. First, permitting the lateral motion of the saw mandril, or arbor, by the device of the rocker boxes and swinging frame, and second, restoring the saw to line by the elasticity of the belt acting as a reacting agent. The defendants [Henry Blandy and Frederick J. L. Blandy] gave the saw arbor end play in its boxes, and did not use the swing frame, but, in order to restore the saw to line, they placed a metallic spring in a box at the end of the mandril, so that when, from any cause, the mandril was deflected, the spring would throw it back to place again. The plaintiffs claimed that the elasticity of this metallic spring in the defendants' machine was an equivalent for the elasticity of the belt in the plaintiffs', in other words, that both were in effect springs, and that the defendants had thus infringed the plaintiffs' patent by using their second improvement.

One or two preliminary rulings were of interest. The plaintiffs offered a copy of the assignment of Nicholas G. Norcross to them, of his rights, under the patent, for the state of Ohio, with a certificate of the patent office, showing it to be a copy of the record of what purported to be the original assignment. The defendants objected, first, because there was no proof of the validity of the original assignment, and second, because the plaintiffs must be presumed to be in possession of the original assignment to them, and, therefore, a copy was not the best evidence. THE COURT overruled the objection, and held that the certified copy was

prima facie evidence of the genuineness of the original, and permitted it to go to the jury.

At a later stage of the case, THE COURT held that a contract which the defendants had formerly made with the plaintiffs, for the right to use their machine, might go to the jury as evidence of the utility of the Norcross invention.

G. M. Lee and S. S. Fisher, for plaintiffs.

C. D. Coffin and A. G. Thurman, for defendants.

Before McLEAN, Circuit Justice, and LEAVITT, District Judge.

LEAVITT, District Judge (charging jury). On January 15, 1850, a patent was issued to Nicholas G. Norcross. The improvement for which he received the patent is designated "an improvement in hanging circular saws." On March 28, 1856, Norcross, the patentee, assigned his rights for the state of Ohio, and eight other states, to the plaintiffs, Lee and Leavitt.

This suit is brought for an alleged infringement of the plaintiffs' right, in the making and selling of a number of circular saws, which, the plaintiffs claim, embodied a material element of the improvement patented to Norcross. A great and important question, involving the construction of the patent, has been made and argued with great force. That is a question exclusively for the consideration of the court, and however anxious I might feel to avoid that legal proposition, and to present the whole case to the consideration of the jury, the position I occupy, and the duties that devolve upon me require me, to deliver an opinion upon it.

On the part of the plaintiffs, it is contended that Norcross' invention consists of two separate improvements: First, the use and application of rocker boxes and a swinging frame to produce lateral motion of the saw. Second, the action of the belt by the force of elasticity, in connection with the pulleys, to restore the saw to line when deflected from its right course.

These are claimed by the plaintiffs' counsel as separate and independent improvements, and as being both covered by the claim of Norcross. They claim that defendants have infringed the Norcross patent by the use of the spiral spring in the end of the mandril, the office of which is to restore the saw to line, which spring is claimed to be a mechanical equivalent for the belt in connection with the rocker boxes and swinging frame.

The defendants' counsel insist: First, that the invention of Norcross, as set out in the patent, is a combination of rocker boxes, swinging frame, and suspension of the frame by the driving belt; they insist that these elements are claimed as an entire structure or machine, and that there can be no infringement unless the defendants have used all the parts or elements of it. They do not use the swinging frame or rocker boxes, and therefore do not infringe. And secondly, they insist that their metallic spring is not the same or an equivalent for the belt and its connections in the Norcross invention.

The latter question, that of identity of the two inventions, is, of course, a question for the jury, and I do not propose, in this place, to say anything upon it, but will ask your attention to the propositions of law in regard to the construction of the claim of this patent.

There can be no question but that there may be a claim for two inventions in the same patent, if they both relate to the same machine or structure; and an action can be sustained for the infringement of either one or the other of these separate inventions, where claimed as separate and distinct in their character. There can be no doubt, if one of these be infringed it is properly a subject for an action. The question, in this case, is, whether the claim is of this character—whether it is, in fact, a claim for two distinct and independent inventions, or whether it is a claim for a combination. If a combination, what is the character of that combination?

There are two classes or kinds of combinations recognized by our patent laws which are properly the subject of a patent. The first may be defined to be one in which all the parts were before known, and where the sole merit of the invention consists in such an arrangement of them as to produce a new and useful result, or where, by adopting parts of a machine which may have been known for ages, an inventor has succeeded in making such an arrangement of them as that they produce a result never before attained, and have, in that point of view, the merit of originality, and are, therefore, patentable.

There is another class of combinations, where some of the parts or elements of the combination are new, and their invention claimed, but where they are used in combination with parts or elements that were known before.

It is well settled that a patent may be obtained for the first class of combinations, but it is a principle well recognized that there is no infringement unless the party has used all the elements. If the combination consists of A, B, C, three mechanical structures long known, and if the party sued has only the parts B, C, and not A, he is not regarded as an infringer; he must use all to subject himself to liability.

If the combination have the other character to which I have referred, being, to a certain extent, new, but embracing some old parts or elements, then there is an infringement by the use of that part which is new and the invention of the patentee. In the present case, there is no claim or pretense that these defendants use the swinging frame and rocker boxes in their saw mill; and, therefore, if

the Norcross claim is to be viewed as for a combination, without anything new, it would result that defendants have not infringed by their method of producing lateral motion, and of restoring the saw by the use of the spiral spring.

The language of the patent seems, in my judgment, to contemplate a machine made up of a combination of different parts, all necessary to its harmonious working, as a unit. It seems hardly possible to resist the conclusion, that the machine was arranged and constructed so as to produce lateral motion, and the restoration of the saw into line in case of divergence. There is no intimation that any one of the appliances are separate and independent inventions. I am obliged to state as my view of the proper construction of this patent, that it claims a structure or machine in combination, or composed of a combination of different elements. There is certainly great force in the idea that the patentee could not have claimed the belt per se as a novelty, and that it could only be claimed in combination with the rocker boxes and swinging frame, for it is only in connection with them that the belt could act as a restoring agent; and this would seem sufficient to show that it was not contemplated as a separate invention, but as one of the parts of the entire combination.

These are the views I have felt it my duty to give the jury upon the question of combination. I have regretted somewhat that I have been brought to this conclusion, as I am very desirous, independent of any legal question of this kind, growing out of this specification, that the jury should take the entire case upon the facts, untrammeled by anything of this kind, and pass upon the merits, and I should be glad that it might be understood, even now, that the jury should take this case and consider it upon the question of identity, infringement and utility. I do not understand it to be claimed that, except in the use of the equivalent of the spring for the belt, there is any infringement.

Upon the question of infringement I had not intended to say a word. The evidence has been full upon all questions of fact, and has been extensively commented upon by counsel. I shall not, therefore, go into the consideration of what has or has not been shown by the evidence.

Upon the question of identity I will, however, remark that it is not a question as to the precise form or size: the point is, whether the principle of the two things is the same or not. The law is that the patentee is protected against any other device which involves substantially the same principle. But if another party produces the same result by means different in principle and application, then it is no infringement, for it would be absurd to say that the granting of a patent covers all possible ways of producing the same result. Such is not the intention and spirit of the patent law. On the subject of the identity of these two contrivances, I need not extend my remarks. The jury have had the benefit of models and the testimony of witnesses, besides the explanation of counsel. They are entirely posted upon the character and features of the two inventions. In regard to the evidence of witnesses upon that point there is diversity. A number of intelligent witnesses, some of them experts, say that the contrivances are, in principle, the same; another large number, equally intelligent and capable, say they consider the two different in their action. It will be for the jury to reconcile the evidence, and come to such result as they shall think proper.

Some question has also been made in the course of the case upon the question of utility. Some evidence has been adduced to show that the lateral motion provided for, is really of no utility. On this subject I have only to remark, that the general doctrine is undoubtedly as stated, that there is a presumption arising from the patent itself, that the invention is of some degree of utility; but that it is not conclusive, and the other party may show that it is useless and worthless. You will remember upon this point there was some diversity of opinion. Some of the witnesses have stated not only that they considered it of no benefit, but a disadvantage. I would state that, if the jury find a substantial identity, it does not lie in the mouths of the defendants to say that the machine they use is of no utility, that is, upon the hypothesis that if there is identity, it does not become them to say that what they have appropriated is of no utility, as the mere fact that they have appropriated it, is evidence that they regarded it as of utility.

The jury found a verdict for the defendants.

Case No. 8,183.

LEE v. BOWEN et al.

[5 Biss. 154.] [1]

Circuit Court, N. D. Illinois. July, 1870.

RIGHTS OF HOLDER OF BILL OF LADING — RIGHTS OF CONSIGNEE.

The bona fide holder of a draft drawn against goods shipped, with bill of lading assigned, has a lien upon the goods in the hands of the consignee, and can recover from him the proceeds of their sale, even though the consignor be indebted to the consignee on general account.

Bill for an accounting and to recover of defendants the proceeds of goods consigned to them, the bill of lading for which had been assigned to complainant by the consignor as security for his draft drawn against the goods shipped.

BLODGETT, District Judge. In the fall of 1865, King & Pennock were manufacturers of cotton goods at Pittsburg, Penn.,

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

and Bowen Bros., wholesale merchants in this city, acting as factors for King & Pennock. Owing to a decline in values and other embarrassments, King & Pennock became unable to go on with their business without assistance, and, in order to prevent their stopping, Bowen Bros. agreed to advance their drafts or acceptances to them, to be paid in manufactured goods, which were to be shipped from Pittsburg to Bowen Bros. as fast as manufactured, to meet such acceptances. In pursuance of this arrangement, Bowen Bros. between December, 1865, and the 1st of April, 1868, advanced and paid, for account of King & Pennock, about $25,000. The goods which it was expected would have met those acceptances had been shipped to Bowen Bros., of Chicago; but, owing to a decline in values during the winter and spring, there was a balance due Bowen Bros. of nearly $8,000 on general account. Under this state of facts, King & Pennock, on the 11th of April 1866, shipped by the Pittsburgh & Ft. Wayne R. R., to Bowen Bros., at Chicago, six bales of sheeting, and simultaneous with this shipment drew their draft, payable to their own order, for $1,030, which they negotiated to plaintiff, transferring to him, also as security for the payment of the draft, the shipping bill of said six bales of sheeting. At the same time they advised Bowen Bros., by letter, of the shipment and of the draft. The shipment was received in due course of business, and also the letter advising Bowen Bros. of the draft and the disposition to be made of the shipment. The draft was duly presented for acceptance and protested for non-acceptance. Bowen Bros., when the goods came to hand, sold them and passed the proceeds to the credit of King & Pennock, on general account. They refusing to pay the draft, complainant files this bill to compel Bowen Bros. to account to him for the proceeds of the goods.

I think the complainant acquired a lien upon the goods by the transfer to him of the shipping bill as attendant upon the draft which had been negotiated to him, and that Bowen Bros. had no right to apply the proceeds of the goods to the payment or liquidation of their general balance. The authorities all concur that a consignor may create a lien of this kind, and that the consignees have no right to disregard it. The rule seems to me a salutary one, and one, in fact, without which the commercial business of the country could hardly be transacted. The crops of the West could scarcely be moved if this well-established business rule were now to be overturned, as every man at all familiar with affairs knows that the usual course of shipments and business transactions of this country is, that banks make advances on drafts drawn upon bills of lading or shipping bills of essentially the character of the one before us.

Decree for complainant for the value of the goods.

In support of the text, consult Bank of Rochester v. Jones, 4 N. Y. 497.

LEE (BREEDEN v.). See Case No. 1,828.

Case No. 8,184.

LEE v. CASSIN.

[2 Cranch, C. C. 112.] [1]

Circuit Court, District of Columbia. June Term, 1815.

BILLS AND NOTES—DEMAND NOTE—WHEN CAUSE OF ACTION ACCRUES—LIMITATION OF ACTIONS—LEX LOCI CONTRACTUS.

1. Upon a note payable on demand, the cause of action does not accrue until demand made; and if the defendant remove before demand, the act of limitations is no bar.

2. The act of Maryland is no bar, in the county of Washington, D. C., to an action upon a note made by the defendant in Massachusetts, if the plaintiff has always resided in that state; and to the plea of the statute he may reply that he was beyond seas, &c.

Assumpsit upon the defendant's promissory note, made in Massachusetts, where all the parties resided. There was a count also for money had and received. The defendant pleaded, 1st. Non assumpsit. 2d and 3d. Non assumpsit, and actio non accrevit infra tres annos, under the Maryland act of limitations. 4th. Non assumpsit infra sex annos, under the act of limitations of Massachusetts. The note was payable on demand, and to the 4th plea the plaintiff replied that the defendant removed from Massachusetts before demand, and consequently before the cause of action accrued; and that he left no property, &c. To the 2d and 3d pleas the plaintiff replied that he was beyond seas, &c. To these replications the defendant demurred.

Mr. Wallach and Mr. Jones, for plaintiff.

The statute of limitations of Massachusetts is no bar here. It is to be considered as a statute of limitations of a foreign state which does not extinguish the right, but the remedy only in that state. Williams v. Jones, 13 East, 439; Pearsall v. Dwight; 2 Mass. 84; Nash v. Tupper, 1 Caines, 402. The plaintiff has never been in the District of Columbia; the statute of Maryland, therefore, cannot apply to him. He has always been within the exception of persons beyond seas. Searight v. Calbraith, 4 Dall. [4 U. S.] 327; Conframp v. Bunel, Id. 419; Ruggles v. Keeler, 3 Johns. 263.

Mr. Key, contra.

The lex loci contractus governs the case. Ball. Lim. 84. The note being payable on demand, the cause of action arose as soon as the note was signed; and consequently

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

before the defendant left the state, so that the statute of limitations of Massachusetts had begun to run before he removed.

THE COURT (MORSELL, Circuit Judge, not sitting) was of opinion that on a note payable on demand, the cause of action does not accrue so as to make the statute of limitations begin to run until a demand be made. That the removal of the defendant from Massachusetts, before the cause of action accrued, was a bar to the statute of limitations of Massachusetts; and the replication that the plaintiff was beyond seas, was a bar to the statute of Maryland.

LEE (CASTLE v.). See Case No. 2,506.

LEE v. CHADWICK. See Case No. 2,570.

Case No. 8,185.

LEE v. CHASE.

[1 Hughes, 402.] [1]

Circuit Court, E. D. Virginia. July 7, 1874.

TAX SALES—RULE NOT TO RECEIVE TAXES EXCEPT FROM OWNER—TENDER WAIVED.

1. Under the act of June 7th, 1862 [12 Stat. 422], "for the collection of the direct tax in insurrectionary districts," etc., as construed in Bennett v. Hunter, 9 Wall. [76 U. S.] 326, a tender by a relative of the owner of the tax due upon property advertised for sale, is a sufficient tender. And if the tax commissioners have, by an established general rule announced, that they will not, and a uniform practice under it refused, to receive the taxes due unless tendered by the owner in person, even a formal offer by another to pay is unnecessary. It is enough if a relative, friend, or agent of the owner "went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person."

2. Precedent given of proceedings under the acts of May 9 and June 8, 1872, § 2 (17 Stat. 89, 332), and under supreme court decisions in Bennett v. Hunter, 9 Wall. [76 U. S.] 326, Smith v. Turner, 14 Wall. [81 U. S.] 553, and Tacey v. Irwin, 18 Wall. [85 U. S.] 549.

[This was a proceeding in equity by George Washington Custis Lee against Azro Chase, sole heir of George W. Chase, deceased.]

F. L. Smith, for plaintiff.

W. W. Willoughby, for defendant.

The finding of the court, and the judgment rendered, were as follows, and were based upon the late decision of the United States supreme court in the case of Tacey v. Irwin, 18 Wall. [85 U. S.] 548.

The finding was agreed by counsel.

HUGHES, District Judge. And now at this day, to wit, the 7th day of July, 1874, the issues of fact in this cause having been tried and determined by the court without the intervention of a jury, pursuant to a stipulation, in writing, duly signed and filed, the court makes the following finding upon the facts:

Long prior to December, 1867, George W. P. Custis was seized in fee of the tract of land in the declaration mentioned; and by his last will and testament, an office copy of which is herein inserted, did devise as follows, to wit: "In the name of God, Amen. I, George Washington Parke Custis, of Arlington, in the county of Alexandria, and state of Virginia, being sound in body and mind, do make and ordain this instrument of writing as my last will and testament, revoking all other wills and testaments whatever. I give and bequeath to my dearly beloved daughter and only child, Mary Ann Randolph Lee, my Arlington House estate, in the county of Alexandria, and state of Virginia, containing eleven hundred acres, more or less, and my mill on Four Mile Run, in the county of Alexandria, and the lands of mine adjacent to said mill, in the counties of Alexandria and Fairfax, in the state of Virginia, the use and benefit of all just mentioned, during the term of her natural life, together with my horses and carriages, furniture, pictures, and plate, during the term of her natural life. On the death of my daughter, Mary Ann Randolph Lee, all the property left to her during the term of her natural life, I give and bequeath to my eldest grandson, George Washington Custis Lee, to him and his heirs forever, he my eldest grandson, taking my name and arms. I leave and bequeath to my four granddaughters, Mary, Anna, Agnes, and Mildred Lee, to each ten thousand dollars. I give and bequeath to my second grandson, William Henry Fitzhugh Lee, when he shall be of age, my estate called the White House, in the county of New Kent, and the state of Virginia, containing four thousand acres, more or less, to him and his heirs forever. I give and bequeath to my youngest grandson, Robert Edward Lee, when he is of age, my estate in the county of King William, and state of Virginia, called Romancocke, containing four thousand acres, more or less, to him and his heirs forever. My estate of Smith's Island at the capes of Virginia, and in the county of Northampton, I leave to be sold, to assist in paying my granddaughters' legacies, to be sold in such manner as may be deemed by my executors most expedient. Any and all lands that I may possess in the counties of Stafford, Richmond, and Westmoreland, I leave to be sold to aid in paying my granddaughters' legacies. I give and bequeath my lot in square No. 21, Washington City, to my son-in-law, Lieutenant-Colonel Robert E. Lee, to him and his heirs forever. My daughter, Mary A. R. Lee, has the privilege by this will of dividing my family plate among my grandchildren; but the Mount Vernon alto-

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

gether, and every article I possess relating to Washington, and that came from Mt. Vernon, is to remain with my daughter at Arlington House, during said daughter's life, and at her death to go to my eldest grandson, George Washington Custis Lee, and to descend from him entire and unchanged to my latest posterity. My estates of the White House, in the county of New Kent, and Romancocke, in the county of King William, both being in the state of Virginia, together with Smith's Island, and the lands I may possess in the counties of Stafford, Richmond, and Westmoreland counties, are charged with the payment of the legacies to my granddaughters. Smith's Island, and the aforesaid lands in Stafford, Richmond, and Westmoreland, only are to be sold; the lands of the White House and Romancocke to be worked, to raise the aforesaid legacies to my four granddaughters. And upon the legacies to my four granddaughters being paid, and my estates that are required to pay the legacies being clear of debt, then I give freedom to my slaves; the said slaves to be emancipated by my executors in such manner as to my executors may seem most expedient and proper; the said emancipation to be accomplished in not exceeding five years from the time of my decease. I do constitute and appoint as my executors, Lieutenant-Colonel Robert Edward Lee, Robert Lee Randolph, of Eastern View, Right Reverend Bishop Meade, and George Washington Peter. This will, written by my own hand, is signed, sealed, and executed the twenty-sixth day of March, eighteen hundred and fifty-five. (Seal) George Washington Parke Custis. Witness: Martha Custis Williams. W. Eugene Webster."

The said tract of land was devised to his daughter, Mary Ann Randolph Lee, during the term of her natural life, and on her death was devised to his eldest grandson, G. W. Custis Lee, the plaintiff in this case, and to his heirs forever; the said Mary Ann Randolph Lee departed this life on the 5th of November, 1873; said last will and testament was admitted to probate in the county court of Alexandria, Virginia, on the 7th day of December, 1857, as appears by the copy of certificate of the clerk of said court, as follows: "At a county court held for Alexandria county, on the 7th day of December, 1857, the foregoing paper writing, purporting to be the last will and testament of George Washington Parke Custis, was produced in court for probate by Robert E. Lee, one of the executors named therein, and Cassius F. Lee was sworn as a witness, who deposed that he is well acquainted with the handwriting of George W. P. Custis, and that he verily believes the whole of said paper writing, together with the signature thereto, are in the genuine handwriting of said George W. P. Custis. Robert E. Lee, one of the executors named in the last will and testament of George W. P. Custis, qualified and gave bond with security according to law, the security having justified. Teste: B. H. Berry, Clerk."

On the 11th day of January, 1864, the said premises in the declaration mentioned were sold by the United States direct tax commissioners for Virginia, appointed under the act of congress approved June 7th, 1862, entitled "An act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes," and amendments thereto. The said property was sold by said commissioners as land liable to be sold under the provisions of the 7th section of said act, because the direct tax imposed upon said property by the act of August 5th, 1861, imposing a direct tax, had not been paid. The property was purchased at said sale by George W. Chase, since deceased, leaving the defendant his sole heir-at-law, at the price of four thousand one hundred dollars, who received from said commissioners a certificate of sale, in the words and figures following: (The certificate is omitted.)

Before the commencement of this suit, and prior to January 1st, 1874, under and by virtue of said certificate of sale, and as heir-at-law of G. W. Chase, the said defendant entered upon and now holds the said property. The said tax commissioners entered upon the discharge of their duties in the city and county of Alexandria, Va., in the month of June, 1863. On the 14th day of September, 1863, they fixed the amount of the said direct tax chargeable respectively upon the several lots and parcels of ground in said city and county, including the property in controversy in this cause. On the 11th of September, 1863, they caused to be inserted in a newspaper published daily in Alexandria, Va., the following notice: Notice to owners of real estate: "The undersigned commissioners hereby give notice that they will be ready at their office, corner of Washington and Prince streets, Alexandria, on and after the 14th of September next, to receive the direct tax assessed and fixed by them on the lots and tracts of land in the city and county of Alexandria, under and by virtue of an act of congress, entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes.' Office hours from 8¾ o'clock a. m. to 2¾ p. m. John Hawxhurst, W. J. Boreman, G. F. Watson, Commissioners."

The said commissioners, in performing their duties under the said act of June 7th, 1862, did not, at any time or in any case, make or cause to be made any demand for the payment of the tax, either upon the owner or occupant of the property respectively liable therefor, or upon any person whatever, and they made no effort in any case, of any kind whatever, to collect said tax, before proceeding to a sale of the land.

except the publication of the said notice of September 11th. On the expiration of sixty days from the 14th of September, 1863, the said commissioners treated all of said property in said city and county on which the tax remained unpaid, as forfeited to the United States, and liable to sale under said seventh section of said act of June 7th, 1862, and they proceeded, from time to time, to advertise the same for sale accordingly. Pending the advertisement of property for sale under the said seventh section, said commissioners, pursuant to a general rule adopted by them to that effect, invariably refused, in all cases, to receive the tax upon property so advertised, unless tendered by the owner in his own proper person, and notwithstanding the tender of the tax by an agent, relative, or friend of the owner, the commissioners, nevertheless, treated and sold the property as delinquent. This rule and practice was established and followed by them, pursuant to instructions from some officer of the treasury department. Applications were made to said commissioners by the agents and friends of absent owners to pay the tax upon advertised property and save it from sale; which applications, under the operation of said rule and practice, were uniformly refused by the commissioners. No note, record, or memorandum of such applications was kept or made by the commissioners, though such applications were frequent.

The premises in the declaration mentioned were sold as aforesaid by the commissioners without the knowledge or consent of the said Mary Ann R. Lee or of the said plaintiff, both of whom were absent from Alexandria, and within the Confederate military lines from May, 1861, until May, 1865, continuously, and were not within the said county during that time. The amount of taxes, costs, and penalties due upon the said land at the time of the sale to the United States under the said act was forty-six dollars and ninety-seven cents, which, together with interest, costs, and expenses of sale, has been brought into court and deposited with the clerk of this court for the use of the United States, and the whole amount of which is seventy-six dollars and seventy-five cents.

Wherefore, it is considered by the court that the plaintiff do recover of the defendant the premises in the declaration mentioned, according to the finding of the court, and that he recover also his costs by him about his suit in this behalf expended.

NOTE. The tract of land mentioned in the foregoing case was devised by the following clause of General George Washington's will to Mr. Custis: "Fourth. Actuated by the principle already mentioned, I give and bequeath to George Washington Parke Custis, the grandson of my wife, and my ward, and to his heirs, the tract of land I hold on Four Mile Run, in the vicinity of Alexandria, containing one thousand two hundred acres, more or less, and my entire square, number twenty-one, in the city of Washington." The tract was afterwards called by Mr. Custis, "Washington Forest," but is known locally as the "Custis Mill Property."

[The same plaintiff brought suit against other defendants who had bought at tax sale other property belonging to him known as "The Arlington Estate." The case is reported in full in Cases Nos. 8,191, and 8,192.]

Case No. 8,186.

LEE et al. v. CHILLICOTHE BRANCH BANK.

[1 Bond. 387;[1] 2 Leg. & Ins. Rep. 10.]

Circuit Court, S. D. Ohio. Oct. Term, 1860.

BILLS AND NOTES—WORDS OF INDORSEMENT—RESTRICTION.

1. The law does not require any particular form of words in the transfer of negotiable paper. Any words which show an intention to transfer a note or bill, without restriction or limitation, will constitute a valid indorsement, and the indorsee, upon non-payment, may resort to the prior parties.

2. An indorsement on a bill of exchange of the words, "Credit my account—James B. Scott, Cashier," is restrictive in its character, and suspends the further transfer and negotiability of the bill.

[Cited in Bank of Metropolis v. First Nat. Bank, 19 Fed. 303.]

3. Such an indorsement is sufficient to apprise subsequent indorsees of the bill that no authority existed authorizing a transfer to them.

[Cited in brief in Bristol Knife Co. v. First Nat. Bank, 41 Conn. 424.]

[This was an action by James Lee and Co. against the Chillicothe Branch Bank of the State of Ohio.]

H. H. Hunter and H. Stanbery, for plaintiffs.

C. D. Coffin, S. F. Vinton, and A. G. Thurman, for defendants.

LEAVITT, District Judge. The plaintiffs, as they allege, are the holders and indorsees of fourteen bills of exchange; and this action is brought against the Chillicothe branch of the State Bank of Ohio, as the indorser of the bills. They amount in the whole to about fifty thousand dollars, and were drawn by different persons at Chillicothe, on Edwin Ludlow, cashier of the Ohio Life Insurance and Trust Company at New York, payable to the order of James B. Scott, cashier. The declaration contains a special count on each of the bills, together with the usual money counts. It is averred that the Chillicothe Bank indorsed the bills by "the name of James B. Scott, its cashier;" and that, not being paid at maturity, they were protested for non-payment, of which the bank had due notice.

A jury has been sworn, and the plaintiffs to sustain their action have offered in evidence the several bills referred to. They are objected to by the counsel for the defendant, as not showing any title in the plaintiffs, or any right of action in them as indorsees.

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

This objection is urged by counsel, on several grounds, which have been brought to the notice of the court, and fully argued. In the brief views I propose to submit, I shall limit myself to the question: What is the construction and legal effect of the indorsements of the bills by Scott to Ludlow. If these indorsements restricted the further negotiability of the bills, it will be obvious that Ludlow had no authority to transfer them to the plaintiffs, and they can have no standing in courts as indorsees.

The indorsements on each of the bills is in these words: "Credit my account—James B. Scott, Cashier." And the question presented is, whether they import an unqualified and unrestricted transfer to Ludlow, with the right to transfer to others, and thus continue their circulation as negotiable paper. This, it is insisted by the counsel for the plaintiffs, is the legal effect of the indorsement to Ludlow. On the other hand, it is claimed that the indorsements by the cashier of the Chillicothe Bank were intended solely to authorize Ludlow to hold the bills until their maturity, and receive the proceeds, and place them to the credit of the bank; and that by a fair and natural construction of the words used, the intention to restrict the further negotiability of the paper is legally inferable. Or, if the paper could in any sense have been subsequently transferred by Ludlow, it could only be on the condition and for the purpose stated in Scott's indorsement, and that this limitation applies to it in the hands of any subsequent holder or transferee.

It is not controverted that the Chillicothe Bank, as the holder of the bills, had a right to direct to whom the proceeds should be paid, and to designate the specific purpose to which they were to be applied. And the only question is, whether the words, "credit my account," which precede the signature of Scott, imply an intention to qualify and restrict the operation of the indorsements. It is unquestionably true, that the law does not require any particular form of words in the transfer of negotiable paper. Any words which show an intention to transfer a note or bill, without restriction or limitation, will constitute a valid indorsement, and the indorsee upon nonpayment may resort to the prior parties. Indorsements, however, not intended to restrict the further negotiability of paper, are usually designated, either as in full, or in blank. An indorsement is said to be in full when the name of the assignee or transferee is stated without any words of limitation. The usual form of a full indorsement is: "Pay to A. B., or order." An indorsement in blank is perfected by the mere signature of the indorser across the back of the paper, without prefix or affix. In the latter case the paper may be subsequently transferred by delivery; but in either case it goes into circulation unclogged by any condition or limitation. These are familiar principles of commercial law, which do not require the citation of authorities to sustain them. It would seem to be a very clear proposition that the indorsements by Scott to Ludlow do not fall within either of the classes referred to. They are not indorsements in full, because there is no designation of the assignee or transferee. They are not blank indorsements, because there are words before the signature, which have significance, and which a subsequent holder would have no authority to strike out, and thus convert them into simple indorsements in blank.

In the progress of the arguments, very full references were made to elementary writers on the law of negotiable paper, and many reported cases have been cited bearing on the question before the court. It is hardly necessary to notice these authorities in detail. It may be stated, however, that the general doctrine sustained by the authorities and cases cited, is that effect will be given to any words used by an indorser, showing the specific purpose of the indorsement, and directing payment to be made to a particular person or for a special purpose; and that subsequent holders of the paper take it subject to the limitation imposed. That the words, "credit my account," which precede the name of Scott in the indorsements under consideration, are within this principle, seems quite clear. It is true that among the many cases cited by counsel, there are none in which this precise form of words is used. But the principle is fully recognized, and these authorities are entitled to respect as giving it the highest judicial sanction. Without stopping to analyze the many cases referred to, in which indorsements have been held to be restrictive in their character, as suspending the further negotiability of commercial paper, the following instances may be briefly stated: "Pay to my use." "Pay to A. only." "Pay the contents to the use of B. only." "Pay the money to my servant for my use." "Carry this bill to the credit of A." "The within must be credited to L. H. value in account." "Pay to J. P., or order, for account of T. & W." Chit. Bills, 176, 177; Byles. Bills, 121 (marginal paging); Edw. Bills & N. 277, 278; Story, Bills, § 211; 2 Burrows, 1227; Doug. 637; 8 Taunt. 100, 15 E. C. L. 319; 3 Mass. 227, 5 Mass. 544.

As before intimated, the words, "credit my account," can not be supposed to have been used without a meaning and a purpose. They were clearly intended as a naked authority to Ludlow to receive the proceeds of the bills, and credit them to the account of the Chillicothe Bank. This is their fair import; and that they were so intended by Scott can not be doubted. He is the cashier of an important banking institution, and may be presumed to be familiar with all the different ways of transferring negotiable paper. He is, without doubt, cognizant, not only of the form, but the legal effect of the

various species of indorsements in use among bankers and commercial men. That he did not intend the transfer of the paper to Ludlow to have the effect of the usual indorsement, either in full or in blank, may be inferred from the fact that the words used negative such a purpose. Why adopt the words, "Credit my account," if the usual indorsement had been intended? The words are equivalent to a direction to Ludlow to credit the proceeds to the Chillicothe Bank on account, instead of making an actual remittance of the funds. They are in effect, as if he had written: "Pay the proceeds to the bank, by a credit of the amount to its account." If such had been the form of the indorsements, could there have been a possible doubt as to their meaning?

Although in the present posture of this case, the court can not notice the known course of business between Ohio banks and those in New York, or the business relations existing between the institution represented in that city by Ludlow, and the Chillicothe Branch Bank, yet it is not perhaps a strained inference from the words used by Scott, that there were existing accounts between them, and a balance due from the latter to the former, which was to be reduced or paid by the application of the proceeds of the bills in question. The transaction is susceptible of this view from the language in which the indorsements are couched. And thus viewed, it needs no argument to prove that it was decidedly in bad faith for Ludlow to use the paper for a purpose not in the contemplation of the indorser, and greatly to the hazard of the Chillicothe Bank. This, it is true, under ordinary circumstances, could not affect the rights of these plaintiffs without knowledge of the dishonest purpose of Ludlow in making the transfer. But the words of the indorsements to Ludlow, were sufficient to apprise the plaintiffs of the real character of the transaction, and operate as a notice to them that Ludlow had no authority to indorse the paper to them, so as to divert the proceeds from the object intended. I confess to some incredulity as to the good faith of the plaintiffs in this transaction. I am slow to believe that a banker or business man, of reasonable intelligence, with the qualified indorsement of Scott before him, would have taken this paper, with the hope or expectation that the Chillicothe Bank would be liable as an indorser, in case of non-payment by the drawers.

It would not be proper to indulge in any speculative remarks in regard to this transaction, as between Ludlow and the plaintiffs. There may be facts involved which will never be brought to the light of day, and which, if fully developed, would reveal great frauds. This consideration, however, can not influence or control the decision of the court, on the question before it. There seems to be enough, in the very vestibule of this case, to warrant the legal conclusion that these plaintiffs received the bills in question with full notice that Ludlow had no right to transfer them in any other sense, or for any other purpose than that indicated by the terms of the indorsements, and that they have no standing in court as indorsees, and no right of action on these bills. In the judgment of the court, therefore, these bills can not go in evidence to the jury.

As this view is decisive of the case, it is unnecessary to discuss the other objection presented by counsel, namely: that the official character of Scott, as the cashier of the Chillicothe Branch Bank, does not appear in the bills, or by his indorsement, so as to create a legal liability in the bank as indorser. The point has been strenuously urged by counsel, but for the reason indicated, I give no opinion upon it.

The plaintiff thereupon submitted to a nonsuit.

[For another case between the same parties, involving the same points and the same matter, see Case No. 8,187.]

Case No. 8,187.

LEE et al. v. CHILLICOTHE BRANCH OF STATE BANK.

[1 Biss. 325.] [1]

Circuit Court, S. D. Ohio. July Term, 1860.

BILLS OF EXCHANGE—INDORSEMENT—"PAY TO ACCOUNT OF," ETC., IS RESTRICTIVE, AND NOT A TRANSFER — HOLDER OF RESTRICTED BILL IS TRUSTEE — PAYEE HAS POWER TO LIMIT — RESTRICTIVE INDORSEMENT GIVES AN EQUITY — PARTY WHOSE NAME NOT ON BILL CANNOT BE SUED.

1. An indorsement on a bill of exchange, "credit my account," is restrictive, and puts an end to its negotiability. It is an appropriation of the proceeds which renders any other appropriation illegal. The credit should be given when the bill became payable—this is the ordinary course of dealing, and the court will not presume a different course.

2. Whether an indorsement is restrictive depends upon the intention of the parties, as expressed.

3. Such an indorsement implies an open account, which is to be credited, and this can only be done by payment. Entering the bill, either before or after maturity, as a credit on the account, would not be within the order—the words are mandatory.

4. An indorsement to pay for the use, or account of the indorser, is not an assignment of the security, but only an authority to receive the money, and imports that the indorsee receives the bill for a special purpose, and as trustee for the indorser; it is equivalent to a direct notice to every party to whom it may be afterwards presented, that he has not a right to dispose of it as his own property.

5. A holder who takes a bill, the circulation of which is restricted by indorsement, cannot in good faith sue the drawer or acceptor, but holds the bill or its proceeds as trustee for the restraining party.

6. The payee, having the absolute property in the bill, and the right of disposition thereof, has

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

the power of limiting the payment to whom he pleases.

7. If a bill be restrictively indorsed, a subsequent indorser takes it upon the same trust that was devolved upon the first indorsee.

8. But the indorsement, though not conveying the property in the bill, gives an undoubted equity to the money to be paid; and this it is the safer and better course to enforce.

9. A party whose name does not appear upon a bill of exchange cannot be sued upon it. His name may be signed by an agent, but it must appear that the agent undertook to bind his principal.

This was an action brought by the plaintiffs, as indorsees of the defendants, on fourteen bills of exchange. The special counts aver that the bills were drawn by certain named persons at Chillicothe, Ohio, on one Edwin Ludlow, of New York, by the name of E. Ludlow, Esq., cashier, Ohio Life Insurance and Trust Company, payable to the order of the defendant, "by the name and style of James B. Scott, its cashier,"—acceptance waived; that the defendant, by its cashier, then and there, for the purpose duly authorized, indorsed and delivered the bills to said Edwin Ludlow, cashier, who indorsed them to the plaintiffs; that they were duly presented and protested for non-payment, and notice given to the defendant. The defendant was a corporation created under the law of Ohio; and the Ohio Life and Trust Company was also a corporation chartered under the laws of Ohio, each being vested with banking powers. The principal office of the trust company has always been in Cincinnati; but for many years its principal cashier kept an office in the city of New York, called its "New York Agency."

Hunter & Dougherty and Henry Stanberry, for plaintiffs, cited the following cases of restrictive indorsements:

Edie v. East India Co., 2 Burrows, 1216; Ancher v. Bank of England, 2 Doug. 637; Treuttel v. Barandon, 8 Taunt. 100; Lloyd v. Sigourney, 5 Bing. 525; Attenborough v. Mackenzie, 36 Eng. Law & Eq. 562; Theobold v. Hare, 8 B. Mon. 39.

Vinton, Thurman, Taft & Perry, counsel for defendant, filed an elaborate brief, citing the following cases on restrictive indorsements:

Snee v. Prescot, 1 Atk. 249; Edie v. East India Co., 2 Burrows, 1227; Ancher v. Bank of England, 2 Doug. 637; Treuttel v. Barandon, 8 Taunt. 100; In re Nunn, 15 E. C. L. 319; Lloyd v. Sigourney, 5 Bing. 525; Gully v. Bishop of Exeter, 15 E. C. L. 527; Rice v. Stearns, 3 Mass. 227; Wilson v. Holmes, 5 Mass. 544; Drew v. Jacocks, 2 Murph. 138.

No action can be maintained against the defendant upon these bills because his name does not appear upon them. Pentz v. Stanton, 10 Wend. 271; Stackpole v. Arnold, 11 Mass. 28; Leadbitter v. Farrow, 5 Maule & S. 348; Wilson v. Rastall, 4 Term R. 757. The defendant's cashier had no power to transfer the bill. No such power was expressly given him, and he could not derive it from custom. Hallowell & A. Bank v. Hamlin, 14 Mass. 180; Hartford Bank v. Barry, 17 Mass. 97; Wyman v. Hallowell & A. Bank, 14 Mass. 58; Salem Bank v. Gloucester Bank, 17 Mass. 29. The transfers by Ludlow to the plaintiffs being fraudulent, the onus lies on the plaintiffs to prove bona fides and the payment of a valuable consideration, or parting with value. McKesson v. Stanberry, 3 Ohio St. 156; U. S. v. Price [Case No. 16,090]; Paterson v. Hardacre, 4 Taunt. 116; Smith v. Braine, 3 Eng. Law & Eq. 379; Woodhull v. Holmes, 10 Johns. 231; Skilding v. Warren, 15 Johns. 270; Brown v. Taber, 5 Wend. 566; Vallett v. Parker, 6 Wend. 615; Wardell v. Howell, 9 Wend. 170; Micklethwaite v. Thebaud, 4 Sandf. 97. The bills were merely pledged by Ludlow to the plaintiffs, as collateral security for a precedent indebtedness, or upon account. This leaves the equities open. Field v. Holland, 1 Am. Lead. Cas. (5th Ed.) 334; Roxborough v. Messick, 6 Ohio St. 448; Bay v. Coddington, 5 Johns. Ch. 54; Coddington v. Bay, 20 Johns. 637; Rosa v. Brotherson, 10 Wend. 86; Smith v. Van Loan, 16 Wend. 659; Jones v. Swan, 6 Wend. 589; Hart v. Palmer, 12 Wend. 523; Manhattan Co. v. Reynolds, 2 Hill, 140; Stalker v. McDonald, 6 Hill, 93; Furniss v. Gilchrist, 1 Sandf. 53; Bank of St. Albans v. Gilliland, 23 Wend. 311; Small v. Smith, 1 Denio, 583; Wardell v. Howell, 9 Wend. 170; Stewart v. Small, 2 Barb. 559; Spear v. Myers, 6 Barb. 445; Bramhall v. Beckett, 31 Me. 205; Jenness v. Bean, 10 N. H. 266; Williams v. Little, 11 N. H. 66; Prentice v. Zane, 2 Grat. 262; Petrie v. Clark, 11 Serg. & R. 377; Kirkpatrick v. Muirhead, 16 Pa. St. 117; Kimbro v. Lytle, 10 Yerg. 417, 428; Brooks v. Whitson, 7 Smedes & M. 513; Reddick v. Jones, 6 Ired. 109. Express proof of actual knowledge by the purchaser is not required. His knowledge may be proved by circumstances and constructive notice may suffice. Wiggin v. Bush, 12 Johns. 306; Brown v. Taber, 5 Wend. 566; Comstock v. Hoag, Id. 600; Payne v. Cutler, 13 Wend. 605; Small v. Smith, 1 Denio, 583; Solomons v. Bank of England, 13 East, 135, note; Goodman v. Harvey, 4 Adol. & El. 870; Clarke v. Spence, 31 E. C. L. 212. If a note or bill be peculiar in its form, or have indorsed upon it, or written on its face, any marks or matter the purchaser is put upon inquiry. Fowler v. Brantley, 14 Pet. [39 U. S.] 318; Jones v. Fales, 4 Mass. 245, 252, 253; Springfield Bank v. Merrick, 14 Mass. 322; Heywood v. Perrin, 10 Pick. 228; Barnard v. Cushing, 4 Metc. [Mass.] 230; Shaw v. First M. E. Soc. in Lowell, 8 Metc. [Mass.] 226; Fletcher v. Blodgett, 16 Vt. 26; Sanders v. Bacon, 8 Johns. 485.

McLEAN, Circuit Justice. No particular form of words is essential to an indorsement,

if the words used import a transfer of the title to the bill and designate the transferee. Story, Bills, § 204. Indorsements are either in full or in blank; a full indorsement is that by which the indorser orders the money to be paid to some particular person by name; a blank indorsement consists only of the name of the indorser, (1 Jac. Law Dict. 324), as where the indorser simply writes his name on the back of negotiable paper. There are also restrictive indorsements, which stop the currency of the bill, and it often becomes an important question whether the indorsement is in full, in blank, or restrictive. On this depends the decision of the important case now before us. Where the indorsement is in full or in blank, without restriction, the holder may fill up the blanks and perfect his title at pleasure. In the leading case of Edie v. East India Co., 2 Burrows, 1216, a new trial was granted, because at the trial the usage of merchants was proved, which the court held to be erroneous, and on this ground a new trial was granted. On argument the declaration was held to be good on demurrer, although the assignment on the note was alleged to have been made to Witherhead, without saying to "him and order."

Every one knows the splendid reputation of Lord Mansfield for his liberal views on commercial law, which were greatly in advance of Kenyon and others, but were still, in some things, behind the present day. By some of the judges in the above case, a restrictive indorsement had never been heard of, and doubts were expressed whether the negotiability of an instrument could be restricted. The case of Ancher v. Bank of England, 2 Doug. 637, was upon a bill of exchange payable to A or order. A indorsed it as follows: "The within must be credited to Capt. Morton Lassal Dahl, value in account." This was held by Lord Mansfield to be a restrictive indorsement, though Butler was of a contrary opinion. A majority of the court held that the indorsement was simply a request to pass the amount to Dahl's credit. Lord Mansfield said the indorser did not mean to make himself answerable, as indorser, or to enable Dahl to raise money on the bill. So in Treuttel v. Barandon, 8 Taunt. 100, it was held that the indorsement, "pay to J. P. Rouse or order, on account for Mr. Treuttel & Wurtz," was restrictive. And in Lloyd v. Sigourney, 5 Bing. 525, the indorsement was in these words: "Pay to Samuel Williams, Esq., of London, or his order for my use," and the court says, "Whoever reads the indorsement must perceive that its operation is limited."

It is said the indorsements in this case are capable of various constructions, and have no definite meaning. The direction to credit the account of the indorser is addressed to Ludlow, it is said, and not to the drawers; Ludlow is the drawee, but on the face of the bills his acceptance is waived, and the bills were not sent to him for acceptance, but for some other purpose, either to discount them, as urged by the plaintiffs, and then credit the indorser with the proceeds, or to credit the bills in account to the indorser, or to hold them until payment by the drawers, and then credit the amount to the indorser. And it is contended, that "on the face of the instrument, it is impossible to say what was meant." The bills were drawn by certain persons at Chillicothe, Ohio, on Edwin Ludlow, of New York, as cashier of the Ohio Life Insurance and Trust Company, payable to the order of the defendant, indorsed, "Credit my acccount. James B. Scott, Cashier." The bill had some time to run, but the credit was to be given when the bill became payable. This was the ordinary course of dealing, and the court will not presume a different course without proof. The thing to be done under the indorsement, was subject to no contingency. The direction to credit the account of Scott, cashier, was indorsed upon the bill, and this put an end to its negotiability. It was an appropriation of the proceeds of the note, and which rendered any other appropriation of them illegal.

Whether an indorsement be restrictive or not, depends upon the intention of the parties, as expressed. "Pay to J. S. only;" "pay to A for my account;" "pay the contents to my use;" "pay the contents to the use of a third person;" "carry this bill to the credit of A, a third person;" "pay to A B, or order, for my use;" "pay to A B for my account;" "pay the within to A B, for the use of C D;" "pay the money to my use;" "pay the money to my servant for my use;"—these are specimens from cases where the indorsements have been held restrictive. More might be added, but the above are sufficient, and they all rest upon the principle that from the nature of the restriction, the negotiability of the bill ceases. Had Ludlow filled up an indorsement over Scott's signature, under the restriction, it could only have been done thus,—"Pay E. Ludlow, cashier, to credit my account. Jas. B. Scott;" or "Pay E. Ludlow, cashier, and credit my account. Jas. B. Scott, Cashier;" or "Pay E. Ludlow, cashier, credit my account. Jas. B. Scott, Cashier."

"'Pay J. H. for my use, or for my account,' shows the intent of the indorser, and is barely an authority to receive the money upon it. It imports that the indorsee receives the bill for a special purpose, and as a trustee for the party indorsing; and is equivalent to a direct notice to every person to whom it may be afterwards presented, that he has not a right to dispose of it as his own property." Edw. Bills & N. 277.

Courts will take notice of a usage, in transmitting bills from one part of the country to another, for collection especially, where the forms of indorsements are influenced by the usage. Bank of Washington v. Triplett, 1 Pet. [26 U. S.] 25, 30; Bowling v. Harrison, 6 How. [47 U. S.] 258; Wallace v. McCon-

nell, 13 Pet. [38 U. S.] 150. But this principle is clearly settled without the aid of usage, by judicial decision. The words, "credit my account," seem to be too explicit to be mistaken, especially in a commercial transaction. This implies an open account, which is to be credited, and this could only be done by payment. Entering the bill before or after it becomes due, as a credit on the account, would not be within the order, as in a proper sense, no credit could be entered without payment. The words "credit my account, when due," were mandatory, and could only apply to the account specified. This is too clear for controversy. To apply the proceeds of the bill to a credit on any other account than the one specified, would be a fraud on the defendant, under the notice, and a court of equity would restrain such payment or give a judgment at law for its recovery.

Shortly before the failure of the trust company, Ludlow, as plaintiffs allege, indorsed the bills in question to the plaintiffs, as collateral security for loans which they made to the trust company. A holder who takes a bill, the circulation of which was restricted by an indorsement, cannot, in good faith sue the drawer or acceptor upon it, but holds the bill or the money raised by him as the trustee of the restraining party. "The payee or indorsee having the absolute property in the bill, and the right of disposing thereof, has the power of limiting the payment to whom he pleases; and consequently, he may make a restrictive indorsement: thus he may stop the currency of the bill, by giving a bare authority to receive the money, as by an indorsement requesting the drawee to "pay to A for my use," or to "J. S. only," or, "the within must be credited to A B," which modes prevent a blank indorsement from being filled up by the indorsee, so as to convey any interest in the bill to himself, and from making a transfer of the bill, &c.; and when made for the use of the indorser, is renewable in its nature by him like a power of attorney." Chit. Bills, 233. An indorsement, to pay the contents to my use, or to the use of a third person, or to carry this bill to the credit of a third person, is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. Chit. Bills, 232, note 1.

The declaration is that the defendant indorsed the bills to Ludlow, and if he had filled up the instrument it would have read, "Pay to E. Ludlow, to credit my account. James B. Scott, Cashier." Thus showing that the money was to be paid to Ludlow, not for himself, but for the use of James B. Scott, cashier. Or suppose the plaintiffs were to strike out Ludlow's indorsement and fill up Scott's indorsement to themselves, which they may do if Scott's is a blank indorsement. It would then read, "Pay Lee & Co., to credit my account. James B. Scott, Cash'r;" and this would show that the money, if paid, would belong to the defendant, and consequently that Lee & Co. have no right to the money. An indorsement "Payable to J. S. only," or by indorsing it "The within must be credited to J. S." (Ancher v. Bank of England, 2 Doug. 637), or by any other words clearly demonstrating his intention to make a restrictive and limited indorsement, would be sufficient (Chit. Bills, 232, 233, and notes). Judge Story says: "It is difficult to assert what language will amount to a restrictive indorsement, or in other words, what language is sufficient to show a clear intention to restrain the general negotiability of the instrument, or the general purposes to which the indorsement might otherwise entitle the indorsee to apply it. Where the indorsement is, 'Pay to A B only,' the word 'only' makes it clearly restrictive, and does not authorize a payment or indorsement to any other party. So if a bill should be indorsed, 'The within to be credited to A B,' or, 'Pay the within to A B for the use of C D,' it would be deemed a restrictive indorsement, so far as to restrain the negotiability, except for the very purposes indicated in the indorsement. In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof." Story, Bills, § 211.

This leaves the question open as to what cases the lien attaches and where it does not. On this head the authorities to some extent are in conflict. Lord Hardwicke says in Snee v. Prescot, 1 Atk. 249: "Promissory notes and bills of exchange are frequently indorsed, 'Pay the money to my use,' in order to prevent their being filled up with such an indorsement as passes the interest." If no valuable consideration appears to have been paid for the bill, none will be presumed. In Ancher v. Bank of England, an indorsement that "the within must be credited to Captain Morton Larsen Dahl, value on account," was a restrictive indorsement, and stopped the negotiability of the bill. And Lord Mansfield said: "It does not seem to me that, after the special indorsement by Morterlin, Dahl himself could have indorsed it over." And Willes, J.: "I am of the same opinion. The question is whether the negotiability is not restrained by the indorsement; and I think it is." Ashurst, J.: "I am of the same opinion. I think Dahl himself could not have indorsed it." In Drew v. Jacocks, 2 Murph. 138, it was said: "Indorsements are of two kinds, general and restrictive, the latter precluding the person to whom it is made from transferring the instrument over to another, so as to give him a right of action, either against the person imposing the restriction or against any of the preceding parties." But if the bill be restrictively indorsed, the subsequent indorsee takes it upon the same trust that was devolved upon the first indorsee. Hence he can maintain no action against the restraining indorser. He is a mere agent and trustee

for his principal, and whoever takes the money holds it under a similar trust. Lloyd v. Sigourney, 5 Bing. 525. This indorsement was held to be restrictive. "A bill of exchange drawn in America, on a house in London, payable to order, was indorsed by the payee generally to A, and by him in these words: 'Pay to B, or his order, for my use.' B applied to his banker to discount the bill, and they, without making any inquiry, did so, and applied the proceeds to the use of B. Held that the indorsement was restrictive; that the property in the bill remained in A, and that he was entitled to recover the amount of the bill from the bankers." Chief Justice Parsons says: "It is also settled that when a negotiable security is indorsed, pay the contents to my use, or to the use of a third person, or carry this to the credit of a third person, such an indorsement is not an assignment of the security, but merely an authority to pay the money agreeably to the direction in the indorsement." Rice v. Stearns, 3 Mass. 225. Chief Justice Parsons said: "The merits of this question depend on the interest which Wilson, the plaintiff, had in the bill. His right to put the bill in suit in his own name must depend upon the effect of the indorsement. It is expressly made to him for the use of the payees. Upon this indorsement, had there been no acknowledgment of value received in account, Wilson would have no property in the bill general or special, and he could not recover upon it in his own name. But admitting, by the acknowledgment of that value received in account, it is the usage of merchants to consider the bill as transferred to the indorsee, as the factor of the indorser, who may sue it, either in his own name or in the name of the indorser, of which we give no opinion; yet the same facts may be given in evidence against the factor as against the principal." Wilson v. Holmes, 5 Mass. 545.

On a pretty extensive view of the authorities, it is found that under some of the restrictive indorsements, no suit can be maintained against the indorser by the assignee. But the restrictive nature of the indorsements, which do not transfer the property in the bill, but operate as an appointment to pay the money, especially where the bill has been assigned since the transfer, makes it the safer and better course to enforce the equity against the holder of the bill. The indorsement on the bill, although it may not convey the property in the bill, gives an undoubted equity to the money directed to be paid. And this may be recovered against any one who has possession of the bill. No action can be maintained on these bills, as the name of the defendant does not appear upon them. They are drawn by certain individuals, payable to James B. Scott, cashier, and indorsed by him without any designation as to his agency. He, therefore, cannot sustain a suit on the bill, as he has not a legal title to it. He may become a guarantor on the bill. In Pentz v. Stanton, 10 Wend. 271, it is held that the plaintiff cannot recover upon the bill of exchange against the present defendant; his name nowhere appears upon it, and Chitty says it is a general rule that no person can be considered a party to a bill unless his name or the name of the firm of which he is a partner, appears on some part of it. In Fenn v. Harrison, 3 Term R., 762, Buller, J., observes that in the case of bills of exchange we know precisely what remedy the holder has if the bill be not paid; his security appears on the face of the bill itself; the acceptor, the drawer and the indorsers are all liable in their turn, but they are only liable because they have written their names on the bill. A person may draw a bill of exchange by his agent, and it will be obligatory. But the agent must sign the name of the principal, or it must appear on the face of the bill itself. The form is not important if the name of the principal appears on the bill. Story, Ag. §§ 147, 154, 155. Where a party is sued on an express contract, it must at least appear on the face of the instrument that the agent undertook to bind the principal. The appellation by which the contractor may be distinguished is of no importance, provided it be sanctioned by the principal and embraced in the power conferred on the agent. Judgment for defendant.

[For another case upon the same points, and involving the same subject-matter, and between the same parties, and apparently the same case, see Case No. 8,186.]

LEE (DEAKINS v.). See Case No. 3,697.

Case No. 8,188.

LEE v. FRANKLIN AVE. GERMAN SAV. INST. et al.

[3 N. B. R. 218 (Quarto, 53);[1] 1 Chi. Leg. News, 370.]

District Court, E. D. Missouri. 1869.

BANKRUPTCY — PREFERENCE — OUT OF THE USUAL COURSE OF BUSINESS—CREDITOR MUST ENFORCE HIS SECURITY—SALE WITHOUT AUTHORITY—HOW CONFIRMED.

1. Although a security given to a creditor by mortgage be out of the usual course of business of the debtor, yet, unless the creditor know of the insolvency of the debtor or have reasonable cause to believe him insolvent, the security will be valid, and may be enforced, although the debtor may have been in fact insolvent at the time the security was given.

2. A creditor of a bankrupt holding security by mortgage or deed of trust cannot enforce his security after the commencement of proceedings in bankruptcy until he first prove his debt and receive permission of the court. If he proceed without authority of court the sale will be invalid, and will be set aside, or upon application for good cause the court may confirm the sale upon terms after the debt is properly proved.

[Cited in Re Brinkman, Case No. 1,884; Phelps v. Sellick, Id. 11,079; Re Hufnagel, Id. 6,-

[1] [Reprinted from 3 N. B. R. 218 (Quarto, 53) by permission.]

837; Re Miller, Id. 9,555; Bradley v. Adams Express Co., 3 Fed. 897.]

The bankrupt, John H. Luehrman, was a member of the firm of Woerheede, Luehrman & Bro., owning one-third interest in a planing-mill and its business. The firm was solvent. In June and July, 1868, the bankrupt indorsed for the firm of Th. Kleinschmidt & Co. two notes, one for two thousand five hundred dollars, maturing September 24, 1868, and the other for three thousand five hundred dollars, falling due October, 1868. In August, Kleinschmidt & Co. failed in business, and the bankrupt became exposed to the payment of these notes, amounting to six thousand dollars. In September, the bankrupt applied to the savings institution to make arrangements to answer to his liability as indorser for K. & Co., and proposed to the defendant, either to sell or to give a deed of trust upon his interest in the mill and its machinery and fixtures to secure his liability. At the time of making these propositions the bankrupt stated that he owed no other debts than those due defendant, and that he had a right, upon giving three months' notice, to dissolve the partnership; that he was tired of the business, and desired to go into some business that he understood better; that he had put into the firm about six thousand dollars, and considered his interest in the mill to be worth that sum. At the same time he was also the maker of a note with his brother Charles Luehrman, held by defendant, for one thousand three hundred dollars, and was second indorser upon a note of K. & Co. for five thousand dollars, the first indorser being abundantly solvent, this fact being known to defendant. The defendant, after making inquiry as to the value of the bankrupt's interest in the mill, agreed to take the deed of trust, and on the 23d of September, before the maturity of the first note, the bankrupt executed his note for six thousand one hundred and twenty-six dollars and fifty cents, maturing December 31, 1868, and securing the same by a deed of trust upon his one-third interest in the mill, machinery, and fixtures, at the same time notifying his partner that the firm would be dissolved in accordance with the articles, on the 31st of December, 1868. The notes of K. & Co. were then handed to the bankrupt, who left them with the defendant, and on the 30th of September the defendant bought the notes of K. & Co. from the bankrupt for three hundred dollars, applying the money to the credit of the notes of Luehrman & Bro., the bankrupt saying that he had to pay only three hundred dollars, and that his brother was liable to pay the balance of one thousand dollars. The liability to pay the indorsements of the note of Kleinschmidt & Co., with what he lost by their failure, made J. H. L. insolvent in fact, although he represented that he could pay all his debts when he settled with the bank. On the 31st of December, 1868, J. H. L. filed his petition in bankruptcy. On January 5, 1869, the note of six thousand one hundred and twenty-six dollars and fifty cents not being paid, the trustee advertised the property for sale on January 28, and on that day the bank bought in the property for four thousand one hundred dollars. The assignee in bankruptcy [John R. Lee] filed his bill to set aside the sale made by the trustee, as having been made after an act of bankruptcy without authority of court; and also to set aside the deed of trust as having been made with a view to give a preference, the defendant having at the time reasonable cause to believe the bankrupt insolvent, the conveyance being out of the usual course of business. The evidence showed that the deed of trust was made and executed as a security by the bankrupt before his liability as indorser of K. & Co. was fixed, but that the bankrupt stated that he owed no other debts than those due defendant, and that when he became indorser for K. & Co., inquiry was made as to his means, and he was considered as being worth from twelve to fourteen thousand dollars. Meyer, a son-in-law of the bankrupt, and a member of the firm of K. & Co., owed the bankrupt four thousand dollars for money borrowed, which was lost by the failure of K. & Co. The firm of Woerheede, Luehrman & Bro. was solvent, but J. H. L. was indebted to Woerheede, for about one thousand one hundred dollars, part of the original purchase of his share of the property of the firm, and was, in fact, rendered insolvent by the failure of K. & Co., and his liability to pay his accommodation indorsements in their favor. The deed of trust did, in fact, give a preference to the defendant over the other creditors.

Mr. Whittlesey, for assignee.
M. L. Gray, for defendants.

THE COURT held that, although the deed of trust executed by the bankrupt did in fact give a preference to the savings institution, yet, that its officers did not at the time know that the bankrupt was insolvent, and did not have reasonable cause to believe him to be insolvent, or to be acting in contemplation of bankruptcy or insolvency, and that the security was valid.

THE COURT further held, as the defendant had enforced its security by a sale under the deed of trust after the filing of the petition in bankruptcy, without proving its debt as secured creditor, the sale was invalid; but as the property had sold for a fair price, and for as large a sum as it would probably bring upon a resale, that upon application of the saving institution, due proof of the debt being made before the register, the sale would be confirmed upon payment of the costs of the suit. The defendant, upon a subsequent day, made proof of its debt, and applied for a confirmation of the sale,

which was granted by the court upon payment of the costs of the suit, and the defendant was allowed to stand as a general creditor for the unpaid balance.

LEE (GAITHER v.). See Case No. 5,182.

Case No. 8,189.

LEE v. GAMBLE.

[3 Cranch, C. C. 374.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

BAIL IN CIVIL CASES—DISCHARGE IN INSOLVENCY—CREDITOR NOT SPECIALLY NAMED—OBLIGATION AND REMEDY.

1. Upon a motion to appear without special bail, the court will not examine the merits of the case.

[Cited in Brook v. Brown, Case No. 1,931.]

2. The debtor may avail himself of the discharge of his person under the act for the relief of insolvent debtors within the District of Columbia, against his creditor, although he has not named him in the list of his creditors filed with his petition.

3. A discharge of the person of the debtor from arrest, does not impair the obligation of the contract, it affects the remedy only.

Debt upon a judgment in New York, in February, 1806, and a bond with a warrant of attorney to confess judgment dated January 27, 1806. There was a paper of the same date, signed by the plaintiff [Robert Lee] stating that the bond was only a collateral security for a contract concerning land.

Mr. Ashton, for defendant [William Gamble] moved for leave to appear without special bail; because the judgment was only a collateral security, and its validity depends upon the title to the land; because the lapse of time, (twenty-two years,) is primâ facie evidence of payment, and because the defendant was discharged under the insolvent law of this district in 1818, long after the cause of action, if any, accrued. The act of congress (3 Stat. 682), which declares that no discharge under the said insolvent act "shall operate against any creditor residing without the District of Columbia, except the creditor at whose instance the debtor may be confined," was not passed until May 6, 1822. By the 10th section of the original insolvent act, any debtor who shall have been discharged under that act, if arrested for any debt owing before his discharge, shall be discharged out of custody, on his common appearance being entered, without special bail. 2 Stat. 237.

Mr. Coxe, contrà. The judgment is primâ facie evidence of a debt, and payment must be pleaded. The court will not decide the merits of the case upon this motion. The paper said to have been signed by the plaintiff, does not appear judicially to apply to this case. A discharge under the insolvent act, is no discharge against a creditor not returned as such in the list of creditors annexed to the petition of the insolvent. The discharge is a judicial act, and can bind only the parties to the suit. The parties must all appear on the record. Simms v. Slacum, 3 Cranch [7 U. S.] 300, 305; Ogden v. Saunders, 12 Wheat. [25 U. S.] 366. No creditor, not included in the debtor's list of creditors, can file allegations against the debtor. If the fact be not admitted by the debtor, that the person is a creditor, the judge cannot hear the allegations. Baker v. Sydee, 7 Taunt. 179; 4 Starkie, 729. No discharge here can affect a creditor residing in one of the states, if the contract were made in that state. The plaintiff and defendant both resided in New York at the time of the judgment. Van Reimsdyk v. Kane [Case No. 16,871]; Campbell v. Claudius [Id. 2,356]; Ogden v. Saunders, 12 Wheat. [25 U. S.] 254, 255, 259, 326, 366, 369.

CRANCH, Chief Judge. This is not a question as to the obligation of the contract; but only as to the means of enforcing it. The obligation depends upon the lex loci contractûs; the means of enforcing it, upon the lex fori. In Van Reimsdyk v. Kane [supra], Mr. Justice Story says, "But as to the form of action, or the remedy by which a contract is to be enforced, it seems on all sides conceded, that the recovery must be sought, and the remedy pursued, not according to the lex loci contractûs, but according to the lex fori." The question in that case was as to the obligation of the contract, not as to the means of enforcing it. In Campbell v. Claudius [supra], the ground of the decision was, that the courts of the United States are not bound by the state laws as to remedies, although the state courts may be; and, therefore, Mr. Justice Washington refused to discharge the defendant on common bail, the debt having been contracted beyond seas. But this court is bound by the act of congress as to the remedy, and therefore that case is inapplicable to the present. In Ogden v. Saunders, 12 Wheat. [25 U. S.] 259, Mr. Justice Washington says, "It" (the municipal law of the state) "forms a part of the contract, and travels with it wherever the parties may be found." "It is so regarded by all civilized nations of the world, and is enforced by the tribunals of those nations, according to their own forms, unless the parties to it have otherwise agreed." In the same case (page 327) Mr. Justice Trimble says, "I do not mean to say, that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts, would be manifestly a law impairing the obligation of contracts."

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

THE COURT (THRUSTON, Circuit Judge, absent) permitted the defendant to appear on common bail. A like order was made in the case of Shephard, for the use of Riggs v. Jacob Dixon [unreported], argued at the same time by Mr. Wallach, for the defendant, and Mr. Coxe, for the plaintiff. Dixon's discharge also was before the act of 1822.

Case No. 8,190.

LEE v. GUARDIAN LIFE INS. CO.

[5 Ins. Law J. 26; 2 Cent. Law J. 495; 5 Bigelow, Ins. Cas. 18.]

Circuit Court, D. California. March, 1875.

LIFE INSURANCE — REPRESENTATIONS IN APPLICATION—WHEN WARRANTIES—WAIVER AND ESTOPPEL—AUTHORITY OF AGENT—DELIVERY AND ACCEPTANCE OF POLICY.

[1. A declaration in the policy that the application is to be considered a part thereof, and that the policy is issued on the faith of the representations, and shall be void if they are untrue, makes the representations a part of the contract, and constitutes them warranties, which, if false in any material respect, render the policy void.]

[2. A waiver or matter of estoppel, to be effectual, must be made by an officer or agent of the company who has authority to make it; and a mere local agent employed to solicit applications has no such power, unless specially authorized.]

[3. The mere making of an application and sending it to the company does not complete the contract, nor is it completed until the policy is delivered to and accepted by the insured; and, if on receiving it he is not satisfied with the conditions therein contained, it is his duty to reject it.]

[4. The fact that an application is signed by the applicant himself is prima facie evidence that the answers therein contained are his answers, and the burden is on the plaintiff to show that the fact was otherwise.]

[This was an action at law by Hannah Lee against the Guardian Life Insurance Company to recover upon a policy issued by defendant upon the life of her husband.]

[1] [SAWYER, Circuit Judge (orally charging jury). Before going into the merits of the case, I wish to give you this caution, gentlemen of the jury: I do not suppose it necessary, but still I deem it advisable, under the circumstances, to give it. You will sit here as an impartial jury,—as impartial arbiters between these parties. You are neither to look with favor or disfavor upon the one or the other. You are to hold the scales of justice even. You are to determine the facts of the case upon the evidence that is before you, and not upon any other evidence, or any other consideration whatever. You are to take that evidence as the witnesses delivered it to you upon the stand, precisely in the way that you believe them to intend to be understood. Counsel, in their zeal, often differ as to what the testimony of witnesses is. In their interested view they are sometimes liable to misapprehend. They are apt to repeat testimony, and give it a different turn, a different construction, from that which was intended; or to echo it back in their own language, and convey a certain idea of their own, when the witness does not mean to convey that precise idea. Anything of that kind you are to disregard. You will reject all those changes and turns and glosses that may be given to the testimony conveying a meaning manifestly not intended by the witness, and take the testimony from the witness' own mouth, as you believe he desired it to be understood. There is one other remark that, in view of the course which was taken in the argument, I think I ought to make:] [2]

A great deal has been said of the injustice of insurance companies defending against their policies. Now, gentlemen, I state this to you: That if a fraud has actually been perpetrated upon this defendant, and an uninsurable life has been fraudulently palmed off upon it, and its officers are aware of that fact, it is as much the duty of defendant to itself, to the other policy holders in that company, and to the public, to defend a suit upon such a policy, as it is to pay a loss when the policy has been fairly and properly issued. You must determine all these questions upon their individual merits, and not allow yourself to be swayed or prejudiced by what other companies have done, or by what this company may be said to have done in other cases on other occasions. You are to determine whether or not, in this particular case, there has been a fraud perpetrated, or there are such other circumstances as give the defendant a just defense.

[If you find for defendant, then it is your duty to give it the benefit of that finding; if you find against the defendant, then it is equally your duty to give the benefit of the facts to the other party. You should not allow yourselves to be swayed either the one way or the other, but determine this case upon the evidence, upon its own merits, independent of any other action or other considerations. * * * A good deal has been said about the Case of Wilkinson [30 Iowa, 119]. In my judgment there are elements in this case which are important and material, and which are not found in that case. I shall not point out to you, gentlemen, wherein, because it is not your province to determine the law; but you will take the law as the court gives it to you, whether it be right or wrong, and be governed by it.] [2]

The first inquiry is: What relation has this application to the policy introduced in evidence? That is an important question for consideration. Was it a mere representation made by the party, as an inducement to insure, or does it go further, and does it form an integral part of the contract? Is

[1] [From 2 Cent. Law J 495.]

[2] [From 2 Cent. Law J. 495.]

it one of the elements or stipulations of the contract itself, and a warranty? The authorities are uniform, I think, on that subject and upon the authorities this application is not a mere preliminary representation, but it enters into and forms a part of the contract itself. It is therefore a warranty, and as much an element, a term of the contract, as any provision in it,—as any other term of this contract.

The introduction of the contract is as follows: "In consideration of the representations made to them in the application made for the same, which is hereby made a part of this policy;" and further along it proceeds: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof that, if the representations made in the application for this policy, and upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

Now, that makes the truth of the representation in the application, and the application itself, an express stipulation,—an express term of the contract. It is as much a part of the contract as though it were embodied in the policy itself. The fact that there are two instruments does not change the legal relation of the papers. Many contracts are composed of two, or three, or four, different instruments; and although the application is in one instrument, and the policy, so called, in another, they are one entire and indivisible contract, and the affirmance of the truth of the answers is as much a term of the contract as any other. If the answers are false,—if they are substantially false in any matter material to the risk,—then, by the terms of this policy, the contract is void, and the defendant is entitled to a verdict, unless the defendant itself has done something—performed some act—by which it is estopped from availing itself of its provisions.

The provision is one of the terms of the contract. The defendant has never agreed in this policy to insure the applicant upon any other terms than that those representations are true, and the plaintiff has accepted the contract with that term in it. Their minds have fully met upon that one item of the agreement, and not upon any other proposition or terms. As I said before, if any of those representations are substantially false in any particular material to the risk, then, under the terms of this contract, the defendant is entitled to a verdict. That would be its right upon the contract itself. There is only one way, as before remarked, of avoiding this result; that is, by correctly answering in the affirmative the question, has the company done anything by which it has estopped itself from availing itself of this provision of the policy?

There is only one point upon which it is claimed the defendant has estopped itself. It is not claimed that the defendant itself, or its officers, have done anything to work an estoppel, because they have not been brought in contact either with the plaintiff or the assured. It is claimed, however, that the act of Mr. Wright (in respect to which there is a conflict in the evidence as to what took place) is the act of the defendant; and that the parties are estopped by reason of his action in this, it is claimed; and the testimony on one side—the testimony of Mrs. Lee—is that these questions propounded in the application were never read over to the applicant by Mr. Wright, and were never answered at all by Mr. Lee, the assured.

On the part of Mr. Wright, the testimony is directly to the contrary. His testimony is that he read these questions through, question by question, received to each Lee's answer, wrote it down as given, and after writing it down read the question and answer again before proceeding; and that he thus went through with each and every question in the application to Mr. Lee, who gave the answers now appearing in that paper.

Now, Mrs. Lee testifies that Mr. Wright did not read these over, and that the application was not filled up in the house; that when Mr. Lee was about to look at it Mr. Wright put his hand over it, and said: "You don't want to see that," or something to that effect; "You are to sign here; this is only a matter of form, and your signing it is only a matter of form, to indicate that you desire to be insured."

Now, gentlemen, this is claimed to be a waiver or estoppel against the defendant from asserting or relying upon the clause in question in the contract. I instruct you, gentlemen, that a waiver or matter of estoppel, to be effectual, must be made by an officer or agent of the defendant authorized to make it. If there has been no evidence of any waiver or matter of estoppel of this kind except by a local agent, only employed to solicit applications, there must be additional proof of specific authority given him, or the company will not be bound. Unless Mr. Wright had authority to thus represent to this party, and to prevent him from knowing the answers that were given, and to induce him to sign in ignorance of the answers, even if he did it, it is not binding upon the company, and it is not estopped by that act. [See Ryan v. World Mut. Life Ins. Co., 4 Ins. Law J. 37, 4 Big. Ins. Cas. 627; Goddard v. Monitor Mut. F. Ins. Co., 108 Mass. 56; Lewis v. Phoenix Mut. Life Ins. Co., 39 Conn. 100.[3]

Had Wright such authority? The testimony, and the only testimony on the point, is that he was authorized and employed by Mr. Garniss, the defendant's agent for California, only to solicit applications. He tes-

[3] [From 2 Cent. Law J. 495.]

tifies that he (Wright) was instructed to procure answers to those questions; that he was directed to read them over, and obtain the answers to those questions; that he never had any instructions to fill up other than with such answers as were given by the applicant. Mr. Wright testifies, further, that he never did fill up applications with any other than such answers; and Mr. Garniss also testifies to the same thing,—that he gave instructions simply to fill up the applications as indicated by the printed forms, and gave no instructions or authority to fill in any answers except such as were given by the party, and that he never knew of any applications filled up in any other way. There is no testimony, direct or inferential, that goes beyond this, unless it is to be inferred, by rule of law, that his powers resulted from the very fact that he was authorized and empowered to solicit these applications from parties desiring to be insured. There is further testimony to the contrary; because the very application itself, upon its face, indicates that the solicitor had no such authority. I instruct you, gentlemen, from that fact alone, that there is no presumption of law arising that he has authority to do the act which it is claimed he did in this instance. To do that, unless he had express authority beyond the mere right to solicit, would be assuming or presuming that he had authority to perpetrate a gross and palpable fraud upon his employer and in the interest of the assured. No such presumption of law arises from the facts in this case, and there is no direct testimony to show that his authority extended beyond the point I have mentioned.

As I was about to say, the very application with which Wright was furnished—the blanks to be used indicated his duties and his authority, with its limitations, what he was to do and all he was to do. There are the questions, printed in form, to be answered by the applicant, and to be answered by the party on whose behalf the insurance is made,—not by the solicitor,—and on that very blank application are these questions: "Have you read the answers given to the questions pages 1 and 2 of this application, and do you believe them to be correct?" "Are you aware that any untrue or fraudulent answers to the queries contained in this application, or any suppression of facts in regard to his (or her) health, habits, or circumstances, or neglect to pay the premium on or before the day it becomes due, will vitiate the policy, and forfeit all payments thereon, except as specified and agreed in the company's policy?" "Do you understand that agents of the company are authorized to receive payments when due, upon the receipt of an authorized officer of the company, but not to make, alter, or discharge contracts, or waive forfeitures?" Now, if Wright was authorized to make these declarations testified to by Mrs. Lee, and to procure, or himself insert and return, false answers, that would be an authority to change, by way of estoppel,—to waive,—the terms of the contract which the defendant itself had prescribed, and that very thing is expressly forbidden in the application which is presented, and under which he is at the very moment acting. But, gentlemen, the rights of the party are not ended or concluded with the making out of the application. When the application is made out and forwarded to the company, it is not yet a contract of insurance. It is only then that it has attained to the position of a proposal on one side, not accepted by the other. There is no contract of insurance until the policy itself is delivered and accepted. If such a representation were made by the solicitor at the time, afterwards, when this contract was delivered, the contract (under which the plaintiff claims, and which she has in her possession ever since) informs the party that the agent had no authority to make any such statement or procure the application in any such manner. It expressly brings it to the attention of the applicant that the contract is made upon the consideration that the representations made in the application for the same are made a part of the contract; and it further provides, as I have already read, that "it is also understood and agreed by the within assured to be the true intent and meaning hereof that if the representations made in the application for this policy, and upon the faith of which this policy is issued, shall be found in any respect untrue, then and in such case this policy shall be null and void."

When this contract is tendered to him, there is brought to the applicant's attention, directly from the defendant itself, from the officers of the company, in the very contract, the statement in express terms, that if those answers are false the contract is void; and it calls his attention to that fact, which would negative any idea of authority to the solicitor to make these representations in fraud of the rights of the company. Again it says, in the margin: "The agents of the company are authorized to receive premiums, when due, upon receipt of an authorized officer of the company, but not to make, alter, or discharge contracts, or waive forfeitures." Thus, in every paper where the defendant itself acts, it takes particular pains to bring this limitation of authority to the notice of parties dealing with it, and when this policy was delivered, if the party insured was unwilling to accept those terms, he should have rejected it; and it was not a contract until it was delivered, and until he received and accepted it, and the policy itself brought again to his attention the fact that there was no such authority to waive, expressly or by matter of estoppel, any right under the provisions of the policy in question.

This duplicate receipt in evidence, if it be the receipt that was given by Wright on the

payment of the first $20 (and whether it is or not is a question for you to determine), also carries out that idea, that the contract is not a contract until accepted by the defendant. One of the provisions of it is: "If declined, the above amount will be returned on the surrender of this receipt; if the policy be not accepted by the party when issued, the above sum shall be forfeited to the company." It goes upon the theory that Lee might decline to take the policy, although he made the proposition, and then provides that since he has made the proposition, and put the company to the trouble and expense of examination, the sum shall be, if he then rejects the policy, forfeited to the company. But whether they acted upon that idea or not, that is the correct legal position of the parties.

In all this evidence there is no evidence that this agent had specific authority to commit this fraud upon the company. All the affirmative evidence in the case goes to show that he had no such authority. I instruct you, therefore, that there is no evidence which will justify you, in this case, in finding that Mr. Wright had authority from this defendant to perform these acts which they claim to be matter of estoppel. If you were to find against this view from the testimony in this case, I should be compelled to set aside the verdict. I instruct you that there is no evidence to show that specific authority. The evidence is all the other way, and there is no conflict in it whatever; and the authority does not result, as a presumption of law, from the mere fact that Wright was furnished with those blank applications, and with authority to fill or have them filled up with the answers given by the parties desiring to be insured as the applications indicate. Then, gentlemen, this policy, as it is written, is the contract by which these parties must be bound and their rights determined.

I will say, further, with reference to this point, that if Mr. Wright performed the acts which it is claimed he did perform, and in the way stated by Mrs. Lee, it was a fraud upon the defendant,—a fraud practiced in the interest, necessarily, of the applicant or the assured, and not in the interest of the defendant; for it is not in the interest of the insurance company to insure an uninsurable life. If the company cannot protect itself by its contracts and other means adopted, it will be at the mercy of any of the multitude of persons it necessarily employs, who choose to practice these frauds upon it.

Besides, this kind of fraud could not be well practiced upon the insurance company except by either the co-operation of the applicant,—and, in case of such action and co-operation, of course the policy would be void for fraud on his part,—or else through his becoming by gross negligence the passive and culpable instrument of the party perpetrating the act. He is in fault because it is a piece of gross negligence on his part to sign a document of that kind without knowing its contents, and to accept a policy containing these specific provisions, referring back to the application, without considering the effect it would have upon his rights. And such negligence necessarily contributes to the accomplishment of the fraud.

I instruct you, gentlemen of the jury, that this contract is the measure of the rights of these parties; that this clause is binding; and that, if there are any false statements or misrepresentations in any of those answers,—any statement substantially false material to the risk assumed,—then you must find for the defendant. If they were all true,—substantially true,—then you must find for the plaintiff.

[4] [This brings us to the question whether there was anything false in these representations. It is claimed on the part of the defendant that these are false in several particulars. One question is, "Have you had any of the following diseases," among others, "spitting of blood," "rheumatism," "palpitation of the heart," "or disease of any vital part"? The answer is, "No." "Are you subject to cough or shortness of breath"? The answer is, "No." "Have you ever had any serious illness or personal injury"? The answer is, "Broken leg when about 13 years old." You have heard the testimony on this subject. * * * Gentlemen, in addition to your general verdict, I have concluded to submit to you four interrogations, upon which you are directed to find specially, and my further remarks will have reference to these special findings. I will read them now. Question. Did Mr. Wright, the defendant's solicitor of applications, write the answers in the application, in accordance with the answers to the questions therein propounded, and information given to him for that purpose by Andrew Lee? Question. Did Mr. Wright induce Andrew Lee, while ignorant of the contents, to sign the application, by saying that it was only a form to make known his desire to insure, and did he so sign? Question. Did Andrew Lee, at the time he signed the application, or at any time before the delivery and acceptance of the policy, know what answers were inserted in the application to the questions therein propounded? If not, did he have an opportunity to know? Question. Did Andrew Lee take the application with him to Vallejo, and return it or cause it to be returned, by mail, express, or otherwise, to the defendant's office at San Francisco, with the certificate purporting to be made by Dr. McPhee appended. Gentlemen, these are all questions of fact, and on these questions there is a conflict of testimony; it is for you to determine from that testimony which is right and which is wrong. I will call your attention, as I deem it my duty to do, to some of

[4] [From 2 Cent. Law J. 495.]

the salient points of that testimony, and explain to you what the tendency is, and leave it to you to say what it proves, as it is your province alone to determine the weight to be given to it, and the facts it establishes. * * * If there are any contradictions between the testimony given by any of these witnesses on former trials,—substantial differences,—and the testimony on this trial, you are entitled to consider that also. I mean by "substantial differences," differences in the main important facts of the case. They may differ in the form of the statement. They may differ in recollection as to the precise time and the precise minute, circumstances on different trials, but upon the great and essential facts in issue, can they differ without throwing suspicion upon the testimony? If you find any differences other than mere formal ones, differences in their testimony upon the main essential facts, that is for you to consider in determining the credibility to be given to the respective witnesses; and if you find any one witness who has willfully, knowingly testified to a falsehood in any one particular, you are justified in rejecting his testimony in all other particulars. Then as to the manner of the witnesses on the stand,—their relation to the subject-matter. All these circumstances, taken in connection with the intrinsic probabilities of the case as developed by the evidence, are matters for you to consider in determining which is right and which is wrong; and what, if any, weight shall be given to any of the circumstances. It is my duty to point out the salient points of the testimony, and call your attention to them, so that you may reflect upon them in a proper manner, and then leave you to determine the facts upon the testimony. You will answer these specific interrogatories by determining which of these parts is correct on these various points. To recapitulate: If you find that there is a substantial falsehood in the answers to these questions, in the application which I have mentioned, in a matter material to the risk, you must find a general verdict for the defendant. If you find these are all substantially true, then you must find for the plaintiff. The other questions you must answer according as the testimony satisfies your minds.][4]

On the question of what took place on the making out of this application, I will say to you further, gentlemen of the jury, that the application itself appears to be signed by Mr. Lee and Mr. Moore, and, of itself, that is prima facie indication and evidence that those answers are their answers, and that, if the other side rely upon overthrowing that, the burden is upon them to prove the issue affirmatively, by testimony satisfactory to your minds, and you are to be governed by the preponderance of evidence. When I say, "preponderance of evidence," I do not mean preponderance in amount; I mean its weight, taken in connection with the intrinsic probabilities,—the natural course of things under the circumstances. There may be half a dozen witnesses upon one side and one upon the other, and yet there might be cases where the jury would be justified in disregarding, under the circumstances, the testimony of all but one. Whether they should or not is a question for them to determine. You will be governed, not by the quantity, but by the quality and weight, of the evidence in considering the credibility to be given the various witnesses, and the probabilities in connection with all the circumstances. [I will only add, gentlemen of the jury, that if you find for the plaintiff, your verdict will be for the sum of $5,000, with interest at 7 per cent. from September 26, 1870.][5]

General verdict for defendant. The jury disagreed on all the special issues, except that upon the third they found that Lee had no opportunity to know the contents of the application.

LEE (JELISON v.). See Case No. 7,256.

Case No. 8,191.

LEE v. KAUFMAN et al.

[3 Hughes, 36; 24 Int. Rev. Rec. 90; 17 Alb. Law J. 237.][1]

Circuit Court, E. D. Virginia. March 15, 1879.

SOVEREIGNTY—SUIT AGAINST OFFICER OF GOVERNMENT—TITLE CLAIMED BY UNITED STATES—INTERVENTION BY GOVERNMENT.

As courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power whenever the service of mesne process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding looks to a judgment, final execution upon which if issued would dispossess the government; so they may take cognizance of actions concerning real property, especially in statutory ejectments, where the forms of law and the practice of the courts admit, under statutory provision, of a trial of the right or title upon a summons, and appearance of the occupant of the land, where he is an officer or agent of the government and his occupancy is not interfered with; and this is especially so when the government voluntarily intervenes to assist such officer or agent in defending its title to the land.

[Cited in Adams v. Bradley, Case No. 48; Baltimore & O. R. Co. v. Allen, 17 Fed. 177.]

The plaintiff [George W. C. Lee] sued in ejectment for the recovery of the Arlington estate, near Alexandria. The suit was brought in the circuit court of Alexandria, and removed into the circuit court of the United States, on petition of the defendants [Frederick Kaufman, R. P. Strong, and others] by procurement of the United States. It was

[4] [From 2 Cent. Law J. 495.]

[5] [From 2 Cent. Law J. 495.]

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 24 Int. Rev. Rec. 90, and 17 Alb. Law J. 237, contain only partial reports.]

heard upon suggestion made by the attorney-general of the United States, that the property was claimed by the United States on a title of record, and that the United States could not be sued; and upon his motion for the dismission of the proceeding, and the plaintiff's demurrer to the attorney-general's suggestion.

W. J. Robertson, Legh R. Page, and Francis L. Smith, for plaintiff.

L. L. Lewis, Dist. Atty., and W. Willoughby, for the United States.

Samuel F. Phillips, U. S. Sol. Gen., attended in person.

The facts bearing upon the question of jurisdiction were stated by HUGHES, District Judge, in his opinion on that branch of the case, as follows:

As necessary to an intelligent understanding of what is to be decided, I must set out the facts of the case as shown by the record. I will connect with them some others derived aliunde chiefly from the briefs of counsel, which are inseparable from those exhibited in the pleadings, but to which I shall allow no technical value, and which will be seen not at all to influence the judgment of the court. I conceive the facts of the case to be as follows:

The late G. W. Parke Custis was the owner in fee of the tract of eleven hundred acres of land which is the subject of this controversy. It is known as the "Arlington Estate." It is situated south of the Potomac river, in Alexandria county, Virginia, and forms a conspicuous object in the landscape which presents itself to the eye in looking southward from the capitol at Washington. I need not add that it is an estate of considerable value, and of profound historical interest. Mr. Custis, who died in 1857, devised this estate to his only child, Mrs. Mary A. R. Lee (wife of General Robert E. Lee), to be held during the term of her natural life, and at her death to the present plaintiff, G. W. Custis Lee, to be held in fee. During the Civil War this estate, with the Arlington mansion, was unoccupied by its owner, Mrs. Lee, who was then living; and the title did not pass to her son until 1873, the date of her death. On the 5th of August, 1861, the United States congress passed "An act to provide increased revenue from imports to pay interest on the public debt, and for other purposes," and on the 7th of June, 1862, passed "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and on the 6th of February, 1863, enacted still another law, entitled "An act to amend an act entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes.'" The first-named law imposed a direct tax of $20,000,000 upon the United States, and apportioned to Virginia the sum of $937,552.67. The tax imposed on Arlington was $92.07. On the 11th day of January, 1864, the whole estate of eleven hundred acres was sold for the payment of this tax by John W. Hawxhurst, Gillett F. Watson, and A. L. Foster, who were the duly appointed and confirmed direct tax commissioners of the United States for Virginia. The price bid by the government was $26,800, an amount exceeding the means of any friend of the owner who might have desired to buy in the property for him. It was so bought in by the tax commissioners under authority of that clause of the act of congress of February 6th, 1863, which empowered the government, at such a sale as this was, to purchase lands which might be selected by the president "for government use, for war, military, naval, revenue, charitable, educational, or police purposes." The United States at once took possession of the estate, and has held it ever since; no part of the purchase-money which would have remained, after deducting the tax, having ever been paid over either to the life tenant or remainderman. The estate is now occupied by Frederick Kaufman, R. P. Strong, and about two hundred other persons. Against all these by name, as defendants, the plaintiff, in April last, brought two actions of ejectment (now treated as one) in the circuit court of Alexandria county, Virginia, having postponed his suit until within the last year of the period of five years, after which it would, in some of its objects, have been barred by the statute of limitations. The action was statutory ejectment under chapter 131, Code Va. The notice in ejectment was served personally on each occupant, and the declaration was filed at the May rules following. In due course of procedure the defendants all appeared by counsel and demurred and pleaded, their plea being the general issue authorized by the statute. The cause was thus matured for trial at the term of the state court, which was held in July, 1877. Before the commencement of that term, however, the defendants filed a petition here for the removal of the cause into this court from the state court. The petition was founded upon section 643 of the Revised Statutes of the United States, which authorizes any officer of the United States, or any person holding estate by title derived from any officer of the United States, when sued in a state court by any proceeding affecting the validity of any revenue law of the United States, to remove the cause into a circuit court of the United States.

Among the recitals of their petition, the defendants say: ". . . Your petitioners say that they do not claim the title to said land, or interest therein, except as follows, to wit: A certain portion thereof, consisting of about two hundred acres, more or less, is in charge of the war department of the United States, and is being used as a national cemetery for the burial of deceased soldiers and sailors of the United States; and the said defendant Kaufman is a superintendent thereof, under the directions of said war department. The remaining portion of said premises is set

apart as a military post, and reserve connected therewith, of the United States, and is now in charge of the defendant Strong, who is an officer of the United States, and occupying the same under orders of the war department and in obedience to an order thereof, of which the following is a copy, to wit: 'War Department, Adjutant-General's Office, Washington, D. C., July 27, 1872. The Quartermaster-General U. S. Army—Sir: The secretary of war directs that all that part of the Arlington estate outside the walls of the national cemetery be considered a military reservation pertaining to Fort Whipple, Virginia, and under the immediate charge of the commanding officer of that fort. The secretary has approved your recommendation that those persons who have crops on the proposed sites for the new buildings shall be compensated therefor from the contingencies of the army. A board of survey has assessed the total amount at $540, which has been ordered to be paid to the parties; also that the copy of the survey describing the metes and bounds of the Arlington estate be filed in the quartermaster-general's office as record of a military reserve, and be recorded in the proper land record office in Alexandria, Virginia. Very respectfully, your obedient servant, (Signed) E. D. Townsend, Adjutant-General.' That such of said defendants, except Strong and Kaufman, as are upon said premises, occupy the same not as tenants, but under permission of the officer in charge of said military reservation, which is in writing or printing, and is substantially as follows: 'Fort Whipple, ——, 187–. This is to certify that —— permitted to occupy —— acres of —— on the Arlington reservation until ——, 187–. No rent will be charged for this occupation of the reservation to that date. (Signed) ——, Officer in Charge.' "

Upon the filing of this petition, a writ of certiorari was issued hence to the clerk of the Alexandria circuit court, under which a copy of the record in the suit was certified here; the cause, when brought here, being ready for trial on issues joined of law and fact. The following proceedings were thereupon had in this court: "In the Circuit Court of the United States, for the Eastern District of Virginia. G. W. C. Lee v. Frederick Kaufman, R. P. Strong, and Others. In Ejectment. And now comes the attorney-general of the United States and suggests to the court, and gives it to understand and be informed (appearing only for the purpose of this motion) that the property in controversy in this suit has been for more than ten years, and now is, held, occupied, and possessed by the United States, through its officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in actual possession thereof as public property of the United States for public uses, in the exercise of their sovereign and constitutional powers, as a military station and as a national cemetery, established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery,' and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff, and which is a true copy thereof, is annexed hereto and filed herewith under claim of title, as appears by the said certificate of sale, and which was executed, delivered, and recorded as therein appears. Wherefore, without submitting the rights of the government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction on the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises. Charles Devens, Attorney-General."

Then follows the certificate of sale referred to, setting out in full recital the tax title under which the government claims. Upon this suggestion the following rule was issued: "In the Circuit Court of the United States, for the Eastern District of Virginia. George W. C. Lee v. Frederick Kaufman, R. P. Strong, and Others. In Ejectment. Suggestion having been made by the attorney-general of the United States that the property in controversy in this cause is in the use and possession of the United States under claim of title of record; and such suggestion having been filed, together with a motion for those reasons to set aside the declaration and dismiss the proceedings, and for such other orders as may be proper, as more fully appears by such suggestion and motion on file in the office of the clerk of this court at Alexandria. Ordered, that a rule issue requiring the plaintiff to show cause at the court-house in Alexandria, on the 4th of September, 1877, or as soon thereafter as counsel can be heard, why such motion should not be granted, provided that such rule be served upon the plaintiff or his counsel on or before the 1st of August, 1877. R. W. Hughes, Judge. Norfolk, 19th July, 1877."

In response to this rule the plaintiff filed the following answer and demurrer: "In the Circuit Court of the United States for the Eastern District of Virginia. George W. C. Lee v. Frederick Kaufman, R. P. Strong, and Others. The plaintiff, not waiving, but still so far as he may lawfully do, insisting upon his motion to remand the cause to the state court, for answer to the summons requiring him to show cause why the motion of the attorney-general of the United States to set aside the declaration and to dismiss the proceedings in the above-entitled cause, for the reasons set forth in the suggestion of the said attorney-general, which has been filed therein, should not be granted, says, and for cause shows: 1st. That said suggestion should be dismissed as not being a proper mode of making an objection to the jurisdiction of the

court. 2d. That said suggestion and matters therein contained, in manner and form as they are therein set forth, are not sufficient in law to sustain said motion or to show that any relief whatsoever should be granted under the application made by said attorney-general; and that the plaintiff should not be required to make any further or other answer thereto. 3d. If this, his demurrer, should be overruled, and he should be required to make further answer to said suggestion, the plaintiff says: That he does not admit it to be true, as set forth in said suggestion, that the United States are in possession of the property in controversy in this suit by their officers and agents charged on behalf of the government with the control of the property. One of the defendants, Maria C. Syphax, is in possession of and holds a portion of said property under an act of congress, approved on the 12th of June, 1866, entitled 'An act for the relief of Maria Syphax' (14 Stat. p. 589, c. 121), whereby the title to seventeen acres and fifty-three one-hundredths of an acre, be the same more or less, being a part of the property in controversy in this suit, was released and confirmed unto the said Maria Syphax, being one and the same person. The plaintiff is informed, and believes it to be true, that a very large majority of the other defendants are in fact tenants of the government of the United States, rendering valuable services in work and labor done and performed by them for said government in consideration of being permitted by it to occupy and use the lands of which they are respectively in possession. The plaintiff further says that the United States have no other or further title to the property in controversy in this suit than that which was acquired by them as purchasers at a sale thereof for taxes, made by John Hawxhurst, Gillett F. Watson, and A. Lawrence Foster, as United States direct tax commissioners for Virginia, and shown by their certificates of sale, a copy of which is filed with said suggestion; and the consent of the state of Virginia has never been obtained to such purchase. The plaintiff, therefore, denies it to be true, as is set forth in said suggestion, that the property in controversy in this suit has been or is now held, occupied, or possessed by the United States, through their officers and agents, charged in behalf of the government of the United States with the control of the property, and who are in actual possession thereof as public property of the United States for public uses in the exercise of their sovereign and constitutional powers, and calls for full proof of each and all of said allegations. G. W. C. Lee."

Thus the suit is here, not only on the issues of law, made up before the removal from the state court, but on the suggestion of the attorney-general, and the plaintiff's demurrer to the suggestion and answer to the rule nisi. Such are the facts in the case as it stands upon record. It is now heard upon the plaintiff's demurrer to the suggestion, upon the whole record, up to and including the demurrer. And on that demurrer the first inquiry is: Whether it is competent for the government, in the person of its chief law officers, to appear by suggestion at all? And the second is, assuming that the suggestion is a proper form of proceeding, does it set forth such a case in connection with the antecedent record as, conceding the facts alleged to be true, entitles the government to a dismissal of these proceedings, in pursuance of the motion of the attorney-general?

Counsel on either side submitted elaborate briefs and arguments. It is deemed due to the importance of the question to give that of Messrs. Willoughby and Lewis, counsel of the United States, nearly in full, as the decision was adverse to them.

Argument of the Counsel for the United States on Motion to Dismiss.

This action is brought against the parties above named, who are officers of the United States, and nearly two hundred others, who are charged to be in the occupation of the premises in controversy; and which is the estate known as the "Arlington Estate," in the county of Alexandria. The record shows that there has been what is equivalent to inquisition and office found. The supreme court of the United States say, in reference to a sale under this act, in the case of Bennett v. Hunter, 9 Wall. [76 U. S.] 336, "The sale was the public act, which was the equivalent of office found." From these facts it appears that the United States is in possession of the property in question; that it is in such possession under claim of title of record, valid upon its face, and that it is being used for proper and necessary governmental purposes. Under these circumstances it has been deemed proper to suggest to the court that it has not jurisdiction to take any action which will tend to disturb this possession of the United States, under those principles which will not allow a suit by a citizen, as plaintiff, against the government, as defendant, or against its property, especially when such property is held and used as this is held and used. For these reasons the motion is made to dismiss this suit.

The inquiry will doubtless be made whether the mode we have selected is a proper one by which to bring this question before the court. The answer to this inquiry will be seen in authorities and precedents which I shall hereafter cite in full, but which I do not, in the order of my argument, wish now to anticipate. For the present it may be sufficient to call attention to the familiar principle, that if the court is apprised by any authentic evidence that it has not jurisdiction of the case before it, it will refuse to proceed until it is satisfied upon that point. In some cases it may be necessary to plead want of jurisdiction. When such plea is made, that question is first to be determined. But when the subject-matter of the suit is without the juris-

diction of the court, and this fact comes to the knowledge of the court in any way, it will, either on motion or suggestion, or even ex mero motu, at once refuse to proceed. Such is said to be the law in Heriot v. Davis [Case No. 6,404], and cases there cited. In the case of The Pizarro [Id. 11,199], cited in the United States Federal Digest, at page 506, suggestion by the United States district attorney was held the proper mode to bring to the attention of the court that the suit before it was that of a private suitor against an armed ship of a friendly power, on account of which it could not take jurisdiction. In Maxfield v. Levy [Id. 9,321], a rule was issued to show cause why an ejectment case should not be dismissed from the record upon a suggestion that the court had no jurisdiction, for the reason that a conveyance had been made to a non-resident of the state for the sole purpose of giving jurisdiction. The truth of this suggestion was shown upon a bill for discovery, upon which the rule was made absolute. In the case of The Exchange, 7 Cranch [11 U. S. 116], a suggestion was made at the instance of the attorney-general that the property in controversy was a public armed vessel in the service of the French government. Issue was taken to such suggestion and a hearing had, upon which, it having been ascertained that such suggestion was well founded, the case was for that reason dismissed. Upon the record thus made the case was appealed to the supreme court, and was by that court heard and decided. In Doe v. Roe, 8 Mees. & W. 579, which was an action of ejectment against property held by the crown, and which I will cite fully hereafter, a rule was made to dismiss, upon suggestion filed by the attorney-general, and which was made absolute.

We are now prepared, I think, to discuss the proposition that the court has not jurisdiction of this case, for the reason that it is a suit by a private citizen against the property of the United States, claimed to be held under a title of record, and used for governmental purposes. The object of the suit is to establish the right of the plaintiff to the possession of the property in question, and to put him into the actual possession thereof; which can be done only by invalidating this record-title of the government, and putting the government out of possession. Whatever may be regarded as the form or nature of the action, it cannot be denied, nor the fact disguised, that the substantial controversy in this suit is between the plaintiff on the one side and the United States on the other. The plaintiff in accordance with the statute, which requires him to state the nature of his title (Code Va. 1873, p. 959), claims in fee. According to the statute (Id. p. 962): "The verdict shall specify the estate found in the plaintiff, whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term. The judgment for the plaintiff shall be that he recover the possession of the premises according to the verdict of the jury." He is thus seeking not merely possession, but a judgment as to the nature of his title, which he claims to be in fee. In both respects his claim is in direct opposition to the interests and claims of the United States; and it cannot be supported except by overthrowing the apparent title of the United States, and evicting them from their present possession; for it is a philosophical axiom that two bodies cannot occupy the same space at the same time.

It is manifest that this suit was intended to be brought in pursuance of the provision of the statute, which says: "The person actually occupying the premises shall be named defendant in the declaration." Code Va. 1873, p. 959. It will, therefore, doubtless be urged that inasmuch as the United States is not named as a party defendant the suit can be maintained, regarding the defendants named as the occupants within the meaning of this statute. Now, for the purpose of showing that a suit in ejectment is substantially a proceeding in rem, a suit against the property rather than as against the parties named, or as against the parties who may happen to be in the occupation of the property at the commencement of the suit, I trust I may be justified in briefly recurring to the nature of this familiar action. This mode of proceeding was a device of the courts, about two hundred years ago, at Westminster. The plaintiff, who was out of possession, and could not therefore convey the property, made a formal entry upon the land, and executed a lease to a fictitious person, usually called John Doe. This lessee was then supposed to be ousted from his fictitious possession by another fictitious person, sometimes called Richard Roe. Doe, the lessee, then commences a suit against Roe, on account of this ouster, and claims the judgment of the court, that he be restored to his possession, from which he has been ousted. The defendant, then, who is called the casual ejector, having no special interest in the matter, sends a notice or warning, to the person who is in the occupation of the land, that these proceedings are going on, that a declaration will be filed at a time named, and advises him to attend to it, as otherwise judgment will be taken by default. On proof of the service of such a notice, if no one appeared, judgment was taken by default and process issued, putting the plaintiff in possession, and, of course, putting the occupant out of possession. Such a suit, as will readily be seen, was not a suit, in form, against the occupant. He was not even named as defendant. As Lord Mansfield said, in Fairclaim v. Shamtitle, 3 Burrows, 1292: "In form it appears as a trick between two to dispossess a third by a sham suit and judgment." The occupant had a mere notice, not a writ or process. He was not made a party to the suit by such notice. If he wished to prevent a process from issuing, which would

put him out of possession, he was compelled to apply to the court for leave to show cause why this should not be done. This was granted to him only upon terms, to wit, that he should confess the entry of the plaintiff, his lease, and the ouster, leaving only the question of right of possession to be tried. But if the occupant had no special interest in defending the possession, then any person having title to the property, consistent with his occupation, and interested in preventing the recovery of the plaintiff, was allowed to come in and defend upon the same terms. This privilege existed at common law, and although a statute was passed giving such right to landlords of the occupant, yet this has been uniformly construed as permitting any person, having a title consistent with that of the occupant, to show cause why the plaintiff should not recover possession. Id.; Tyler, Ej. 447, and cases there cited. But formerly, notwithstanding the introduction of these new parties, the suit was carried on in its original style. This shows that the proceeding was regarded as not an action in personam, but in rem. The object was, not a judgment against any person, but it was for the possession of the res, the thing in controversy. No judgment was rendered against the person. No person was concluded by the judgment. The occupant, or his landlord, even though he had defended the suit, could immediately commence another suit. The only conclusive result of judgment for the plaintiff was to put him into possession. Notice was served upon the occupant, because that appeared to be the best mode of giving notice to all parties interested. The suit could be maintained even when there was no occupant, and it did not abate by the death of the occupant. All these considerations show that the persons named as defendants are of comparatively small importance in the suit, and that such suit is, in substance, a suit against the property itself, rather than against the nominal defendants. The real defendants are those interested to prevent a change of possession, whether they be the occupants, their landlords, or any other person, having a right to defend the course. All the text-writers agree that the action of ejectment is a real action, in distinction from a personal action. "In a real action, the proceedings are in rem, for the recovery of real property only." Tidd, Prac. 1. In Runn. Ej. p. 4, the author says: "By the ancient law in ejectment, the plaintiff recovered only damages, the true measure of which was the mesne profits; the term was not recovered. When, however, it became established that the term should be recovered, then the ejectment had the effect (though by no means the form) of a real action, the proceeding was in rem, the thing itself, the term, only, was recovered, with nominal damages, but not the mesne profits." True, ejectment has been styled an action of trespass, founded on tort. This has reference to the ouster, which was one of the fictions that need not be proved. It requires another sort of action for the continued trespass; to wit, the action for mesne profits. Now, the statute of Virginia has preserved the essential principles of this action, though it has in some respects simplified the proceedings. This statute is a copy of the New York statute upon this subject. The revisors, in recommending this statute to the legislature of New York, say, in their note, they "have carefully adhered to the leading principles of the action, so as to make little or no alteration, except in the form of the proceedings." Instead of having a fictitious defendant, the statute requires that the person occupying the premises shall be named as defendant. It says, also, that the "real claimant shall be named as plaintiff, and all the provisions of law concerning a lessor of the plaintiff shall apply to such plaintiff." Code 1873, p. 959. Suit is commenced, not by a writ or process, but a declaration is served, and notice that such declaration will be filed. Upon filing the declaration the plaintiff is entiled to a rule to plead. But this rule is a mere entry made in the office of the clerk. It is not required to be served. Judgment for the plaintiff is that he recover possession according to the title he proves. This judgment is conclusive upon the parties who appear and defend the suit as to the right established in the action. It would not be a bar to such persons who do not appear, except, perhaps, as to the person upon whom the notice is served; but it would be conclusive upon all parties until it is set aside by a subsequent action. Parties who do not appear would be put out of possession and their title adjudged to be invalid, and it would be so held until other proceedings or a subsequent ejectment set such judgment aside.

The first effect of judgment for the plaintiff in this case, if the United States do not appear, would be a process to divest them of possession and title, which they could not again obtain except by another suit in ejectment, in which they would be the plaintiffs. By the prosecution of this suit the United States is compelled to appear and defend, or to allow their possession to be taken from them, and their title to be adjudged to be invalid, if this suit is proper to be maintained. The judgment operates upon the property, irrespective of the parties named in the suit. It thus really affects those who are interested in the title and possession, whether they appear as parties or not. In this respect it is analogous to a proceeding in admiralty against a vessel or against property for the violation of a revenue law, or an attachment against personal property, which may be condemned and sold without reference to the real ownership, or to the owners being named as parties to the cause. What I claim is, not that this is a direct suit against the United States, but that it is a suit, in substance,

against its property, and not, necessarily, against the defendants named, the mere occupants for the time being. They have no right or claim. It is not simply to turn them out that this suit is brought. The real object aimed at is to remove the hands of the United States. It is the title, interest, and possession of the United States which is attacked. In fact I do not believe that a soldier or officer of the United States, who is in charge of property by command of the executive authority, and liable to be removed in a day, is an "occupant" in the sense contemplated by the statute, no more than a mere servant of a tenant would be such occupant, who could not be made a party to such suit. 1 Chit. 116. The real occupant is the United States. 11 Abb. Prac. 97. Let there all along be borne in mind the legal maxim, "Nemo potest facere per obliquum quod non potest facere per directum." The principle underlying all the authorities relating to the jurisdiction of courts, where their action may affect sovereign power, is that the sovereign power of any nation is supreme; that it is not the subject of judicial power; that it will not permit process against itself either directly or indirectly, or allow its operations or instrumentalities to be affected or disturbed, except by its own consent. Sovereign power is above the courts. It is their creator and master. It cannot permit coercion by judicial process. It cannot allow the supposition that it is capable of doing wrong. The idea contained in the maxim that the king can do no wrong is not peculiar to England. The basis of that maxim is that sovereign power cannot be regarded as capable of wrong, and I will not permit it to be said unchallenged that the dignity and sovereign power of the people of the United States are in any respects inferior to the like attributes of the king of England, or to those of any other sovereign on earth.

Let us now consider some of the authorities relating to the subject before us; and I will begin with quoting from English authors and judicial decisions.

Blackstone, in his Commentaries (volume 3, p. 236), says: "The common-law methods of obtaining redress or restitution from the crown, of either real or personal property, are: 1. By petition de droit, or petition of right. 2. By monstrans de droit, manifestation or plea of right; both of which may be preferred or prosecuted either in the chancery or exchequer." See, also, 5 Bac. Abr. tit. "Prerogative," 571. This petition it is well understood, must be presented to the sovereign, who thereupon, by the proper officer, indorses his permission that the right may be tried. In 4 Coke, 55a, known as "Sadler's Case," the court resolved: "At common law, when the king was seized of any estate of inheritance or freehold, by any matter of record, were his title by matter of record judicial, as attainder; ministerial, as by office; or by conveyance of record, as by fine, deed enrolled, etc.; or by matter of fact, and found by office of record on oath, as by alienation in mortmain, purchase by alien, etc., he who had right was put to his petition of right, in nature of a real action, to be restored to his freehold and inheritance." In Stamford on Prerogatives (72a, b), the author says: "And this method of proceeding is proper, where the king seizes the goods or lands of a subject without due order of law, or enters into the lands of another without title or office found." Cited in Bac. Abr. tit. "Prerogative." Monstrans de droit was allowed where the right of the party, as well as the right of the crown, appeared upon the same record, or by another record of as high a nature as that upon which the right of the crown appeared. 4 Coke, 55a, b. "At common law, where the king was entitled by office, though untruly found, the party could not have a traverse to the office, nor could he avoid it without petition." Id. 56a; Stamf. Prerog. 606; 6 Com. Dig. tit. "Prerogative," 67. "If the king be seized of lands or tenements by matter of record, he cannot be disseized or ejected; but if any one enters, he will be an intruder upon the king's possession. And, therefore, if a man enter upon the king's demesnes, and take the profits, it will be an intrusion; for, as the king takes only by matter of record, he cannot be ousted of possession save by matter of record. An intruder cannot make a lease to maintain an ejectment; nor can he maintain trespass." Id. 67, 64. In the Year Books (30th Ed.) 171, as early as the year 1302, we find the following recorded: "To a writ of right brought against the abbot of Saint Serle, it was answered that the tenements were seized into the king's hands, by reason whereof the abbot could not and ought not to answer. (Wescott.) Although the tenements are seized into his hands, you are tenant of the freehold. Judgment, if you ought not to answer. (Brompton.) He ought to answer; but inasmuch as we cannot entertain the suit while the tenements are seized, I advise that you who wish to sue for them do send to court to purchase permission, for we will hold no such plea before we are commanded so to do."

The following extracts are taken from the opinions in a very celebrated case of The Bankers, reported in 14 How. State Tr. p. 28, at about the year 1700: "There is nothing in the law so fenced and guarded and so sacred as the king's inheritance. Where that is concerned there must be petition de droit, an inquisition found, besides searches, etc. So careful is the law of the king's inheritance and revenue. As the common law stood, wherever a title for the king was found by matter of record, though it was false, the party could not traverse it; so, where a title was found for the king which was true, but it was disclosed in the record

that the subject had a good right which would avoid the title found for the king, yet, in that case, the subject could not be admitted to show it, but was so far concluded as to be put to his petition of right. Monstrans de droit was given by the statute 36 Edw. III., and did not lie at common law." Page 78. "Suppose a man hath a rent-charge, or a rent-service, or other rent issuing out of land by prescription or grant, and this land comes to the king by grant or forfeiture, in all such cases the owner of the rent is put to his petition to the king, and hath no other remedy whatsoever." Page 81. "By all the authorities (citing a large number), and by many others which I could cite, both ancient and modern, that if the subject was to recover a rent, or annuity, or other charge, from the crown, whether it was a rent or annuity originally granted by the king, or issuing out of lands which by subsequent title come to be in the king's hands, in all cases the remedy to come at it was by petition to the person of the king; and no other method can be shown to have been practiced at common law. Indeed, I take it to be generally true that, in all cases where the subject is in the nature of a plaintiff, to recover anything from the king his only remedy at common law is to sue by petition to the person of the king." Pages 81, 82.

In Barclay v. Russell, 3 Ves. 436, the controversy was in regard to some stocks in bank in London. Some records produced showed an apparent title in the crown. The attorney-general was present but made no claim to it. As between the parties the court admitted the equity to be plainly with one of them. But the court dismissed the bill, saying that the court could not give judgment because it might affect the interests of the crown suggested by the record. In this case the crown was not a party.

In the following case [In re Goods of George III.], reported in 1 Addams, Ecc. 255, the court refused to make any order, because it might be adverse to the reigning sovereign. The proctor of George III. was cited to show cause why his will should not be exhibited and proved, at the instance of Olive, princess of Cumberland, who claimed to be interested in it as legatee. The court say: "Now, the history of wills of sovereigns from Saxon times, from Alfred the Great down to the present day, has been diligently searched and examined, but no instance has been produced of probate having been taken of the will of any deceased sovereign in the courts, much less of its having been contested against any reigning sovereign." This was a proceeding against the king's proctor, but the court held that it was on that account no less a proceeding against the reigning sovereign. The court had no jurisdiction to make any order affecting the interests of such sovereign. "Where the crown is in possession, or any title is vested in it, which the suit seeks to divest or affect, or its rights are the immediate and sole objects of the suit, the application must be to the king, by petition of right." Mitf. Eq. Pl. 31.

In Hovendon v. Lord Annesley, 2 Schoales & L. 617, where both parties claimed as tenants of the crown, the court say: "There being two grants at different rents, and one grant being more beneficial than the other, the court could not rege inconsulto make a decree; and I doubt whether the court of chancery has jurisdiction in such case to bind the crown, and whether the proceedings should not have been, for that purpose, in the exchequer. The decree ought to set the whole question at rest between the crown and the different claimants, as well as between the claimants. I am called upon to act upon the mere right, and transfer the possession according to the mere right. It strikes me, if the proceedings had been at law in a real action, the defendants might have prayed aid of the king, and there could have been no proceeding without him, as the effect might be to prejudice his right and establish, as his tenant, a patentee at a less rent, and an ouster of the king's fee farmer, to the prejudice of the king. It is clear, therefore, this court could not proceed without the attorney-general, and I doubt whether it could proceed if the attorney-general were a party. . . . . I take it, however, to be clear that the king's fee farmer cannot be ousted under a prior grant from the crown without the king being a party, unless it be for the benefit of the king that he should be so ousted."

In 1 Anstr. 215, the court—a court of exchequer—say, A. D. 1798: "An ejectment was brought in the court of king's bench, February 10th, 1710, and it was, as to part of it at least, for lands which were part of the queen's estate. There was an application to this court to stay the proceedings, and the parties were heard upon it. The attorney-general appeared, and after the hearing it was put off for a day or two. At length the entry was that an injunction issue pro domina regina, so that the action was not removed, but simply an injunction went to stay the proceedings. And I think I can see why that was. If the action had been removed, the question could not have been tried, even in the office of pleas, because you cannot try the queen's title in an ejectment. The queen was in possession; her hands must be removed by some other course of proceeding than an ejectment, and therefore it was fruitless to think of removing it, and it remained under an injunction. It may be said that it might as well be left to the king's bench to determine that they could not recover the queen's land in ejectment. To be sure they might if the prerogative of the king had not been that the king had a right to prevent that question being discussed there, and to have it dis-

cussed here, and that is what was done." See 5 Bac. Abr. 569, 570. "An ejectment will not lie for lands belonging to the crown, of which the crown is in possession by its officers; the proper remedy is by petition of right." Adams, Ej. p. 18.

The last case I will cite under this head from the English authorities is that of Doe v. Roe, 8 Mees. & W. 579 (decided in 1841); and I cite this in full because it is a comparatively late case, covers the whole ground, and shows the practice of the government in relation to it. It will be observed that the queen was not a party named in the pleadings, nor made a party by motion or otherwise. This action was brought to obtain possession of a house and lot adjoining Hurst Castle, in which a person by the name of Watson had been placed in 1823 by the authority of the board of ordnance. The attorney-general obtained a rule to show cause why the declaration should not be set aside and proceedings stayed. It was claimed by the plaintiff that by statute the board of ordnance was a corporation, and by statute authorized to sue and defend in actions of ejectment. The action it was urged was not brought to try any title of the crown or to turn the queen out of possession, but to establish affirmatively the title of the plaintiff to this particular piece of land. The attorney-general said: "Such a proceeding is without precedent. You might as well bring ejectment to recover the Tower of London. If the plaintiff have title, he must proceed by petition of right. (Argument stopped by the court.)" Lord Abingdon, C. B.: "This rule must be made absolute. The only doubt I have had was whether the act of parliament of the 1 & 2 George IV. had not some application to this case. It is quite clear that the court could not issue any process to turn the crown out of possession, and the only doubt I had was whether this property was not, by the operation of the act of parliament, in the possession, not of the crown, but of the board of ordnance. But, on looking more fully into the act, my doubt is entirely removed. It does not apply to any of the ancient possessions of the crown, but only vests in the officers of the ordnance, as a sort of corporation, certain messuages, manors, lands, etc., which it recites to have been, at various times, purchased for the use of the crown since the reign of Henry VIII., and we find the board of ordnance in possession for the crown, but not in that sort of possession which is contemplated by the act of parliament. The rule must therefore be made absolute." Alderson, B.: "I am of the same opinion. No ejectment can be maintained against the crown, to turn the crown out of possession, by the authority of the crown itself. The lessor of the plaintiff may proceed by petition of right. The statute 1 & 2 George IV., as it seems to me, has nothing to do with the case; its only effect is to make the principal officers of the ordnance trustees for the crown for certain purposes of the ordnance property, so as to prevent the necessity of its being transferred from one set of officers to another. I doubt very much whether the 9th section enables the ordnance to defend an ejectment." Rolfe, B.: "I am of the same opinion. The question may be tested thus: Suppose there were no trial, but judgment went against the casual ejector; then there would only be a writ to turn the crown out of possession, which clearly cannot be. On the other hand, there is no more difficulty in prosecuting a writ of right than an action of ejectment; and although that remedy may be a more dilatory one, it presents no such incongruity and anomaly as in the case of an ejectment, which is to be followed by the issuing of a process that cannot be executed. Rule absolute." Nm. a. Lord Abingdon, C. B., stated also, that he was "much disposed to think that no affidavit was necessary in support of such application, but that it was sufficiently made by the attorney-general appearing on behalf of the crown."

Surely there can be no doubt as to what the law of England is, and has been during its judicial history, in a case like that before this court, and as to the proper practice in bringing before the court the motion we have made. In whatever form the question is presented, whether in a court of law or in equity, in the probate court or the court of exchequer, whether the crown is a party or not, whether the action of the court is to affect the interests of the crown directly or indirectly, the moment the court becomes informed that its action may operate adversely to the interests of the crown without its consent, it invariably suspends all further proceedings. It recognizes the fact that to it the domain of sovereign power is forbidden ground, and that its judicial authority is to be so exercised as not in any manner to trespass upon the prerogatives, property, instrumentalities, or operations of this sovereign power. If this be so, there can be no escape from the conclusion that this suit must be dismissed, unless it can be shown that there is a distinction between the courts of England and this country, or that there are statutes in this country making this distinction, which operate to bring this court to a different conclusion in this case.

Suggestion may be made that the law may be different in this country, on account of the difference between the foundation of courts in that country and in this. It may be said that in England the king is the foundation of justice, and that, for this reason, there would be an impropriety in suing him in his own courts, while here the judicial and executive functions are distinct, and controlled by different branches of the government. A little reflection will clear up any obscurity arising from such suggestion. The real difference is that in England the king is the

sovereign; here the people are sovereign. In England the courts are of the king; here they are of the people. In both cases the courts are emanations of the sovereign power. In both cases property is held by the sovereign power; and it is on account of this sovereignty that neither can be made defendant in a suit except by consent. But it may be urged that in England there have been more exalted notions of the prerogatives of the king than we have been accustomed to recognize in this country. Now it is true that there are certain prerogatives of the king with which we have nothing to do. Those which pertain to his personal affairs and dignity, in distinction from those which he enjoys for the good of the public, may be regarded differently from what similar prerogatives of the chief executive in this country might be considered. The king may hold property in his personal capacity, in distinction from that which he holds in his sovereign capacity. As to the former the ruling of the courts might not be precedents to guide us in this country. There might, in relation to this, be some idea of kingly prerogative, which would be inapplicable here. But as to those prerogatives which he enjoys as a sovereign for the public good, and as to the property held by the crown for the public, I can conceive of no reason why what is there regarded as essential for the proper and independent enjoyment of such prerogatives and property should not be so regarded in respect to our sovereign, the people of the United States. In relation to these questions of policy, propriety, expediency, and jurisdiction must be of the same nature, and must rest upon the same principles. In our own country the chief executive is not a sovereign. He, in his personal capacity, is subject to the law and to the jurisdiction of the courts substantially the same as a private citizen; and it is in relation to him, in comparison with the king, that we chiefly derive our notions of the greater extent of kingly prerogatives that are not regarded as guides for our action in our courts. But even here, when a suit was attempted to be made against the president, in his official capacity, by the sovereign state of Mississippi, in that august body, the supreme court of the United States, the court would not even allow the bill to be filed. [Mississippi v. Johnson] 4 Wall. [71 U. S.] 475. And it is very suggestive, too, that in this case the court would not allow Andrew Johnson, as a citizen of the state of Tennessee, to be enjoined, recognizing the force of the maxim, "Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud." When a thing is forbidden to be done, everything having a tendency towards its taking effect is also forbidden. Maxims are axioms which need no reasoning for their support, and this is peculiarly applicable to the case before us. For, if the United States cannot be sued directly for the purpose of defeating its title or destroying its force, can the same object be accomplished by a suit in form against private individuals? The supreme court refused to allow its records to be stained by the suggestion of a similar device.

But let us examine further the authorities of our own courts, to see how these principles have been applied in our own country. Call to mind the great case of Chisholm v. State of Georgia (decided at the very earliest period of our judicial history), reported in 2 Dall. [2 U. S. 419]. It was there held by a divided court, that, by reason of the peculiar language of the constitution, the state has consented to the jurisdiction of the supreme court in a suit against it by a citizen of another state. But such was the indignation and alarm at the consequences of such a construction, that within less than a month after the judgment, the following amendment was proposed by congress, and in due time was ratified by the legislatures of the states: "The judicial power . . . . shall not . . . . extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." What would have been the attitude of a lawyer attempting to maintain the doctrine that the United States was liable to be sued in the court of Alexandria county? In No. 81 of the Federalist, the author says: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind." In Cohens v. State of Virginia, 6 Wheat. [19 U. S.] 264, the court say: "A sovereign, independent state is not suable except by its own consent. This general proposition will not be controverted. As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the courts cannot exercise jurisdiction over it." U. S. v. Clarke, 8 Pet. [33 U. S.] 444. See, also, [U. S. v. Eckford's Ex'rs] 6 Wall. [73 U. S.] 484; [Field v. U. S.] 9 Pet. [34 U. S.] 201; 1 Story, Eq. Pl. § 69, and note. In Hill v. U. S., 9 How. [50 U. S.] 389, the court say: "No maxim is thought to be better established or more universally assented to than that which ordains that a sovereign, or a government representing a sovereign, cannot ex delicto be amenable to its own creatures, or agents employed under its own authority, for the fulfilment merely of its own legitimate ends. A departure from this maxim can be sustained only on the ground of permission on the part of the sovereign or the government, expressly declared, and an attempt to overrule it or impair it on a foundation independent of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. Upon the principle here stated, it has been that, in cases of private grievance proceeding from the crown, the petition of right in England has been the nearest approach to an adverse posi-

tion to the government that has been tolerated, and upon the same principle it is that, in our own country, in instances of imperfect land-titles, special legislation has been adopted to permit the jurisdiction of the courts upon the rights of the government."

Even in cases where the United States, as a plaintiff, has instituted suits against private individuals, and has given them in such cases the right of set-off, the court will not permit a judgment against the United States for the excess of such claim over the claim of the United States. Reeside v. Walker, 11 How. [52 U. S.] 290; De Groot v. U. S., 5 Wall. [72 U. S.] 431; U. S. v. Eckford, 6 Wall. [73 U. S.] 484. Neither can a judgment or decree be given against the United States for costs. U. S. v. Boyd, 5 How. [46 U. S.] 29. This principle will not be controverted, and perhaps an apology is due for quoting so extensively to establish so plain a proposition. But I have done so because I desired to show that, in every form in which the question has been presented, our own courts have shown the same sensitiveness to encroaching upon the prerogatives of our sovereign as has been shown by the courts of England in regard to those of her sovereign, and upon the same principles, that the opinions and acts of judges in both countries have been tinctured with the same spirit, and tend to the same results; from which it must of necessity be inferred that, as in England, such spirit and such principles compelled the courts to hold that an action of ejectment would not lie against lands held by the crown, so here lands held by the United States are exempt from such suit, though the United States is not made defendant upon the record.

I think that I have sufficiently established both by the principles of an ejectment suit and by the decisions of the courts, that this suit in ejectment is, at least, a suit against the property of which the United States is in possession under a title of record; that it is substantially a suit in rem, not a personal action merely against the persons named, but a real action. This being so, let us see what the decisions are as to the property of the United States in such a situation.

In the case of People v. Ambrecht, 11 Abb. Prac. 97, decided in 1859, and cited in Brightly's New York Digest (page 1178) as having been affirmed by the court of appeals of that state, suit was brought at the instance of Gerritt Smith, in ejectment, to recover a portion of the land occupied by Fort Ontario of the United States, at Oswego, and process was served upon a soldier in charge. After saying that such process was not properly served, for the reason that such soldier was not an occupant in the sense contemplated by the statute, and that "the premises, so far as they were occupied at all, were occupied by the United States," W. F. Allen, J., further says: "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction in it. Ejectment, therefore, could not be brought against the United States any more than an action of assumpsit, and it seems to follow that they cannot be indirectly sued in the person of their agents and officers, and the title and claim thus subjected by indirection to the jurisdiction of the state courts. In theory it is unreasonable, and in practice it might prove mischievous by bringing the state and national sovereignty in conflict. The state, by its militia, would be bound to execute the powers of its courts, and give possession, in pursuance of ejectment, while the United States might be disposed to retain possession of its fortifications and barracks by a resort to force, if necessary. Suppose that by the time judgment and a writ of possession should be awarded to the plaintiff the defendant should be court-martialed or superseded, and a body of United States troops should occupy the fort, of what avail would be the power of the state court and the posse of the country to the plaintiff, in obtaining possession of the premises? Certainly the judgment in an action against a soldier would not bind the United States, or estop them from claiming title in hostility to it." In the case of The Othello [Case No. 10,611], the vessel and cargo were libelled in rem on account of a bottomry-bond, given by her master on the vessel and cargo. The vessel had been chartered by the government. The court say: "The cargo belonged to the United States, and was in their possession as shippers of it. As such it was not subject to seizure or attachment, nor could a suit be instituted against the government in respect to it." In U. S. v. Barney [Id. 14,525], in the United States court of Maryland, in 1810, the defendant was indicted for obstructing the mail, in detaining a horse used in the service of the United States. His defence was, that under the laws of Maryland he had proceeded against the driver for a claim against him, and had taken the horse from him under such law and proceedings. The court, Winchester, J., overruled this defence, saying: "The United States cannot be sued. Suability is incompatible with the idea of sovereign power. The adversary proceedings of a court of jurisdiction can never be admitted against an independent government, or the public stock or property." In the case of The Siren, 7 Wall. [74 U. S.] 152, the vessel had been captured as prize at Charleston. On her way to Boston she ran into and sunk the sloop Harper. She was libelled in Boston, and condemned as lawful prize and sold. In the proceedings the owners of the Harper intervened, asserting her claim for damages occasioned by the collision. The court say at the outset: "It is a familiar doctrine of the common law that the sov-

ereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy, the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property." In the same case the court say: "Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government. . . . . So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property the title to which had subsequently passed to the United States would be in the same position as a claim against the vessel of the government, incapable of enforcement by legal proceedings." The equity of redemption held by the government, therefore, could not be foreclosed by an advertisement and sale, under a power of sale in the mortgage. In the case of The Davis, 10 Wall. [77 U. S.] 15, the court, announcing the same principles, say: "No suit in rem can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court." As to what shall constitute such possession, the court say: "The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession." This case cites with approval the case of Briggs v. The Light-Boats, 11 Allen, 157, where these principles are most elaborately discussed. In Case v. Terrell, 11 Wall. [78 U. S.] 199, where the court below had rendered a judgment affecting the interests of the United States in a suit to which it was not a party, the court expressed its amazement that a court of the United States could be found that would render such a judgment, and, with all the impatience that it is proper to attribute to that tribunal, referred to the fact that it had repeatedly held that this could not be done. The state of Virginia has provided by express statute modes of proceeding where individuals have claims against the commonwealth in certain cases. Chapters 44, 109, 110, Code 1873. See, also, 12 Grat. 564; 5 Leigh, 512. But the courts would no doubt look with amazement upon the lawyer who would attempt to maintain an ejectment for lands in the possession of the commonwealth, under claim of title, especially a record title upon office found.

It may be proper in this connection to notice some principles which, without some discrimination, might appear to be not in perfect harmony with the doctrines we have just shown. It has been held, for example, that the United States in its business relations is subject to the same laws and liabilities as private individuals. Thus, in the case of U. S. v. Wilder [Case No. 16,694], it was held that the property of the United States on board a vessel was liable for salvage the same as the property of a private individual, and because the United States was plaintiff in that suit the lien was enforced. But had the United States been defendant, although the lien attached as though it were the property of a private individual, it was held that it could not be enforced. There was the same right but no judicial remedy. The same distinction was made in the case of The Siren, 7 Wall. [74 U. S. 152], and in the case of Briggs v. The Light-Boats, 11 Allen, 157. So, liabilities in the case of contracts are the same as in the case of individuals, but there was no remedy for their enforcement until congress established the court of claims, in which the citizen is permitted to file his petition. The meaning, then, of the general statement, that in such cases the United States is subject to the same liabilities as private individuals, is, that it is so so far as the right is concerned, but not necessarily so concerning the remedy. When the United States is plaintiff it is liable to be met with the same defences as though it were a private citizen. Again, when the United States is not in the possession of ordinary property, and does not have a record title, liabilities against it may be enforced This distinction was taken in the case of The Davis, 10 Wall. [77 U. S. 15], where cotton which had been captured from the Confederate States, was held liable for salvage, the proceedings to enforce the lien having been instituted and the cotton seized before it came to the possession of the officers of the United States. This principle would not apply, however, where the property is being actually used for governmental purposes. "The lien can only be enforced in the courts in a proceeding which does not need a process against the United States, and which does not require that the property shall be taken out of the possession of the United States." The Davis, 10 Wall. [77 U. S. 15]. See, also, Chit. Prerog. c. 13, § 1. So, also, where the United States, or a state, becomes a stockholder in a private corporation, and even where it creates a corporation, and is the sole owner of the stock, it has been held to surrender or waive its prerogative of

sovereignty in some respects. It could not otherwise transact business; though in the case of [Curran v. State of Arkansas] 15 How. [56 U. S.] 309, where a state was the sole owner of stock in a corporation, the United States court put their decision upon the ground that they were bound to follow the decision of the state court, and that in that case the state had consented to the jurisdiction; and in McCullough v. Maryland [4 Wheat. (17 U. S.) 316], it was held that such stock of the United States was not liable to taxation by the state authorities.

It has also been held that in a suit between individuals the decision is not to be affected by reason of its ultimate effects upon the rights of the state or nation. Thus in a suit against a collector of taxes for the wrongful collection of the tax, the state may be interested, but it will readily be seen that the state is not directly affected by the result. Judgment is not against the state, nor does process issue against the state or its property, nor does it affect it only by the consent of the state in a subsequent and independent proceeding. These distinctions are clearly explained in Case v. Terrell, 11 Wall. [78 U. S.] 199. In the case of Fowler v. Lindsey, 3 Dall. [3 U. S.] 411, which was an ejectment suit between individuals, growing out of a controversy as to whether the land was in New York or Connecticut, the court refused to regard it as a controversy between two states, because a decision as to the right of the soil between individuals did not decide anything as to the jurisdiction as between the states, neither of the states being nominally or substantially parties to the suit. But surely it must be easy to see that such cases are far different from cases where the direct effect of the judgment and consequent process is to divest the state of its possession and to change its relations to the property. As we have before seen, the direct effect of judgment and execution of final process for the plaintiff in this case would be to turn the United States out of possession and to set aside its title, which could be re-established only in a case where the United States would be plaintiffs. Perhaps the principle we are contending for may seem less surprising when we recall to our minds the familiar doctrine that property in the hands of an officer of the government cannot be attached ([Buchanan v. Alexander] 4 How. [45 U. S.] 20; [Field v. U. S.] 9 Pet. [34 U. S.] 201); nor when in custodia legis (6 Md. 1); and that even a receiver of a court cannot be sued as to property in his hands, as such, without the permission of the court of which he is the officer.

It must be borne in mind that in this case three leading facts occur: 1st. Possession; 2d. record title; and 3d. governmental use. It is possible that in some cases it may be found that suits of this kind may be maintained; but, if so, I think that it will be seen that some one or more of these elements are lacking. It is not necessary for us to argue such a case. It has been contended that property held by the government as private property is held, and without being in actual use for the purposes of the government, may be distinguished from that in actual governmental use. But that is not this case, and it is not necessary to affirm or deny that such distinction exists. We may say, however, that it would not be reasonable or practicable to make such distinctions as to separate portions of property where only one piece is in controversy, especially in a court of law. My attention has been called to the case of French v. Bankhead, reported in 11 Grat. 136, where suit was brought in ejectment against the general in command of Fortress Monroe, to recover lands claimed to be owned by the United States adjacent to that fort. In regard to this it may be said, first, that no question was made as to the jurisdiction of the court, and there was no decision upon the point now before this court. So far as the case shows, it does not appear but that the United States consented to allow the court to pass upon the merits of the case. In the second place, an examination of the case will show further that this question could not have been presented as it is in this case. The United States could not have suggested that it had a record title, for this was the precise question disputed upon the trial. The question was, whether the records produced were to be so construed as to embrace and describe the property in dispute. In this case the decision was in favor of the United States in both the original and appellate courts, and no opportunity occurred to show what might have been the result if final process against the United States had been sought to be enforced.

It was gravely argued, in a memorial presented by this plaintiff to congress for an act authorizing him to have his rights adjudicated by the court of claims (possibly realizing the difficulties of proceeding in any court without the authority of congress), that the United States had no right to acquire the title to this property without the consent of the legislature of Virginia, and this view was earnestly contended for by Senator Johnston in advocating this bill in the United States senate. In regard to this it may be said, first, that it presents a question for adjudication by the court, but to hear it the court must have jurisdiction and the right to determine it. But if we are right in the position we have taken, it is one that cannot be discussed at this stage of the case, nor until it is first determined that the court has the right to question the title of the United States. But we say that such a claim is entirely unfounded. It is true that where the United States becomes the owner of real estate in a state, it does not thereby obtain the power of exclusive legislation over it without the consent of the leg-

islature of the state. The jurisdiction and power of the state still extends over it. But there is a wide distinction between sovereignty and title to real estate; and there is no reason why the latter should not be acquired without the acquisition of the former. This distinction is plainly made by Vattel (book 2, § 83), in reference to states which are in all respects foreign to each other. He says: "What is called the 'high domain,' which is nothing but the domain of the body of the nation, or of the sovereign who represents it, is everywhere considered as inseparable from the sovereignty. The useful domain, or the domain confined to the rights that may belong to an individual in the state, may be separated from the sovereignty, and nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction. Thus many sovereigns have fiefs and other possessions in the territories of another prince. In these cases they possess them in the manner of private individuals."

The kingdom of Great Britain and other nations have real estate in the District of Columbia. If, then, a nation may have property in a foreign state, may not the United States have property within her territorial jurisdiction, even though it also be within the territory and jurisdiction of one of the states? But we do not choose to rest upon this theory alone. The United States is not an alien and a foreigner in Virginia. We claim to be citizens of the United States as well as citizens of Virginia. True, there was a time when a considerable portion of the people of the state attempted to repudiate the claims of the United States upon them, and proclaimed that all they desired was to be let alone. True, in later days, a few regarded it as an invasion for the United States to place her soldiers within the borders of our sacred soil. But this idea is now pretty well exploded. We have been reconstructed. The general sentiment is far different. We are all loyal to the United States. We are willing to serve the United States, as no doubt our chief magistrate can abundantly testify. Virginia is not a sovereign state, in the full sense of a sovereign power. It never had the power of declaring war, making treaties, coining money, establishing a navy or post-offices, or laws of naturalization, nor many other powers and prerogatives, universally regarded as pertaining to sovereign nations. Until the Declaration of Independence it was a colony of Great Britain. Its people joined with the people of the other colonies in proclaiming their absolution from allegiance to the British Crown, as "United Colonies." As such they joined in a confederation, and so remained until the adoption of our constitution by the people of the country, under which the United States exists as a nation, supreme within its sphere. As such, it has jurisdiction throughout all the territory occupied by the states, as well as in the territories. It has the usual incidents of a nation. It has the right to acquire both real and personal property for governmental and national purposes. If necessary, it has the right to condemn property for its uses. It could acquire title by confiscation, and declare forfeiture even without office found. 5 Wall. 268. It has the right to take real estate in payment of debts, to sell it upon execution, and purchase it at such sale. This right has been exercised without question from the beginning of its existence. It holds real estate in every city and in every part of the country. It has the right to tax property everywhere within its borders. This right was exercised by the imposition of a direct tax upon the property in question. The taxing power is conceded by all to be far-reaching and all-pervading. It is one of the highest attributes of sovereign power. As is said in McCullough v. Maryland, 4 Wheat. [17 U. S.] 316: "It is an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it." Under this power the government may declare a forfeiture for non-payment, and may, if it chooses, declare such forfeiture, especially upon inquisition and office found, to result in transferring the title to the government. It was by virtue of a power of such transcendent magnitude that the title to this property appears to have been acquired. Whether this power was executed according to the terms of the law or not, it is not now proposed to discuss. It is sufficient for the present purpose to say that the United States had the right to acquire the title to this property under an act of congress, passed by virtue of its taxing power, and which expressly conferred upon its officers power to purchase real estate for the government for the purposes enumerated by the law, and such right could not be questioned except by attacking the constitutionality of the law itself.

It is refreshing to emerge from the stifling fog and malarial obscurity which beclouds the understanding, dwarfs the spirit of patriotism, and confuses the judgment, when we are seeking for reasons to limit the capacity of our government so as to render it incapable of holding property within its borders for purposes necessary to carry on its operations without the gracious permission of state legislatures, to the serene atmosphere and clear sunlight which inspires such utterances as are found in Kohl v. U. S., 91 U. S. 367. In speaking of the condemnation of real estate under the power of eminent domain, which is said to be the offspring of political necessity, and inseparable from sovereignty, the supreme court say: "This power cannot be enlarged or diminished by a state. Nor can any state prescribe the

manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and the right of exclusive legislation, after the land shall have been acquired." Why should it be said that the consent of the legislature of a state is required to enable the United States to hold its title to real estate, acquired for its governmental purposes, under the boundless power of taxation, which is also an incident of sovereignty and the offspring of political necessity, any more than when acquired under the power of eminent domain, which is certainly limited by the condition-precedent of giving compensation? But it may be argued that conceding the right of the United States to hold real estate in Virginia without the consent of the legislature, yet as this title has been acquired, if at all, without such consent, therefore it is still subject to the laws and jurisdiction of Virginia; and even though proceedings might not be commenced in the courts of the United States against the United States or its property, yet such proceedings might be instituted in the courts of Virginia, as was done in this case; and although the case has been removed to this court, the rights of the parties are not affected by such removal. The first suggestion in answer to this is, that this is one of those cases which, under the constitution and laws of the United States, both the defendants and the government have the right to have transferred to the courts of the United States. They have the right to have especially all questions relating to the revenue laws of the United States heard and determined by the courts of the United States. When such transfer is made, it is no longer within the jurisdiction of the courts of the state. The subject of the controversy is no doubt subject to the laws of the state, and all questions are to be decided according to the laws of the state as well as of the United States applicable to it. But it is not in the judicial power of the state; it is in the judicial power of the United States, where the parties had the right to place it, and to have it adjudged and determined according to principles applicable to the courts of the United States. But let us consider the case as though it were still in the state court, and as though the state and national jurisdictions were entirely independent of each other. It will not be contended, I presume, that the interests of the United States would be regarded with less consideration than those of a foreign state or nation, and it may be proper to consider a few of the authorities in such cases. In Story, Eq. Pl. § 69, the author says, after stating that where the interests of the crown are involved, or it is sought to divest or affect its rights, the proper mode of redress is not by bill, but by petition of right. "A similar exemption from being sued applies to the case of foreign sovereigns, for they are not suable in the courts of a foreign country, although they may be found personally within the dominions of such foreign country." In Wadsworth v. Queen of Spain, 17 Q. B. 171 (decided in 1851), the syllabus is: "Property in England belonging to a foreign sovereign prince in his public capacity cannot be seized under process in a suit instituted in this country on a cause of action arising here, and, therefore, where a suit had been brought in the lord mayor's court against the queen of Spain, upon bonds of the Spanish government, bearing interest, payable in London, and moneys belonging to her, as the sovereign of that country, had been attached in the hands of garnishees in London, to compel her appearance, the court of queen's bench granted a prohibition. Although the action was not in form brought against the queen of Spain as sovereign, it appeared sufficiently, by the proceedings, that she was charged with liability in that character. The garnishee, in such case, may move for a prohibition, and it is no objection that he has put in a plea to such attachment." The court, Lord Campbell, C. J., is very severe in his condemnation of such a proceeding. Among other things, he says: "I must express my very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie, and am very sorry to find that this has been persisted in." This case is well worth examination, as is also the case of Duke of Brunswick v. King of Hanover, 6 Beav. 1, where these principles are elaborately discussed. It will be observed that an attachment is a proceeding in rem; that it may be prosecuted to judgment without the appearance of the owner, and that the action, as stated in the syllabus, was not in form against the sovereign.

To show the extreme regard for the interests of foreign powers in property they may have in this country by the supreme court of the United States, I call special attention to the case of The Exchange, in 7 Cranch [11 U. S.] 117. In that case, a vessel in the possession of the officers of the government of France was libelled by its former owners, who claimed that their title had never been divested. No one appeared on behalf of the French government, but at the instance of our own executive department the attorney-general appeared and suggested that it involved the interests of that government, and the case was heard upon issue made to such suggestion. All the questions relating to the jurisdiction of our courts over the property of foreign powers were carefully reviewed by Chief Justice Marshall, who held most emphatically that they have none whatever, and especially where such property is used for national purposes. This case, too, it will be observed, was decided without the appearance of the French government, and without its appearing from the record that it was a party to the suit. In Harris v. Dennie, 3 Pet. [28 U. S.] 292, an act of congress had

provided that goods imported from a foreign port could not be removed until the owner had obtained a permit from the officer of customs. They were held to be, until that time, in the possession of the United States. Held, that for this reason an attachment by a state officer on behalf of a creditor of the owner of the goods would not lie. The court say: "An attachment of such goods, by a state officer, presupposes a right to take the possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon mesne process, he has the right to hold the possession to answer the exigency of the process. If he attaches upon an execution, he is bound to sell, or may sell, the goods within a limited period, and thus virtually displace the custody of the United States. The act of congress recognizes no such authority, and admits of no such exercise of right." In the case of Briggs v. The Light-Boats, 11 Allen, 177, the state court was asked, under an act of the legislature of that state, to enforce a lien given by the statute to builders of a vessel upon such vessel, after it had been transferred to the use of the United States. The court admitted the existence of the lien, but held that there could be no remedy in the courts. After delivering an opinion of extraordinary elaboration the court say: "In every aspect in which we can look at these suits, in the light of principle or authority, we cannot escape the conclusion that the state courts have no jurisdiction or right to entertain them." In U. S. v. Weise [Case No. 16,659], Grier, J., says: "Even if the state of Pennsylvania had power to tax lands, where the jurisdiction over the lands had not been ceded by the legislature, payment of such tax could not be enforced by distress or seizure of property of the United States. To the extent of the powers granted, the United States are sovereign, and cannot be treated by the states as a mere corporation, a citizen, or a stranger, and subjected to distress or execution for claims, real or pretended, by any county or township officer. If the state of Pennsylvania has any just demand against the government for the use of her soil, recourse may be had to congress, to whom an appeal for justice can always be successfully made, especially when the appellant is a state of the Union. There is no necessity for this humiliating spectacle of petty officers of a state distraining or levying on the public property of the general government, and treating it as a petty corporation or an insolvent or absconding debtor." When the court of the state of Maryland attempted to compel the officer of a branch bank of the United States to use stamped paper in issuing its notes, according to an act of the legislature of that state, the supreme court of the United States said, in McCullough v. Maryland, 4 Wheat. [17 U. S. 316], it should not be done. If these states in the exercise of their exalted power of taxation for public uses could not affect the operations of the government, or interfere with its property, how much less ought the courts, in behalf of private interests, to place the government in the position so graphically portrayed by Justice Grier.

I now propose to analyze a number of authorities which have been furnished me by counsel for the plaintiff, and to which my attention has otherwise been called as apparently in opposition to the principles for which I have been contending. I shall endeavor to bring out the precise points decided in these, and I invite comparison of my statement of the cases with the reports themselves. But, before entering upon this, permit me again to state the precise principle upon which I rely. It is not (though some of the cases might possibly justify me in so doing) that a suit could not be maintained where simply the interests of the government may be affected. It is not that such suit could not be maintained where the government seizes upon property without color of title, nor where the government claims title without possession or government use, nor where the government is in the use of property, if it could be, without possession or color of title. None of these constitutes our case, and it is unnecessary to maintain such a case, and authorities in such cases can have no controlling effect. Our position is this: That where the United States is in possession of real estate through its officers, and has been in such possession peaceably for a considerable period, under a title of record valid upon its face, the result of what is equivalent to office found, using it in the proper exercise of its sovereign powers, a suit in ejectment cannot be maintained upon process served upon its officers and agents, when the court is properly informed through its proper officer that it claims exemption from suit and expressly objects to the jurisdiction of the court upon this ground. I confidently assert that no authority will meet a case where all these things concur, and that every case which can be cited differs from this in one or more material and vital particulars.

The first and apparently the most formidable case, for it is a leading case, and the basis of most of the others cited, is Osborne v. Bank of U. S., 9 Wheat. [22 U. S.] 856. I propose to bring out this whole case to analyze it as thoroughly as possible, in order to show the precise questions decided and the true principles established thereby. This case is cited in support of a general principle there laid down, that jurisdiction depending upon parties has relation to the actual parties upon the record. Chief Justice Marshall thus states it: "It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently,

the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record. The amendment has its full effect if the constitution be construed as it would have been construed had the jurisdiction never been extended to suits brought against a state by the citizens of another state or by aliens. The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest or as being only nominal parties. . . . . The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and if denied could be demonstrated. . . . . It is believed that no case can be found where any person has been considered as a party who is not made so in the record." As to this, in the first place, I remark that this statement is that of a general principle, and much broader than was necessary to decide the precise case before the court. It has been said, and it is manifest to the judicial mind, that it is unsafe to interpret language used in reference to a particular case before the court as settling general principles as to cases not before the court and of a different nature, and not in the minds of those using the language. See, upon this point, Cohens v. Virginia, 6 Wheat. [19 U. S.] 399, and Peyton v. Bliss [Case No. 11,055]. So far as the general principle stated is necessarily applicable to the case in reference to which it is used and to like cases, it is authority; but when cases of different nature are in contemplation, it is obiter dicta to the extent of the difference between the cases.

Now let us see what was the precise case before the court and the precise point decided; the legislature of Ohio, representing a strong public opposition to the United States Bank, passed an act directing that if, after the 15th day of September, 1819, it continued to transact business in the state it should be liable to a tax of $50,000 on each office of discount and deposit, and in such case directed the auditor to make out a warrant, directed to any person, authorizing him to enter the banking-house and seize the money if not paid, and if necessary to go into every room, open every chest, etc. On the 14th of September a bill was filed for an injunction against the auditor. The auditor was served with subpoena and indorsement of bond for injunction early on the 15th of September. After that, to wit, on the 17th of September, one Harper, who had been employed to collect the tax, entered the bank and violently seized $100,000. While taking this to the capitol, he was served with the injunction. He took it, however, to the state treasurer and delivered it to him. It passed to his successor in office, who, though he passed it upon the books to the credit of the state as revenue, kept it in a separate package. The bill was filed against the auditor and was afterward amended by making Harper and the treasurer parties defendants. A decree was made directing them to restore the money, and they appealed to the supreme court of the United States. The principal points made were that the bank could not sue in the United States court; that it was a case for a court of law and not for a court of equity; that the law of Ohio was constitutional and justified the act; and that, as it was a suit against the officers of a state, having a direct effect upon the property of the state, such suit was prohibited by the eleventh constitutional amendment. It will thus be seen that this was in reality a contest between two sovereign powers, the state of Ohio and the United States, initiated by the state of Ohio, having for its object the destruction of one of the instrumentalities of the sovereign power of the United States, and invoking the principle of immunity from suit for the very purpose of being permitted to commit the injury against sovereign power which this immunity from suit is designed to prevent. The point under discussion, when the statement of the above general principle was made, was the interpretation of the eleventh constitutional amendment, which declares that the judicial power shall not be construed to extend to suits against a state by citizens of another state or alien. The court say the interpretation is to be made by considering the words. English cases will throw but little light upon it. This amendment is but a limitation upon the judicial power originally granted by the constitution. It is therefore necessary to determine what was originally granted. Illustrations are then given to show that the original grant of judicial power was to enable the court to take jurisdiction over states where they were made parties upon the record, and, as decided by the supreme court before this limitation was made, where they were parties defendants upon the record. The amendment limits this judicial power only by denying it in cases where suits are against a state by citizens of other states and aliens. The original grant of power enlarged the jurisdiction of courts only to the extent of allowing states to be made parties defendants upon the record. Where states were interested but not named in the record, then jurisdiction would depend upon principles of common law. As this was the interpretation of the original grant of judicial power, and the eleventh amendment was simply a limitation of the original grant, both had reference to states when named as parties upon the record. The court say, therefore, that the eleventh amendment was not a prohibition to the

suit. The question of jurisdiction depended upon principles aside from this, and in cases embraced by the limitation stood just as it would without either the original grant or the eleventh amendment. As the court say, "the amendment has its full effect if the constitution be construed as it would have been construed had the jurisdiction never been extended to suits brought against a state by the citizens of another state or aliens."

Now, the general statement we have been considering was made for the purpose simply of interpreting the eleventh amendment, a subject with which we have nothing to do, and it was made, too, with particular reference to the case then before the court. So far as the interpretation goes, it is simple, direct, and plain, and is binding authority, but the general statement made in illustration merely, or arguendo, is not necessarily so, especially in cases of an entirely different nature. The court did not mean to say that the courts would always take jurisdiction in cases where the interests of states or sovereign power are affected unless such state or sovereign power were a party on the record. If it did, it was unnecessary to say so for the purposes of that case, and can easily be shown to be incorrect. For example, in the case of The Exchange, 7 Cranch [11 U. S. 116], decided by Chief Justice Marshall himself, it was held that the court could not take jurisdiction, because it affected the rights of the French government, when, certainly, that government did not appear as a party to the record. An act of congress provides that the assignee of a chose in action shall not be able to sue in a United States court as a citizen of another state if the assignor could not. If such assignee, then, commences suit, it can then be shown that the court has no jurisdiction, because it has no jurisdiction over one not a party to the record. Many illustrations might be given to show that the statement cannot be correct as a universal principle applicable to every variety of cases. The English cases already cited do certainly show that it is not, as applied to an ejectment case. So the cases of The Siren and The Davis [supra] show that the rule would not apply in admiralty. It must be evident that language of a judicial opinion cannot be construed by the same rules as that of a statute. Rules as to parties are different in different forms of action. They are unlike in cases at law and in equity, in admiralty and in ejectment. Proceedings in rem are different in this respect from mere personal actions. Jurisdiction may be obtained over property when it cannot over its owner, and so it may over persons when it cannot over the property to be affected. For example, a court of equity can take jurisdiction of a case affecting property beyond its jurisdiction where process can be served upon the proper persons. Penn v. Lord Baltimore, 2 White & T. Lead. Cas. Eq. 1806. Now it would be very difficult to lay down a principle as to parties applicable to all such cases. Because a rule might be applicable in one, it would be unsafe to hold that therefore it is applicable to all. Take the instance of a case in equity where a necessary party is beyond the jurisdiction of the court, and for that reason process cannot be served. It is true that in most states proceedings in rem may usually be prosecuted by publication in such cases; but it has not always been so. In such cases the court say, in Hagan v. Walker, 14 How. [55 U. S.] 36, "Where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant." The court will refuse to proceed in all cases, and refuse to make a decree affecting his rights, if there is a party necessary over whom, for any reason, jurisdiction cannot be obtained. See [Barney v. Baltimore] 6 Wall. [73 U. S.] 280; [Russell v. Clark] 7 Cranch [11 U. S.] 98; [Shields v. Barrow] 17 How. [58 U. S.] 136.

In the case at bar the court cannot obtain jurisdiction over the United States, and yet judgment, according to the statute, cannot be obtained and enforced without defeating the title of the United States, and putting them out of possession. In 6 Wall. 187, the court say, "The rule is universal that if the power be conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree." It follows as a logical and absolutely necessary deduction from this, that, if it be ascertained that the court has not power to issue proper process for the enforcement of its judgment or decree, it has not power to enter them. Now, the reason that a decree was made and sustained in the case of Osborne v. Bank of U. S. [supra] appears, partially, in the language of the general statement we have been considering; and that is, that the court had jurisdiction over persons who had such relations to the property in controversy that a decree against them could be enforced which would effectuate the whole object of the suit. They had possession and control of the property in controversy. This will be more apparent from a more critical examination of the case. At the time of the commencement of the suit the property was in the possession of the bank. The defendant obtained it in violation of the injunction, but even then it never came to the full possession of the state of Ohio. The court had power to grant full relief by enforcing its process against the parties named in the record. It admits that if the property was in full possession of the state of Ohio the suit could not be maintained. The foundation of the bill was that the property had not gone into the

possession of the state of Ohio. It was upon this ground that the suit was maintained as one suitable for a court of equity instead of a case at law, and the injunction was granted for the purpose of preventing the defendant from delivering the property to the state of Ohio, whereby the remedy would be lost. It will thus be seen that the whole foundation of the case, the vital point and object of the bill, was to prevent a change of possession, to prevent the state of Ohio from obtaining possession. It was because this would have placed the state in such a situation that suit could not have been maintained that this suit in equity was sustained. The bill recognized and rested upon the very principle we are contending for, to wit, that the possession of sovereign power cannot be disturbed by judicial process. Without this principle the case itself would have been totally destitute of vitality. The bill alleges "that neither Currie nor Sullivan held the said money in their character as treasurer, but as individuals." The case, when properly understood, is a most complete vindication of our position. The "true inwardness" of this case is, that while a suit could not have been maintained if the property had come into the possession of the state, yet it could be maintained to prevent it from coming into such possession, and the state could not, by merely asserting its interest in the subject in controversy, and without being a party to the record, defeat the suit. The court say: "Where the right is in the plaintiff, and the possession is in the defendant, the inquiry cannot be stopped by the mere assertion of title in the sovereign." The court say this because in that case the possession was in the defendants and not in the state. It says further: "In such case a friend of the sovereign may suggest it, but the court will go on and investigate the title if it has jurisdiction of the parties before it who have possession of the property." In the case at bar the defendants in the suit have not possession. The United States is in the actual possession, according to the definition of possession given by the court in the case of The Davis, 10 Wall. [77 U. S. 15], as follows: "The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property coupled with its actual possession," and in reference to which the court say, in the same case, the proceeding could be maintained only when it "does not need a process against the United States, and which does not require that the property shall be taken out of the possession of the United States." Let it be borne in mind, too, that it is not title that we suggest, at least nothing more than a prima facie record-title. It is not a suggestion of ownership that we make or rely upon. We would not ask the court to try title or ownership on suggestion. We simply suggest facts, which are indisputable,—possession, record, and government use. We are not contending that a mere suggestion of interest in the property, or title thereto, without possession, record, or government use, would deprive the court of power to hear the cause. If the facts we suggest are disputed, then the court will investigate the cause sufficiently to determine their truth or falsehood. If found to be true, that is all we now claim; if false, of course we fail, and the court will proceed. Aside from these general expressions used "arguendo," this case of Osborne v. Bank of U. S. is, in another point of view, one of the strongest cases that can be found in support of the positions we have taken. In the first place, in speaking of the point as presented by the state of Ohio, in a case, as we have already seen, quite different from this, the chief justice says: "The full pressure of this argument is felt, and the difficulties it presents are acknowledged. . . . . The very difficult question is to be decided whether in such a case the court may act upon the agents employed by the state and on the property in their hands." Before passing to its discussion he deems it proper to pause and reflect upon the consequences of denying this power to a court of the United States, and he then goes on to show how the result would be to permit an attack upon the very sovereign power we are now endeavoring to maintain. Now, in that case, the great question to be decided, that which overshadowed all others, they being mere questions of jurisdiction, form of action, authority to sue, etc., was the constitutionality of the legislative act of Ohio, the object of which was to impair and destroy, so far as it could, one of the means and instrumentalities of the government of the United States. The state of Ohio had made an attack upon the sovereign power of the United States through its most formidable weapon, the sovereign power of taxation upon property within its jurisdiction. It was not an attack by a private citizen through a proceeding in a state court; it was the state of Ohio itself, speaking and acting by the whole force of its legislative and executive power, inspired by the most determined resolve to so impair the operations of one of the instrumentalities of the United States as to render it incapable of action there. Could this be permitted, was the great question in that case. Upon this question the great chief justice, aided by the discussions of Clay and Webster, brought the full force of his intellect, and the result was a complete vindication of the precise principle for which we are contending,—the entire independence of the means and instrumentalities of the United States government from all interference short of the sovereign power of the government itself. The independence of such instruments from all interference has been carried to such an extent that the supreme court has held that a state cannot tax the income of an officer of the United States (Dobbins v. Commissioners, 16 Pet. [41 U. S.] 435), nor can the

United States tax the income of a state officer (Collector v. Day, 11 Wall. [78 U. S. 113]).

The principle which we would present prominently, which, as we have seen, is not only in harmony with the case of Osborne v. Bank of U. S., but is the leading idea upon which the bill in that case was framed, and which will be found to be the test which may be applied to nearly all of the cases cited by the plaintiff, showing them not to be in conflict with our position, is this: Wherever the process necessarily growing out of the proceedings has the effect to take the possession of property from the sovereign power, to divest it of such possession and change it to an individual, without the consent of such sovereign power, express or implied, or where the suit has not been instituted by the sovereign, the suit by an individual will not be maintained. In nearly all the cases the reason given has reference to this principle. The process of a court is its effective means of action. The proceedings in an ejectment suit do no harm to any one except by the final process, the writ of possession. In some suits process to take possession may issue at the commencement of the suit or during its progress; but it makes no difference in principle at what time such process issues. A process to take possession gives authority to the officer to use sufficient force to execute it. It authorizes the officer to put down such force as may be opposed to it. Now, if this process can be executed upon parties to the cause, and full effect given to it by the execution upon such parties, then it may be done; but if, in order to execute it, it becomes opposed to a sovereign power not a party to the cause, such sovereign power, not being a party, is not bound by the order of the court, and has the legal right to resist. It cannot be that an officer has the legal right to take possession from a sovereign and at the same time that the sovereign has the lawful right to resist. This would produce a collision like an immovable body being met by an irresistible force. It surely will not be pretended that the sovereign, if not a party, would be bound legally or morally to yield its claims on account of a judgment in a case in which it had not been heard. See 27 Grat. 301. However this may be, the principle above stated will be found to be the key to reconcile what otherwise might appear to be conflicting. Thus in the case cited from 8 Mees. & W. 579, the court say: "The question may be tested thus: Suppose there were no trial, but judgment went against the casual ejector, then there would be a writ to turn the crown out of possession, which clearly cannot be." In Osborne v. Bank of U. S., the writ had full effect by its operation upon the individuals named as defendants upon the record. It could not invite resistance by state authority, nor could it have been resisted by the state except upon its own motion, and not merely in opposition to the process. The reason of this principle is well stated in People v. Ambrecht, 11 Abb. Pr. 97: "In practice it migh prove mischievous by bringing the state and national sovereignty in conflict. The state, by its militia, would be bound to execute the process of its courts and give possession in pursuance of ejectment, while the United States might be disposed to retain possession of its fortifications and barracks by a resort to force if necessary. . . . . Certainly the judgment in an action against a soldier would not bind the United States or estop them from claiming in hostility to it." This was the precise principle applied in Harris v. Dennie, 3 Pet. [28 U. S. 292], and Briggs v. The Life-Boats, 11 Allen, 157, and it is the reason why an attachment would not lie in a state court against goods in the custody of a United States marshal.

Let us now apply this test to some of the other cases cited by the plaintiff. In the case of Davis v. Gray, 16 Wall. [83 U. S.] 203, the receiver of a railroad company filed a bill in chancery to enjoin the governor and land commissioners of the state of Texas from issuing patents of lands claimed to belong to the company to other persons. Those lands had been granted to the company upon certain conditions, which it was claimed by the defendants had not been performed, and for which reasons that the lands had become forfeited. It was objected that this was equivalent to a suit against the state, though not a party to the record. The main question upon the merits was as to whether the obligation of contracts had become impaired by this action of the state officers. The court decided the case upon two grounds: one that the state of Texas allowed suits of this kind in its own courts, citing a number of cases; and the other is stated as follows, to wit: "Here the property in question is not in possession of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession, and there is no question in the case relating to that subject. . . . . He is seeking to enjoin the appellants from doing illegal acts, which, if done, would render the right and title of the property in his hands of greatly diminished value." The court could enjoin the governor as well as any other and inferior officer from doing an illegal and unconstitutional act. In the case of U. S. v. Peters, 5 Cranch [9 U. S.] 115, proceedings had been had in admiralty against certain certificates held by one Rittenhouse, who was treasurer of the state, and which were claimed to be proceeds of a vessel belonging to the state of Pennsylvania. It was claimed by the state authorities that as the state was not a party to those proceedings the court had no jurisdiction to decree against it, and that it was not, therefore,

bound by the decree of the court, and the legislature of the state passed an act declaring such decree to be void as against the state, and directing the governor to employ sufficient force to resist its execution. The district judge, Peters, submitted the question to the supreme court on a return to a writ of mandamus ordering him to show cause why he should not issue the writ notwithstanding the act of the legislature. It was decided by Marshall, Chief Justice, that the court had jurisdiction notwithstanding the interest and claim of ownership suggested by the state. He says: "In this case the suit was not instituted against the state or its treasurer, but against the executrices of David Rittenhouse for the proceeds of a vessel condemned in the court of admiralty which were admitted to be in their possession." After giving a history of the case, the court further say: "These circumstances demonstrate beyond the possibility of doubt that the property which is represented in the Active and her cargo was in possession not of the state of Pennsylvania but of David Rittenhouse as an individual, after whose death it passed, like other property, to his representatives. Since, then, the state of Pennsylvania had neither possession of nor right to the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited, and consequently that the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause." In Olmsted's Case, Brightly, N. P. 9, the marshal was attached for not obeying the process of the court directing him to pay over the moneys described in the above case of Judge Peters, where the same principles were declared, and the decision was based upon precisely the same grounds, to wit, that the state was not in possession, but was in the possession of Rittenhouse as an individual while the suit was being prosecuted. In the case of Swasey v. Northern Cent. R. Co., 71 N. C. 571 [Case No. 13,679], the state was not in possession of the property, but in possession of the railroad company. The court say: "The railroad company, therefore, in this case holds the share of its property represented by the stock subscribed by the state in trust as well for the stockholders as for the state. The charter made the company the depository of the pledge to hold it for both parties according to their respective interests." This case, was, however, decided substantially upon another ground, which I will presently show. The United States was not in possession in the case of Elliott v. Van Voorst [Case No. 4,390], nor did the question of possession arise in the case of McCoy v. Washington Co. [Id. 8,731]. I think it may safely be said that in no case where this point has been decided has the court held that proceedings can be maintained in a suit against the sovereign where the necessary process is to divest such sovereign "in invitum" of the possession of the property in controversy. I think also that this principle is in harmony with all the cases which have been or can be cited. But a class of cases have been cited which, as we shall see, were decided upon another principle, not at all in conflict with the position we have assumed, to wit, consent of the sovereign.

In the case of Swasey v. Northern Cent. R. Co. before alluded to, the facts were as follows: The railroad company had been incorporated by the state, and the board of improvement had been authorized to subscribe $2,000,000 capital stock. In case it became necessary to borrow money, the state was authorized to issue certificates in sums of not less than $1000 each, pledging the payment in thirty years, with interest at 6 per cent. As security the faith of the state was pledged, and in addition its stock held by the company was pledged for the same purpose, and dividends upon stock were to be applied to the payment of interest. This stock was made preferred stock. Subscription was made and certificates issued. A large amount of interest had accrued upon these certificates. An action was brought in chancery by the holder of seven of these certificates, in his own behalf and in behalf of others who chose to join with him, asking that a sufficient amount of state stock be sold to pay this interest. The objection was that the court did not have jurisdiction because it was against the property of the state.

After citing Osborne v. Bank of U. S. in support of the position that a suit may be maintained where the state is not made a party upon the record, the court decides this point in the following words: "The real question, therefore, presented for our determination is whether the court has jurisdiction of the property which it is sought to charge or of the agent having it in possession. The property consists of shares in the capital stock of a corporation. At its inception it became charged as security for the payment of the debt contracted on its account. This was part of the law of its creation. It has always been pledged. The property of a corporation represents its stock. This property the corporation holds for its stockholders. A stockholder's share of the stock is equal to his share of the corporate property. The railroad company, therefore, in this case holds the share of its property represented by the stock subscribed by the state in trust as well for the stockholders as for the state. The charter made the company the depository of the pledge to hold it for both parties according to their respective interests; consequently a suit which seeks to charge the stock as

security and brings in the corporation to represent it may be maintained in the absence of the state as a party. This was evidently the understanding when the pledge was made. It was then the case as now that a state could not be sued, but that its agents could, and that property in the hands of its agents could be controlled and disposed of by the courts in proper cases notwithstanding the ownership by the state. The faith of the state had been pledged. This pledge the courts could not enforce. The stock to be obtained with the money borrowed could not be reached under such a pledge of faith alone, because a suit could not be prosecuted for that purpose. Notwithstanding this a lien was given upon the stock as security in addition to the pledge of faith. But it was no addition if the bondholder had no power to make his security available. A lien which cannot be enforced has no value as a security. These parties were engaged in no such vain work. It was clearly their understanding that the state not only should but that it in fact did grant to the bondholders the power to use the machinery of the courts to subject this portion of their security if default should be made in the payment of the debt. In sustaining this action, then, we are but carrying into effect the manifest intention of the parties at the time the money was borrowed." Is it not perfectly manifest that the two leading ideas of this decision are, 1st, that the property in controversy is in the possession of the company in trust as a depository, and that therefore the power of the court can have full effect by operating upon the parties named; and, 2d, that the state, for the purpose of the enforcement of the trust, had consented to grant "the full power to use the machinery of the courts?" Were this not so the court say the giving a power to sell the stock to meet its liabilities, "in addition" to the faith of the state, which could not be enforced by suit, would have been a vain thing. It has been held that a state, by becoming a member of a corporation, or by chartering a bank to be carried on in the usual course of banking business, thereby surrenders its prerogative of exemption from suit against such corporation or bank. Such act or charter is construed as a consent that its obligations incurred through such means may be enforced by the courts. This is indeed a necessity, for otherwise it could not do business in such capacity. Individuals would not deal with a party whose obligations could not be enforced. This was the ground of the decision in Briscoe v. Bank of Kentucky, 11 Pet. [36 U. S.] 257. In that case the bank, which had been incorporated by the state and made liable to be sued, brought suit upon a note given to it. The defence was that the consideration was bills of the bank, which it was claimed, being issued by such bank, of which the state was sole incorporator, were bills of credit issued by the state, and were therefore unconstitutional and void, for which reason there was no consideration. The question then was whether they were bills of credit in the sense contemplated by the constitution. Bills of credit in that sense were defined to be bills issuing solely on the faith of the state. Such bills could not be enforced, for there could be no suit against the state. In issuing such bills it was not to be presumed that the state intended to do an unconstitutional act. Such construction was not to be given to the act unless necessary. As it had been held, citing Bank of U. S. v. Planters' Bank, 9 Wheat. [22 U. S.] 904, that when a government becomes a corporator it lays down its sovereignty so far as it respects such corporation; that therefore the bank could be sued and payment of its bills thus enforced, on account of which the bills did not rest solely upon the faith of the state; they were not bills of credit in the sense contemplated by the constitution.

Justice Story, in dissenting from the opinion of the court, thought that as the state, being the sole owner of the securities of the bank, might at its pleasure by legislative act withdraw such securities, and thus leave nothing to rely upon but the faith of the state, the effect was that the bills had nothing but the faith of the state for her security, and therefore were bills of credit in an unconstitutional sense. But this precise question came up afterwards in Curran v. Arkansas, 15 Pet. [40 U. S.] 304, where it was held that such action by the legislature would itself in such case be unconstitutional, as impairing the obligation of contracts. The leading idea of these cases is that the privilege of exemption from suit is in such cases waived and the jurisdiction rests upon consent. The case of U. S. v. Bank of Metropolis, 15 Pet. [40 U. S.] 377, was where a suit was brought by the United States as plaintiff, and the defendant claimed off-set to an amount in excess of the claim. The principle announced is, "When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibilities of individuals who are parties to such instruments. We know of no difference except that the United States cannot be sued." In this case off-sets were allowed and a judgment sustained against the United States for over $3000. But in later cases this has been refused. In Reeside v. Walker, 11 How. [52 U. S.] 290, the court say: "To permit a demand in set-off against the government to be proceeded on to judgment against it would be equivalent to the permission of a suit to be prosecuted against it." This cannot be tolerated "as against the government, except by a mere evasion, and must be as useless, in the end, as it would be derogatory to judicial fairness." . . . The court also say, it being the settled principle of our government that the sovereignty of the government

protects it from suit even against judgments for costs, "it would be derogatory to the courts to allow the principle to be evaded or circumvented." In U. S. v. Eckford, 6 Wall. [73 U. S.] 490, the above extracts are quoted and affirmed, by which it seems very plain that in this respect the case of U. S. v. Bank of Metropolis [supra] is overruled.

Two or three cases have been cited, apparently for the purpose of showing that whatever may be the law of England upon this subject, or whatever may be the law where a sovereign's rights are to be passed upon by its own courts, in relation to property within its exclusive territorial jurisdiction, yet, that as to property of the United States within a territorial jurisdiction of a state obtained without the consent of the legislature, this prerogative of exemption from suit is not to be applied. As to this, it is, it seems, apparent that the cases already cited by us as to the application of this prerogative in relation to states entirely foreign to each other are sufficient to establish the position that such a doctrine cannot be maintained. But even these cases I think do not so hold. Certain expressions used arguendo disconnected from the case in hand may convey such an idea, but the decision, taken as a whole, does not warrant the principle contended for, especially in such a case as this. In Com. v. Young, Brightly, N. P. 302, the defendant was indicted for selling land so held, as an auctioneer, in violation of a law of Pennsylvania, which prescribed that sales of land at public auction should be made only by a person commissioned by the governor. It was contended that the defendant was justified by having acted under the direction of the president of the United States, and that the law did not apply to land held by the United States, as it was not expressly named in the statute. But the court held that lands so held were in all respects subject to the laws and municipal regulations of the state. That in such cases the United States held land as an individual, and not as a sovereign. That the state is the sovereign over the land. That although the United States held the fee, yet sovereignty and title are separable from each other. That the United States held by the same tenure as an individual, and that the principle of law that a sovereign is not bound by a statute unless it is expressly named is inapplicable in such a case. This is, I think, a fair statement of the views of the court in that case. It will be observed that much more is said than was necessary to decide the point then before the court, but I can see no inconsistency with the statement as made with the position assumed by us. There is no doubt but that lands so held are to be governed in all respects by the laws of the state as a general principle when such laws do not trench upon some proper and necessary prerogative of the sovereign power of the United States. In this case there was no attempt to disturb the possession of the United States, to impeach its title, to interfere with the means and instrumentalities of the United States in the exercise of its sovereign powers, or even to affect the interests of the United States in any respects whatever. An individual who was indicted for an offence against a statute law of the state attempted to bring to his aid the sovereign prerogatives of the United States for his own purposes, and this the court said he could not do. And that was really the whole of this case.

The case of Elliott v. Van Voorst [Case No. 4,390] was as follows: The United States, upon a judgment against Swartwout, a defaulter, and sale upon execution, had bid in an equity of redemption upon land previously mortgaged. Afterwards suit was brought to foreclose the mortgage. The United States was made a party, and the district attorney of the United States appeared and filed an answer, and submitted the interests of the United States to the court. Van Voorst became the purchaser at the foreclosure sale. After twenty years (during which the land had been built upon and immensely increased in value), Elliott, who, somehow, had procured an assignment from the United States, instituted another suit to recover, claiming that the equity of redemption had not been properly foreclosed. The court decided that, under the circumstances, this could not be done, especially in a collateral proceeding—a decision not at all in conflict with our position. But the court says: "In the mere exercise of a mere corporate right, the United States cannot claim the immunities or prerogatives of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to congress and redeem. . . . When the government, in the exercise of the rights and functions of a civil corporation, purchases land to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands." In the syllabus it says: "When it purchases land within a state not intended for forts, arsenals, and other national uses, but merely to secure a debt, it takes the land as any corporation, and cannot claim any of the immunities and prerogatives of a sovereign." But it also says: "The rights of the United States government as a sovereign, and its prerogatives as such, are coextensive with the functions of government committed to it." The whole case shows, by the strongest implication, at least, that, in relation to property, used for public purposes, the prerogatives of sovereignty are to be applied in full force even where the land is obtained without the consent of the legislature. In 3 Story, Comm. Const. § 1671, the author says: "Cases may, indeed, occur in which the individual may

not always have an adequate redress without some legislation by congress. As, for example, in places ceded to the United States and over which they have exclusive jurisdiction, if his real estate is taken without or against lawful authority. Here he must rely upon the justice of congress or of the executive department." In section 1672, he says this has sometimes been regarded as a serious defect. But if it is so, it is a defect of the constitution itself. After suggesting the propriety of some legislation upon the subject, and commenting upon the petition of right as it exists in England, he says: "The republic enjoys a despotic sovereignty to act or refuse as it may please, and is placed beyond the reach of the law." In the first extract the writer states positively that the property of the United States is exempt from suit in a case like the present, certainly in places within its exclusive jurisdiction. But it may be that in his manner of statement it may be otherwise implied, in places not within its exclusive jurisdiction. The statement undoubtedly does imply that he was not so certain in the latter case as the former. But that is all. It is a mere negative implication. He by no means intends to say that the same principle would not apply in the latter case. He is not professing to enumerate all the cases in which the principle is applicable. The main thought in his mind is the apparent hardship which sometimes results from this prerogative of the government, and gives as an illustration merely an example about which, in his view at least, there is or can be no question. It certainly would not be treating the author fairly to say that he gives it as his deliberate opinion that in cases not within the exclusive jurisdiction of the United States the rule would not apply, especially in a case like the present, where the property is being used as this is for public purposes. There is nothing to show that as to this part of the extract he gave it more than a passing thought. In U. S. v. Fox (Sup. Ct.) 94 U. S. 315, land in New York had been devised to the United States for the payment of the public debt. The law of New York did not permit such a devise. The United States applied for probate of the will, and it was resisted by the heirs. It was held that lands in New York could not be devised contrary to the law of that state, even though the devisee were the United States. The state has exclusive power to regulate the tenure of lands within its jurisdiction. This follows from her sovereignty. Title and modes of disposition of real property are not matters placed under the control of federal authority. Such questions are to be determined by the laws of the state.

It is impossible for me to see anything in this bearing upon the question of the right of the United States to exercise its prerogative of exemption from suit as to property in a state in public use. It is nothing more than the statement of a general principle which all admit, that real estate within a state is subject to the laws and jurisdiction of the state. This is no doubt always so, except when any action in relation to it trenches upon the prerogatives of the United States. This case asserts in the strongest manner the right and prerogative of the United States to acquire property for public use in any state, even, if necessary, in hostility to the express enactments of the legislature. It will be observed that in none of these cases cited upon this point was the property in controversy public property; that is, in public use as one of the means of carrying on the government. I am sure that none of them show that the United States is deprived of any of its sovereign powers or prerogatives in relation to any property held by it which it has the right to acquire for its own public uses within its territory, no matter where it may be, nor that they hold them by the permission of state legislatures. It will not be pretended that the United States can be sued directly in relation to such property. But why not, if they can be sued indirectly? If it be pretended that the prerogatives of the United States do not extend as to property held under the exclusive jurisdiction of a state, why not bring a direct suit against it at once? The principle stated in the syllabus of the case of Elliott v. Van Voorst [supra] seems much more consistent: "The rights of the United States government as a sovereign, and its prerogatives as such, are coextensive with the functions of government committed to it." [Worcester v. State of Georgia] 6 Pet. [31 U. S.] 570. Perhaps a state might provide by law that the United States should not acquire title to real estate within its borders for private purposes, except through the exercise of some sovereign power of the United States, such as taxation, eminent domain, etc., and in such cases it might limit the rights of the United States. But when the United States proceeds or acts as a sovereign, where it has the right to go and to act in spite of the legislature, it goes and acts as a sovereign, with all the prerogatives of a sovereign. Otherwise, it is not a sovereign power at all, but a mere subject or foreigner.

The cases we have heretofore cited show how a sovereign power, entirely foreign, is to be regarded; and certainly to show that the United States is to be treated with less consideration, the authority and the logic should be irresistibly clear, especially in view of the decisions of the supreme court in the cases of The Siren and The Davis. The burden of the argument is certainly upon those who would establish such a distinction. Prerogatives are, by the common sense of mankind, attributed to sovereign power for the sake of the public good and for the reason that they are considered prop-

er and essential for the exercise of its functions. They enter into the very definition of sovereign power. As such, they pertain to all nations. There is the same reason for their belonging to the United States as to any other sovereign nation, and if the United States is a nation at all, it is, I contend, disrespectful to it to suggest that it is inferior in these respects to any other nation. So far as it has occasion and the right for the exercise of sovereign power, so far should it have the same privileges and prerogatives as are accorded to all other governments. I protest against the idea that it holds them in the exercise of its sovereign powers in subjection to any power whatever. It cannot be denied that in England ejectment for the recovery of lands in the possession of the crown cannot be maintained. But it has been suggested that a reason exists there for this that does not exist here, in that there is a remedy by petition of right, and that, therefore, it is there a mere question as to proper form of proceeding. But that is not true in fact. We have the same remedy in substance as petition of right; that is, by petition to our sovereign or its representative, the congress. Not as simple and effective in practice, I admit, but in theory the same. In law, the supposition cannot be indulged in that our sovereign will not do justice as speedily and promptly as any other sovereign. But if in practice this mode of proceeding is found to be unsatisfactory, that is a question which addresses itself to the discretion of congress and not to the courts. Strong arguments may be used, as were used by Story in his Commentaries, for action upon this subject by congress; but such arguments are for that body and not for this tribunal. Meanwhile, precisely the same reason for not permitting an ejectment suit for the recovery of lands in possession of the crown exists for not permitting such a suit for lands in the possession of the United States, especially when in government use.

A class of cases have been cited to show that courts have taken jurisdiction in cases of this kind, and have in such cases passed upon the validity of the title. I propose to examine those to which my attention has been called, seriatim, and in each one, though varying from each other, we will find important differences from the case at bar. The first one is Meigs v. McClung, 9 Cranch [13 U. S.] 11. The question there was as to the construction of a treaty, whether the land in controversy was described as within the reservation of the terms of the treaty. The court say: "The question on which the cause has been placed is this, is the land claimed by the plaintiff in the court below within the ceded territory?" The court further say: "The fact that the agents of the United States took possession of the lands lying above the mouth of the Highwassee, erected extensive improvements thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty which would contradict its plain words and obvious meaning." It will thus be seen that the question of jurisdiction was not made, was not brought to the attention of the court, and certainly was not passed upon by the court. The court expressly say what the question was upon which the cause had been placed. That case differed, too, from this in another very important aspect. There a record-title could not have been suggested, as there is in this case. The United States had no claim of title except by contradicting the record produced. It did not come at all within the case we have before cited from 4 Coke, 55a, known as Sadler's Case, where the court said: "At common law, when the king was seized of any estate of inheritance or freehold by any matter of record, were his title by matter of record judicial as attainder, ministerial as by office, or by conveyance of record as by fine-deed enrolled, etc., or by matter of fact, and found by office of record, on oath, as by alienation, purchase by alien, etc., he who had right was put to his petition of right, in nature of a real action, to be restored to his freehold and inheritance." This case was one of the most prominent of leading English cases. It is cited in hundreds of English cases. It is referred to as the law in the textbooks, and is unquestioned by any authorities of our own courts. See 5 Bac. Abr. tit. "Prerogative"; The Bankers, 14 Howell, State Tr. 28; Chisholm v. State of Georgia, 2 Dall. 419. We rely upon this principle as the settled law of England, beyond all question. See Attorney-General v. Hallett, 15 Mees. & W. 106. And we can conceive of no reason why it should not be so regarded here.

The next case is that of Wilcox v. Jackson, 13 Pet. [38 U. S.] 498. There suit was brought to recover Fort Dearborn, in Chicago, against the officer in command. The decision was in favor of the plaintiff in the state court, but upon a writ of error it was reversed by the supreme court. It is true that it was not reversed upon the ground of want of jurisdiction, but upon other errors assigned. The court does not pass upon the question of jurisdiction, nor mention it as a question made in the case. It is assumed, however, that by passing upon the law of the case it decided the question of jurisdiction. It will be observed that the question of jurisdiction raised by us is not strictly as to the subject-matter. It is a question arising from the character of the party, and is undoubtedly one which may be waived by consent. Perhaps that consent may be implied where the point is not expressly made and insisted upon by the United States. This case was an agreed case. The facts were agreed upon, and it was further agreed that judgment should be entered according to the law of the case. So far as it appears

in the statement and decision of the case in the supreme court, it may fairly be implied that the question of jurisdiction was waived. Certain it is that no reference whatever is made to such a question. Again, this was in a case arising upon a writ of error to a state court, and in such a case the supreme court could pass only upon such questions as the record showed were within the provisions of the 25th section of the judiciary act. See [Montgomery v. Hernandez] 12 Wheat. [25 U. S.] 132; [Murdock v. City of Memphis] 20 Wall. [87 U. S.] 590.

The question before the court, and one upon which it took jurisdiction, was the construction and effect of acts of congress which the appellant claimed had been improperly decided adversely to him. It is quite doubtful, at least, whether the question we are now considering could in such a case have been before the supreme court, whether decided rightfully or wrongfully by the state court. In Hall v. Gaines, 22 How. [63 U. S.] 144, where the writ of error was to state court, the court say: "To give jurisdiction to this court the party must claim for himself, and not for a third party in whose title he has no interest. Setting up a title in the United States by way of defence is not claiming a personal interest affecting the subject of litigation. . . . If it was allowed to rely upon the United States title in this instance, the right might be decided against the government when it was no party and had not been sued. See, also, [Verden v. Coleman] 1 Black [66 U. S.] 472; [Owings v. Norwood] 5 Cranch, 344; [Henderson v. State of Tennessee] 10 How. [51 U. S.] 311. This case (Wilcox v. Jackson) also was one in which the United States could not have suggested a title apparent solely from the record. It depended upon facts outside of a record-title. The case, too, shows plainly that with regard to property the legal title to which is still in the United States, or where the question is whether such title has passed from the United States, acts of congress are paramount to legislation by the state, notwithstanding the property is within the territorial jurisdiction of the state, and that in such case, even as between citizens, the state of Illinois could not declare that a title, inchoate and incomplete because of a patent not having issued from the United States, should be deemed as perfect a title if a patent had issued in opposition to an act of congress which says that a patent is necessary to complete a title. The case of Brown v. Huger, 21 How. [62 U. S.] 305, came before the supreme court upon a bill of exceptions from the circuit court of the United States for the Western district of Virginia. [Case No. 2,013.] In the exceptions there is nothing whatever relating to the question before us here, and there is not, in the opinion of the court, the slightest reference to such a question. There was no objection of this kind made. In both courts the decision was in favor of the United States, or rather of the officers holding under the United States. It is inferred, however, that because the supreme court exercised jurisdiction in a case where the fact appeared that the property was in the possession of the United States, therefore it can have jurisdiction in a case like this. This inference results partly from failing to distinguish from the want of jurisdiction in regard to subject-matter when consent cannot give jurisdiction, and want of jurisdiction on account of the character of parties affected where consent may give jurisdiction. In the latter case, if the point is not made, consent may be implied. It was not made in the case we are now considering. The court could only hear the questions made by the bill of exceptions and assignment of errors. It is assumed that because the court passed upon these that such a decision is equivalent to an express declaration that the court below had jurisdiction. But in the Dred Scott Case, 19 How. [60 U. S. 393], it is expressly held that the supreme court may, in cases coming from the United States circuit court, pass upon the law and merits of the case when the court below had no jurisdiction whatever. Such an assumption, therefore, by no means necessarily is sustained by the fact that the court discusses the merits of the case, especially in a case where the question of jurisdiction is not raised in either court, and where the court could only pass upon questions raised by the bill of exceptions and assignment of errors. In this case, also, the United States was not in a position where it could have suggested a record-title. The question was as to the boundaries of the property described, and one which rested upon extrinsic facts. Any suggestion would have at once presented the very issue to be passed upon by the jury. In the case of Grisar v. McDowell, 6 Wall. [73 U. S.] 363, precisely the same observations may be made as in the case of Brown v. Huger, last considered. Both cases came before the supreme court upon bills of exceptions taken by the plaintiff in the court below, in none of which was any reference to the question we are considering, and it would have been not only entirely unnecessary to have alluded to this question, especially as the exceptions were not sustained and the judgment was therefore properly affirmed, but it would have been a work of supererogation, uncalled for, and improper according to the practice of the court upon a hearing of bills of exceptions, where the only question is whether upon these the plaintiff in error is entitled to a new trial, and the merits of the case are not before the court; and, according to the decision in the Dred Scott Case, it was proper to pass upon the questions, though the court might have thought from the facts before it that the court below would have had no jurisdiction if the question had been made. It will be remembered that the practice of the

supreme court requires the plaintiff in error to assign errors, and the court will not hear argument nor pass only upon the errors assigned. The case of Cooley v. O'Connor, 12 Wall. [79 U. S.] 391, also arose upon a bill of exceptions, in which no reference was made to this question, nor did it appear in the assignment of errors, nor was the point made in any way, and of course no decision was made upon it. In that case also the United States was not in possession of the property, nor was it in government use. None of these cases are therefore any authority upon this point whatever.

There are some cases decided by state courts no doubt adversely to some of the principles we contend for here, and I will notice such as have been called to my attention. In the case of Wilcox v. Jackson, 13 Pet. [38 U. S. 498], already referred to, the court below, in 1 Scam. 344, held that in that case a suit could be maintained in ejectment for the recovery of property in the possession of officers of the United States. The same was held in Dreux v. Kennedy, 12 Rob. (La.) 502, and in Polack v. Mansfield (1872) 44 Cal. 36. In regard to these, I will say, first, that they are authorities entitled to such respect as the reasoning on which they are based appears to demand. They are not binding upon this court, and are only persuasive. If they are contradicted by authorities, as they are equally entitled to respect (see People v. Ambrecht, 11 Abb. Pr. 97, and the English cases cited), then, viewed simply as authorities, they have but little weight. If the principles on which they are founded are shown to be erroneous by decisions of the supreme court of the United States which are binding upon this court, as we think we have shown, then these state authorities must fall. One thing is certain, the reasoning upon which they are based throws no light upon the subject to one who has examined the subject in the light of the authorities, both English and American, heretofore cited by us. None of them show by internal evidence a thorough investigation of the subject. None of them show that a single English authority was cited or considered. They rely upon cases which we have already fully discussed, and show upon their face that they have misapprehended the full force and effect of those cases. For example, in the California case the decision is based upon the idea that, in the cases of Meigs v. McClung, Wilcox v. Jackson, and Grisar v. McDowell [supra], the supreme court of the United States passed upon the merits of the cases; whereas, as we have already shown, it did no such thing, but only passed upon the bill of exceptions and the assignment of errors in the cases. In Dreux v. Kennedy, the decision was based upon the cases of Wilcox v. Jackson and Osborne v. Bank of U. S. [supra], which we have fully considered, and certainly throws no new light upon those cases. As mere weights by force of the reasoning contained in them these authorities are not intrinsically very ponderous, and in this light only can they have influence here. I say this without disrespect to these authorities, for all authorities which are not binding ought to be tested by this rule. The true judicial mind is controlled by reasoning rather than by authorities of other independent courts. It may be said in regard to these cases also that in none of them could the United States have suggested, as we have here, a title of record. That was the very question involved on the merits of the case, and which could not have been suggested. In the Louisiana case, the United States retained only a usufructuary interest for a period depending upon the occurrence of a certain event, and the legal title was in another, which title was the subject of controversy.

I now call attention to the fact that in no case cited or which can be cited has the question we are discussing been presented to the court in the manner it is presented here. In no case has the question been presented directly by the United States; but in all of them the question, when made, has been by the party to the suit. Here it is raised by the United States itself, or by the attorney-general representing the United States, the real party affected by it, and who, it may be contended, is the only party having a right to make this question. As we have before said, the want of jurisdiction claimed by us relates to the character of the party rather than to the subject-matter of the suit. It is of that nature which may be waived either by consent or possibly by implication, if it is not expressly set forth and insisted upon. For the sake of argument, though without admitting it, it may be that no one but the United States itself or its law officer in its behalf, can object to the jurisdiction of the court upon this ground. That being personal to the United States alone, an individual who is sued and over whom the court has jurisdiction has no authority to and cannot set up this prerogative in behalf of the United States. If this be so, this of itself would be a complete answer to all the authorities which have been cited for the plaintiffs reviewed by us. But in such case the question then arises whether the United States can, in the way it has here, effectually interpose and set up its exemption from the jurisdiction of the court without consenting to become a party to the suit, which would of itself be a waiver of the very point it appears for the purpose of making before the court. Has the United States the right to be sued without becoming a party and without submitting to the jurisdiction of the court? As an original question, this would not be, it must be confessed, an easy question to answer. But fortunately this problem has been solved for us both in the English and American courts. The case of Doe v. Roe, 8 Mees. & W. 579, is an

exact precedent for us in every particular, and justifies our course in all respects. It is not necessary for us to reason upon it. It presents a case where no analogies in cases between individuals can be of much assistance. Such a solution seems to result from the necessities of the case, for in some way the right of exemption from suit should be protected, without being destroyed in the very act of asserting it, when, unless it is done, the court is indirectly about to deprive the sovereign of the benefits of such a right of prerogative. It was therefore held in Florida v. Georgia, 17 How. [58 U. S.] 478, that the attorney-general of the United States had the right to intervene in a suit between these states, and, to present the case of the United States, "to adduce evidence, written or parol, to examine witnesses and file their depositions," and to be heard upon the questions affecting the United States, without becoming a party to the cause; and this although the court had no jurisdiction over the United States and could render no judgment by which it would be bound. The court say: "But the court do not regard the United States in this mode of proceeding as either plaintiff or defendant; and they are therefore not liable to a judgment against them nor entitled to a judgment in their favor. But, in deciding upon the true boundary-line, we will take into consideration all the evidence which may be offered by the United States." This authority therefore recognizes the right of the United States to present its case and assert its rights and to have them considered without submitting to the jurisdiction of the court. If this can be done for one purpose why not for another, and why not the United States assert all its rights? That case related to property in which the United States was interested, though it had neither possession nor record title, nor was it in government use. If, without any of these, the United States had the right to appear to protect its interests without submitting to the jurisdiction of the court, how much more should it have such right when all three of these are assailed? In view, therefore, of the principles and precedents of the common law as established by a series of English authorities, uncontradicted, and extending through the period of the judicial history of England; of the principles established by the supreme court of the United States, that the actual possession of the United States cannot be disturbed by judicial process in a suit commenced by an individual; of the fact that nearly all authorities may be reconciled with these principles and must be reconciled with them to prevent a direct conflict; that there can certainly be found no opposing authority in any case presented, as this is, by the United States itself, it is insisted that this court cannot consistently justify any further proceeding in this case, but must dismiss the cause.

The able and learned brief submitted by counsel for the plaintiff is not given, as much of it is covered by the opinion of the court.

OPINION OF THE COURT (HUGHES, District Judge). The first question is whether it is competent for the government of the United States to appear by suggestion, as it has done in this cause. Though I concede that the intervention of the government in this manner, in a cause pending between other parties, is unusual in our American practice, I do not see that for that reason it is inadmissible. It was sanctioned by the supreme court of the United States in the cases of Florida v. Georgia, 17 How. [58 U. S.] 478; Maxfield v. Levy [Case No. 9,321]; and The Exchange, 7 Cranch [11 U. S.] 117; as well as others which might be cited. It was allowed in the case of The Pizarro [Case No. 11,199]. I believe that intervention by this method is the settled practice in England. It was, for instance, the proceeding taken by the attorney-general, in Doe v. Roe, 8 Mees. & W. 579. On authority, therefore, I do not feel at liberty to question the right of the attorney-general to intervene by suggestion in a cause in which the government is alleged to be interested, as in this cause. Nor is there any validity in the objection that a new and side issue is introduced into the cause by this proceeding. It is nothing more in effect than another form of a plea to the jurisdiction. This plea always introduces a preliminary issue requiring to be dealt with before the cause can proceed upon the merits; and the present demurrer is, in effect, an issue of law joined on a plea to the jurisdiction, which is not anomalous and works no hardship.

We come, therefore, to the questions of law presented by the suggestion and demurrer. These are two: 1st. Whether the attorney-general's suggestion is of itself sufficient to defeat the jurisdiction of the court over the cause; and, 2d. Whether, supposing it has not that effect ipso facto, the court may look into the grounds on which that officer intervenes; in pursuance of the observation made by Chief Justice Marshall in the case of U. S. v. Peters, 5 Cranch [9 U. S.] 115: "It certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court and prevent their looking into the suggestion and examining the validity of the title."

I. I should compromise the judicial office if I were to devote any serious argument to the first of these questions. The right of every citizen to a judicial determination of a controversy affecting his liberty or property, in which he may be involved, will not be denied at this day in this country. The courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors

against him. I have no thought that the chief law officer of the United States, who in the performance of his duty in this cause has entered the suggestion now under consideration, claims for his action any such prerogative as that in question. But even if it were possible to conceive that such a pretension could be made, let it be answered that it is a cardinal tenet of the constitution that the judiciary are an independent branch of the government, not to be controlled in its dispensations of justice by interference from other departments, and not only empowered but bound to administer the right without fear, favor, or affection. It is useless to dwell upon these topics, but it is appropriate to recall what has been said by luminous jurists of a former era in regard to the decision of questions arising between citizens and their government. In book 2, c. 14, § 213, Vattel, has these sentences: "If any difficulties arise (on questions of contract and title between the sovereign and private persons) it is equally conformable to the rules of decorum, to that delicacy of sentiment which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. And this indeed is the practice of all civilized states which are governed by settled laws." In the same spirit were the utterances of Mr. Selden, one of England's most illustrious scholars and lawyers in the time of the first Charles: "In all cases, my lords, when any right or liberty belongs to the subject by any positive law, written or unwritten, if there were not also a remedy by law for the enjoying or regaining the right or liberty where it is violated or taken from him, the positive law were most vain and to no purpose; and it were to no purpose for any man to have any right in any land or other inheritance if there were not a known remedy, that is, an action or writ by which in some court of ordinary justice he might recover it. And in this case of right or liberty of person, if there is not a remedy in the law for regaining it when it is restrained, it were of no purpose to speak of laws that ordain it should not be restrained." 3 How. St. Tr. 95. If the hereditament of an English subject could be taken and held by the king without question in the courts, the notable words which the elder Pitt pointed at George III., would have had no truth or meaning: "The poorest man may, in his cottage, bid defiance to all the force of the crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter; but the king of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." Speech on the excise act. If there could be no judicial inquiry into the government's possession of property claimed by the citizen, what could be said of the clause in the fifth amendment to the constitution, forbidding that private property shall be taken for public use without just compensation, except that it was a meaningless form of empty words, a delusive safeguard against public wrong, a deceptive guarantee of private rights. The only alternative which would be left to the plaintiff, if this suggestion should prevail as confessed by counsel for the government, would be what Mr. Justice Grier once characterized as "the hopeless remedy of a petition to congress." The effect would be to defeat a judicial adjudication of the rights of parties and refer the plaintiff's claims for political determination to a political tribunal. If the fact be as implied by the suggestion, that there is no method known to the judicature of the country by which the rights of parties to this action could be judicially determined, it would be a reproach to American jurisprudence. In every sense would the result in this cause be unfortunate So much of sentiment, so much of sectional sentiment invests this estate of Arlington, at once the burial-ground of soldiers who lost their lives for the Union and the patrimony of the Lees, that it were in the highest degree desirable that its title should have a judicial determination rather than be relegated to the debate and vote of a popular assembly, always more or less liable to the influences of partisan passion. It would, therefore, be somewhat excusable in the court if it should apparently, in its consideration of the suggestion of the government, lean in favor of retaining its jurisdiction of such a cause as that at bar.

II. I come now to look into the grounds on which the attorney-general, through counsel here, claims that the court should stay its action and dismiss the cause. It is conceded on all hands that the sovereign power in this country, whether it be a state or the United States, cannot be made a direct party defendant in any action, except by its own consent, given generally by statute, or specially by its authorized law officer. And the question here is, whether it can be made so indirectly; and, in the present instance, whether the United States can be made so indirectly in an action brought against defendants who are the occupants of lands which it claims to own. Conceding under protest that the law may be against them on this broad proposition, counsel for the government themselves narrow this latter question, and say that even though a suit may be brought indirectly against the United States, yet that it cannot be where the proceeding takes the form of an action of ejectment, brought against defendants who are occupants of lands which the government claims by prima facie title of record, of which it is in actual possession by its officers, and which it claims to be actually using for public purposes. Such is the exact pretension made in this cause by the government.

On the part of the plaintiff it is contended

that the government does not hold the Arlington estate as a sovereign, for the reason that the jurisdiction of Virginia over it has never been surrendered; but that it holds it only in a corporate capacity, by the same tenure as, and with no other prerogative than that by which a private corporation or citizen would hold the land in Virginia. I am not sure that the inquiry is material; but, in deference to the views of counsel, I will consider these respective pretensions in the light of the facts of the record. How does the government hold this property? By whom and for what public purposes? And does it hold it in its sovereign or corporate capacity? The estate consists of eleven hundred acres. Less than a fourth of it—two hundred acres—is set apart as a national cemetery. This parcel is undeniably occupied by an officer of the government, and used for a necessary public purpose—a purpose, indeed, which no individual in the land would be willing to see defeated. The rest of the land, nine hundred acres, is occupied by some two hundred people, whom I judge from the record to be poor people, as every one but two or three signs his name with an attested cross-mark. Of all the occupants of this nine hundred acres, only one (R. P. Strong) is shown to be an officer of the government. They are mostly tenants of the government, but paying no rent. The record shows that this land was not, until as late as 1872, "set apart and held as a military post and reserve connected therewith," and directed to be "considered a military reservation pertaining to Fort Whipple." For this land the government seems to have so little use, that it allows it to be occupied for their own purposes, probably in mere charity, by nearly two hundred people in the humblest walks of life. Is it in fact a military reservation connected with a military post? Can it be more than "considered" so? A military post is a place at which troops are posted or intended to be posted, and without the troops, or the probability or the intention of troops being posted on it, a tract of ground cannot be a military post. Laying out the plan of a city in a forest, and calling it a city, does not make it so; it remains a forest still. In the theoretical sense only is Fort Whipple a military post, and the lands around it a military reservation. The surface of Virginia is studded over with such "forts," and the only happy thought connected with them is, that they are forts no longer. It is so in fact with Fort Whipple, and it is a painful anachronism now to "consider" it as still a fort. Yet, the name Fort Whipple implies that it was intended as a missionary, rather than a military post. Not only is the land thus set apart and directed to be considered a military reservation, almost wholly occupied by persons who are not agents or officers of the government, but the government has shown in another way how little real bona fide use it has for it. I consider that I may allude to the acts of congress as part of this record, for the judicial mind dwells in the laws of the country, and that of the federal courts in the statutes of congress, from which they derive all their jurisdiction. The action of these courts is wholly based on the statutes, so that the record of such a court is a palimpsest originally inscribed with the statute law of the subject, overwritten with the proceeding in the particular case. In 14 Stat. 589, is an act of congress within the judicial cognizance of the court, releasing about eighteen acres of this land to Maria C. Syphax without consideration. Of course it cannot be contended that either this parcel, or the eight hundred and eighty-two acres which is directed to be considered as a military reservation, is in any but the nominal use of the government. Justice is figuratively thought to be blindfold; but it cannot be supposed that a court of justice sitting in Alexandria, in full view of this reservation, can by any reasonable fiction (the matter entering as an element in a question which it is called upon to decide) regard this military post, called Fort Whipple, as really occupied by the government for a military purpose. But there is what seems to me conclusive evidence that the government is not treating or using this reservation as a permanent acquisition of land for any purpose. Section 355 of the Revised Statutes, forbids the acquisition of real estate by the government for any permanent military purpose until a perfect legal title and cession of state jurisdiction shall first have been obtained. All reservations of military lands in the Western states are for a more or less temporary purpose. The term military reservation has come to be synonymous in that part of the Union with temporary reservation for military purposes. The requirements of section 355 are, I believe, never complied with in regard to those reservations, because they are deemed temporary properties of the government, temporarily used, and they are reserved from public domain acquired by the government by treaty, as a sovereign power. The requirements of that section have not been complied with in regard to the parcel in question of the Arlington estate embodying eight hundred and eighty-two acres. It is not now occupied by troops, and the fact that the requirements of section 355 have not been obeyed, nor the authority conferred on the president by section 1838, himself to obtain from the state a cession to the United States of its jurisdiction, has not been exercised, seems to prove that the government has and has had no real intention of occupying that property with troops. I therefore conclude that nine hundred acres of the Arlington estate are not in actual bona fide government use, and that the only practical uses to which it is devoted in fact are those enjoyed and exercised by the two hundred poor people who live on the premises gratuitously. I am not aware of any express law, and I doubt if there be any law, authorizing any of-

ficer of the army of the United States in a time of peace to "set apart as a military post and reserve in connection therewith," to be "considered as a military reservation," any considerable tract of land in the old thirteen states, where there are no "public lands," and where the government has no actually used military post, without a previous compliance with the requirements of section 355. In respect to this nine hundred acres, I think the pretension of the counsel for the government is unfounded, either that it is occupied by officers or agents of the government; or that it is actually used by the government for any but nominal government purposes; or that the government has title in it in its sovereign capacity; even though it should be found to have such title in its merely corporate character.

In the foregoing inquiry I have unavoidably, to some extent, overstepped the showing of the record, but I have gone into an examination of the uses made by the government of this property, more in deference to the estimate of the importance of the matter expressed by counsel for the government, than from any opinion of my own that it can affect the decision of the cause. It will be seen in the end that the principles of law governing this decision apply as conclusively to the smaller portion of the estate, embracing the cemetery, as to the larger portion of the estate occupied by its miscellaneous throng of defendants. I return to the parcel of two hundred acres set off as a national cemetery; and I cannot but regret that the title of property so hallowed in the minds of patriotic people as that now under contemplation should have been left in such doubt as to fall under the cold, inexorable scrutiny of a court of law. If sections 4870–4872 of the Revised Statutes, be examined, it will be found that they contain specific directions as to the manner in which an exclusive title in the United States in lands intended as cemeteries shall be obtained, and the exclusive jurisdiction of the United States over them shall be secured. Their provisions have not been availed of in respect to the Arlington Cemetery. Nor has the requirement of section 355 been complied with, nor the authority conferred by section 1838 exercised. The title in this property is held by the United States merely as if it were an ordinary purchaser without the authority of a sovereign over it, or the prerogatives of a sovereign to protect it. The case of the cemetery tract differs from that of the reservation not at all in regard to the legal or political title, and only in the fact that it is actually used for a necessary, I will add sacred, public purpose. In regard to the whole Arlington estate, the title of the United States is in the condition alluded to by the chief law officer of the government, in 14 Op. Attys. Gen. 200, in a letter written to the secretary of the treasury, instructing him in these words: "In regard to lands owned by the United States, within the limits of a state over which the state has not parted with its jurisdiction, the United States stand in the relation of a proprietor, and the local officers have, in my opinion, the same right to enter upon such land, or into the buildings located there, and seize the personal property of individuals for non-payment of taxes thereon, as they have to enter upon the land or into the buildings of any other proprietor for the said purpose, it being understood in the former case that the right must be so exercised as not to interfere with the operations of the general government." The tenure by which the United States holds the Arlington estate is described by Vattel in a passage quoted by counsel of the government, wherein that writer says: "What is called the high domain, which is nothing but the domain of the body of the nation or of the sovereign who represents it, is everywhere considered as inseparable from the sovereignty. The useful domain, or the domain confined to the rights that may belong to an individual in the state, may be separated from the sovereignty, and nothing prevents the possibility of its belonging to a nation in places that are not under her jurisdiction. Thus may sovereigns have fiefs and other possessions in the territories of another prince. In these cases they possess them in the manner of private individuals." It was said by Judge Story in U. S. v. Cornell [Case No. 14,867]: "Although the United States may well purchase and hold lands for public purposes, within the territorial limits of a state, this does not of itself oust the jurisdiction of sovereignty of such state over the land so purchased. It remains until the state has relinquished its authority over the land, either expressly or by necessary implication." In Com. v. Young, Brightly, N. P. 302, it was held that "the constitution of the United States prescribes the only mode by which they can acquire land as a sovereign power, and therefore they hold only as an individual, when they obtain it in any other way." To the same effect is the decision in the case of People v. Godfrey, 17 Johns. 225. In Renner v. Bennett, 21 Ohio St. 431 (decided in 1871), it was held that where the United States, without the consent of the state, purchases and uses land for any of the purposes specified in section 8, art. 1, of the federal constitution, it acquires no jurisdiction over the land. In the case of Com. v. Young, it was held that the sale, by public outcry, of lands of the United States over which the state jurisdiction had not been ceded, in violation of a state law requiring that lands should be so sold by an auctioneer commissioned by the governor, was invalid. It seems clear to me that the government holds the Arlington estate by private and not by sovereign tenure, and that it is holding only two hundred

acres of it by an officer for a necessary public purpose. Therefore I think that the pretension of counsel for the government, that it holds the whole estate for actual public purposes by the hands of its officers, and by sovereign tenure, is quite inadmissible. The government acquired the land under authority of a loose law passed in 1863, when the times were much out of joint; but it does not hold it in observance of and compliance with the requirements of any law upon the statute-book prescribing the manner in which its title to and authority over the lands shall be secured and perfected.

I come now to consider the question whether the government can be sued indirectly in the manner in which it is sued in this action for real property held as just described. I have brought to the investigation of this question an earnest solicitude to decide it aright, because, as must be known to every lawyer, on its decision the title of the government to Arlington, in all probability, depends. There stands in the background of this suggestion and demurrer the fact that the tax titles derived by purchasers at the tax sales made by Commissioners Hawxhurst, Watson and Foster have been overthrown and held void by the supreme court of the United States in the two cases of Bennett v. Hunter, 9 Wall. [76 U. S.] 326, and Tacey v. Irwin, 18 Wall. [85 U. S.] 549. Under these decisions as many as eighteen or twenty actions of ejectment have passed under the supervision of this court, in proceedings to which the defendants have not thought it worth while to make contest. An instance of one of these cases may be found in Lee v. Chase [Case No. 8,185]. Since the decision in Tacey v. Irwin no holder of land acquired from Hawxhurst, Watson and Foster has made defence until now; and it is known to the bar that there can no defence be made in this case except the one now under consideration, to wit, that the government is not amenable to suit in the indirect form employed in this action. The commissioners who have been named adopted a rule not to receive the taxes due on property advertised for sale unless tendered by the owner in person. This rule was so rigidly enforced that neither friend, relation, nor agent was allowed to pay taxes due for the absent owner; their application to pay and save the property from sale being uniformly refused by the commissioners under the operation of the rule in question. In Bennett v. Hunter [supra] it was insisted, in support of the tax deed, that the right to pay the tax before sale was limited to the owner in person, and could not be exercised by the tenant in possession, who had offered to pay it. This position was not sustained by the court, which held that payment of the tax which the act requires to be made by the owner need not necessarily be made by him in person. It held that it was enough if it be made by any person for him; and this on the ground that an act done by one for the benefit of another is valid, if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice, and the court held the tax sale to be void. In Tacey v. Irwin [supra] where there had been no tender of the tax by the owner or other person, the court said: "It is difficult to see how, upon the case as found here, the sale can be sustained. The law does not require the doing of a nugatory act, as would have been a formal tender of payment, after the action of the commissioners declining to receive the taxes from any person in behalf of the owner. Bennett v. Hunter decides that the owner has the right to pay either in person or through any one not disavowed by him who was willing to act for him. This right the commissioners, by the rule which they established and the uniform practice under it, effectually denied. The friends and agents of absent owners were informed that it was useless to interpose in their behalf, and unless the owner appeared in person and discharged the tax the property would be sold. This was equivalent to saying that a regular tender by any other person would be refused. While the law gave the owner the privilege of paying by the hands of another, the commissioners confined the privilege to a payment by the owner himself. This was wrong, and a denial of the opportunity to pay accorded to the owner by the act; and the lands were therefore not delinquent when they were sold. If an offer in a particular case, to pay the tax before sale, and refused by the commissioners because not made by the owner in person, rendered a subsequent sale by the commissioners void, surely a general rule announced by the commissioners that in all cases such an offer would be refused must produce the same effect. Such a rule of necessity dispenses with a regular tender in any case. In the absence of any proof to the contrary, it is a legal presumption that the tax in this case, though not actually offered, would have been offered and paid before sale but for the known refusal of the commissioners to accept any offer when not made by the owner in person. If so, the commissioners were not authorized to make the sale in controversy, and the judgment must be affirmed."

It is plain, therefore, in the light of these decisions of the supreme court of the United States, that the tenure of the government in the Arlington estate depends upon the success of its present endeavor to defeat a judicial trial of this cause upon its merits; and there can be no doubt but that the attorney-general was bound under the impulsion of a supreme duty to intervene by suggestion to test the jurisdiction of the court. The pivotal question on which the government's title to Arlington must stand or fall is therefore the one which I am now to consider. Can the government be indirectly sued in this ac-

tion? This suit is brought under the laws of Virginia. See Code 1873, c. 131, pp. 958–963. It is a statutory action of ejectment. The ejectment law of Virginia is a copy of that of New York. Under it the action of ejectment may be brought to try the right of possession, serving thereby the purpose of the English action of ejectio firmae; and it may be brought to try the right of property, thereby standing in lieu of the English writ of right. The law of Virginia provides expressly that this statutory action of ejectment may be brought in the same cases in which the writ of right could before be brought. The present action is brought in a case in which the old English action of ejectment would not lie. It is brought by a remainderman after the termination of the life estate, where there was disseisin of the life tenant during the life estate. The right of entry had been lost, and the right of entry was necessary to the old action of ejectment. Under the statutory action given by the Virginia law no entry is necessary. None was necessary in these suits, process having been served by mere notice, and therefore there could not, in respect to these lands claimed by the government, be, as in England, either in fact or fiction an intrusion or possible collision with the king's officers by entry. In all these respects it differs materially from the English action of ejectment of Blackstone's day; and counsel for the government is mistaken in supposing with Tidd and Runnington that even the English ejectment was an action in rem, requiring seizure of property on mesne process. The English action of ejectment did not lie for one who had, like the plaintiff in this case, lost the right of entry. The right of entry was necessary to it, and entry, actual or theoretical, was the proper step for commencing it; but there was no seizure in limine as in actions in rem. The action of ejectment in England was, 1st. In its origin a mere personal action for damages. 2d. By degrees it became a mixed action to recover damages and estates for years. 3d. When it had begun to be used for the recovery of freehold estates it became a real action; for our ancestors in their high regard for freehold estates were not willing to divert the mind of the jury from the complicated questions of title to the consideration of the infinitely less important matter of damages. Thus ejectment was certainly in its origin no proceeding in rem; in its subsequent use it could no more be called a proceeding in rem than any other real action, and it would now be no less absurd to consider it as such than it would be to take that view of detinue brought to recover a specific horse, or debt to recover a specific sum of money. 2 Brown, Civ. Law, 111; Percival v. Hickey, 18 Johns. 257; 2 Kent, Comm. 378; 4 Minor, Inst. 79 (lithograph). It was for the reason that the English action of ejectment required entry and disseisin as a means of commencing it, either actual or theoretical, that it did not lie against lands of the king; for it could not be commenced without intrusion upon the king's possession. But the present action, as before said, though bearing the name of ejectment, is in effect equivalent to a writ of right, not requiring to be commenced by entry and disseisin, either in fact or fiction. The law of the local sovereignty in which this land lies gives to the citizen this right to try his right of property in lands by a proceeding which disturbs the possession and offends the dignity of no claimant whatever. It authorizes a suit to be instituted to try the title, by peaceful notice given to the actual occupants of the land, and leaves it entirely in the volition of the claimant, whoever he be, to appear or not as defendant in the suit. Section 5 of the law provides in terms that "if a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in the place of the lessee," if he chooses. Thus, in case the landlord be the government, the action may not only be commenced, but prosecuted to judgment, without any disturbance of the possession of the government, or "interference with its operations," or even service of mandatory process upon its officers. The action may be brought against the state of Virginia.

State of the Law in Respect to Suits for Personal Property.

But first, I will review those decisions which relate to personal property where it has been the subject of suit, or has been directly sued for, in proceedings to which the government of a state or of the United States was not directly, but was indirectly, defendant to the action. First, as to the leading case,—The Siren, 7 Wall. [74 U. S.] 152. The steamer Siren was captured in the harbor of Charleston by a naval vessel of the United States while in the act of violating the blockade of that port, and was lawfully a prize under the law of nations. She was brought into the port of Boston, and while on her way there committed a maritime tort by running into and sinking another vessel. Being lawful prize and property of the United States, she was libelled by the government merely to obtain a judicial verification and certification of its title, and for a sale on its account, pursuant to certain provisions of law. While in the custody of the court, the owner of the sunken vessel intervened by petition, asserting a claim upon the Siren and the proceeds of her sale, for the damages he had sustained. The district court refused to grant the prayer of the petition on the ground that the Siren and the proceeds of her sale, being the property of the United States, were exempt from legal process at the suit of the intervenor, because, to allow the intervention

would be to allow the citizen to implead the government. But the supreme court of the United States reversed the district court and allowed the damages for the maritime tort claimed by the petitioner. The court stated (page 159) that the fact that the government was exempt from a direct proceeding in rem against the vessel while in its custody, was no ground for holding that it was exempt from the indirect proceeding. Yet this case is cited by counsel for the government in support of their proposition that the government can not be sued indirectly; and I understood the district attorney to express a willingness to stake the fortunes of his cause in the present suit upon that decision. His confidence resulted from relying upon expressions of the court, detached from the context, rather than upon the principle decided; for it is true, as the district attorney recited, that Mr. Justice Field, who delivered the judgment of the court, did make use, in the course of his decision, of this expression: "As justly observed by the learned (district) judge who tried this case, there is no distinction between suits against the government directly and suits against its property"—an expression the judicial import of which will appear in the sequel.

The Nature of Proceedings in Rem.

Before going further in this line of inquiry, let me examine the nature of an admiralty proceeding. Any one having a claim by maritime contract against a vessel afloat may file a libel (a little book) in a maritime court within whose jurisdiction the vessel may be, setting out his claim, and praying her arrest. Thereupon issues process in rem; that is, against the thing, the vessel by her name: the Mayflower, for instance; which is seized and brought into custody of the court, whereupon the owner of the vessel is allowed a day to answer. The res or vessel being thus in judicial custody, all other persons having claims against it by maritime contract are allowed to come in, by libel or petition, and submit them to the judgment of the court. And, by our law, under the forty-third rule in admiralty, any person who may have an interest in the proceeds of the sale of the seized vessel, whether by maritime or other contract, may come in with like purpose. Thus it is apparent that a proceeding in admiralty presents the scene of a group of suits; of suits in rem, suits against the thing, the vessel; in which the owner is indirectly defendant, and the several libellants and petitioners are independent and distinct actors or plaintiffs. Accordingly, if the government of the United States be the owner of the libelled vessel, as it was in the case of The Siren [supra], the government is indirectly sued, not only by one plaintiff, but possibly by half a dozen plaintiffs. In The Siren Case, it had been decided below by the United States district court that there could be no intervention by petition or libel against property belonging to the government; but, as before stated, it was there held by the supreme court, that such suit would lie; and decree was given in favor of the claimant for damages sustained by the collision. It will not do, therefore, from that decision, where the government was sued indirectly, and where its property was the direct subject of judicial proceeding, to quote any expression employed by the court as authority against the very jurisdiction which the court was in the act of exercising. Previously to this case, that is to say in 1865, had been decided, the leading case of The Light-Boats (by the supreme court of Massachusetts) 11 Allen, 157. That was, of course, not an admiralty suit. It was a statutory proceeding very similar in character to an admiralty suit, taken to enforce by attachment in rem a mechanics' lien given by the state law. Certain boats intended to be used for floating lights on the Potomac during the Civil War had been built for the United States at New Bedford, Mass., by contract; the contractor had received the price, and they had been delivered to the government, and were in the custody of the officers of the United States, with crew and provisions on board, awaiting their armament, but they were still at the builder's wharf. It was while thus conditioned, and in custody of the government, that they were seized on attachment by a state officer. The petition alleged that the United States were the owners of the vessels, and prayed that notice should issue to the United States "that they appear and answer thereto." The vessels were the lawful property of the United States; had been fully paid for, and were in their actual custody by voluntary delivery. After an exhaustive review of all then existing authorities on the subject, the supreme court of Massachusetts held that "after the vessels had once come into the possession of the United States, for public purposes, they were subject to the exclusive control of the executive government of the United States, and could not be interfered with by state process," and that the attachment of them was illegal and void. But the court prefaced this judgment with the following remarks: "The petitioners suffered the title to pass into the possession of the United States, before they took one step in the state courts to establish their lien. If they had filed their petitions and attached the vessels before they came into the possession of the United States, they might well have contended that the court of the commonwealth had acquired a jurisdiction of the case, which could not be divested until the object of the suit was accomplished. This process does not wait for final adjudication of the rights of the parties before it takes the property out of the hands of its owner and possessor; but assumes the custody at the very first stage of the proceedings." This latter language was used by the court after having stated that the contractor had been paid by the government, by instalments, the contract

price of the vessels, as the work progressed, and had been fully paid before the attachment had been levied. The language which it employed was used, therefore, in respect to property wholly owned by the government. The result of this decision is, that though government property may be seized under mesne process of the court before it comes into the government's custody, yet it cannot afterwards be thus dealt with when the process of the court originating the suit would wrest the property from the possession of the government's officers. To the same effect was the decision of Judge Shipman in the case of The Thomas A. Scott, 10 Eng. Law T. (N. S.) 726, a public armed vessel libelled during the war.

There are many cases in which it has been held that libels in admiralty, or attachments in rem on mesne process will not lie against property owned by the government, and we are driven to ascertain the principle which discriminates cases in which such proceeding will lie, from those in which it will not lie. That principle is distinctly set forth in the case of The Davis, 10 Wall. 20; a case which is the more important from the fact that the opinion of the supreme court was delivered by Mr. Justice Miller; from its having been rendered on appeal from a decree of Mr. District Judge Shipman, who, I believe, had never before been reversed; and from its having been rendered after the decision of the supreme court of Massachusetts in the leading case of The Light-Boats, to which I have already alluded. Let it be borne in mind that a proceeding in rem in admiralty courts, or by attachment in other courts, is commenced by the seizure of property into the custody of the court, and that execution is virtually had on mesne process, at the beginning of the suit. The principle decided in the case of The Davis [supra] was this: that an admiralty court may enforce a lien in a proceeding in rem against the personal property of the United States in any case where the marshal, in executing mesne process, does not interfere with any officer or agent of the United States; does not destroy the possession of the United States; does not, by putting the government out of possession, reduce it to the necessity of becoming plaintiff or actor in court to assert its claim to the property. The government had shipped, in 1865, a quantity of cotton from Savannah to its agent in New York, on the schooner Davis. During its voyage the vessel and its cargo fell into the perils of the sea, and were saved from destruction by salvors; so that, afterwards, she came safely into her port of destination. The cotton (as well as the vessel) was at once regularly libelled by the salvors, as is usual in such cases, and was seized by the marshal of the court, of course, on mesne process. It was objected in the admiralty court that this was, in fact, a proceeding indirectly against government, the cotton being confessedly the property of the government. Mr. District Judge Shipman held, in the admiralty court, that the master of the schooner was, as to the cotton, the agent of the government; that the marshal's seizure of it was a dispossession of the government; and that, therefore, the libel could not lie as to the cotton. But the supreme court of the United States held otherwise. It held that the master of the schooner was a common carrier, and not a mere agent of the government, and that seizure of cotton while in his custody was not a dispossession of the government. It held that, though this was an indirect suit against the government, yet the court might properly proceed to adjudicate upon the lien of the salvors, and to decree out of the proceeds of the sale of the vessel the amount due to them. Mr. Justice Miller, in delivering the opinion of the court, makes the following observations, in which it will be seen that he explains the sentence which we have quoted from the decision in the case of The Siren. He says: "Perhaps the two most authoritative and well-considered cases on this subject are The Siren and Briggs v. The Light-Boats. Both of these decisions assert the doctrine, after full review of the authorities, that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of congress expressly authorizing it to be done. They also both assert the proposition that no suit in rem can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court. There are some expressions in the opinion of this court in the case of The Siren which seem to imply that no suit in rem can be instituted against the property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. * * * The learned judge who delivered the opinion cites with approval the case of The Light-Boats, 11 Allen, 157, in which the doctrine is laid down, and well supported, that proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of The Siren."

We have here a clear elimination of the principle of which we are in search. The learned judge did not qualify his language by confining his meaning to mesne process, but he was speaking of admiralty process, which is commenced by seizure of the res, and could have meant no other than mesne

process. The cases of The Light-Boats and of The Davis have the greater significance because they carry the liberty of indirectly suing the government farther than does the admiralty court of England. Without going into a review of the English cases of this class, I will state the result of such a review in the language employed by Judge Shipman in the case of The Davis (when it was before him), that in no case has the English court of admiralty attempted to deal adversely with the public property of the sovereign, except where there has been a voluntary appearance on its behalf, and submission of the case to the judgment of the court. Yet it is to be observed that England is notable for the absolute and unquestioning deference and subjection to law which characterizes her people and public officers in every department of society; and that the officers of the admiralty would not dare so to outrage public sentiment as to refuse to submit a right or claim of the government to the judgment of a proper court.

I will now pass from the review of those suits concerning personal property, which are commenced by a seizure of the res in contest, to those which are commenced by service of the ordinary mandatory process of the courts. The leading case in this class is the great one of Osborne v. Bank of U. S., 9 Wheat. [22 U. S.] 735. We have to do with this case only in its relation to the question whether a sovereign power may be indirectly sued. A state tax of some $100,000 had been assessed under a law of Ohio upon the branches of the Bank of the United States doing business in Ohio. A bill of injunction was filed in the circuit court of the United States, in apprehension of a levy for the tax, praying that the auditor of the state, Osborne, might be enjoined from demanding or recovering the amount of the tax. The order of injunction was granted and served on one J. L. Harper, a state collector, "while on his way to Columbus with the money and funds on which the injunction was intended to operate;" and on Osborne, before Harper reached Columbus. The amount in the hands of Harper was $98,000. This money was delivered by Harper to the state treasurer, and by him entered on his books to the credit of the state. Its identity was preserved by its being placed in a separate package. It went afterwards into the custody of a committee of the state legislature, and was by it returned into the state treasury, where it remained during the pendency of the suit. Here was property claimed by the state as collected under its tax law, in the custody of its collector at the commencement of the suit, and in its possession as its own, by prima facie title, by deposit in its treasury standing to its credit on its treasury books. The suit was brought against Osborne, the auditor, and amended to embrace Harper, the collector, and Curry, the treasurer. It would not be possible to find a case where a state could be more positively sued in indirect form than was the state of Ohio in this case. It was only in the single particular that the state was not by name a party to the record that she was not sued. The supreme court ruled that this suit thus brought and maintained was one in which the United States court had jurisdiction. In an earnest and elaborate opinion Chief Justice Marshall spoke as follows: "In a case where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the state, what rule has the constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the existence of jurisdiction? The judicial power of the Union is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties in the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest, but it has never been suspected that if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record."

In U. S. Bank v. Planters' Bank, 9 Wheat. [22 U. S.] 904, where a state was shareholder in the bank, and was indirectly a party defendant, Chief Justice Marshall said it was "a sound principle that where a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen;" and in Briscoe v. Bank of Commonwealth, 11 Pet. [36 U. S.] 257,

where the state of Kentucky was the exclusive stockholder of a bank, and was the exclusive party sued, though sued nominally as a corporation, Mr. Justice McLean held that the state imparted none of its elements of sovereignty to the bank in creating it, and that the funds and property of the bank might be reached by the legal or equitable process of a court of justice. In Davis v. Gray, 16 Wall. [83 U. S.] 203, which was a Texas railroad case, the court said (Mr. Justice Swayne): "In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest." The case of Swasey v. North Carolina R. Co. [supra] was one of the same character. There certain property of the state, in the form of railroad shares, was the subject of litigation, and I shall let Chief Justice Waite, who rendered the decision, state the objection to it and his answer: "It is insisted by the defendant that the state of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause. The state, although directly interested in the subject-matter of the litigation, is not a party to the record. The eleventh amendment to the constitution of the United States, provides that no suit can be prosecuted in this court against a state by the citizens of another state, or by citizens or subjects of a foreign state. It has long been held, however, that this amendment applies only to suits in which a state is party to the record, and not those in which it has an interest merely. It is next urged that if the state is not actually a party to the suit, it is a necessary party in whose absence the cause cannot proceed, and that as a state cannot be brought into court, no relief should be granted upon the case made. If the state could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of Osborne v. Bank of U. S., 9 Wheat. [22 U. S.] 738, it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a state in the hands of its agents, without making the state a party, where the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent. The real question, therefore, to be determined is, whether the court has jurisdiction of the property which it is sought to charge, or of the agent having it in possession."

I will here point out the fact, that the court maintained its jurisdiction in, and heard and determined each of the suits of, Osborne v. U. S. Bank and Swasey v. North Carolina R. Co. [supra], (to say nothing of the intermediate suits), notwithstanding that the effect of final process of execution would be, in one case, to invade the treasury of a state and to take from the hands of its officer property (money) claimed by the state as public property, and in the other case to invade the office of a corporation acting as agent of the state, for the purpose of a compulsory transfer and sale of the state's shares in its capital stock. I point out the fact in this place only for the purpose of showing passim that the "process" contemplated by Mr. Justice Miller, in his opinion in the case of The Davis, was only mesne process. And now I deduce this principle as the teaching of the leading cases which have just been reviewed, viz.: That government may be sued indirectly in regard to personal property in actions not attended by a seizure of the property out of its officers' possession on mesne process, even though, in executing judgment on final process, such seizure and dispossession would result. If a court of justice, after a full hearing, decides that personal property, claimed by government by title on which it has judicially passed, belongs to another, it will not presume that government will fail to deliver it to the rightful owner; and it is believed that in this country, as in England, final process for restitution would never be necessary. At all events a court will not be deterred from adjudicating such a cause by the presumption that the government will not make restitution without the indecent interposition of the court's writ of execution. But suits to test the title to property manifestly differ from those brought to recover a pecuniary debt, and it is conceded that no court but the court of claims has jurisdiction to render what Mr. Justice Miller calls "a moneyed judgment" against the United States. Case v. Terrill, 11 Wall. [78 U. S.] 199. Counsel for the government speak of the impatience with which the supreme court expressed itself, of the decree which the court below (the United States circuit court for Louisiana) had rendered against the United States in this last case. The cause of the judicial impatience was that a court should have rendered a judgment "against any one not made a party to the suit, and who had in no manner," direct or indirect, "appeared in the case." Here a moneyed judgment for more than $200,000 had been rendered against the United States, though not a party, direct or indirect, to the proceedings. But even where money is the subject of judicial proceeding, it is held that a court may proceed to the point of determining what amount is due the government without regard to the fact that the power to order execution be not within its jurisdiction. U. S. v. Bank of Metropolis, 15 Pet. [40 U. S.] 377; De Groot v. U. S., 5 Wall. [72 U. S.] 419; U. S. v. Eckford, 6 Wall. [73 U. S.] 484; and many other cases. In a case, for instance, where gov-

ernment is plaintiff, and a set-off proved against it exceeds its own demand, the judgment is only that the defendant go without day. Reeside v. Walker, 11 How. [52 U. S.] 590. And "this for the reason that no officer in a republic, however high, not even the president of the United States, much less a secretary of the treasury, or treasurer, is generally empowered to pay debts of the United States when presented to him." Suits for money debts stand on a different footing from suits respecting specific personal property claimed by government. But, we repeat, that although a moneyed judgment cannot be rendered against the government except where authorized by law, the mere fact that it cannot be, does not of itself suffice to defeat the jurisdiction of a court to ascertain what is due the citizen.

This examination into decisions of the courts could be pursued until research degenerated into pedantry; and it is confidently believed that the result of a discriminating and candid reading of them all would be precisely that derived from the leading cases already cited, namely, that courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power whenever the service of mesne process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding look to a judgment, final execution upon which, if issued, would dispossess the government. Before passing on to cases involving real property, I will mention the case of Cohens v. Virginia, 6 Wheat. [19 U. S.] 264. There, I believe for the first time, arose the question whether a state, having prevailed below in a suit in which she was prosecutor by indictment, might be made defendant to an appellate proceeding for carrying the case up to the supreme court of the United States, in spite of amendment 11 of the federal constitution, forbidding suits against the states. It is hardly worth while to state that the proceeding was sustained by the supreme court.

I think now the way is cleared for an examination of the authorities which bear upon the precise question which we have in hand, namely, whether a statutory action of "ejectment," which is used in this instance in lieu of the old English writ of right, lies to test the title in lands claimed by the United States all of which the government has in possession, and a part of which, at least, it has in actual use for a necessary public purpose, the United States being only indirectly a party. The chief reliance of counsel for the government in denying such jurisdiction is upon English cases; but it is useless to say more than I have done in demonstration of the fact, that no authorities indicating the state of the law in England on the question whether ejectment will lie to recover lands held by the crown, have any application in the present case. This is only in statutory name an action of ejectment, being really in technical effect a writ of right. It was not necessary, in installing this suit, to make entry and disseisin, or to feign to do so, on lands held by the sovereign power, as it would have been under the old practice in England. There was no intrusion, actual or fictitious, on the sovereign's tenure in the incipiency of the action, and the possession of the government remains as free from actual disturbance, and its dignity from actual or intentional insult, as if there were no suit pending at all to test its right to hold these premises. There is no doubt of the fact, that in England ejectment will not lie to recover lands in possession of the crown. There are technical reasons for this fact which, though once founded in reason, are no longer so; and there are real reasons. One of the technical reasons is, that the possession of the crown, however wrongful, is exempt from intrusion by the entry and disseisin which were deemed necessary to the commencement of ejectment. Another is, that since Edward I., or at least since James I. (Allen, Royal Prerog. 93), the practice established by the courts has required another remedy to be pursued, namely, the petition of right. So that now, in England the action of debt will no more lie where detinue ought to be brought, than ejectment where the practice requires the petition of right. The spirit of the English law, as well as the temper of the English constitution, require the suits against the soverign shall be in precatory rather than in mandatory form. But while the law and the constitution are thus far in accord, it must be confessed that there is a wide difference between the ideal king of the English lawyers, who is above law, and the real king of the British constitution, who is subject to law. He is represented in the law-books as an absolute sovereign; as, indeed, a supernatural being who never dies, who is present at one and the same time in every court of his dominions, who can neither do wrong nor imagine evil, and who is incapable of any act of impropriety, folly, or weakness. In contemplation of the lawyers the king is not only everywhere in the courts, but at the same time commands the army and navy, bestows all honors and titles, represents the majesty of the whole community at home, conducts all correspondence and negotiations abroad, makes peace or war, and binds the kingdom by contract or treaty. In their minds he is a corporation sole, he is an artificial person that never dies, he cannot be summoned before an ecclesiastical or secular court, he cannot commit treason or felony, and cannot suffer punishment or corruption of blood, nor be imprisoned or outlawed. While such is the king recognized by those of us who have studied the English law-books, those who have also studied English history know that the sovereign of the constitution is a very different character, of whom it is watchful

and jealous, whom it often denounces, frequently prosecutes, sometimes deposes, and occasionally beheads. Of such a king as that of the English lawyers we have known nothing in America for one hundred years, and it is simply idle to cite, in American courts, precedents and authorities from English courts, which, after all, merely lay down the principle that suits against the crown must, for a thousand reasons founded in English sentiment, be in precatory and not in mandatory form. Nothing is more true than that in England, for reasons which have no existence or countenance in America, ejectment will not lie for lands in possession of the crown. And it is also the case, although it was not formerly so, that the writ of right, which is not originated by entry, but is commenced by mere praecipe, will not lie. The single, sufficient reason why neither ejectment nor writ of right will lie is, that a petition of right has become, in modern practice, the proper remedy in England for suits against the sovereign. See Sadler's Case, 4 Coke, 55a; The Bankers, 14 How. State Tr. 28; Attorney-General v. Hallett, 15 Mees. & W. 106; Doe v. Roe, 8 Mees. & W. 579; Hovenden v. Lord Annesley, 2 Schoales & L. 617; and 1 Anstr. 215. The nature of this proceeding is nowhere more succinctly and fully explained than in 4 Minor, Inst. 667, as follows: "This is a proceeding in chancery, originating at common law, it is said, under the auspices of Edward I. used where the king is in full possession of any hereditament or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself, in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate, and then upon this answer being indorsed on the petition of the king, soit droit fait al partie (let right be done to the party), a commission issues to inquire of the truth of this suggestion; after the return of which the king's attorney is at liberty to plead at bar, or to demur, and the merits are then determined as in suits between subject and subject. And if the right be determined against the crown, the judgment is quod manus domini regis amoveantur et possessio restituatur petenti salvo jure domini regis, whereby the crown is instantly out of possession without the necessity for the indecent interposition of its own officers." 3 Bl. Comm. 256, 257; Bac. Abr. Prerogative, E; 1 Th. Co. Litt. 308 et seq., and notes N, O; Baron de Bode's Case, 8 Adol. & E. (N. S.; 55 E. C. L.) 208 (where the mode of proceeding is stated). In the Case of the Baron de Bode, it will be seen that the court exhibited a disposition to enlarge and extend the scope of the petition of right, rather than to narrow it. The truth is, that all the learning which is cited from the English reporters, showing that other remedies will not lie against the sovereign, and that petition of right must be resorted to, at the same time shows that the sovereign may be and is habitually sued in England in the form prescribed by English practice, so that it may be said, to the glory of England, that the words of John Selden and of the elder Pitt, which have been quoted, are true. In that country, probably more than any other pervaded with the spirit of obedience to law, fidelity to contracts, and reverence for the tribunals and instrumentalities of justice, there is a remedy open for every grievance. "Non recedant querentes in curia regis sine remedio." All that the injured person is required to look to is, that he seek his remedy, be it against the king or a private person, at the proper source; his remedy against the king being as open and free to him as against any other person. Mr. Broom, in his note to the Banker's Case (Constitutional Law, 241), has this just and lucid explanation of the subject of remedies in England: "The crown submits, as is abundantly proved by the cases already cited, to have its prerogatives openly discussed and investigated in courts of justice, and allows a remedy against itself for any infringement of the subject's right, provided such remedy be sought where it can be had. The constitution of England, as remarked by Lord Holt (14 State Tr. 784), 'has wisely distributed to several courts the determination of proper causes, but has left no subject in any case where he is injured without his adequate remedy, if he will go to the right place for it. If a man will seek for a remedy at common law for a legacy, it is his own fault if he do not recover; as it would be if he should begin a suit for land in the court of admiralty, or go for equity in the common pleas.' And so if the subject has cause of complaint against the crown, he must proceed for redress by that pathway which the constitution has laid down for him. For an illegal invasion of his liberty he should proceed by habeas corpus; to obtain the revocation of a grant which injuriously affects him he should proceed by scire facias; for an illegal invasion of the right of property he should proceed by petition of right, speaking of which latter remedy Sir W. Blackstone (3 Comm. 255) tells us that the law has thus furnished the subject with a 'decent and respectful' mode of informing the king of a grievance, and soliciting redress. This mode of procedure is appropriate for inducing restitution by the crown of land or chattel property, of which it has through misinformation or inadvertence, wrongfully possessed itself." It is apparent from these authorities that the crown in England may be sued, and that the petition of right is the remedy supplied by the English law for an aggrieved subject, by which he may have his claim against the crown judicially determined. I do not think, therefore, that the practice, or the legal authorities, in England can with any reason be adduced in support of the attitude held by the government in this cause. Nor is the view of counsel for

government correct that the petition to congress here is the equivalent of the petition of right in England; for the petition to congress is a political remedy, whereas the petition of right is strictly judicial. The only equivalent here of the petition of right is the right given by statute to sue in the court of claims, a grant, however, which does not extend to such a claim as that of the plaintiff in the present action. Yet I will venture the opinion that the clause of the fifth amendment to the constitution, which forbids the taking of private property for public uses without just compensation, proprio vigore gives jurisdiction to the courts of suits brought directly against the government for the recovery of property, where the complaint avers that the property was taken without just compensation.

For the present case, and those of its class, there is no jurisdiction specially derived from the express legislation of congress, just as there is probably no express law of congress authorizing by name the action of debt or trespass on the case; and this being an inferior court, we must needs look to the decisions of the supreme court of the United States for that judicial legislation which supplies in the present instance the only chart by which we may direct our course. I come, therefore, in conclusion to consider those cases decided by the supreme court of the United States, in which the government of a state or of the United States has been indirectly sued in respect to lands in its possession, whether held or not for public purposes. The leading case on the subject, and the first in point of time, is that of Meigs v. McClung, 9 Cranch [13 U. S.] 11. The land in dispute was occupied by the United States as a military garrison. In a treaty settling the boundary of the territory of the Indians, and extinguishing their title to the rest, in the now state of Tennessee, the government had reserved a right to put a garrison on the Indian portion, and to use a reserve of three miles square in connection with it, but it happened that the Indian land did not extend above the mouth of the Highwassee river, and the government was unfortunate enough, through a mistake, to put its garrison above the mouth of the river on private property, and not below the river on Indian ground. An action of ejectment was brought and the process served on Meigs, the military officer of the United States in command at the garrison. The cause proceeded to judgment in the federal court below, and went up on writ of error to the supreme court of the United States. The cause was there heard, and Chief Justice Marshall delivered the unanimous opinion of the court in these words: "This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished in the land in controversy, and that the plaintiff below might sustain his action." Though it was "objected and insisted that the action could not be maintained against them because the land was occupied by the United States troops, and the defendants as officers of the United States for the benefit of the United States and by their direction," yet it does not appear from Mr. Cranch's report of the case that the question of jurisdiction was raised by plea in the court below. That point does not seem to have been relied upon by the government as a ground of error in the argument above. And so the counsel for the government in the present case, with that extraordinary and commendable diligence and alacrity which has characterized them throughout its progress, object that, as an appellate court does not consider any grounds of error but such as are relied upon in the record brought up to it, so the supreme court could not have considered this question of jurisdiction in the case of Meigs v. McClung [supra]. They cite Montgomery v. Hernandez, 12 Wheat. [25 U. S.] 130; Murdock v. Memphis, 20 Wall. [87 U. S.] 590; Venden v. Coleman, 1 Black [66 U. S.] 472; Webster v. Cooper, 10 How. [51 U. S.] 54; Brown v. Huger, 21 How. [62 U. S.] 305. But it seems to me that the question of jurisdiction is one which does not fall within the rule stated by counsel, or within the reason of the rule, and that the court below and the supreme court could not but have considered that question in the case under consideration. Whether or not the court had jurisdiction to try the title of the United States in property held as a garrison by officers and visible troops of the army, for a bona fide, patent, necessary public purpose, was, it seems to me, of the very essence of the case before the supreme court, and the language employed by the court in rendering its decision, that "the plaintiff below might sustain his action," seems to imply that, whether the question of jurisdiction which the consent of counsel cannot affect was technically before it or not, it was distinctly and expressly passed upon by it. Here the judgment was against the government. Another case of ejectment, to recover Fort Dearborn, at Chicago, a possession of the government, occupied by its army officers, for the purpose of a military station, was that of Wilcox v. Jackson, 13 Pet. [38 U. S.] 498. The action was brought in a state court, and was proceeded in there to judgment. 1 Scam. 344. It was taken by writ of error to the supreme court of the United States, and that court heard the cause and proceeded to judgment upon it. In that case the decision of the state court against the government was reversed, and a judgment for the government given by the supreme court. The judgment in each forum was upon the merits, and not upon the question of jurisdiction. The state court took jurisdiction upon the merits, and the supreme court reversed the state court upon

the merits, taking no notice of the question of jurisdiction. Counsel for government in the present case admit that the supreme court in that case "in deciding upon the law of the case decided the question of jurisdiction;" though they think that, as it was decided upon agreed facts, the question of jurisdiction was virtually waived. But can a merely implied consent give jurisdiction in such a case? Consent of counsel does not give jurisdiction where jurisdiction is of the essence of the proceeding. Mordecai v. Lindsay, 19 How. [60 U. S.] 199; Montgomery v. Anderson, 21 How. [62 U. S.] 386; and Ballance v. Forsyth, Id. 389. In the case of Grisar v. McDowell, 6 Wall. [73 U. S.] 263, the plaintiff claimed as seized in fee the presidio of the old pueblo of San Francisco, then occupied by the United States, and brought his action indirectly against the United States, who set up that the property was public property of the United States reserved for military purposes. The defendant named was General McDowell, commanding the military post, and process was served on him. The circuit court entertained jurisdiction of the cause, and proceeded in it to judgment. It was thence carried to the supreme court of the United States, which proceeded in it to judgment. The report does not show that in either court the question of jurisdiction was expressly raised. But certainly they could not have considered that the mere fact of possession by the United States and use of the property for public purposes was sufficient to defeat their jurisdiction. They looked narrowly and diligently into the grounds of the title of the plaintiff and of the United States, and they each decided the case, on the relative strength of the two titles, in favor of the United States. The fact that the property was claimed by the United States, was in the possession of its officers, and in its actual necessary use for military purposes, intruded itself into the cause at every stage, and neither court deemed this fact sufficient to defeat its jurisdiction, and each proceeded to consider and decide the case on its merits.

I now come to the latest case which has been decided in the supreme court of the United States, in which the question now before this court was brought under review. This was the case of Cooley v. O'Connor, 12 Wall. [79 U. S.] 391. The action was ejectment. It was brought to recover a lot of ground in the town of Beaufort, South Carolina, owned by the United States. Process or notice in ejectment was served on the occupants, who were tenants of the United States. It was a case in which the United States were sued indirectly, in ejectment for property claimed by government. The claim, as in the case now at bar, was founded on a tax-title obtained at a sale made durante bello by direct tax commissioners of the United States for delinquent taxes. The action of ejectment brought was the old one of trespass quare clausum fregit, with indorsement that "the action was brought to try title as well as for damages." It was the equivalent of Blackstone's English action of ejectio firmae. It was a case to which the English authorities cited by counsel for government apply directly, and with which the English cases which they rely upon run on all fours. The government was using the lot of ground sued for, for public purposes, virtually as it is using the 882 acres of Arlington, those purposes being rather imaginary than real. The defendants were one Cooley, one Judd, and others. Cooley was the tenant of a government lessee, and Judd a clerk of the United States for certain, in his view, important purposes. From the exceptions of the defendants set out in the record, the following is an extract: "And the defendants, to maintain and form the issue on their part, gave in evidence tending to show that Samuel A. Cooley was in possession of a portion of the premises in the plaintiff's declaration mentioned, as a tenant of George Holmes, who had leased said portion of said premises from the United States direct tax commissioners at Beaufort, S. C.; that as such tenant he went into possession in June, 1867, and continued therein until about the 1st of December, 1868; that the said Henry G. Judd occupied a portion of said premises in the plaintiff's declaration mentioned as clerk of the United States direct tax commissioners at Beaufort, and by their permission and direction; that he was in possession of said premises from or about the 1st of June, 1867, until about the 1st day of December, 1868; that said Cooley and Judd, defendants, had no other right, title, or interest in said premises, except as hereinbefore set forth, being mere tenants at will, in possession, and that they derived their right to possession from the United States direct tax commissioners at Beaufort, S. C., who acted and assumed to act for and on behalf of the United States of America." Of this cause the circuit court below took jurisdiction, heard it on the merits, and proceeded to judgment. When carried up the supreme court did the same. The government had lost the case in the circuit court on an instruction to the jury. The supreme court found error in the instruction, and what did it do? Did it reverse the judgment below and order the lower court to dismiss for want of jurisdiction by reason that the United States was the only defendant in interest? It did not. Its order, as reported, was "Judgment reversed and venire de novo awarded."

These decisions of the supreme court are supported by several cases decided in other courts of the highest authority. Mr. Justice Grier had held the same view as to the jurisdiction of a court in Elliott v. Van Voorst [Case No. 4,390]. In that case the government of the United States by some

accident of business had become the owner of the equity of redemption in some land in New Jersey, and a proceeding had been taken by a mortgagee to foreclose his mortgage. It was necessary under the rules governing chancery suits to give notice of the proceeding to the United States, standing virtually in the shoes of the mortgagor, and Mr. Justice Grier, sitting in circuit court, held that, quoad hoc, the United States held as a private person and not as a sovereign, and might be served with notice of the proceeding just as any private mortgagor or holder of his equity of redemption might be served. In Dreux v. Kennedy, 12 Rob. (La.) 489 (decided in 1846) plaintiffs sued the defendants to recover lands in Louisiana alleged to be in their possession. The latter prayed for a dismissal, averring that the property was in the possession of the United States, a branch mint having been erected thereon; that they were merely officers of the mint and not in possession of the premises and had no authority to represent the United States. But it was held that the exception be overruled, the court saying: "Where the party in possession of land, when sued for it, points out the owner under whom he holds, he is bound to defend the action if such owner do not live within the state, or is not represented therein, or if such proprietor, lessor, or principal be the United States, against whom no direct action can be brought."

In the case of French v. Bankhead, 11 Grat. 138, which was an action of ejectment, brought against the military officer in command at Fortress Monroe, Virginia, for the recovery of land of which the United States claimed to be owner, and occupied by him as such officer, and where the defendant was represented in the supreme court of appeals of Virginia—the action having been brought in the state court and never removed to a federal court—by counsel, one of whom (Jones) was at the time United States district attorney, and where it was decided in favor of the defendant, upon the ground that the United States was entitled to the property in controversy; no objection to jurisdiction was made at any stage of the case. In Polack v. Mansfield, 44 Cal. 36, decided in 1872, after deciding that a mere servant or employé, who does not claim any interest in the premises, nor any right to their possession, and only in that manner occupies the premises, cannot be sued in an action to recover lands, the supreme court of California goes on further to decide: "That the rule which thus exempts the mere servant or employé of another from an action presupposes that the employer may be sued, and that the wrongs of which the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case, therefore, where the employer is for any reason not amenable to an action, the rule referred to has no application, and the employé or servant becomes ex necessitate the proper party defendant, since he is the only party who can be subjected to a suit at all. Were this otherwise, it would result, that open and admitted violation of private right would find no redress in the courts of the country. The government of the United States as such cannot be sued as a party defendant in the courts of the state; and unless its servants and employés may be properly responsible for the lawless invasion of private property committed by them at the command of the government, the citizen is left wholly without the protection which it is the first aim and purpose of municipal law to afford."

There is but one other and very unimportant part of the case to be dealt with, and that is the intimation that in the event of the plaintiffs recovering in this action, the court would have no power to make good its judgment by final process. But the court will not imagine that its judgment would be resisted. That is a matter that must take care of itself. Mr. Justice Blair, in Chisholm v. State of Georgia, 2 Dall. [2 U. S.] 451, after alluding to this argument ab inutile and speaking of the jurisdiction of the court being questionable on the ground that congress had not provided any form of execution or pointed out any mode of making a judgment against a state effectual, said: "Let us go on as far as we can, and if, at the end of the business, notwithstanding the powers given us in the 14th section of the judicial act, we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers, to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation that a state may have other motives than such as arise from the apprehension of coercion to carry into execution a judgment of the supreme court of the United States, though not conformable to its own ideas of justice?" To the same effect were the words of Mr. Justice Grier in the case of Elliott v. Van Voorst [supra], where, in meeting the objection that there was no precedent to be found for his assuming jurisdiction of a cause, judgment on which the process of the court might be inadequate to enforce, with that practical wisdom and downrightness of speech which characterized him he said: "It is time there was one."

Is it possible, in the light of these cases, to hold, that the fact of the federal government being claimant by record-title or property which is made the subject of an indirect suit against it, in possession of the property, and in the actual use of it for public purposes, defeats the jurisdiction of a court to look into the grounds of its title and decide the action upon the merits? Sitting here, in an inferior court, I am not at liberty so to hold, because to do so would be to overrule the supreme court in all the four cases of Meigs v. McClung, Wilcox v. Jackson, Grisar v. McDowell, and Cooley v. O'Connor [supra]. I have

found it impracticable to make mention of each of the multitude of authorities which were cited in the argument of the cause. I have, however, examined them all, and think that I have adopted the teaching of most of them and done violence to that of none. In the fact that the case at bar is the only one yet arising in which this especial question of jurisdiction has been raised at the outset of proceedings, and in which the fate of the government's title has seemed to depend wholly upon this question, the present is a case of first impression. It is not to be denied that this cause is before the court in a form not heretofore known to American precedent; that is to say, it presents a case in which the sovereignty sued, comes into court, in the first incipiency of the proceeding, deigning to protest its exemption from amenability to the action, but disdaining to submit itself, as may have been done in the cases last cited, to the jurisdiction of the court. A case of such consequence will naturally ascend from this forum to the lofty and most profoundly revered tribunal of ultimate resort provided by the constitution of the United States. With firm judicial confidence I sustain the demurrer of the plaintiff in this cause, and direct that it shall proceed to trial on the issues raised by the plaintiff's answer to the attorney-general's suggestion. If, then, it shall go up to the supreme court, as I doubt not it will do, I shall console myself with the memorable reflection of Lord Nottingham, in the case of the Duke of Norfolk: "I am not ashamed to have made this decision, nor will I be wounded if it should be reversed."

[NOTE. This case was afterwards heard by the same court upon instructions asked and refused, and was tried by a jury, and verdict given for the plaintiff. Case No. 8,192. Two writs of error were prosecuted, by the defendants and by the United States, eo nomine, to the supreme court, which affirmed the decision of the lower court. 106 U. S. 196, 1 Sup. Ct. 240.]

Case No. 8,192.

LEE v. KAUFMAN et al.

[3 Hughes, 139.] [1]

Circuit Court, E. D. Virginia. Jan. 30. 1879.[2]

TAX SALES — TENDER OF TAX BEFORE SALE BY FRIEND—CUSTOM OF COMMISSIONER TO RECEIVE ONLY FROM OWNER—WAIVER OF TENDER.

Under the act of June 7, 1862 [12 Stat. 422], amended by that of February 6, 1863 [Id. 640], "for the collection of the direct tax in insurrectionary districts," etc., as construed in Bennett v. Hunter, 9 Wall. [76 U. S.] 326, and Tacey v. Irwin, 18 Wall. [85 U. S.] 549, a tender by friend or agent of the owner of the tax due upon property advertised for sale is a sufficient tender; and, moreover, if the tax commissioners have, by an established general rule, announced, and a uniform practice under it, refused to receive the taxes due unless tendered by the owner in person, even a formal offer by another to pay is unnecessary. It is enough if a friend or agent of the owner went to the office of the commissioner to see after the payment of the tax on the property, but made no formal offer to pay because it was in effect waived by the commissioners, they declining to receive any tender unless made by the owner in person.

[Cited in King v. La Grange, 61 Cal. 229.]

In ejectment. The case came on for trial on the merits of this term of the court, the same counsel on either side in attendance as on the trial of the question of jurisdiction [Case No. 8,191], and was put to the jury. The only questions of law that could arise in the case were of course upon the prayers of counsel for instructions to the jury. These prayers were numerous, but none of them touched the merits of the controversy very essentially except those which were commented and passed upon by the court in the following opinion of the court delivered in the course of the trial.

HUGHES, District Judge. The two instructions [3] asked for by the plaintiff, and the instructions No. 1 asked for by the defendants, depend upon the same principles of law, and may be considered together. I think these instructions embrace the principles of law which control the case under trial, and it would seem to be hardly necessary to give much special consideration to the other instructions offered. I will premise that the certificate of the sale of Arlington made by the tax commissioners, which can be impeached only by showing either, 1st, that the property was not subject to the tax for which it was sold; or 2d, that it was after the sale redeemed from the tax according to the provisions of the law of 1862; or 3d, that the tax had been paid before the tax sale; is impeached by the plaintiff in this suit only on the last of these grounds. The sale is conceded to have been valid in other respects. This objection to the sale is made by the plaintiff not on the claim that the tax was in fact paid, but on the claim that he (or his predecessor in title) did all that he was bound to do by law towards paying it; that the non-receipt of it by the government was not through fault of his, but through fault of its own officers; and that, having himself done what was the equivalent of paying the tax, the land was not forfeited by law, and the commissioners' sale of the property for the tax was therefore unauthorized, null, and void.

The instructions under consideration all relate to the question whether the acts of the plaintiff (or of his predecessor) in regard to the payment of the tax were in law the equivalent of payment to the extent of preventing a forfeiture. The plaintiff's claim is, that through a friend or agent he went to the tax commissioners, at their office, during the period when the tax was receivable by law, with money in hand for the purpose, and proposed to pay the tax, but was pre-

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

[2] [Affirmed in 106 U. S. 196, 1 Sup. Ct. 240.]

[3] They are given at the end of this opinion.

vented from doing so or from tendering payment by being informed by such one or more of the commissioners as were then in their office, that the tax would not be received except from the owner of the land in person. He claims, moreover, that this rule of the commissioners, this construction which they put upon the law of 1862 and 1863, was so generally known and announced as to amount to a waiver of tender on their part, and that he was thereby exonerated from the useless task and nugatory formality of making tender or offer of payment through an agent or friend (through whom he had a right to act in the matter), and was thereby relieved in law from default, and his land from forfeiture for the tax.

The single question raised by the three instructions under consideration is therefore whether the tax imposed upon this estate by the law of June 7th, 1862, "for the collection of direct taxes in insurrectionary districts," as amended by the act of February 6th, 1863, could be paid except by the owner in person. The clauses of the act of 1862, as amended, under which the sale of Arlington was made, are substantially in the following words. Section 3 provides: "That it shall be lawful for the owners of land, within sixty days after the tax commissioners shall have fixed the amount, to pay the tax thus charged into the treasury of the United States or to the tax commissioners, and take a certificate thereof, by virtue whereof the land shall be discharged from the tax." Section 4 declares the land forfeited on the non-payment of the tax as required by section 3. Section 7, after providing that if the tax is not paid as required in section 3 it shall be sold, goes on in one of its clauses to provide substantially: That in all cases where the owner of land shall not, on or before the day of sale, appear in person before the tax commissioners and pay the amount of the tax, with interest and cost of advertising, and request the land be struck off for a less sum than two-thirds of its assessed value, the tax commissioners shall be authorized at the tax sale to bid off the land for the United States at a sum not exceeding two-thirds of its assessed value, unless some person shall bid a larger sum, in which case the land shall be struck off to the highest bidder. In another clause of the same section 7 it is provided, substantially, that at the tax sale, any tract of land which may be selected under the direction of the president for government use, for war, military, naval, revenue, charitable, educational, or police purposes, may be bid in by the tax commissioners for, and struck off to, the United States. Another clause of section 7 allowed the owner of lands so sold to redeem the same, in the following terms: "The owner of said lots of ground, or any loyal person of the United States having any valid lien upon the interest in the same, may, at any time within sixty days after said sale, appear before the said board of tax commissioners in his or her own proper person, and, if a citizen, upon taking an oath to support the constitution of the United States, and paying the amount of said tax and penalty, with interest thereon from the date of the said proclamation of the president mentioned in the 2d section of this act, at the rate of fifteen per centum per annum, together with the expenses of the sale and subsequent proceedings, to be determined by said commissioners, may redeem said lots of land from said sale," etc. These having been the provisions of the law in force at the time of the tax sales under consideration, it is obvious that all sales at which private persons became purchasers must have been made under the first quoted clause of section 7; and, the price bid for Arlington ($26,200) having been more than two-thirds of its assessed value ($22,733), and it having been struck off to the United States at such price, it is equally obvious that the sale of Arlington was made under the second quoted clause of section 7, and could not have been made under the clause first quoted.

Upon this state of the law, the supreme court of the United States, in the case of Bennett v. Hunter, 9 Wall. [76 U. S.] 326, in which Bennett had purchased land under the first clause of section 7 above quoted, decided that a tender of the tax by an agent of the owner to the tax commissioners, before the tax sale, was equivalent to a payment, so as to destroy their authority to sell and to render their sale invalid; and it so held, notwithstanding the language of the first above-quoted clause of section 7, providing that sale might be made in all cases in which the owner had not, before the sale, appeared in person before the tax commissioners, and paid the tax. The court expressly remarked in its decision, that it "did not perceive in the terms of the act any limitation of the right of paying the tax to the owner in his proper person." In ascertaining who was authorized to pay the tax, which it expressly said was the only question in the case, the court seemed to feel bound to confine its view to section 3 as the part of the act which determined the rights of the owner of land in regard to paying the tax—a section which did not expressly require the owner to pay in person. The court in determining this question, refused to consider the terms used in section 7, the object of which section was, not to determine the rights and duties of the owner of taxed land, but the powers and duties of the tax commissioners after the owner had failed to pay the tax. It was not necessary for the court in this case to look beyond and above the terms of the statute in determining the rights of the owner of taxed land, but I think it was evidently in its mind that there was no power in congress to impose conditions much less disabilities upon the owner of land subject to taxation, as to the manner of paying the tax at any time before the divestiture of his title by a tax sale made

after delinquency and forfeiture. It distinguished the indefeasible right of the owner to pay the tax by an agent before sale, from the right of redeeming the land after forfeiture and sale; intimating that congress might properly limit the right of redemption to the owner in person, while it could not constitutionally prohibit payment of the tax by an agent before the sale. I say that it was not necessary for the court to resort to this higher ground in deciding Bennett v. Hunter [supra], but from the tenor and spirit of its language I am persuaded that the proposition was in its mind that congress had no power to restrict the owner of land, in paying the tax, to payment in his own proper person.

In the case of Tacey v. Irwin, 18 Wall. [85 U. S.] 549, the tax sale of the land had been made to a private purchaser under the first quoted clause of section 7. In that case no tender of the tax had been made by Irwin's agent. The language of the record on this point in the court's finding of the facts is: "Whilst the said premises, however, were advertised for sale, his (Irwin's) brother-in-law went to the office of the commissioners to see after the payment of the tax on the property, but made no formal offer or tender of payment, because such offer or tender was, in effect, waived by said commissioners, they declining to recognize any tender unless made by the owner in proper person." This case differed from that of Bennett v. Hunter, in the fact that there was no tender of the tax to the tax commissioners by the friend or agent of the owner. The owner's brother-in-law merely went to see after the payment of the tax, but made no formal offer or tender of it, that being virtually waived by the commissioners in declining to recognize any tender unless made by the owner in proper person. Judging from the language of the court, the decision in that case, as I read it, was based not merely on the presumption that an offer would not have been made, but for the refusal to recognize a tender by an agent in that particular instance, but was based also on the fact that it was the rule and practice of the commissioners so to refuse. I think a careful and unbiased reading of the decision in Tacey v. Irwin leads to the inevitable conviction that it was based chiefly on the existence of that rule and practice, and but partially, if at all, on such declarations of the commissioners on the occasion when Irwin's brother-in-law called "to see about paying the tax," as deterred him from making a formal tender. But I think the higher principle on which both of the decisions under review were made was, that the language quoted in section 7, implying a requirement that the owner should pay the tax in person, was overridden by the superior principle of constitutional law, that congress had no right in levying a tax for purposes of revenue, to impose disabilities or denounce penalties for political conduct, thereby converting revenue laws into instruments for indirectly confiscating that entire estate in land which the constitution forbids congress from confiscating by direct laws. But whatever view might have been in the mind of the court, Bennett v. Hunter and Tacey v. Irwin [supra] were cases involving lands which were sold under that provision of section 7 which expressly gave authority to sell in all cases where the owners had not appeared in person before the commissioners and paid the tax. The court decided that sales thus expressly authorized were nevertheless void when the owners had through friends or agents tendered payment of the tax, and that the law would presume that owners were ready to make offer of payment by friends or agents if such offer had not been rendered nugatory in advance by a rule and practice of the commissioners to receive the tax only from owners in person. If, therefore, sales expressly authorized by the language of section 7 were void, then for a stronger reason was the sale of Arlington void, which could not, as I conceive, have been made under this clause of section 7, apparently containing such express authority, but was made under another clause of that section, which authorized sales to the United States of such lands as the president should direct to be purchased for military, educational, or kindred purposes, without reference to whether or not the owner had offered to pay the tax by a friend or agent. If the principle on which the supreme court decided the sales of Hunter's and Irwin's lands to be void was so strong as to override express language authorizing them, found in the law, it certainly may be followed in the present case, where the land was sold under a provision which in terms gave no authority to sell lands of persons who had not appeared in person to pay the tax.

I cannot agree with defendants' counsel in the opinion that the two clauses in section 7, one of them authorizing sales to both government and private persons, but restricting the government to bids not exceeding two-thirds the assessed value of the lands, and the other clause, directing the sale of lands to the United States without restriction of price when the president ordered their purchase for certain purposes, as both governing in such sales as that of Arlington. I think the clauses are distinct and several, each of them authorizing sales which could not have been made under the other. The sale of Arlington could not have been made under the prior clause of section 7, because it was not made to a private person, nor made to the United States at a price less than two-thirds of its assessed value. How, therefore, could both clauses have governed in this sale? The language of the prior clause imposing disabilities as to the payment of the tax by restricting the right to owners in person, is for that reason to be construed strictly, is to be given as limited an application as possible, and is not unnecessarily to be extended to

other clauses of section 7. But even if this rule of construction did not govern, I do not think that the language of the clause authorizing the sale of the lands of all owners who had not appeared in person and paid their taxes, could, by any logical construction, be extended to the other clauses of section 7. This clause is an independent provision, not found in the original law, not necessary to the sense of any other part of the law either in its original or present form, not connected grammatically or in logical course of thought with the context, but interjected into a place in the section no better suited to its admission than any other place, and having every characteristic of a piece of patchwork. I do not think it has any control over the other clause standing at a distance from it in section 7, under which Arlington was sold; and I do not think that the theory of defendants' counsel that the two clauses apply inseparably to all sales is tenable.

I do not think I ought to pass unnoticed the distinction which defendants' counsel drew in their argument for their instruction No. 1, between a tax sale made to a private purchaser, such as was passed upon by the supreme court in the two cases which have been under consideration, and a sale made to the United States, no instance of which has been considered by the supreme court in connection with the question whether or not an owner could pay his tax by an agent and not in person. They base this distinction upon the pretension that although under the decisions of the supreme court in the two cases referred to, a tender or offer of the tax made before the tax sale by a friend or agent of the owner is valid against the purchaser, if the land be afterwards purchased by a private person; yet, if the purchaser turn out to be the United States, that fact, under the language of the first-quoted clause of section 7, will retroactively render the tender or offer of the tax by a friend or agent, which was valid and sufficient before the sale, void afterwards as against the United States. I have already expressed the opinion that the language in the clause of section 7 referred to, does not apply to a sale to the government made under direction of the president, as this sale of Arlington was. But even if the case were otherwise, I do not see how such a distinction as counsel have taken can be maintained. The decisions in Bennett v. Hunter and Tacey v. Irwin were intended to define the rights of owners of lands assessed with taxes, during the period anterior to the tax sales. The first decision distinguished between the rights of a landowner before the tax sale and his rights after the sale. It held that, as the object of the law under review was to raise taxes and not to inflict penalties for political conduct, it must be construed with reference to and in aid of that object. It held that an owner of taxed land had a right to pay the taxes due, through a friend or agent before sale: and the chief justice, I repeat, discriminated between this right of paying taxes by an agent, and the absence of the right to redeem lands after their sale for taxes, except in person. Those decisions establish the right of any owner of land, taxable under the laws of congress imposing direct taxes, to pay the tax by a friend or agent, at any time before the tax sale. If the owner had this right to tender or offer payment of a tax through a friend or agent at any time before a sale, and the right was denied him, then it is difficult to see how a subsequent sale to a particular purchaser could, by ex post facto and penal operation, annul that right. A law which makes such discrimination would seem to be unconstitutional, not only in giving to an act performed by government officials under it an ex post facto and penal effect, but also in depriving a person of his vested right in property by a process other than "due process of law," as that phrase is used by the constitution. The impolicy of such a provision of law is as obvious to me as its unconstitutionality. Its evil would be liable to fall not only upon disloyal but upon the most loyal citizens. A severe illness lasting only ninety or a hundred days, would subject the owner of land to the irreclaimable loss of its possession and of all but two-thirds of its value; for the period of advertisement added to the sixty days allowed by the act for redemption, would require an illness of less than a hundred days to divest a citizen of his estate. We can imagine, too, a case of even grosser injustice, which might happen by accident, though my respect for the government forbids me to think it could be morally possible by design. It might happen by accident that government, desiring a piece of land belonging to a loyal citizen engaged in its military service, might in time of war order his command to a distant and protracted service, rendering it impossible for him "to appear in person before the tax commissioners and pay the amount of his tax," and thereby bring on a sale of it for taxes, at which sale it would itself have the power to obtain the land irreclaimably. The familiar expedient employed by King David towards Uriah would here be repeated by accident. I doubt the constitutionality of any provision of a law for raising revenues which would subject to forfeiture lands upon which the taxes, when tendered in behalf of the owner, would by its own terms be prohibited from being received. A law passed for raising taxes, if containing provisions inflicting, without trial, disabilities and penalties for political conduct, in defeat of revenues, would be construed by any court liberally in aid of the provisions for raising revenues, and very narrowly as to the provisions inflicting penalties in defeat of revenues. I think I may construe the decisions of the supreme court, in the two cases which have been cited, as going to the extent of holding that the owner of land assessed for taxes under the laws of 1862-63 might pay them, or tender or offer to pay them, through an agent, at any time

before the tax sale, as against all purchasers, whether private individuals or the United States. I therefore feel bound to refuse the instruction No. 1, prayed for by defendants' counsel. On the other hand, on the authority of the decisions of the supreme court in Bennett v. Hunter, and Tacey v. Irwin, rendered upon the proceedings of the same tax commissioners as sold Arlington, and the validity of whose certificate of sale is now impeached on the same grounds as were relied upon in those cases, I feel not only authorized, but bound, to give the two instructions asked for by the plaintiff. They are in these words:

"Instructions for the plaintiff: (1) If the jury believe from the evidence that Philip R. Fendall, for and on behalf of the owner of the property in controversy, prior to the sale thereof of the tax commissioners, on the 11th day of January, 1864, offered to pay the amount chargeable on said property, under the act of congress entitled 'An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' approved June 7th, 1862, and the acts amendatory thereof; and that said offer was refused by said commissioners because it was not made by the owner in person, then said sale was unauthorized, and conferred no title upon the purchaser. (2) If the jury believe, from the evidence, that the commissioners, prior to January 11th, 1864, established, announced, and uniformly followed a general rule, under which they refused to receive, on property which had been advertised for sale, from any one but the owner or a party in interest, in person, when offered, the amount chargeable upon said property, by reason of said acts of congress, then said rule dispensed with the necessity of a tender, and in absence of proof to the contrary the law presumes that said amount would have been paid, and the court instructs the jury that, upon such a state of facts, the sale of the property in controversy, made on the said 11th day of January, 1864, was unauthorized, and conferred no title upon the purchaser."

The verdict of the jury was for the plaintiff. The defence on the coming in of the verdict moved to set it aside as contrary to the law and the evidence of the case, and the motion was entered and set for hearing at an adjourned term of the court in the April following. At the time set for the hearing of the motion defendants' counsel relied upon a decision which had been shortly before made in the case of Carr v. U. S., since reported [98 U. S. 433]. But the judge did not think the case so conclusive as to justify a new trial, and a renewal of his ruling on the question of jurisdiction. He has filed the following note on that case:

Note of the Judge on the case of Carr v. The United States.

HUGHES, District Judge. In the case of Carr v. U. S. [supra], the court below and the supreme court, on a bill brought by the United States to test the validity of the title in real property, both held that the United States were entitled on the law and evidence, of right, to the property. There had been previous suits before state justices of the peace, and in county and other local state courts, in which the title of the grantor of Carr had been held good by these courts; but in none of these suits were the United States a party of record, and only in some of these state courts were its officers or agents parties. The decision of the supreme court in this case of Carr v. U. S. is that judgments of inferior state courts to which the United States were not a party did not estop the United States from setting up their right in a suit in which they are properly a party. This is true on the general principles of estoppel. There is a dictum in the case that where it appears in the course of a suit for possession that the possession assailed is that of the government the suit ought to cease; but this is a dictum, and I am not at liberty that the court would intend by a dictum to overrule its own judgments in the cases of Meigs v. McClung [9 Cranch (13 U. S.) 11]; Wilcox v. Jackson [13 Pet. (38 U. S.) 498]; Grisar v. McDowell [6 Wall. (73 U. S.) 363]; and Cooley v. O'Conner [12 Wall. (79 U. S.) 391]. This Case of Carr was one in which the legal title and the equities were on the side of the United States, in which this was decided to be the case, and in which the supreme court goes on to decide that contrary decisions on this title in inferior state courts in suits to which the United States were not a party did not estop the United States from recovering.

The case at bar—the Arlington Case—is the reverse of this. The jury on the facts, and the court on the law of the case, have decided that the plaintiff is entitled to recover the land. The statutory law regulating the practice expressly allowed the right to be tried after service of the declaration in ejectment on the occupant of the land, and in the action of ejectment the government voluntarily intervened. There is no question of estoppel here. The case has gone to a verdict. Nothing remains to be done except to enter judgment so that the case may go before the supreme court on a writ of error, or for execution to issue on the judgment. I should not be willing to order the execution under any circumstances; but I do see nothing in the case of Carr v. U. S. to require me to dismiss this suit at the present time.

[NOTE. This case was taken to the supreme court upon two writs of error, one prosecuted by the United States eo nomine, and the other by the attorney general of the United States in the names of Kaufman and Strong. These two writs are considered together by the court. The main propositions involved therein are: (1) Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in plaintiff? (2) If such an action could be maintained, was the

prima facie title divested by the tax sale and the certificate given by the commissioners? Mr. Justice Miller delivered the opinion of the court, in which he says: "It is believed that no division of opinion exists among the members of this court on the proposition that the ruling of law under which the latter question was submitted by the court to the jury was sound, and that the jury were authorized to find, as they evidently did find, that the tax certificate and the sale which it recited did not divest the plaintiff of his title to the property. No substantial objection is seen on the face of the certificate to its validity, and none has been seriously urged. It was admitted in evidence by the court, and, unless impeached by extrinsic evidence offered by the plaintiff, it defeated his title." Upon the question of the evidence offered by the plaintiff the learned justice remarks: "It is proper to observe that there was evidence, uncontradicted, to show that Mr. Fendall appeared before the commissioners in due time, and offered, on the part of Mrs. Lee, in whom the title then was, to pay the taxes, interest, and costs, and was told that the commissioner could receive the money from no one but the owner of the land in person." The sales of the property under the conditions of this case could not divest the plaintiff's title, for, says the learned justice, continuing: "The commissioners having, in the execution of the law, acted upon a rule which deprived the owner of the land of an important right,—a right which has, in no instance known to us, or cited by counsel, been refused to a taxpayer,—the sale made under such circumstances is invalid; as much so as if the tax had been actually paid or tendered." Upon the first question—the relation of the possessions of the United States—the learned justice examines very fully a number of English and American cases, as also all of the previous cases touching upon the points which have been heard in the supreme court, after which he says: "This examination of the cases in this court establishes clearly the result that the proposition that, when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title, and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound." The judgment of the circuit court is affirmed, Mr. Justice Gray, dissenting. 106 U. S. 196, 1 Sup. Ct. 240. For the findings of the circuit court and the judgment entered in a similar case to this, brought by the same plaintiff, see Case No. 8,185.]

Case No. 8,193.

LEE v. LACEY.

[1 Cranch, C. C. 263.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.

SLAVERY—CARRYING AWAY SLAVE—KNOWLEDGE OF CARRIER.

In an action upon the case against the master of a vessel, for carrying, or attempting to carry away the plaintiff's slave, contrary to the act of Virginia of 25th of January, 1798, §§ 6, 7, the defendant is not liable unless he knew that the slave was on board.

This was an action upon the case upon the statute of Virginia of 25th January, 1798, §§ 6, 7, by [E. J. Lee,] the owner of a slave, against [Benjamin Lacey,] the master of a Georgetown packet-boat, for damages for carrying the plaintiff's slave from Alexandria to Georgetown, whereby the plaintiff lost the service of the slave from the 29th of April to the 21st of May, and was put to great expense, &c. There were two counts upon the statute, namely, one for carrying away, and the other for attempting to carry away a negro belonging to the plaintiff. There were also several counts at common law.

Mr. Jones and C. Lee, for plaintiff.

Mr. Swann, for defendant.

THE COURT instructed the jury, that if the defendant had no knowledge of the negro coming on board, nor of his being on board his boat, nor of his going out of his boat in Georgetown, the defendant was not liable; but that if the defendant saw the negro during the passage, or knew of his being on board his boat, and suffered him to land and go at large in Georgetown, he was liable in this action for damages if the plaintiff can prove that he sustained any thereby. Verdict for the plaintiff, 120 dollars.

Case No. 8,194.

LEE v. LEE.

[4 Cranch, C. C. 643.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

SLAVERY — DISTRICT OF COLUMBIA — TEMPORARY HIRING FROM VIRGINIA—ACT JUNE 24, 1812.

1. A temporary hiring of Virginia slaves in the county of Alexandria, D. C., with intent to evade the law in the county of Washington against the importation of slaves into this county, will not authorize the owner, residing in Washington, to bring them into the county of Washington to reside therein.

2. The ninth section of the act of congress of the 24th of June, 1812 [2 Stat. 755], does not authorize an inhabitant of Washington, owning slaves in Alexandria, to remove them to Washington.

Petition for freedom [by Sam Lee and Barbara Lee against Elizabeth Lee]. Upon the trial of this cause on the venire de novo ordered by the supreme court of the United States at its January term, 1834. 8 Pet. [33 U. S.] 44. This court, at the prayers of the petitioners' counsel, instructed the jury that if they believe, from the evidence, that the petitioners were the slaves of R. B. Lee, deceased, in the state of Virginia, from whence he removed with his family to Washington county, D. C., where he continued to reside till his death; that in 1820 the petitioners who continued to reside, as his slaves, in Virginia, were by him brought to Alexandria

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

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

county, and thence removed by him to Washington county to reside, Barbara, in about a year from her coming from Virginia, and Sam in a period of four or six months, and have since resided in the said county of Washington; then, from the said facts, the jury must find for the petitioners, if they shall believe, from the said evidence, that the bringing of the said slaves to Alexandria county was merely colorable, and with intent to evade the law prohibiting the direct importation of slaves from Virginia to the county of Washington to reside therein. And, at the prayer of the defendant's counsel, further instructed the jury that an intent to evade the law, as supposed in the foregoing instruction, ought not to be presumed without proof; and that the burden of proving such intent is on the petitioners; and it is left to the jury to weigh the whole evidence in the cause, and decide whether it be sufficient to prove such intent.

The defendant's counsel then prayed the court to instruct the jury, in effect, that if Mr. R. B. Lee, being an inhabitant of Washington county, and owner of the petitioners, in Virginia, in 1820 removed them from Virginia to Alexandria, bona fide, and without intent to evade the law prohibiting the direct importation from Virginia to Washington county, and hired them out there, one for one year and upwards, and Sam for five or six months, and, after their said terms of service, removed them from Alexandria county to Washington county, whereof he continued to be an inhabitant, then such removal from Alexandria to Washington was lawful.

But THE COURT (MORSELL, Circuit Judge, dissenting) refused to give the instruction; being of opinion that an inhabitant of Washington county could not, under the ninth section of the act of congress of the 24th of June, 1812 (2 Stat. 755), remove his slaves from Alexandria county to Washington county; he not being an inhabitant of the county in which the slaves were, and possessing them therein.

The verdict was for the defendant; and THE COURT refused to grant a new trial, which was moved for on the ground that the verdict was against the law and the evidence in the case.

Case No. 8,195.

LEE v. LINCOLN.

[1 Story, 610; 4 Law Rep. 301; 6 Hunt, Mer. Mag. 174.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1841.

CUSTOMS DUTIES—CONSTRUCTION OF TARIFF LAWS—GUNNY BAGS—COTTON BAGGING.

[If the jury find that gunny cloth and bags were before the tariff act 1832 (4 Stat. 583) not known to merchants and the trade under the general head of cotton bagging, but had a distinctive name, then the cloth and bags should not be taxed under the act as cotton bagging, although since its passage they had been imported and used as cotton bagging.]

This was an action [by Henry Lee] against the defendant [Levi Lincoln], as collector of the port of Boston, to recover back the amount of duties, paid under protest, upon a quantity of gunny cloth, imported by the plaintiffs, and charged with the duty on cotton bagging by the collector. The tariff act of 1832 [4 Stat. 583] lays a duty "on cotton bagging, three and a half cents per square yard, without regard to the weight or width of the article." There is no mention in this, or in any preceding tariff law, of the article, gunny cloth. It was stated, and not denied on the part of the government, that the comptroller of the treasury, at Washington, issued a circular, dated December 26th, 1833, in which gunny cloth was declared "exempt from duty, on the assumption of its being an unenumerated article." After this declaration, the article was imported and admitted free of duty in the port of Boston, for nearly five years and a half. But subsequently, the department at Washington was informed, that "gunny cloth" was imported in large quantities, and sold for the purposes of cotton bagging; in consequence of which, another circular was issued by the comptroller, dated June 3d, 1839, instructing the collectors of the different ports to levy the cotton bagging duty "on all articles suitable for and used in making cotton bagging." This circular was repeated on the 12th of May, 1840. The importers of gunny cloth gave their bonds, in conformity with this requisition, but always under protest; and brought the question before the circuit court at its next sitting. This was at the October term, 1840. A verdict was then rendered, under instructions from Mr. Justice Story, in favor of the importers, upon the ground, that gunny cloth was not subject to a duty as cotton bagging within the meaning of the law. Bacon v. Bancroft [Case No. 714]. After this decision, instructions were transmitted to the collectors of the principal ports, by a circular dated January 19th, 1841, under which the article was admitted free of duty. This continued for a few months, when the former order of June 3d, 1839, was issued again by the comptroller of the treasury. Under this order, the collector of the port of Boston has compelled the importers to give bonds for duties on gunny cloth as cotton bagging, which they have done under protest, and paid under protest. This action, with others, was brought to recover back the money so paid.

Mr. Wigglesworth, Mr. Whitney, and Mr. Dixwell, merchants of Boston, testified, that they were acquainted with the trade with Calcutta and the East Indies, prior to 1832 (the year when the tariff was enacted); that

[1] [Reported by William W. Story, Esq. 6 Hunt, Mer. Mag. 174, contains only a condensed report.]

the article, "gunny," for a long series of years before, was well known as the covering of packages and bales of goods coming from the East Indies; that it had been imported in the shape of bags prior to 1832, and that it had been sometimes imported in whole pieces prior to 1832; that prior to 1832, it was well known among merchants as gunny, and was never included under the term "cotton bagging"; that its commercial name was "gunny," and that it had never been applied to the uses of cotton bagging until a considerable time after the passage of the tariff law, and about three or four years ago.

Depositions of New York merchants were offered, on the part of the defendant, in order to show, that the term, "cotton bagging," was, in 1832, applied to all fabrics intended for the baling of cotton. Mr. Brown, an assistant appraiser in the New York custom house, was also introduced by the defendant, to establish this view. He said, that the term, "cotton bagging" was not applied to a fabric of any one material; that generally the fabric was of hemp, tow, or flax; and that twenty years ago he had known it made of cotton. Most of the witnesses, who had deposed, in their answers to the cross-interrogatories, agreed with the witnesses for the plaintiffs, that if, in 1832, they had received an order from a distant correspondent for a certain quantity of cotton bagging, they should not, at that time, have considered it a proper compliance with the order, to send gunny cloth. They also agreed, that gunny cloth was never applied to the purposes of cotton bagging previous to 1832.

Charles G. Loring and Charles Sumner, for plaintiff.

F. Dexter, Dist. Atty., for defendant.

STORY, Circuit Justice, in summing up to the jury, said: The case turns upon a question of fact, dependent upon the true interpretation of the tariff law of 1832. If gunny cloths, or gunny bags, were at or before the passage of the tariff act of 1832, known or denominated by merchants, or in commercial trade, or business, as "cotton bagging," then the collector has acted rightly in demanding the duties. But if gunny cloth or gunny bags were at and before that period always known by merchants, or in commercial trade, or business, by a distinct name, and were never known by the denomination of "cotton bagging," then they are not liable to the payment of duties under the act of 1832, as cotton bagging. The tariff laws are to be construed according to the commercial sense of the terms used in them. If this were not so, they would operate, as a fraud upon the people, and upon the merchants, who are guided by them in their business. The language of merchants is looked to in the construction of commercial laws and commercial contracts. The government must show, that gunny cloth was known as "cotton bagging" in 1832, and had, at that time, acquired this appellation. Congress are not presumed to tax an article under a denomination, which it never bore; much less, if the article has always borne another distinct name. In the present case, if the evidence is believed, not only before and up to the passage of the act of 1832, but long afterwards, gunny cloths and gunny bags were always known by a distinct name and denomination, and never by the name of "cotton bagging." They never had been used or applied to the purposes of cotton bagging; but they were wholly used for other and different purposes; and they have been used for cotton bagging only within three or four years last past. If this evidence be true, and be believed by the jury, then the case is made out for the plaintiff. In articles of promiscuous use, the mere fact, that a particular article is now used for a new purpose, to which it has never before been applied, will not alone change its character, or make it liable to a different duty from that, which it was before liable to. Verdict for the plaintiff.

Case No. 8,196.

LEE v. LUTHER.

[3 Woodb. & M. 519.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1847.

GIFTS—INTER VIVOS—GIFT BY CESTUI QUE TRUST TO TRUSTEE—DOMINION PARTED WITH—REVOCATION AT WILL.

1. A, in his lifetime, purchased a share in a ship, and B took the bill of sale to hold the same in trust for A, taking B.'s bond. A afterwards promised B that he should have the share at his death. A received the profits of the share, and afterwards in writing directed the trust to be conveyed to C, and died. C assigned to the executors of A, who brought a bill against B. for the share. When the respondent offered parol evidence to show a declaration of gift of the trust property to him, to take effect at the death of cestui que use, *held* madmissible to contradict the written declaration of trust. Semble, if made at same time.

2. Evidence of a parol gift made after the declaration of trust rebutted by proof that the cestui que use continued to take the profits of the share.

3. To make an absolute gift inter vivos, the owner must part with his dominion over the property.

4. A parol promise to the trustee that he should have the share after the death of the cestui que use, is not an absolute gift, and is revocable at pleasure.

[Cited in Smith v. Dorsey, 38 Ind. 457.]

5. Nor can an action be supported on it, if afterwards the cestui que use makes a new disposition of the same. Here A has made a new disposition in writing of the trust, and thereby has revoked the promise set up by respondent.

This was a bill in equity brought to enforce a conveyance to the plaintiff [John C. Lee] of one-sixteenth of a vessel called the

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

Philip Tabb, and to account for the profits received from it. The complainant claimed title to this extent in the vessel in consequence of its having been bought and paid for by Joseph Lee, on the 24th of October, 1832, and the said Joseph dying in 1845, John Whipple, his administrator, having assigned the above share of Joseph to the complainant. On the contrary, the respondent [Henry H. Luther] set up a title in his answer, to this share of one-sixteenth, on the ground that when Joseph Lee purchased it, he took a bill of sale, running to one John Luther, who afterwards was allowed to manage it in trust, paying over the proceeds to said Joseph, and that he made a verbal promise, this share should be Luther's at the death of said Joseph. In December, 1840, John Luther, becoming embarrassed, assigned this share to the respondent to hold it in trust under the agreement between Joseph Lee and John Luther, the former having died and made no other disposition of it. The complainant, in argument, denied any such verbal agreement, and set up, if there was one, that a different disposal of this property was made by said Joseph before his death in March 25th, 1845, ordering it to be transferred to Henry Lee, Jr., and that Henry directed it to be paid to the administrators of Joseph, who assigned it to the complainant. Some evidence was put into the case on both sides. On the part of the respondent, the conveyance of John Luther to the defendant showed that said John then claimed this share and the income of it after the death of Joseph. And the deposition of Mason Barney showed that Joseph Lee often informed him of his friendship for John Luther, and his intention that John should have all his interest in the whole ship Philip Tabb, and his design to give John considerable property. Stephen Johnson testified also to Joseph Lee's declaration, that he had meant to give him considerable property, but should now give him only his interest in the Philip Tabb. The complainant proved that Joseph, some time before his death, when indisposed, directed his share in the Philip Tabb to be transferred to Henry Lee, Jr., by a writing as follows: "S. P. Child & Co., agents for the Philip Tabb, whaleman, value received, please to transfer to Henry Lee, Jr., my share in the Philip Tabb now on a whaling voyage. Yours with regard, Joseph Lee." This was indorsed to the administrators of Joseph Lee, for his heirs, without consideration, under a belief by Henry Lee that such was Joseph's intent. The original bill of sale when the share was bought by Joseph was not put in, nor any proof who had held it since, or that he was sick when it was taken in the name of John Luther in 1832.

John Whipple, for complainant.
Mr. Bosworth, for respondent.

WOODBURY, Circuit Justice. The original transaction as to this share of one-sixteenth of the whole ship Philip Tabb, the title to which is now in controversy, was very loose. If Joseph Lee in 1832, when purchasing this share, intended then to make an absolute gift of it to John Luther, to take effect at the death of Joseph, it would have been very easy to have said so in some writing directly from him to Luther. It might have been done, also, by the bill of sale of the share which was taken in the name of John Luther. If Joseph had caused it to be stated as a gift on the face of the bill, and delivered it, and if the other evidence was that the parties intended by this a gift, it would be tantamount to a bill of sale, first to Joseph, and then by him to John Luther. But neither of these was done. On the contrary, it is admitted in the answer, that by inserting John Luther's name as vendee in the bill, Joseph did not intend to make a gift in fee in presenti, or one absolutely, but both parties say it was at first to be held in trust by Luther for Joseph. Proceeding, then, as we must, to consider it a trust, if this writing had been produced, (and it is said in argument to be in John Luther's possession,) and had it contained an expression that the share was to be held in trust, it is very doubtful whether the parol evidence offered here to show it was to be a gift on Joseph's death, is competent. Such evidence would directly contradict the writing as to a trust, if it showed a parol agreement to have the share go as a gift to Luther on the death of Joseph. If made at the same time with the bill of sale, it is in that view hardly admissible. But if made afterwards, and was then a subsequent parol gift of this share in the vessel absolute or unconditional, it ought to be proved with more distinctness as to time and circumstances. There is some evidence from which such a gift might be inferred, though it is not very strong, and it is rebutted in some degree, that such a gift had ever been really made, or anything more than contemplated in future; for Joseph continued to take the earnings of the share, and actually disposed of it, or ordered it to be transferred to a different person before his death.

The real truth of the transaction, then, probably was that when Joseph bought this share, by taking the conveyance in John Luther's name, and by subsequently saying he intended to give it to him, his design was to make such a gift thereafter, but not then, and by continuing to take the income from it he meant not to perfect the gift till he might be pleased to do it soon before his death. Both parties, also, considered it not as a gift then, but a trust, on some terms not very clear. It is so admitted in the answer, and in the deed by John to the respondent it is so described expressly. But for this, as before remarked, the title

standing in Luther's name might be considered sufficient evidence of a gift then intended inter vivos, and the delivery of the vessel or share into his charge might be deemed a delivery of possession under the gift, if no other purpose had been expressed and acted on. But now it must be regarded as only evidence of a resulting trust in favor of Joseph, who paid the consideration, and not regarded as proof it was a present gift, or even to become one before his death, unless he did not conclude to transfer the trust or share to some other person, but let the property when he did become the trustee. All the acts of the parties look to such an understanding. In this view it was valid as a trust in form, at the time. But it was not valid as an absolute gift at the time, because the possession was not given to John Luther of this share, as an absolute donee. He was not allowed to use it so, or so to deal with its income.

The delivery or possession was diverso intuitu, and we think not as an absolute gift. To make such a gift good, the donor must at least part with dominion over it. 1 Nott & McC. 237. That was not done here. Whether the subsequent agreement or promise by Joseph to leave it after his death to Luther, could be a good gift inter vivos, is very questionable, for the want of a delivery to carry into effect such a promise. Grattan v. Appleton [Case No. 5,707]; 2 Johns. 52; 7 Johns. 26; 10 Johns. 293; 4 Dane, Abr. 122; 6 N. H. 388. Much more is it questionable, when the promise, if existing and clear, was afterwards attempted to be rescinded by transferring the share to Henry Lee, and was never carried into effect by any new act, or writing, or will. It would, then, as a promise only, be revocable, and be incomplete till something more was done perfecting it. 7 Johns. 26.

In this view, too, the matter is not helped by calling it a donatio causa mortis, for that, likewise, requires a delivery. 4 Dane, Abr. 123; 18 Johns. 145. It requires, also, sickness when the gift is made, which did not exist here, in 1832, when the bill of sale was taken in the name of John Luther. 1 Bligh (N. S.) 530; 2 Ves. Jr. 121; 3 P. Wms. 357; 4 Brown, Ch. 290. Nor did the bill of sale to John amount to a will or legacy, though it might have been sufficient in most cases to pass such a title or share in a vessel, as a gift inter vivos (4 Dane, Abr. "Gift," 122, 123), if the parties here had not both conceded it was meant, when done, to create a trust, and not to be evidence of an outright gift, and had not allowed some control to remain in Joseph, as cestui que trust, and entitled to and receiving the profits. But besides these difficulties in considering the original transaction anything except a trust, and if a trust at that time still one, and still liable to be enforced in favor of the administrators of the cestui que trust, or their assignee, and beside, the difficulty in supposing the trust, then or since, by any act of Joseph, converted into a gift to John Luther, the evidence for the complainant and the conduct of Joseph prove rather the reverse. The case was considered a mere promise or mere intent to extinguish the trust at his death and turn it into a gift, if his regard to John Luther should continue to be such as to prevent him from changing that intent. But he did change it clearly.

Finding that Luther had afterwards failed in business in 1840 and assigned the trust and trust property to the respondent, and had conducted so as on the proof not to meet with his entire approbation, and is stated to have taken the benefit of the bankrupt law, while indebted largely to Joseph, and paying nothing, and Joseph having other persons relations, and near him, when becoming indisposed, he seems to have determined at last to give his property elsewhere. He resolved, not only to refrain from giving to Luther much of his estate, as once contemplated, but to withdraw this share from him and transfer it to another person. Under all these changed circumstances such a course was natural. The writing in the case in March, 1845. to Henry Lee, which is evidence of this, was an order to convey the vessel to him and not Luther. The words used apply, also, to the vessel itself, rather than the mere income of any voyage. No income appears to have been then due for it to cover. The vessel was abroad, and he therefore directs to be transferred to Henry Lee his share in the Philip Tabb, and does not convey to him or order to be transferred to him his interest in the income of any particular voyage. To give it effect, also, as a transfer, and not a mere gift, he admits value received, though Henry Lee, by his testimony, considered it rather an order for a conveyance to him with a view to restore the title for the benefit of the heirs, rather than a gift to Henry Lee. It may be remarked as to this writing, as well as the bill of sale to John Luther, and the parol promise to make a gift of the share to him, if properly proved;—neither, perhaps, could be enforced as executory promises to make gifts or legacies at some future time. No legal right or title is probably created by a mere promise to make a gift. 7 Johns. 26; 4 Dane, Abr. 127. Such a promise is not actionable. 6 N. H. 390; 2 Barn. & Ald. 551; 10 Johns. 293; 2 Johns. 52. Even a note promising to give money, though delivered, but not actually paying over, on delivering, the money itself, has been held not to be a good gift, nor the note recoverable by the promisee. Copp v. Sawyer, 6 N. H. 388; Holliday v. Atkinson, 5 Barn. & C. 501; Fink v. Cox, 18 Johns. 145.

The following case may seem to conflict with the above, holding a promissory note, to be delivered after the promisor's death, good, if duly delivered: Bowers v. Hurd, 10 Mass. 427; 2 Dane, Abr. 257. But I do not decide on these cases of promissory notes.

Naked promises to make legacies are clearly voidable as such, and this was the case of any promise to make a gift to John Luther. In respect to the written order to Henry Lee, he did not try to enforce it as a promise of any legacy or gift, but merely as a written declaration of a new trust in relation to this share. He could have received the transfer of the share under it, and it would have been a valid conveyance. But this being refused by the respondent, Henry Lee assigned it to the administrator of Joseph for his heirs, and he to the plaintiff. This passed his interest, and entitled the plaintiff to have the share. It showed, at least, a declaration by Joseph of the trust as to the share in favor of another person than John Luther, and in writing. It showed a design before his death that the share was not to be Luther's after the date of this writing, and after the death of Joseph, whatever may have been his previous views. Joseph, doubtless, had as much right to make a new declaration of a trust as one has to make a new devise or will before his decease. Luther had paid nothing for the share, bought nothing, had been given nothing outright, not even the income. All agree it was meant, at first, to be only a trust, and if a gift, till his death it stood revocable. All resulting trusts, as this was in law, may, also, at any time be conveyed to any other person than the grantee, if cestui que trust pleases. Wms. Ex'rs, 505. Indeed, the conveyance to the respondent by Luther contains some matter indicating that no interest then existed in John, or he must have had a design to defraud creditors by means of it. If John then possessed any interest in presenti, that could be sold, and it should have passed to his creditors. So as to his bankruptcy, and not accounting for this property: if he had any interest in it left then, it should have been assigned to his creditors. The proof on these last matters comes out or rests more in concessions in the arguments than in other evidence though the acts of John in these respects can only be justified on this hypothesis, and thus help to sustain it: that he himself then supposed he had no present interest in the share beyond that of a naked trustee.

It is objected further, that this order of transfer to Henry Lee was not directed to John Luther or Henry Luther in whose name the title stood, nor in correct form to the agent of the ship. But this is of little consequence, as it is proved what it is meant for; and enough is contained in it to show a design that the trust should operate in favor of Henry Lee, and the share transferred to him, rather than remain longer nominally in the name of John Luther, or in the hands of others, whoever they might be. It was the share in the vessel they were looking to, rather than the name of him who might have the technical trust over it at that moment.

The respondent admits in argument, and admitted in his bond to John Luther, that he was to convey to Joseph the share whenever desired. Now is not this writing to Henry Lee such a desire or wish expressed by Joseph? Is it not a conveyance or transfer requested to be made to his agent or assignee, and thus in law and equity the same as if to himself? The only objection in that view would be its address to the supposed managers of the ship, rather than to John or Henry Luther. But no one can doubt it was intended as a request to have this share conveyed to Henry Lee at his request, whoever might possess the technical authority to do it, and this is very clear on the explanatory evidence which is consistent with the writing, and therefore competent. Heckscher v. Binney [Case No. 6,316]. Under all the facts and circumstances, then, it is impossible, on what is before us, without further matter in evidence, to hold that the transaction with John Luther can be treated as an absolute gift, in presenti, or one to be completed by a certain event, and not open in the meantime to change or revocation by the donor, and not in the meantime being under his dominion and control. And if being under his control till death, no doubt exists that he ordered it to be transferred to another person than John Luther, and hence that John Luther is not entitled to it. The executor represented here both that other person and the heirs. He assigned the share to the plaintiff, and the latter is therefore entitled to the share and its income not before accounted for. The decree must be to account for the income of the share since in possession of the respondent, and to convey the share itself to the complainant, if the vessel remains unsold and not lost; but in either of these events to pay over his share in her value when sold, or in the insurance if lost, and interest since.

Case No. 8,197.

LEE et al. v. NEW HAVEN, M. & W. R. CO.[1]

Circuit Court, D. Connecticut. July 31, 1877.

ASSUMPSIT—CONTRACT—PLEADING—AMENDMENT—JOINDER OF CAUSES—CONTRACT—INTERPRETATION—RAILROAD CONSTRUCTION—EVIDENCE—INSTRUCTIONS—TRIAL—CROSS-EXAMINATION—EVIDENCE—CONTRACTS—DEFAULT IN PAYMENT.

1. A railroad construction contract under seal required the completion of the work at a fixed date to the satisfaction of the company, and provided for monthly payments as the work progressed. The work was not finished in the required time, and the monthly payments were not made. Finally the company notified the contractors that they had failed to comply with the contract, and that the same was thereby rescinded. But all the work done had in fact been accepted by the officers of the company. *Held*, that the contractors could maintain an action of indebitatus assumpsit for all the work done.

2. Under the Connecticut statute of amendments, which is practically adopted by the rules of the federal circuit court, plaintiffs were entitled to amend their declaration by adding a special count in covenant.

[1] [Not previously reported.]

3. In a railroad construction contract, an agreement to do the work to the "full satisfaction" of the company does not of itself give the company power to arbitrarily rescind the contract, and means that the work must be done to its satisfaction, not unreasonably withheld.

4. A railroad construction contract provided that the work as it progressed was to be paid for in monthly installments "in bonds which are to be guarantied by the towns of Portland, Chatham, and Hebron, respectively, and, when these are used up, then in bonds to be guarantied by the town of Middletown." But, by the terms of the vote of Chatham, no bonds were to be guarantied until the work was completed. *Held* that, although this rendered the Chatham bonds unavailable for the monthly payments, it did not exempt the company from the duty of making the same, and, the bonds of Portland and Hebron being exhausted or unavailable, it was bound to pay in Middletown bonds.

5. The fact that by the votes of Portland, Hebron, and Middletown no bonds were to be guarantied by them until contracts had been let for the completion of the road "ready for travel" did not make it the duty of the contractors to do any work subsequent to track laying, the same not being included in the terms of the contract.

6. Other contracts for other parts of the road were let by the company about the same time, and the contract with plaintiffs obligated them to complete any work left unfinished by any other contractors on the same terms as provided for in the agreement of the defaulting contractors. *Held*, that this did not render plaintiffs insurers of the other contractors, and they were not bound to do any such unfinished work until notified of the default by the company.

7. Alleged error in the admission of testimony to the effect that it was the custom of railroad companies, in contracts for construction involving fills, to furnish "borrow pits," was rendered immaterial to defendant by a subsequent instruction that, under the contract, it was incumbent on the contractor to provide "borrow pits."

8. In the course of a cross-examination of the company's secretary, which was for the purpose of showing the active participation of defendants in efforts to prevent plaintiffs from receiving their pay, it was proper to allow a question as to whether witness did not recollect that after a specified date a "batch of suits" was brought against plaintiff wherein the company was garnished.

9. Under a contract which provides for the completion of certain work on a specified date, and for monthly payments as the work progresses, the contractor is justified in quitting work after default in such payments, and can recover for the value of the work actually done.

At Law. Action by John Lee & Son against the New Haven, Middletown & Willimantic Railroad Company to recover for work done under a construction contract. Heard on defendant's motion for a new trial.

Alvan P. Hyde, for plaintiffs.

Simeon E. Baldwin and Samuel L. Warner, for defendant.

SHIPMAN, District Judge. This is a motion for a new trial for alleged errors in the charge to the jury. The case is as follows:

Prior to November 1, 1871, the plaintiffs had been contractors for building a portion of the railroad of the defendant between Portland and Willimantic. Other contracts had also been entered into for constructing other sections of the road. The defendant had exhausted its funds, was unable to pay the contractors, and work had been consequently suspended. In this condition of affairs, the legislature of Connecticut, at its May session, 1871, authorized the various towns upon the line of that portion of the new road to guaranty the bonds of the railroad company. These towns, in the fall of 1871, passed sundry votes, which are hereafter referred to. By the aid of this guaranty the defendant hoped to be able to complete its road. It entered into a contract under seal with the plaintiffs dated November 1, 1871, which was, in substance, as follows: "The plaintiffs agreed to do to the full satisfaction of the chief engineer and board of directors of said company, and according to the plans and specifications of said road, all the unfinished work mentioned under the name of John Lee & Son, in the engineer's estimate annexed to said contract, including all the bridges, trestlework, masonry, grading ready for ties and rails, laying the ties and rails, and all other work therein specified, and to furnish the materials therefor, and to bring all the sections therein named up to grade, all for the price or sum of one hundred and seventy thousand nine hundred and fifty dollars ($170,950), the same to be paid in installments, as follows: At the end of each month, counting from the —— day of ——, on which day said work shall commence, there shall be made, by the chief engineer of said company, an estimate of the work which may have been done, and the materials delivered during the month; and the said John Lee & Son shall, within 10 days after the return of such estimate to the office of said company, be paid such proportion of said whole sum of $170,950, as the monthly estimate of work done bears to the whole work hereby contracted to be done by them; and so on, at the end of each month thereafter, until the whole work is completed. And such payments shall be made in bonds of said company at par, bearing interest at seven per cent. per annum, payable semiannually, and indorsed or guarantied by some one of the towns on the line of said road which have recently voted to so indorse or guaranty. All claims for damages for any cause whatever, which either party might have against the other, were canceled and waived, excepting an agreement for the payment of back claims of said John Lee, amounting to $42,500. The plaintiffs agreed to prosecute said work with all diligence, and to complete the same by the first day of May, A. D. eighteen hundred and seventy-two. And the company agreed to make payment of the several installments promptly, as they from time to time became due and payable. And it is further understood and agreed that the installments hereinbefore provided shall be paid to said John Lee & Sons in the bonds which are to be guarantied by the towns of Portland, Chatham, and Hebron, respectively; and when these are used up, then, if more are needed, in bonds to be indorsed or guarantied by the

town of Middletown. And whereas, certain agreements have this day been made by and between the said railroad company on the one part, and certain other contractors, respectively, on the other part, whereby said contractors have agreed to do and perform certain other work on said road, as in their said agreements, respectively, mentioned, for the completion of the whole road ready for ties and rails, and to supply certain materials therefor: Now, the said John Lee & Son have further agreed, and hereby do agree, to do and perform any and all work which said contractors may fail to perform, and to supply all materials which they may fail to supply on said road, and at the same prices or sums, or the pro rata thereof, and upon the same terms and conditions, as they have respectively agreed upon, and have the same completed within the same time, and take their pay in the same kind of bonds which they agreed to take; and, further, they will accept, and hereby do accept, as correct and true, all the estimates of the work and materials so to be done and supplied by said contractors, which estimates are annexed to their respective contracts, and also the estimates hereto annexed of the work and materials to be done and supplied by said John Lee & Son under this their own contract hereto annexed, whether such estimates shall turn out to be correct or not. And it is further agreed that, if any installment shall be due and unpaid to any contractor at the time said John Lee & Son shall undertake to complete such contractor's abandoned work, it shall belong to and be paid to said John Lee & Son, provided they complete such work."

Sundry contracts, dated November 1, 1871, were entered into by the defendant with other contractors, severally, for the completion up to grade, ready for ties, by April 1, 1872, for definite sums, of sundry sections of the road other than those named in the plaintiffs' contract, and constituting in the aggregate all the sections not therein named, east of Middletown. These other contracts are substantially like the plaintiffs' contract, mutatis mutandis, except that they do not provide for completing unfinished work of other contractors. Prior to November 1, 1871, the towns of Middletown, Portland, Chatham, and Hebron, respectively, voted to guaranty the bonds of the defendant to the following amounts, respectively: $300,000, $102,000, $40,000, and $28,000. The terms of said votes were known by the plaintiffs when said contract was made. The votes of Middletown and Portland provided that no bonds should be guarantied, except for work actually done, and materials to be furnished the company after the date of the votes, and for interest absolutely necessary to be paid to keep possession of the road, and that no bonds should be guarantied until contracts were entered into for the entire completion, for definite sums, of the road, ready for running cars, between Middletown and Willimantic, except for said interest. The Hebron vote provided that bonds were not to be guarantied for interest until the road was completed. Chatham voted to guaranty bonds to be used in the completion of said road on and after such times as it shall have been graded, the track laid permanently, and cars shall have passed over the road from New Haven to the village of East Hampton. The plaintiffs subsequently entered into a contract with B. Richardson for rails, fish plates, switches, frogs, depots, and for all the ballasting of the road, and otherwise for its completion ready for the running of cars thereon, for definite sums to be paid said Richardson. Under the plaintiffs' contract, work was done and materials furnished with reasonable dispatch until the month of August, 1872, when, in consequence of the inability of the defendant to pay according to the terms of the contract, work was suspended until December 15, 1872, when it was resumed by agreement between the parties, a partial payment having been made in an order for $10,700 in bonds, agreed to be bought of the plaintiffs, and bought for $10,000 in cash, and the plaintiffs promising to go on with the work in pursuance of the contract. Work was continued until April 10, 1873, when by a vote of the directors of the company, passed April 8, 1873, the plaintiffs were notified that the company considered that they had failed to carry out their contract in letter and spirit, and that the contract was at an end, and that the work would be completed by the defendant, which was accordingly done. The plaintiffs thereupon, on April 11, 1873, brought their action of general assumpsit, to recover for the sums claimed to be due to them for the value of the work and of the extra work which had been done by them for the defendant. Monthly estimates of the work done by plaintiffs were regularly made down to April 10, 1873, by the chief engineer, and the amounts of such estimates were credited to the plaintiffs on the books of said company. Prior to August, 1872, the plaintiffs were paid by the defendant either in bonds of Portland or of Middletown. The bonds of Hebron and Chatham were not then ready to be delivered, as the condition precedent to the guaranty had not occurred. All the bonds which Middletown and Portland had agreed to guaranty had been issued and disposed of prior to December 15, 1872. The sums which were estimated as due to the plaintiffs in January and February, 1873, were paid to the plaintiffs by orders for bonds drawn by said company on some one of the towns which had agreed to guaranty when the conditions of their votes were complied with. These orders, when given, were bought of the plaintiffs by one of the officers of the company at the time the orders were given, as the plaintiffs would not take orders for bonds unless they could turn them into money forthwith. No payments were made upon the estimates of the plaintiffs' work for March and April, 1873. Prior

to March 10, 1873, the defendant had so far disposed of all the bonds which were to be guarantied by the several towns which had voted to guaranty bonds of said company that the defendant had not reserved enough of said bonds to pay the plaintiffs if they should complete the contract. On April 8, 1873, the plaintiffs had not completed all the work called for by their contract. Cars had passed over the road from New Haven to East Hampton prior to April 8, 1873, but the road was not entirely graded, or the track laid permanently, between Middletown and East Hampton, nor did any trains run between said points until some time after the month of April. The plaintiffs were not called upon to do any work of negligent or defaulting contractors, or notified of any deficiency in the work of the other contractors, except the jobs mentioned in the bill of particulars.

The defendant, upon the trial, denied that anything was due upon the contract, or for extra work, and claimed that, if anything was due, the sum was reduced to nothing by the damages to which it had been subjected by the plaintiffs' noncompliance with the contract, which noncompliance compelled a rescission of the contract, and introduced evidence tending to show that, after the work was resumed under the agreement to that effect, of December 15, 1872, the plaintiffs proceeded with intentional and causeless delays, and did their work poorly, and caused great damage by the inefficient manner and slowness with which the work was conducted. The plaintiffs had a conversation with a majority of the directors of the company, on March 10, 1873, in which they asserted that they should stop work unless they got their pay, and did stop work. The plaintiffs admitted this conversation and stoppage, gave evidence tending to show that work was resumed after the suspension of about a day, and that the proposed abandonment was because they had not been paid, and that they had not been paid, and that it was impossible for the company to make any payment, which fact the plaintiffs then knew, and that after they resumed they proceeded with dispatch. They also offered evidence to show that the plaintiffs always worked with dispatch, that the delays were caused by the laches of the defendant, and that the work was duly accepted by the chief engineer and directors of the company, monthly, as it progressed; that the rescission of the contract was improperly and unfairly made, and with intent to benefit, pecuniarily, certain officers of the company. The defendant introduced Robert G. Pike, who was formerly secretary of the company. Upon cross-examination,—the general object of this part of the cross-examination being to show that the company intentionally placed hindrances in the way of the plaintiffs receiving their pay, and also for the purpose of showing that the plaintiffs resumed work after said conversation with the directors, in March, 1873,—the witness was asked by the plaintiffs' counsel, "Do you not recollect that subsequent to the estimate of March 15, 1872, a batch of suits was brought against Lee, and served upon you, by which the company was garnished?" To this question the defendant objected, on the ground that it called for what should be proved by the records of the courts to which such actions, if any, were brought. But the court admitted the question, and the witness replied, "I have a memorandum of ten suits brought March 25, 1872," and read his memorandum. To the admission of this testimony the defendant duly excepted. J. F. Fielder testified for the defendant, and stated that he had been a railroad contractor for 40 years. On cross-examination, he was asked if it was not the universal custom of railroad companies, which had made construction contracts involving fills by contractors, to furnish the latter with necessary borrow pits, when the contract was silent as to which party should furnish them. To this question the defendant objected, as seeking to vary the contract in suit by parol, but the court admitted it, and the witness answered in the affirmative, to which ruling the defendant's counsel then and there excepted. The court subsequently charged the jury that, under the contract, the plaintiffs, and not the company, were bound to furnish all the earth and "borrow pits" necessary to make the fillings called for by the contract. On April 9, 1874, plaintiffs filed with the clerk a special count in covenant as an amendment to the original declaration, setting up the contract, alleging performance by the plaintiffs, a breach by the defendant, a readiness and willingness to complete the contract by the plaintiffs. A copy of the amendment was served on the defendant. By the statute of Connecticut, counts in assumpsit, debt, and covenant may be joined in the same declaration. Before evidence was taken, the defendant moved that the special count be stricken from the files, and for nothing had, but the court denied the motion, and allowed the count to stand as an amendment to the declaration.

The defendant requested the court to charge th jury as follows: "(1) The plaintiffs cannot recover for any work done or materials furnished under the contract of November 1, 1871, under the general or common counts in their declarations. If they can recover at all for any of said items, it must be under the second count, in which they undertake to set out the contract at length. (2) The plaintiffs agreed to perform their contract to the full satisfaction of the chief engineer and board of directors of the company, and were bound to prove affirmatively that they did so, or else that they were excused from so doing. It is, however, agreed that on April 8, 1873, the board of directors were dissatisfied with the manner in which the plain-

tiffs had performed the contract, and notified the plaintiffs to that effect, and that the directors, therefore, considered the contract as having been abandoned by the plaintiffs. This action on the part of the board, whether just or unjust to the plaintiffs, is conclusive against them, and your verdict must be for the defendant. (3) The contract between the parties to this suit, of November 1, 1871, is to be construed with reference to the several town votes, in just the same manner as if this law, and all the votes of the four towns named in the contract, had been set out at length in the body of the contract. Construed in this way, the contract did not require the company to deliver to the plaintiffs any guarantied bonds within ten days after any of the monthly estimates, unless prior to that time the conditions of making the guaranty, laid down in the votes of Portland, Chatham, or Hebron, had been fulfilled. No Middletown bonds were required to be furnished, until all those of the three other towns were issued and used up. (4) The bonds which the contract calls for, in the first instance, were to be of the following issues: Portland, $102,000; Chatham, $40,000; Hebron, $28,000; total, $170,000. The law is so that the defendant was not bound to furnish the plaintiffs with any Chatham bonds until the railroad was graded, the track laid permanently, and cars had passed over it from New Haven to East Hampton. As these conditions were not fulfilled until long after April, 1873, the defendant was not and is not in fault for not delivering, or having delivered, any bonds guarantied by Chatham to the plaintiffs. (5) As each of the town votes provided that no bonds should be guarantied, except for interest, until contracts should have been entered into for the entire completion, for definite sums, of the railroad, ready for running cars between Midletown and Willimantic, the contract in suit bound the plaintiffs, either directly, or by fulfilling the defaulted contracts, if any, of the other contractors, such as O'Connor, Edwards, and Dooley, to complete the railroad for the definite sums named in those contracts, ready for running cars between Middletown and Willimantic, including bringing the roadbed up to grade, as fixed by the profiles of the road then in the possession of the company. (6) They were bound not simply to do the work particularly specified in the specifications attached to the contract, but to do everything necessary to put the road in a proper shape for the running of cars, although the cost of so doing might greatly exceed the whole contract price, and although it might involve doing work of a kind not specifically estimated for. (7) If you find that ballasting the roadbed with gravel was necessary for that purpose, then the plaintiffs were bound to ballast it in that manner. (8) By the terms of its contract, the defendant was not obliged to notify the plaintiffs of any default of any other contractor. The contract of the plaintiffs was an original undertaking. They were to perfect the road for the formal acceptance of the engineer and board of directors, and without notice, and are answerable for any default under any of the contractors, in the same manner as upon the contract signed by them."

The court charged the jury that the plaintiffs, denying that the contract had been broken on their part, and asserting that it had been broken by the defendant, have brought their action of covenant to recover the money due to them upon the contracts, and also damages for such unauthorized abandonment, and have also joined counts in assumpsit to recover for the value of the work actually done, and the value of the extra work which was not embraced in the contract. If any extra work was done by the direction of the chief engineer and the directors, which was accepted and sanctioned by the engineer and directors, the plaintiffs can recover for so much as such extra work was reasonably worth under the common counts. And the court further charged, upon the question of recovery upon the counts in assumpsit, that, if work is not performed according to the contract (and it was manifest that the terms in regard to time had not been complied with), the work is not to be paid for at all, unless it has been sanctioned or accepted by the contracting party, in which case the sum which is reasonably due is the amount of payment, and the contract price is to be considered by the jury, and be an important element in determining what the work and labor is worth. When the contract has been in good faith fulfilled (until its further fulfillment has been prevented by the unauthorized act of the other party), but has not been fulfilled in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, the plaintiffs may recover upon the common counts in assumpsit. The converse of the proposition is true. In such case the defendant is entitled to recover for the damages it has sustained by the plaintiffs' deviation from the contract, both as to the manner and time of performance, not induced by the defendant. The work was to be done to the full satisfaction of the chief engineer and the board of directors, which means their full satisfaction, not improperly or unjustly withheld; for the contracting party cannot unreasonably and unjustly refuse to approve work which was, in fact, well done, and then be justified in refusing to pay. The first question of fact for their determination, the work not having been actually done according to the contract, is, was it sanctioned and accepted by the chief engineer and the board of directors, and was the completion of the contract prevented by the unauthorized act of the company? If the work was, from time to time, as it progressed, and at

the time when the monthly payments were due, sanctioned and accepted by the chief engineer and by the board of directors, then the defendant is liable for such work so sanctioned and accepted, and the question is whether the work which was done was sanctioned and accepted as done, and at the time it was done. The burden of proof is on the plaintiffs to show this. Under the count in covenant, there was no question in regard to the waiver by the defendant of the non-completion of the contract by May 1, 1872, or that the contract was not completed when it was rescinded. The court charged that, the contract not having been completed, if its completion was prevented by the improper and unauthorized abandonment by the defendant, and if the work which had been done was performed according to the contract, such work was to be paid for according to the terms of the contract.

Upon the plaintiffs' claim for damages for the rescission of the contract by the defendant, the court submitted to the jury the question whether the rescission was improperly made, and, upon the claim of the defendant that one reason for the rescission was because work was stopped by the plaintiff on March 10, 1873, charged that the defendant was bound to pay promptly the monthly estimates in guarantied bonds. They were not obliged to take pay in orders upon the towns. The defendant was bound to furnish bonds. If the defendant did not pay according to the contract for the work which was done according to the contract, or which had been accepted and sanctioned by the company in March, 1873, or if the defendant had paid out all the bonds, and had no bonds to give the plaintiffs, and the plaintiffs knew that fact, the plaintiffs were not bound to go on and complete the contract when the defendant had no bonds to give them, and the plaintiffs knew it. In regard to the work mentioned in the contracts of Edwards and others, which are referred to in the plaintiffs' bill of particulars, the court charged that, if the jury found that any of these contractors failed to fulfill their contracts, the plaintiffs were not bound to take any such contract up and fulfill it, in lieu of such delinquent contractor, unless the defendant first gave them reasonable notice of the default of the latter, and demanded the fulfillment of such contract by the plaintiffs; and if the defendant had accepted the work of such other contractor, notwithstanding its deficiency, and had paid him off in full, this would operate as a discharge of the plaintiffs from any liability to make good such deficiency.

1. The question which arises upon the first request is one of pleading, viz. that the plaintiffs cannot recover upon the common counts for any work done or materials furnished under the contract, which was under seal. In the same connection may also properly be considered the point that a count for breach of covenant cannot by amendment be added to counts in assumpsit for the value of work accepted by the defendant which was originally undertaken under the contract set forth in the count in covenant, and for extra work performed at the defendant's request. When the action was brought, it was admitted and was patent that the terms of the contract which required a completion of the work on April 1, 1872, had not been complied with, and that the contract also required that payment of the work as it progressed should be made in monthly installments, and that such payment had not been made; and it was claimed by the plaintiffs, and may now be considered as established by the verdict, that all work which had been done either under the contract, or as extra work prior to the rescission of the contract by the defendant, had been sanctioned and accepted by it. For the value of the work which had thus been done and accepted, an action of general assumpsit was brought. The cases of Dermott v. Jones, 23 How. [64 U. S.] 220, 2 Wall. [69 U. S.] 1, and Jewell v. Schroeppel, 4 Cow. 566, seem to have settled the doubts which formerly existed in regard to the right of a contracting party to bring assumpsit under the circumstances stated, when a sealed contract had been originally entered into. These cases hold that when work is not completed within the time specified in a building contract under seal, if the plaintiff has subsequently, to the time specified for completion, continued in good faith, with the permission of the defendant, to do the work specified in the contract, and also to do extra work, and the work thus done has been accepted, the work is to be paid for, and, the contract no longer being executory, a recovery can be had in an action of indebitatus assumpsit upon an implied promise on the part of the defendant to pay such a sum as the services which have been performed and the benefit which has been conferred are worth. In Dermott v. Jones, 2 Wall. [69 U. S.] 1, the court say: "While a special contract remains executory, the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or indebitatus assumpsit, and rely upon the common counts. In either case the contract will determine the rights of the parties. When he has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in indebitatus assumpsit. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the

cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and the time of performance." The charge of the court was in accordance with the law as laid down in the cases which have been cited. The plaintiffs, having brought an action upon the common counts, afterwards amended by a count in covenant. At the common law such joinder is inadmissible, but the statute of Connecticut permits counts in assumpsit and covenant to be joined, so that several causes of action upon different promises, whether evidenced by a sealed instrument or by parol, can now be joined in one declaration in different counts. If the non-performance as to time of a contract under seal has been waived by the defendant, and the plaintiff has subsequently been prevented from the completion of the contract by the other party, the plaintiff may maintain an action of covenant for the contract price of the completed work. Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646. But the defendant insists that amendments are governed by the rules which the circuit court has prescribed, and the circuit court for this district having substantially adopted the rule prescribed in the Connecticut statute of amendments, which permits the plaintiff to insert new counts for the same cause of action as that declared upon in any of the original counts, and in any form of action, counts in which might have been originally inserted in the declaration, the amendment was not properly allowable, because a count in covenant for payment of the sums due on a sealed contract, and for damages for its breach, is not for the same cause of action as a cause for work and labor on a quantum meruit. The statute of amendments of this state, which is the rule of the United States courts in this district, does not use the phrase "ground of action" or "cause of action" in any technical sense. It is held to refer rather to the real object of the plaintiff in bringing the suit, which is to be determined, not merely by the face of the declaration, but also by the extrinsic circumstances of the case. Howland v. Couch, 43 Conn. 47; Nash v. Adams, 24 Conn. 38. In this case, the object of the plaintiffs in bringing their original suit, as appears by the bill of particulars, was to obtain payment for their services and labor in the construction of this railroad and for the losses which they sustained in consequence of the acts of the defendant. Whether assumpsit is the proper remedy for all the items in the bill of particulars is not material. Probably the plaintiffs desired to amend, because they supposed that their object in bringing the suit could be more perfectly accomplished by an amendment. Courts in this state have been liberal in the allowance of amendments, in order that the questions at issue between the parties in relation to the subject-matter of the original declaration might be decided in one suit, and strict technicalities have not been allowed to prevent the accomplishment of this result. Such an amendment is generally permitted in states where the disctintion between covenant and assumpsit has been abolished. Phillips & Colby Const. Co. v. Seymour, 91 U. S. 646.

2. The defendant claims that the plaintiffs, having agreed to perform their contract to the full satisfaction of the chief engineer and board of directors, were bound to prove affirmatively that they had done so, or that they were excused from doing so; and that the board of directors having been dissatisfied with the manner of the plaintiffs' performance, and having notified them accordingly, and having considered the contract as at an end, this action on the part of the board, whether just or unjust to the plaintiffs, is conclusive against them. This request is based upon the principle that when a contracting party has agreed to be bound by the determination of the co-contracting party or of a third person in regard to the value of the work, or its conformity with the requirements of the contract, or the diligence with which the work is being prosecuted, such determination is final, because it is the exercise of a power reserved in the contract, and is the agreement of the parties, unless the person making the decision is guilty of bad faith. The cases of Woodruff v. Hough, 91 U. S. 596; Philadelphia, W. & B. R. Co. v. Howard, 13 How. [54 U. S.] 307; Ranger v. Great Western Ry. Co., 5 H. L. Cas. 72; Scott v. Liverpool, 3 De Gex & J. 334; Stadhard v. Lee, 3 Best & S. 354,—are examples of this doctrine. The question, however, which is here to be considered, is not in regard to the correctness of this principle, which is well settled by the cases cited, but it is in regard to the construction of this contract, and whether the contract made the satisfaction of the defendant, in the absence of bad faith, conclusive upon the plaintiffs, and a condition precedent to their right to recover. The rules of construction of contracts which are claimed to reserve in one of the contracting parties the final power of determination as to the value or character of the work which is being done, or as to the diligence with which it is performed, are suggested in two recent English cases. "The duty of a court in such cases is to ascertain and give effect to the intention of the parties as evidenced by the agreement, and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the court is bound to give effect to them, without stopping to consider how far they may be reasonable or not." Stadhard v. Lee, 3 Best & S. 364. "A power which is,

in effect, to inflict a heavy penalty upon one of the contracting parties, must be created in clear and unambiguous terms, or must arise by necessary implication." Roberts v. Bury Imp. Com'rs, L. R. 5 C. P. 310, per Kelly, C. B. This case does not come within that class of cases in which the certificate of the surveyor or engineer that the work has been performed according to the specifications is a condition precedent to any payment, because, assuming that the monthly estimates of the engineer were a condition precedent, these estimates had regularly been made, and the amounts which were estimated by the engineer had been credited to the plaintiffs upon the books of the company. The question depends upon the construction of other parts of the contract. By this contract a large amount of work was to be performed by the contractor, which was to be paid for in monthly installments. The only language which indicates the extent of the power which was conferred upon the railroad company to determine whether due diligence was being used by the contractor is the undertaking of the plaintiffs to perform the work to the full satisfaction of the chief engineer and the board of directors; that is, to the satisfaction of the corporation. Ranger v. Great Western Ry. Co., 5 H. L. Cas. 72. There is no proviso which, either expressly or impliedly, invests the officers or agents of the company with the determination of the question of diligence, or which provides that the dissatisfaction of any officer with the manner or promptness of execution shall give to him or to the company, not acting mala fide, final and conclusive power to rescind the contract. An intention of the parties to confer upon the recipient party such large powers cannot be found in the language of the contract, which contains simply the words which are ordinarily employed in contracts of this character, for generally, in contracts for structures, in the construction of which the taste or convenience of the party for whom the work is done is not a material element, the mere undertaking of the contractor that the work is to be performed to the satisfaction, or the full satisfaction, of the other party, without other language enlarging the scope of the agreement, means to his satisfaction not unreasonably withheld, or reasonably to his satisfaction. Dallman v. King, 4 Bing. N. C. 105; Parson v. Sexton, 4 C. B. 899; Andrews v. Belfield, 2 C. B. (N. S.) 779; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. St. 161. The same construction has been given to the same language in other classes of commercial contracts. Braunstein v. Accidental Death Ins. Co., 1 Best & S. 782; Folliard v. Wallace, 2 Johns. 395.

3. The third and fourth requests were in regard to the construction of that portion of the contract which provides for monthly payments in bonds. The request is based upon this state of facts: The contract provides for payment in monthly payments, which payment is to be be made "in bonds which are to be guarantied by the town of Portland, Chatham, and Hebron, respectively, and, when these are used up, then in bonds to be guarantied by the town of Middletown." By the terms of the vote of Chatham, no bonds were to be guarantied until the road was completed. The Portland and Middletown bonds, except for interest, were not to be guarantied until contracts had been made for completion of the road. No Hebron bonds were to be guarantied until like contracts had been made. This event might not occur until after the plaintiffs' work had been wholly or partially completed. The payments were actually made in Portland and Middletown bonds, which were issued, and were ready for delivery at the time of the monthly estimates. The defendant insists that, inasmuch as Chatham bonds could not be issued until after the completion of the road, and Middletown bonds were not required to be paid until the bonds of the other towns were used up, the defendant was not in default for nonpayment. The corporation had prior to November 1, 1871, entered into a contract for the construction of the road with divers persons, all which contracts had been broken by reason of the inability of the defendant to make payments. It had now undertaken to pay for the road building and track laying in guarantied bonds, and to pay in monthly installments as the work progressed. The provision for monthly payments was a most important one to the plaintiffs. It is hardly reasonable to construe the contract so that it shall provide that the defendant should not be in default in not making monthly payments, especially as its duty so to pay had been uniformly recognized. It is more in accordance with the ordinary rules of construction to harmonize the different provisions of the contract so as to carry out the plain and obvious intention of both parties. The construction which the court gave to the contract was the one which the parties had practically placed upon it, and which they followed at and after the execution. By this construction, the plaintiffs were to be paid their monthly installments in bonds of Portland or Chatham or Hebron, which were ready for delivery at the time when the payments were, respectively, due, and if such bonds, ready for delivery, were exhausted, then in bonds of Middletown. The Middletown bonds were to be given if others were not ready or did not exist, and seem always to have been ready.

4. The fifth, sixth, and seventh prayers are based upon the theory that, because the town votes provided that no bonds should be guarantied, until contracts had been entered into for the entire completion of the

road ready for travel, therefore the contract with the plaintiffs is to be construed so as to make it obligatory upon them to complete the road ready for travel. The contract provided that they should perform the work therein mentioned, and mentioned under the name of John Lee & Son in the engineer's estimate attached thereto. Neither the contract nor the estimate mentioned work subsequent to track laying, but the subsequent labor and materials were provided for in the Richardson contract.

5. The eighth prayer requests the court to charge, in substance, that the plaintiffs were answerable for the default of any of the other contractors upon other sections without notice of such default. It is sufficient to say that such was not the intention of the parties as manifested in the contract. The plaintiffs were not sureties for the other contractors. They were to do unfinished work at the same prices, and upon the same terms and conditions, which had been agreed upon with the other contractors, but were not to do the work without payment by the defendant. Whether such imperfect or unfinished work had been accepted and paid for in full, and, if it had been paid for, whether the defendant wished to have it completed and to pay the plaintiffs, and, in general, all the facts in regard to any default of the other contractors, were peculiarly within the knowledge of the defendant, and not within the knowledge of the plaintiffs.

6. The defendant excepts to the charge of the court that the failure of the defendant to pay the monthly installments, or their inability in fact to make any payments, coupled with the plaintiffs' knowledge of such inability, justified the plaintiffs in suspending work on March 10th. Contracts of this character, which provide on the one part for the completion of work by a specified time, and which also compel monthly payments as the work progresses, do not compel the party who performs the labor to complete the contract, after the other party has been guilty of a default in his payments. The contractor can thereupon cease work, and can recover for the value of the labor actually done. "The defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss." Phillips & Colby Const. Co v. Seymour, 91 U. S. 646; South Fork Canal Co. v. Gordon, 6 Wall. [73 U. S.] 561. In this case the defendant has no money, and was in any event only able to pay in bonds. It is admitted that it had ceased to pay the plaintiffs after December, 1872, except in orders, and prior to March 10, 1873, it had disposed of all the guarantied bonds, so that it could not comply with its agreement. Payment of the plaintiffs' contract by the defendant was impossible. Both parties had full knowledge of this fact. In this state of things, the law does not compel a contractor to complete his contract, when nonpayment from the other party was not only probable, but certain.

7. The admission of Fielder's testimony became immaterial, by the charge, adverse to the plaintiffs' position, that the contract was silent as to the party by whom "borrow pits" were to be furnished. Greenleaf's Lessee v. Birth, 5 Pet. [30 U. S.] 135.

8. The exception to the testimony of the defendant's secretary. The general object of the cross-examination was to show the active participation of the defendant in efforts to prevent the plaintiffs from receiving their pay. The special object of the question which was objected to was to show the relation in point of time of a fact, which was not denied, to another occurrence, and the witness was asked, in substance, "Do you not recollect that, subsequent to a named date, a batch of suits was brought against Lee, wherein the company was factorized?" The existence or contents of the writs were not the subject of the inquiry, but the object was to show, upon cross-examination—First, that the company instigated suits; and, secondly, that they were brought after a certain date. Upon cross-examination, the question was properly allowed. Williams v. Cheesebrough, 4 Conn. 356. The motion for a new trial is denied.

LEE (PATONS v.). See Case No. 10,800

Case No. 8,198.

LEE v. PATTERSON.

[2 Cranch, C. C. 199.] [1]

Circuit Court, District of Columbia. April Term, 1820.

CLERK OF COURT—ATTACHMENT FOR FEES.

The clerk of this court may have an attachment for the non-payment of his fees.

[See In re Atlantic Mut. Life Ins. Co., Case No. 629.]

Mr. [E. J.] Lee, the clerk of this court, had obtained a rule on James D. Patterson, to show cause why an attachment of contempt should not issue against him for not paying fees due to the clerk. The rule having been served, and Mr. Patterson not having appeared, the rule was made absolute; Mr. Lee having made affidavit that he believed he was able to pay.

Mr. Taylor, for plaintiff, cited Cadwell v. Jackson, 7 Cranch [11 U. S.] 276, and 13 Vin. Abr. 153.

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

Case No. 8,199.

LEE et al. v. PREUSS.

[3 Cranch, C. C. 112.] [1]

Circuit Court, District of Columbia. May Term, 1827.

SLAVERY—PETITION FOR FREEDOM—ENTITLED TO FREEDOM AT FUTURE DAY—FEARS OF PETITIONER THAT DEFENDANT WILL VIOLATE LAW.

1. Upon a petition for freedom by slaves entitled to emancipation at a future day, the court refused to instruct the jury, that they might find their verdict for the petitioners, although that day had not yet arrived; and upon a special verdict showing their right to emancipation at a future day, not yet come, the court rendered judgment for the defendant; and refused, as a court of equity, to continue an injunction which had been served upon the marshal to prevent him from delivering the petitioners to the defendant at law, during the pendency of their suit for freedom; being of opinion that the only ground of the right of the court to interfere was the petitioner's claim to immediate freedom; and the pendency of their suit at law.

2. That the fears alone of the petitioners, that the defendant, who was a citizen of Maryland, would violate the laws of that state, were not a sufficient ground of jurisdiction to require of him security that he would not do so.

Petition for freedom by Lizette, John, and Janette, or Jeane, children of Joanna, and Nancy, the daughter of Lizette [Lee against Augustus Preuss]. The petitioners having given evidence tending to prove their right to emancipation after certain periods of service respectively which had not yet expired, prayed the court by their counsel, Mr. Barrell, to instruct the jury, in effect, that they might find the issue for the petitioners, although their respective terms of servitude, according to their deed of emancipation, had not expired; which instruction, THE COURT (THRUSTON, Circuit Judge, contrà) refused to give.

The jury found a special verdict, which stated: "(1) That the negro girl Joan or Joanna, on the 24th of June, 1797, was the property of Anthony Addison, then a citizen of Maryland, residing in Prince George's county, in that state, where he held her as a slave for life. (2) That on that day he sold her to Walter Addison, also a citizen of Maryland and residing in the said county, for a term of twelve years, by a bill of sale in writing, in haec verba," &c. "(3) That after the said Walter Addison had held her about eighteen months under the said bill of sale he exchanged her unexpired term with one Peter Savary, then a citizen of Maryland, and residing in the same county, for a like term in another negro woman, the latter to be returned to Savary at the expiration of the said term. And we find that at the time of this exchange there was a stipulation and an understanding between the parties principals, that the children of the said Joanna, born or to be born, were to be free after having served, men children until they attained the age of thirty or thirty-one years, and female children when they should attain the age of twenty-five years respectively; and that the said Joanna was then delivered, and held in the said state and county, until the expiration of the said term; and that afterwards she was returned and given up to the said Anthony Addison. (4) That three of the petitioners, to wit, John, Lizette, and Janette or Jeane, are children of the said Joanna, born during the said term of twelve years; and the petitioner Nancy is the child of the petitioner Lizette, and was born long after the expiration of the said term, to wit, in the year 1825, or thereabout; the mother still being held by the said Savary. (5) That the said Savary did not deliver up the said petitioners to the said Anthony Addison; and that upon the death of the said Savary, they came to the possession of the defendant as administrator of Savary. (6) That after the expiration of the said term, to wit, on the 8th of October, 1809, the said Anthony Addison executed in the said state of Maryland, and acknowledged an instrument of writing, purporting to be an emancipation of the said Joan or Joanna, and her children; among others, of the three first above-named petitioners, after certain terms of service expressed, or reserved in the said writing, which, with the acknowledgment and memorial of the record thereof, we find, in these words," &c. "(7) We find that the terms of service, which the said instrument purports to have reserved and annexed to the emancipation of the said petitioners respectively, will expire at the times following, to wit, of the said John in May, 1830; of Lizette at Christmas, 1827; of the said Janette or Jeane, on the 19th of May, 1834; and the petitioner Nancy is about two years old. If upon the facts so found," &c.

THE COURT, upon the facts so found, was of opinion (nem. con.) that the petitioners will be entitled to their freedom, at the expiration of their respective terms of servitude agreeably to the deed of emancipation from Anthony Addison. "But a majority of the judges are of opinion that as none of those terms of servitude have yet expired, the judgment upon the special verdict must be for the defendant; who being now fully apprised of the petitioners' contingent right to freedom, will take care that he do not subject himself to the penalty of the law of Maryland by selling them out of the state for a longer time than they have to serve by law."

THRUSTON, Circuit Judge, doubted upon the last point; and was understood to be of opinion that the issue, submitted to the jury, was whether the petitioners were the slaves of the defendant; and that as they had a right to emancipation at a future day they could not now be slaves.

Mr. Barrell, then, as solicitor for the petitioners, filed a bill for injunction in each case, stating their contingent right to free-

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

dom, and their fears that the defendant would sell them to persons who would carry them to some distant place, where they would not be able to prove and maintain their right to freedom. The petitioners had run away from the defendant, believing themselves entitled to freedom, and had been taken up and committed to jail here where they petitioned for their freedom. The court had ordered the marshal not to deliver them up to the defendant unless upon his entering into the usual recognizance, or until the further order of the court. The bills, now filed, prayed that the injunction on the marshal should be continued until the defendant should give security not to sell the petitioners out of the state of Maryland, nor for a longer term than they have to serve.

THE COURT, however (THRUSTON, Circuit Judge, contrà), refused to continue the injunction after judgment at law in favor of the defendant, being of opinion that the only ground of their right to interfere was the petitioners' claim to immediate freedom, and the pendency of their suit in this court; that their suit being now ended and judgment against them, although they may be hereafter entitled to freedom, the court think they cannot require security from the master that he will not violate the laws of Maryland; the fears alone of these petitioners, would not give this court jurisdiction. No final relief could be given. Nothing is asked for by the bill, and nothing could be given, but security that the master, in exercising his acknowledged rights, would not violate the law of Maryland, the place of his residence. It is possible that the courts of Maryland might be of a different opinion as to the rights of the petitioners, and we might bind the defendant not to do, what they might determine he might lawfully do. Injunction refused.

Case No. 8,200.

LEE v. RAMSAY.

[1 Cranch, C. C. 435.] [1]

Circuit Court, District of Columbia. July Term, 1807.[2]

SLAVERY — PAROL GIFT OF SLAVE — LEGACY OF SLAVE—ASSENT OF EXECUTOR—DEED WITHOUT POSSESSION.

1. A parol gift of a slave in Virginia in 1784, was void under the statute of 1758, although possession accompanied and followed the gift, and it was not made valid by the act of 1787.

2. A legacy of a slave, gives no title till assented to by the executor.

3. A deed of gift of a slave in 1790, was void, unless possession accompanied and followed the deed.

Detinue for negro Frederick. W. Wilson made a deed of trust of this negro to Mr. E. J. Lee, to secure Mr. Kennedy. And as part of the plaintiff's title, Mr. Lee read in evidence a deed from Mrs. Ramsay to W. Wilson, purporting to be in consideration of five shillings.

Mr. Youngs, for defendant [Patrick Ramsay], offered to prove that the deed was a deed of gift, and that no money or valuable consideration was paid; and so nothing passed, as the deed was not proved and recorded according to act of assembly of 30th November, 1785, § 2, p. 16.

THE COURT (FITZHUGH, Circuit Judge, contra) permitted the testimony to be given, reserving themselves to give an instruction to the jury thereupon, when the relevancy of the question to the case should be made to appear in the course of the trial:

When THE COURT instructed the jury that it was immaterial in this case whether the consideration was valuable or not, the defendant not being a creditor or subsequent purchaser.

C. Lee, for plaintiff, contended that five years' possession of a slave by Wilson gave him a good title against all the world. So in ejectment twenty years possession is a good title. If the possession of the slave has been so long, that the remedy to recover him by law is gone, the title is good. Law Va. 17th December, 1792, §§ 47–49.

C. Lee also contended, that the parol gift of the slave by Mrs. Gordon to the defendant in 1784, was void under the act of 1758, and to show that such a decision was had in the courts of Virginia, he cited the act of 1787, c. 22, the preamble of which recites such an adjudication; and he also contended that the act of 1787 was not retrospective, and cited Turner v. Turner, 1 Wash. [Va.] 139.

Mr. Taylor, contra, contended, that the act of assembly, 1787, is retrospective; that after the passing of that act, the courts were bound to construe the act of 1758 so that a parol gift made in 1784 should be good, if possession accompanied the gift, unless the rights of creditors, or subsequent purchasers were affected.

But THE COURT (DUCKETT, Circuit Judge, contra) decided, that a parol gift in 1784 was void under the statute of 1758, although possession accompanied and followed the gift, and that the act of 1784 was not retrospective.

THE COURT decided (nem. con.) that a legacy of a slave gives no title, unless the executor had assented before action brought; that a deed of gift of a slave in 1790, was void between the parties under the act of 1758, and the act of 1787, unless possession accompanied and followed the deed; and five years' possession of the slave by W. Wilson, did not support the plaintiff's title, although the plaintiff is to be considered as a purchaser without notice and for a valuable consideration.

Motion for a new trial, by Mr. Youngs, for the defendant, on the ground of miscon-

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

[2] [Affirmed in 4 Cranch (8 U. S.) 401.]

struction by the court, of the law of 1758, in having instructed the jury that a parol gift of a slave was absolutely void under that law, although possession accompanied the gift.

But THE COURT, after the argument (DUCKETT, Circuit Judge, absent), refused a new trial, and said that although there might have been originally some doubt whether the act of 1787, was not intended to be retrospective, yet the case of Turner v. Turner, 1 Wash. [Va.] 139, was conclusive.

Bills of exceptions were taken, but the judgment was affirmed by the supreme court of the United States, February, 1806. 4 Cranch [8 U. S.] 401.

[NOTE. Mr. Chief Justice Marshall, in delivering the opinion of the supreme court, said: "The opinion of the court is that a parol gift to the defendant, accompanied by possession, did not bar the plaintiff's right to recover. The court gives no opinion as to the title acquired by the possession." 4 Cranch (8 U. S.) 4.]

Case No. 8,201.

LEE v. ROGERS et al.

[2 Sawy. 549;[1] 1 Am. Law T. Rep. (N. S.) 218.]

Circuit Court, D. California. Feb. 24, 1874.

PAID JUDGMENT—SALE—ASSIGNEE OF PAID JUDGMENT—POWER OF ATTORNEY—INCIDENTAL POWERS—ACTIONS AGAINST BELLIGERENTS.

1. A sale of lands under an execution issued upon a judgment which had been fully paid, is void.

2. W. had a judgment against C., which was the first lien on his property. T. also had a judgment, which was the second lien on the property. C. paid W.'s judgment in full, but took an assignment of it in the name of his hired man, who paid nothing for it. Afterward, to avoid an attachment, C. confessed a judgment in favor of L., for a debt previously due him, which became a lien upon the property, and, in order to give L. a preference over T., C. procured an assignment to him of W.'s judgment, for which no additional consideration was paid; but L. was not aware that it had been paid. C. afterward confessed a judgment in favor of F., which also became a lien on the property. L. afterward sold the lands on W.'s judgment, and became the purchaser. Afterward F. became purchaser of the same lands under his own judgment. *Held*, that as to F., L. was not a bona fide assignee of W.'s judgment for a valuable consideration; and that his sale was void.

3. By his purchase F. acquired the title to the land.

4. L. executed a power of attorney to H., authorizing him to collect his said judgments against C., by sales under execution, etc., to receive the money thereon, "arbitrate or compound" the same, and for that purpose to employ counsel. After the aforesaid sales, F. brought an action against L., to annul the said sales and conveyances to L., as clouds on his (F.'s) title. H. consulted counsel, who advised him that the said sales under W.'s judgment, after payment, were void, and L.'s title invalid. *Held*, that as incident to the powers expressly given to collect said judgment, arbitrate and compound the same in connection with subsequent instructions from L., by letter, H. had power to authorize counsel to appear in said action, and consent to a judgment annulling said sales upon terms that enabled him to realize the amount due to L. on his judgment.

[Cited in Starr v. Stark, Case No. 13,317.]

5. The existence of war does not prevent the citizens of one belligerent power from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process.

Bill in equity, wherein complainant [Richard B. Lee] seeks to establish a trust in his favor as to certain lands situate in the city of Oakland, held and claimed by the defendants [Daniel Rogers, administrator, and others]. The pleadings and evidence establish the following facts: In the years 1858 and 1859, Andrew J. Coffee was the owner of the lands in question. He had become embarrassed. Sometime in 1856 the agent of the complainant loaned the sum of six thousand dollars of the latter's money on a note signed by one Green, indorsed by said Coffee. It is not clear and not material whether this money was borrowed for the benefit of Coffee, or of Green, or their joint benefit. On September 23, 1858, Joanna Wheelock obtained a judgment in the twelfth judicial district, against A. P. Green, L. Ransom and said Coffee, for $3519.92 and costs, which became a lien upon the property in question. Messrs. Haggin and Tevis obtained a judgment against Coffee and Green for some $12000, which also became a subsequent lien upon the property.

The Haggin and Tevis judgment at the time stood in such position that Coffee claimed that he was discharged, and he had an action pending to procure his own exoneration. In October, 1858, said Coffee borrowed of J. A. Freanor something over $2000, for the purpose of paying, in part, the said Wheelock judgment; and with the money so borrowed, and other money obtained from other sources, he paid the Wheelock judgment in full; but instead of having the judgment satisfied of record, said Coffee procured an assignment of said judgment to be made to one Lester, a hired man of said Coffee. Said Lester paid nothing for said assignment. On January 1, 1859, Coffee executed to Freanor a promissory note for $700, being the balance then due him on said sum borrowed as aforesaid, all said sum except said balance having been paid before that date.

In May, 1859, the complainant, becoming uneasy about his money, determined to secure it, and for that purpose directed his attorney, Col. Crockett, to commence suit by attachment; and the papers for an attachment were accordingly prepared. Before commencing the suit complainant notified said Coffee of his purpose, and thereupon Coffee requested him not to attach. Coffee told complainant that he controlled the Wheelock judgment; that it was the first

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

lien on his property, being prior to the Haggin and Tevis judgment, which was at that time the only other lien; that he would procure the Wheelock judgment to be assigned to complainant; and would, also, confess a judgment in complainant's favor for the amount due him. Upon consultation with his counsel, this proposition was accepted by complainant. On the next day, May 19th, 1859, Coffee brought him an assignment of the Wheelock judgment in due form. Col. Crockett drew up the papers for a confession of judgment, which were signed and delivered, and complainant went to the clerk's office in Alameda county and had his judgment duly entered.

Complainant paid no further consideration for the assignment of the Wheelock judgment. It was taken only as an additional security for the pre-existing indebtedness; and probably, with the design that it should take precedence over the Haggin and Tevis judgment, in case Coffee should not get rid of it in the suit pending for that purpose. Upon thus securing complainant, Coffee understood that he was to have further indulgence. Immediately after these transactions, on May 21st, 1859, Coffee confessed a judgment to Freanor for the amount of said $700 note, interest and costs, which also became a lien on said property.

Soon afterward Coffee went to the Eastern states, and was absent till some time in the fall. Soon after Coffee's departure, on June 9, 1859, said complainant caused an execution to be issued on the said Wheelock judgment, and, upon said execution, had a large portion of the lands in controversy sold on July 1, 1859, himself becoming the purchaser at the sum of $2950. On or about July 5, 1869, the complainant left for the Eastern states, leaving instructions with his attorney in fact, Jno. W. Haynes, to make further sales. In pursuance of said instructions, another execution was issued on said Wheelock judgment, on July 13, 1859, under which the remaining lands in controversy were sold on August 1, 1859, and bid off by said Haynes, in the name and for the benefit of the complainant, for the sum of $1585, which two sales satisfied the Wheelock judgment. No redemption having been made, the sheriff executed deeds of conveyance in due form in pursuance of said sales, April 16, 1860. Subsequently, other property was sold upon complainant's own judgment, from which some $4000 were realized and applied on the judgment. Complainant went to Washington, where he remained till the war of Rebellion broke out, when he resigned his commission in the United States army, went to the states in rebellion, accepted a commission in the rebel army, and continued in the service within the rebel lines till the close of the war.

Said Freanor being aware that the Wheelock judgment had been satisfied before its assignment to complainant in part with money borrowed from him for that purpose, and for a part of which his judgment had been obtained, had an execution issued on his own said judgment, April 25, 1861, and the same property purchased under the Wheelock judgment, sold thereunder on May 20, 1861, before the expiration of his lien, himself becoming the purchaser. No redemption having been made, the sheriff executed a deed in due form, in pursuance of said sale, December 28, 1861.

Afterward, on May 13, 1862, said Freanor filed his bill of complaint in the district court of the Third judicial district, against said Lee, complainant in this action, in which he set out substantially the facts herein stated, claimed a valid title to said lands in controversy, under his judgment and sale; alleged that complainant's deeds, although void, were regular on their face and constituted a cloud on his title; and prayed a decree that the said Wheelock judgment had been satisfied before said transfer and sales thereunder, and that said sales and deeds, given in pursuance thereof, be annulled and adjudged to be void.

At the date of the filing of said bill of complaint of Freanor, defendant, J. W. Haynes was the attorney in fact of the complainant, having charge of complainant's business in California. Said complainant, at the time, was within the rebel lines, and, for that reason, no communication could be had between him and his attorney, and none was had for a long time afterward. Mr. Haynes was, therefore, compelled to act upon his own judgment respecting the action. Under the statutes of California, service could be obtained upon absent defendants by publication of summons. When the filing of this bill of complaint came to the knowledge of Haynes, he consulted with his own attorney, Mr. Rogers, and the former attorney and personal friend of complainant, Col. Crockett, and both advised him that if the facts alleged could be established, the sales on the Wheelock judgment, and the deeds thereunder, would be set aside as void. Upon an investigation of the facts, both Mr. Haynes and his counsel became satisfied that the Wheelock judgment had been fully paid before its assignment to complainant, and that the sales thereunder were void. Col. Coffee now entered upon negotiations between Freanor and Haynes; which resulted in an arrangement between the parties, by which it was agreed that Col. Crockett, upon special authority from Haynes, as the attorney in fact of the complainant, should enter the latter's appearance in Freanor's action, and consent to a decree in pursuance of the prayer of the bill of complaint annulling the sales and deeds under the Wheelock judgment; that Thomas J. Haynes should pay the principal, interest, cost and attorney's fees on Freanor's judgment against Coffee; that Freanor should convey the lands in controversy to said Thomas

J. Haynes, and that said Thomas J. Haynes should sell the lands, and out of the proceeds repay, firstly, the said sum paid to Freanor; secondly, the amount, principal and interest due from said Coffee to complainant on the judgment confessed to him; and, after paying these demands, any surplus should go to Coffee's other creditors. This appears to be the arrangement entered into between Freanor, Coffee and Haynes. Freanor's object after securing his own demand was to favor Coffee, and he would enter into no arrangement that did not give to Coffee the benefit of any surplus. Col. Crockett, however, who was consulted upon the law points, does not appear to have understood that the residue was to go to Coffee, but that the land was to be held for the benefit of complainant. But the others who made the agreement agreed as stated. With the exception of this part of the arrangement, which Col. Crockett does not appear to have understood, or if understood, had been forgotten during the many years which had elapsed, the settlement had his approbation, as being the best thing that could be done under the circumstances; as it secured to complainant the whole amount due him, whereas, if Freanor should succeed in his suit, complainant was liable to lose all. In pursuance of the said arrangement between Coffee, Freanor and Haynes, J. W. Haynes executed an instrument authorizing Col. Crockett to appear, in the words following: "In the district court of the Third judicial district, in and for the county of Alameda. Freanor v. Lee. I do hereby authorize J. B. Crockett, as my attorney, to appear on my behalf to the above entitled action, and to file an answer therein, consenting that a decree be rendered in said cause, in accordance with the prayer of the complaint. San Francisco, 30 July, 1862. R. B. Lee, by Jno. W. Haynes, his attorney in fact." Col. Crockett, in pursuance of said authority, filed the following answer, viz.: "In the district court of the Third judicial district, in and for the county of Alameda. Freanor v. Lee. The defendant, Richard B. Lee, by his attorney, comes, and for answer to the complaint, says he denies all imputations of fraud or fraudulent conduct contained therein, but admits the other allegations in said complaint contained, and does not deny the plaintiff's right to the relief demanded, and consents that a decree be entered in accordance with the prayer of the complaint, and that said decree be entered at the present term of the court. J. B. Crockett, attorney for defendant." And thereupon a decree was entered adjudging said sales and deeds under the Wheelock judgment void. In further pursuance of said agreement, Thomas J. Haynes paid to Freanor some $1472, the amount due him, and Freanor conveyed the lands to said Haynes. Soon after said conveyance, Coffee, as broker for Haynes, commenced negotiating sales, and through him the said lands were, from time to time, all sold in various parcels, and to various purchasers, and out of the proceeds, the said sum advanced by Haynes to Freanor was first paid; then the amount due from Coffee to complainant, after which the balance went to Coffee's other creditors. At the time of said agreement between Coffee, Freanor and Haynes, there were funds of complainant under the control of Haynes to an amount greater than the sum paid to Freanor, but they were at the time otherwise invested, and were not then available for that purpose, and Haynes advanced the same out of his own funds.

Thomas J. Haynes was really expected by the complainant to act as his attorney in fact. He had before been in complainant's employ, and for a long time previous to this transaction, his confidential friend as well as agent. But Thomas J. Haynes went East at the same time with complainant, and, for this reason, the power of attorney was given to his brother, John W. Haynes, although it was understood and intended that he should act under the supervision and advice of Thomas J. Haynes, when the latter should return; or, rather, that Thomas J. Haynes should, in fact, be the active agent. The power of attorney under which John W. Haynes acted was executed by complainant on the day he left, July 5, 1859. It contained no express power to sell land, or otherwise dispose of it, except to lease, but it authorized him to demand and receive all moneys, goods, wares and merchandise, debts, choses in action, etc., and to sue therefor, and to employ counsel to represent him in court "for that purpose;" "to submit to arbitration or compound the same," and "to prosecute through final process any and all judgments to me belonging, and, at the sales under execution issued thereon, to become a purchaser in my name of any lands," etc., receive the money thereon, and any redemption money, etc. This is the only formal technical power of attorney held by Haynes. But, before the war broke out, and while complainant was still in Washington, creditors of Coffee in California had expressed the opinion that the said sales were void, and a design to attack them.

These facts coming to the knowledge of Thomas J. Haynes, on February 20, 1861, he informed complainant by letter of the threats made, and the grounds upon which the sales were claimed to be void. And he particularly refers to Freanor by name as one creditor who claimed the Wheelock judgment to have been satisfied with the money loaned by himself. Also, in a letter dated March 10, 1861, he informs complainant that he has submitted the case to his counsel, Mr. Rogers, who advised him that, "in his opinion, if the creditors assailing those titles can satisfactorily prove the fact of the judgment having once before been paid, then the sheriff's sale would be set aside by the court," and, he adds among

other things, "I am satisfied that an attempt will be made as stated in my letter of 20th ult." In answer to Haynes' said letter of February 20, the complainant writes from Washington to Thomas J. Haynes a letter, under date of March 20, 1861, in which he animadverts upon the charges of fraud, etc., made by Coffee's creditors in relation to the Wheelock judgment, and, among other things, says: "As to my Oakland property, you must be governed by your own judgment as to its management, and should it be necessary to go to law, employ whom you think best." Under date of April 6, 1861, complainant again writes in answer to Haynes' letter of March 10, wherein he refers to it as "enclosing the opinion of Mr. Rogers," and after sundry suggestions about the Wheelock judgment, he says: "As to the clause in my letter of August 22, 1860, you must, as in all cases connected with my Oakland property, be governed by your own judgment, and such legal advice as you may deem expedient." The complainant himself testifies that Thomas J. Haynes, while East, was a guest at complainant's house in Washington; that a short time before Haynes' return to California, complainant had been informed that Col. Coffee had said his title under the Wheelock judgment might be assailed; that the matter was fully discussed between him and Haynes, and that "I (complainant) charged Thomas J. Haynes, upon his return to California, if any such attempt was made to call upon and advise with Col. Crockett as to the necessary steps in the defense of my title."

Complainant further testifies on the subject of the authority of the Haynes brothers to employ counsel on his behalf. "I mean to say, I did not specifically authorize an appearance in that particular action, not knowing of the existence of any such action." But he says: "He (John W. Haynes) was authorized to the extent given in my power of attorney to him, and both himself and his brother, Thomas J. Haynes, were enjoined verbally, and probably subsequently in writing—of which I have no recollection—to employ Col. Crockett as my lawyer in all cases touching my interest if his services could be rendered available; if not, then to employ other counsel;" and this is substantially repeated several times. During the war there was no communication between complainant and his agents here, the Haynes brothers, and he was not advised of the transactions relating to the property in question, which occurred subsequently to the breaking out of the war, until some time after its termination. After the war closed Haynes remitted to him the balance of Coffee's indebtedness, which was received by complainant before he was informed of the said transactions. According to Coffee's testimony, which is not contradicted, there was paid to complainant and his agents for him by Coffee, and out of his property on said $6000 loan, in all, the sum of seventeen thousand three hundred and fifty dollars. There are about one hundred defendants in this action who are purchasers for a valuable consideration of various parcels of the land in controversy from Haynes and his grantees, deriving title through said conveyance from Freanor to Thomas J. Haynes. Many, if not all of them, have put extensive and valuable improvements on the lands thus purchased. The complainant seeks to have the judgment in the case of Freanor adjudged void, on the ground of fraud; and, also, on the grounds of want of power in Haynes to authorize an appearance, or of Col. Crockett to appear and consent to the said judgment; and that the several defendants holding under the conveyance from Freanor be adjudged to hold their title in trust for complainant, and that they be decreed to convey to him, also, prayer for an account as against Haynes and Coffee, etc.

The complainant claims: (1) That by his sales and conveyances under the Wheelock judgment he took a valid title to the lands. (2) That Haynes had no power, as his attorney, in fact, to authorize Col. Crockett to appear; and that Col. Crockett had no authority to appear in Freanor's suit and consent to the decree entered therein, annulling said sales and conveyances under the Wheelock judgment, and that said proceedings are void. (3) That said arrangement between Freanor, Haynes and Coffee, by which said sales and conveyances were annulled, and said lands conveyed by Freanor to Thomas J. Haynes, and afterward sold, and the proceeds appropriated as hereinbefore stated, was made with the intent to defraud complainant, and, consequently, void. (4) That Col. Crockett's appearance in the action of Freanor v. Lee, having referred to the written authority given by Haynes as his attorney in fact for complainant, which written authority was also made a part of the record, purchasers had record notice as to the same, and were bound to ascertain the powers of Haynes; that they are chargeable through the record with notice of the defect in their title, and stand in no better position than Thomas J. Haynes, from whom they derive title. (5) That Haynes, having obtained the apparent title through a fraudulent arrangement with Freanor and Coffee, his vendees, even though bona fide purchasers, could obtain no better title than he himself had. (6) That the said arrangement for vacating the said sales under the Wheelock judgment being with an alien enemy, and, as is charged by the complainant for the purpose of avoiding confiscation of his property, are void. (7) That no action could be legally prosecuted in the courts of the state against an alien enemy while actually absent within the enemy's lines engaged in the war.

B. S. Brooks, for complainants.

Mr. Rogers, Mr. Williams, Mr. Irving, Mr. Crane, Mr. Barstow, and others, for defendants.

SAWYER, Circuit Judge, (after stating the facts.) It is settled without any authority,

so far as I am aware, to the contrary, that a sale under a judgment after its full payment is absolutely void. And a number of the authorities go so far as to say that such a sale is void under all circumstances, and as to all persons, even though purchasers in good faith for a valuable consideration, and without notice. The principle stated in the authorities is, that the judgment is the sole foundation of the sheriff's power to sell and convey; that, if the judgment has been paid at the time of the sale, the sheriff's power is at an end, and he acts without authority; and that the purchaser under a power is chargeable with notice if the power does not exist, and purchases at his peril. The following are the principal authorities upon the point: Hammatt v. Wyman, 9 Mass. 138; King v. Goodwin, 16 Mass. 63; Wood v. Colvin, 2 Hill, 568; Carpenter v. Stilwell, 11 N. Y. 69, 70, 76; Swan v. Saddlemire, 8 Wend. 681; Lewis v. Palmer, 6 Wend. 368; Craft v. Merrill, 14 N. Y. 461; Neilson v. Neilson, 5 Barb. 565-569; Cameron v. Irwin, 5 Hill, 275; Delaplaine v. Hitchcock, 6 Hill, 17; Deyo v. Van Valkenburgh, 5 Hill, 246; Sherman v. Boyce, 15 Johns. 443; Jackson v. Anderson, 4 Wend. 480; Mouchat v. Brown, 3 Rich. Law, 117; Hunter v. Stevenson, 1 Hill (S. C.) 415; State v. Salyers, 19 Ind. 432; Skinner v. Lehman, 6 Ohio, 430. Tax sales after payment of the taxes have often been held to be void, even as to innocent purchasers, upon the same principles. Jackson v. Morse, 18 Johns. 441; Curry v. Hinman, 11 Ill. 420; Hunter v. Cochran, 3 Barr [3 Pa. St.] 105; Dougherty v. Dickey, 4 Watts & S. 146; Blight v. Banks, 6 T. B. Mon. 206.

The Wheelock judgment having been fully paid before its assignment to complainant, and before any sale under it, there can be no doubt that the sale was void. There was no vitality in the execution issued by complainant's direction, and there was no power in the sheriff to sell. This is the legal aspect of the case. But complainant's counsel insists that, at the time of the assignment of the judgment, Coffee led complainant to believe that the judgment was still unsatisfied, and that, conceding the sales to be void at law, he, and those claiming under him, are in equity estopped from alleging the prior payment of the judgment, and the invalidity of the sales under it. Whatever the equitable rights of the parties might be, if the question had arisen between complainant and Coffee alone, I am unable to take that view of the case as it is now presented. Immediately after the assignment of the Wheelock judgment, and the confession of judgment in favor of complainant, Coffee confessed another judgment in favor of Freanor, which at once became a lien upon the land, subject only to the rights of complainant then vested—the prior lien of complainant's own judgment. This was before any steps had been taken by complainant to enforce the satisfied Wheelock judgment. Complainant had paid nothing whatever for the Wheelock judgment. He had at that time parted with nothing. He had in no particular placed himself in a worse position than he was in before in consequence of the assignment. At the time he took the assignment, he also took a confession of judgment for the entire amount of his debt, which became a lien on Coffee's lands, and of itself without reference to the assignment, gave him all the advantage he could by any possibility have obtained by the attachment proceedings, which he forbore, and put him even in a better position than the attachment would have done. The only possible object to be obtained by the assignment of the Wheelock judgment was to get ahead of the Haggin and Tevis judgment, the lien of which had already attached; and even for this purpose no consideration was paid or given.

Besides, the assignment of the Wheelock judgment was taken under very suspicious circumstances, to say the least. Complainant dealt, not with the judgment creditor, but the judgment debtor. The judgment debtor professed to control the judgment against himself. The judgment debtor, not the judgment creditor, procured, brought to him and delivered the assignment, and without any new consideration. This is a circumstance that ought of itself to have excited the suspicion of a prudent man, and put him upon inquiry, as to how it happened that the debtor controlled the debt apparently due from himself to another. It doubtless would have excited inquiry, had the complainant intended to pay any consideration for the judgment, or had he been actuated by any other motive than a desire to get into a better position that he could occupy by any act of his own by obtaining a preference over a vested lien already attached in favor of Haggin and Tevis. For this purpose it was evidently not desirable to scrutinize the claim assigned to him too closely, as his knowledge would only make him particeps criminis in the wrongful act. For any other purpose the assignment was useless, as his own confessed judgment took precedence over all others, and afforded him all the security and all the advantages that the Wheelock judgment could give. The Wheelock judgment had cost complainant no new consideration—he had parted with nothing—at the time when Freanor's lien attached; and with reference to him he was not, under the circumstances at that time, a bona fide purchaser of the judgment for a valuable consideration.

Freanor's right vested at the time his lien attached, and at that time the Wheelock judgment had been fully paid; and, as to him, there was then no matter of estoppel in favor of complainant. Subsequent to that time, no act of either Coffee or the complainant, or both combined, could affect the rights of Freanor.

The subsequent issue of execution upon the Wheelock judgment, the sale thereunder, and the allowing of complainant's lien under his

own judgment, so far as not satisfied by other sales to lapse, in no way affected the rights of Freanor already vested. In my judgment, the sale and conveyance to Freanor under his judgment vested in him the legal title to the land. Freanor's title was from that time perfect, and in no respect dependent upon the proceedings to annul the sales under the Wheelock judgment, subsequently taken. The only effect of the decree in the case of Freanor v. Lee was, to remove a cloud from his title previously acquired. I see no sound reason why, upon the receipt of the sheriff's deed, he could not at once have maintained an action at law upon his title to recover the land against the complainant, or any other party who might have been in possession. See the authorities before cited.

If I am right in this view, then Freanor's deed to Thomas J. Haynes conveyed a complete title, irrespective of the proceedings in equity, in which the sales and conveyances to complainant under the Wheelock judgment were declared void. But, if wrong in this, the view I take upon the other points would lead to the same result. I am by no means clear that the power of attorney to J. W. Haynes is not of itself ample to empower him to authorize Col. Crockett to appear in the case of Freanor v. Lee, and consent to the decree entered. It is true that there is no express power to convey land, or authority in so many words to abrogate titles to land. But is not the power assumed by Haynes, under the circumstances of this case, incidental to other powers granted? It does authorize Haynes to collect, demand and receive all money due complainant, to sue therefor, and employ counsel to appear for him as he may deem expedient for the recovery of the same, and for that purpose "to submit to arbitration, and compound the same," and "particularly to prosecute through final process any and all judgments to me belonging, and at the sale under the execution issued thereon to become the purchaser in my name of any lands," etc.

This power of attorney was executed on July 5th, 1859—the day on which complainant left California, and four days after the first sale on the Wheelock judgment. The subsequent sale on the second execution issued on that judgment was made by Haynes himself, August 1, in pursuance of this power of attorney and instructions from complainant. The power of attorney then was made in part with special reference to collecting the money from Coffee on these judgments, the object at the time being to obtain money, not land. The title even on the first sale had not yet vested in complainant. He had only got an inchoate, contingent interest, which might be defeated on paying the money and redeeming within the time appointed by law. The subject matter, then, upon which this power of attorney was intended to operate was in part these judgments, and executions, and with a view to securing the money due thereon, and to that end the attorney was authorized to act as to him it should seem best for the interest of his principal; to employ counsel in relation thereto, and "to arbitrate or compound the same." The end to be accomplished was to obtain a real substantial satisfaction of these judgments by collecting the money, and the attorney was authorized to bid in the property, in case it should be deemed necessary or advisable, at the contemplated sale; and to receive the redemption money in case it should be paid on the sale already made, and other sales to be made. Haynes proceeded to sell, and there being no other satisfactory bidders he purchased for complainant, the amount being credited on the judgment. It turned out that he got no money, and in the opinion of his counsel no land, and consequently no real, although an apparent, satisfaction of the judgment. He had, as he had good reason to suppose, utterly failed to accomplish his trust—had failed to collect the money or obtain an equivalent, the title having failed through an incurable vice in the judgment through which he sought to make the money. An opportunity occurred, however, by which, through a compromise or compounding of the matter, he could effect the object of the power and still secure payment. Even if he erred as to complainant's real legal rights, there was the strongest reason to fear the loss of the property. It is difficult to see wherein this fails to come within the purview of the power. The contest is not yet ended. The fruits of his efforts are about to slip from his grasp, unless he proceeds further, and he does proceed, and through a compromise secures the full amount due his principal. It appears to me that this power to enter into the arrangement by which he ultimately secured complainant's debt, is incident to the main power conferred to collect these judgments. But however this may be, this power of attorney was not the only authority Haynes had. It is not necessary that authority should be conferred by a formal technical power of attorney. After these sales had taken place, and after the execution of the sheriff's deeds. Haynes had informed complainant by at least two letters received by him at Washington, before the war broke out, that his title was likely to be contested by Coffee's creditors, on the grounds already discussed; and in one of these letters Freanor was particularly referred to as one who claimed the title under the Wheelock judgment to be void. In answer to these letters, and in reference to the threatened contest mentioned therein, he writes to Haynes, and in a letter bearing date April 6, 1861, among other things, says: "As to the Oakland property, you must be governed by your own judgment as to its management, and, should it be necessary to go to law, employ whom you think best." In a letter dated April 6, 1861, in answering the letter referring to

Freanor, and acknowledging the receipt of Rogers' opinions that complainant's title is invalid, he says, among other things: "As to the clause in my letter of August 22, '60, you must as in all cases connected with my Oakland property be governed by your own judgment, and such legal advice as you may deem expedient." Thus, in addition to the fact that the collection of the demand against Coffee, and the completion of the enforcement of the Wheelock judgment had been committed to Haynes by his formal power of attorney, dated July 5, 1859, the complainant, after being informed that the title acquired was likely to be attacked by creditors of Coffee, and Freanor especially; and of the opinion of counsel that his title was invalid, further by letter commits the matter to Haynes' discretion, with directions to employ such counsel as he should deem prudent. In one of these and in other letters he directs him to employ Col. Crockett in all matters relating to his interests where his services could be had.

In my judgment, under this power of attorney, and these subsequent instructions taken together, Mr. Haynes was fully empowered to employ counsel in the case of Freanor v. Lee, subsequently commenced; and that both they and the counsel employed were authorized to pursue the course they did, if in their judgment that course was most conduciye to the interests of complainant. That they acted in good faith, I see no good reason to doubt. Soon after the last letter from complainant referred to was written, the war of Rebellion broke out, and complainant resigned his commission in the United States army, and withdrew himself within the rebel lines, where he continued in the rebel service during the war, and there was no further opportunity to communicate with him in relation to the matter. Freanor filed his bill against complainant to remove the cloud from his title. Mr. Haynes consulted Col. Crockett, who had been complainant's attorney, and whom complainant had directed him to consult in all matters pertaining to his interest. The facts of the case having been fully investigated, both Col. Crockett and Mr. Rogers, Haynes' own attorney, were of opinion that complainant had no title. Upon this hypothesis, the action was in no sense necessary to give Freanor a title, for that he already had. A decree would only serve to remove a cloud upon a title already perfect at law. Complainant was without title, and without the means, so far as anything to the contrary appears, to satisfy his own judgment from any other source. Upon negotiations between Freanor and Haynes, brought about through Coffee, it was ascertained that by an appearance in Freanor's suit on behalf of complainant, and consenting to a decree removing the cloud, Freanor would consent to a sale of the land, and the payment of the proceeds, first, on his own demand against Coffee; secondly, the demand of complainant; and, lastly, that the balance should go to Coffee's other creditors. By this means the complainant would get all the money due him, thereby accomplishing the original object of his judgment, while on the other hand he was likely to lose all. Upon the hypothesis assumed, Freanor was in a position to hold the land himself. Nothing could be done without his assent, and he was not willing to surrender his rights for the benefit of complainant, although he would do it for Coffee's benefit. It was, therefore, in the minds of complainant's agents, and their counsel, only a question whether it was for complainant's interest to permit the cloud to be removed in consideration of getting the moneys due him, or by refusing to enter into the arrangement, risk losing all. The former course was pursued, and I think wisely. It was such a course as any prudent counsel would be likely to advise, and any prudent business man to adopt, if present and acting for himself. I see no good ground for supposing that there was any fraud perpetrated by any of the parties engaged in this compromise. It matters not whether Freanor in surrendering his right was actuated by motives of friendship for Coffee, or by a due regard for the intrinsic justice of the case. He was in a condition to prescribe terms, and it cannot be denied that he acted with liberality, and a due regard to the just claims of all. The arrangement agreed upon was subsequently carried out, and the result was that Freanor obtained his money; complainant his; Coffee's other creditors theirs; and Coffee was partially, if not wholly, relieved from the inconvenience of insolvency. By the conditions of the arrangement under which Freanor conveyed to Thomas J. Haynes, complainant was only entitled to receive the amount due him. That he received, and after receiving his money, he had no further interest in the property; and it was no concern of his what became of it or its proceeds.

I do not think that either Haynes or Crockett, under the circumstances, either exceeded his powers, or improvidently or unwisely exercised them. But if I am mistaken as to the powers of Haynes and Crockett, I think still that the judgment entered upon the appearance and consent of Col. Crockett in Freanor v. Haynes, is valid as to the vendees of Haynes without actual notice for a valuable consideration. The judgment is in all respects regular on its face. Col. Crockett was an attorney of the court. He appeared as such in the case. It is true, his appearance refers to his authority as derived through Haynes as attorney in fact of complainant, and the written authority to appear is filed and made a part of the judgment roll or record. But the power of attorney to Haynes is not in the record. The record stops with the authority given to Crockett by Haynes. Whether Haynes was

duly authorized or not was a question to be determined by the court, in ascertaining whether jurisdiction of the person had been acquired; and it must be conclusively presumed that the court determined the question of Haynes' authority correctly, and upon sufficient evidence. Purchasers were not bound to look beyond the record to see whether the judge committed any error or not. They were entitled to rely on the judgment as they found it. The judgment is regular on its face. It does not of itself affirmatively show any want of authority in Haynes. The judgment is conclusive and cannot be collaterally questioned. Hahn v. Kelly, 34 Cal. 391; Sharp v. Lumley, 34 Cal. 615, 616; Ryder v. Cohn, 37 Cal. 89; Quivey v. Porter, 37 Cal. 462; Eitel v. Foote, 39 Cal. 440; Mahony v. Middleton, 41 Cal. 44; Blasdel v. Kean, 8 Nev. 308; Galpin v. Page [Case No. 5,205].

A point is made, and pressed with some earnestness, that if the object of the transaction by which the decree in Freanor v. Lee was permitted to be taken, and the property conveyed by Freanor to Haynes was to get the title out of complainant in order to protect it from confiscation, the proceedings were all void, because complainant was at the time an alien enemy, and the act, on that ground, unlawful.

This may have been an additional motive in the mind of the counsel of complainant to assent to the arrangement contemplated. But if so it was merely incidental to the main object, which undoubtedly was to secure the money due to complainant, which was in imminent danger of being lost otherwise than by confiscation. Besides, there is nothing to show that Freanor was in any way influenced by such considerations. The title conveyed and the trusts imposed by him, at least as to parties other than complainant, cannot be affected by the secret motives which actuated the representatives of the latter in consenting to the decree.

It is further claimed that a valid judgment could not be obtained removing the cloud upon Freanor's title, even if the court could get a service of process in any mode recognized by law, or acquire jurisdiction by means of an appearance made by an attorney duly authorized. The decisions of the supreme court settle that question. In U. S. v. Grossmayer, 9 Wall. [76 U. S.] 75, it seems to be conceded that "a resident in the territory of one of the belligerents may have in time of war an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such case the agency must have been created before the war began." Now that is the case in hand. Coffee was the judgment debtor of complainant, whose power of attorney to Haynes, and all whose subsequent instructions, verbal and by letter, relating to this business, were given before the war broke out. If Haynes had power to receive the debt or property in discharge of the debt, he must have had power, notwithstanding the war, to enter into these arrangements by means of which the money or property could be received. Besides, at the present term, the supreme court of the United States has held in University of Missouri v. Finch, 18 Wall. [85 U. S.] 106, that a sale of real estate under a power contained in a trust deed given to secure a debt executed before the late Civil War is valid, notwithstanding the fact that the grantors in the trust deed were citizens and residents of the state in insurrection at the time of the sale made while the war was flagrant; and the court say: "But this court has never decided, nor intentionally given expression to the idea that the property of citizens of the rebel states located in the loyal states was, by the mere existence of the war, exempted from judicial process for debts due to citizens of the loyal states contracted before the war. A proposition like this, which gives an immunity to rebels against the government not accorded to the soldier who is fighting for that government in the very locality where the other resides, must receive the gravest consideration, and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war."

So, also, at the present term, in the case of Masterson v. Howard, 18 Wall. [85 U. S.] 99, the court say that the existence of war "does not prevent citizens of one belligerent from taking proceedings for the protection of their own property in their own courts against the citizens of the other, whenever the latter can be reached by process."

In McVeigh v. U. S., 11 Wall. [78 U. S.] 267, the court holds that an alien enemy may be sued, though he may not have a right to bring suits in our courts, and that when he is sued he has a right to appear and defend, and say: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued." These decisions cover this case. If the citizen may sue to recover a debt in his own courts due from an alien enemy, he may sue to enforce any other right. Freanor having a right of action, as he claims, against Lee to remove a cloud upon his title, filed his bill in equity for that purpose. The statute of California provided for procuring service against non-residents in such cases by publication of summons, so that service could have been had in a mode provided by law, as well against an alien enemy as against other non-residents. Section 22 of

the California Code of Procedure at the time provided that, "after the filing of the complaint, a defendant in an action may appear, answer or demur, whether summons be issued or not, and such appearance, answer or demurrer shall be deemed a waiver of summons." Before the commencement of the war, complainant (Lee) had empowered Haynes to employ counsel in any matters of litigation that might arise touching his interests in California, as we have seen, and upon the filing of Freanor's complaint, Col. Crockett was employed to appear in the case, which he did. This gave the court jurisdiction, even though complainant, at the time, was an alien enemy. The other questions have been already discussed.

It ought to be added that I find no offer on the part of the complainant in his bill to return the money he has received under the arrangements which he now seeks to set aside. If he demands the lands after the large increase in value which has accrued during the ten years' growth of the city of Oakland, before the commencement of this action, also enhanced by the improvements put upon them by the parties since the transactions set out have occurred, he certainly ought to offer to return the amount of the debt received by him in lieu of the lands. But aside from this defect in the bill, by failing to offer to do equity, I find no ground for equitable relief. On the contrary, I think, under the circumstances shown, the complainant has abundant reason to be satisfied with the acts of his agents and attorneys, and to congratulate himself, that in his efforts to obtain an undue advantage over prior lien-holders, he did not ultimately lose the advantage to which he was justly entitled. The bill must be dismissed with costs, and it is so ordered.

LEE (SEMMES v.). See Case No. 12,652.

LEE (SMOOT v.). See Case No. 13.133.

LEE (SOMERVILLE v.). See Case No. 13,172.

Case No. 8,202.

LEE v. THOMPSON et al.

[3 Woods, 167.] [1]

Circuit Court, D. Louisiana. April Term, 1878.

PRACTICE IN ADMIRALTY — GARNISHMENT — CONFLICTING CLAIMS — SUBMISSION OF ISSUES OF FACT TO REFEREES—EFFECT OF THEIR DECISION —EVIDENCE BEFORE COURT ON APPEAL.

1. It is according to the course and practice of courts of admiralty, where a libelant has obtained a judgment in personam against the respondent, to attach a debt due the latter from a third person to satisfy the decree.

2. A court of admiralty has power to decide between conflicting claims to property seized by attachment or on execution.

3. Where a party claims property attached by a court of admiralty to satisfy its judgment, and submits his claim to that court, he is bound by its decision.

4. Until the passage of the act of congress, approved Feb. 16, 1875 [18 Stat. 315], "to facilitate the disposition of cases in the supreme court of the United States, and for other purposes," a court of admiralty had strictly no power to try issues of fact by a jury; but it might, either on its own motion or at the instance of the parties, submit any question of fact to commissioners or referees for their opinion and advice. Their decision, however, would not, like the verdict of a jury, be conclusive of the facts, which would finally have to be submitted to the decision of the court.

[Cited in The Empire, 19 Fed. 560.]

5. In a case where the court of admiralty submitted issues of fact to a jury, and the record showed that the court was controlled by the findings of the jury, without consideration of the evidence, *held*, that the proceeding was irregular and illegal, and if the case were simply one to be affirmed or reversed, it would be reversed.

6. But where, notwithstanding such error, all the evidence is before the appellate court, that court will consider it and render such judgment as the evidence warrants.

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

The libelant [Hamilton L. Lee] having obtained a judgment in personam against the respondents [James M. Thompson and others], issued an execution thereon, which was returned that no property could be found. Thereupon the libelant filed a supplementary petition or libel, alleging that Edward Conery and J. H. Menge were indebted to the respondent Thompson on bond for more than the amount due on the judgment, and praying an attachment of so much of said debt as would satisfy the judgment. Conery and Menge being cited to answer this allegation, admitted their indebtedness to Thompson, which had been converted into judgment; but alleged that Thompson had transferred the judgment to Doctor Vincent Boagni, and that they had been duly notified of the transfer. The libelant traversed the assignment, averring that it was simulated, fraudulent and void. Whereupon Conery and Menge, alleging that they were not interested in this question, but were mere stakeholders, prayed that Boagni might be cited to appear and defend his interest. An order for that purpose was made by the court, and Boagni appearing, set forth the act of assignment, alleged its bona fides, but excepted to this mode of proceeding, to try the validity of his title, insisting that the proceeding should be a direct action where he would have a right to a trial by jury. The court then made an order that the matter be tried by a jury, and it was tried accordingly; and the jury rendered a verdict that the transfer from Thompson to Boagni was a simulated transfer. Judgment was thereupon rendered that the libelant recover the amount of his judgment against Conery and Menge. From this judgment Boagni has appealed.

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

Thomas Hunton, for libelant.
B. Egan, for respondent.

BRADLEY, Circuit Justice. I. The first question on the appeal is, whether the district court had power to attach the debt due from Conery and Menge to Thompson in satisfaction of the judgment. By the process act of 1792, § 2 (1 Stat. 276), the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, were required to be the same as then used in the state courts, and in suits in equity and admiralty according to the principles, rules and usages which belong to courts of equity and admiralty respectively; but subject to such alterations and additions as the said courts should deem expedient, or to such regulations as the supreme court of the United States should think proper from time to time by rule to prescribe to any circuit or district court concerning the same. The supreme court did not adopt any general rules on the subject until long afterwards, and the practice in admiralty, including the forms of writs and executions was that which prevailed in the states respectively at the time of the adoption of the constitution, as modified and regulated from time to time, by the district courts respectively. [Mauro v. Almeida] 10 Wheat. [23 U. S.] 489, 490. In 1828, congress passed an act further to regulate process [4 Stat. 278], but it was not extended to courts established in Louisiana.

In 1842, congress passed a further act on the subject (5 Stat. 516), by the 6th section of which plenary power was given to the supreme court to prescribe and regulate the forms of writs and other process to be used and issued in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers and other proceedings and pleadings, in suits at common law, or in admiralty and in equity, etc., and generally to regulate the whole practice of those courts. Under the authority given by this act the supreme court soon afterwards promulgated general rules for the practice in admiralty proceedings, which are still in force so far as not modified by subsequent legislation or amendment. By the 21st of these rules it was declared, that on decrees for the payment of money, the libelant might, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in nature of a capias, or a fieri facias against goods and chattels, and for want thereof he might arrest the person. After the abolition of imprisonment for debt this rule was amended and now declares that, in all cases of a final decree for the payment of money, the libelant shall have a writ of execution in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators. This must be regarded as the paramount law regulating the subject of executions on judgments in admiralty for the payment of money. It is true the act of 1872 (17 Stat. 196) relating to the practice of the courts (which has been generally incorporated into the Revised Statutes), requires that the practice, pleadings and forms and modes of proceeding in the circuit and district courts, in all civil causes, other than equity and admiralty causes, shall conform to those of the state courts respectively, including the remedies for reaching the property of the debtor upon or supplementary to execution.

But the forms of mesne process and the forms and modes of proceeding in the circuit and district courts in equity and admiralty, are still to be conformed to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except as expressly modified by statute or by rules of court made in pursuance thereof, subject, however, to alteration and addition by the said courts, and to regulation by the supreme court; the paramount authority of the latter court being still continued. See Rev. St. U. S. §§ 913-918. Assuming it to be true, therefore, that the process of execution to be issued on money judgments in the admiralty, according to rule 21, is to be a writ in the nature of a fieri facias, leviable upon the goods and chattels, lands and tenements or other real estate of the defendant or stipulators, the question remains as to the manner in which such writ is to be executed, and as to the course to be pursued for obtaining satisfaction of the judgment in cases where the writ is ineffective for want of leviable property. Is there anything in the statutes, or in the rules of the supreme court, which would prevent the district court from exercising its power to reach rights and credits of the defendant within its jurisdiction in a state where that species of property may be thus pursued in its own courts? Is there anything to prevent the district court itself from adopting, in this regard, the practice of the state courts? The power of the court to reach the rights and credits of the respondent in certain cases is unquestionable. By the second rule in admiralty, the court is authorized in suits in personam, to issue a warrant to arrest the person of the defendant, with a clause therein, if he cannot be found, to attach his goods and chattels; or, if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of garnishees named therein; and of course the property so attached may, in default of appearance, be sold to satisfy the debt. This is in strict accordance with the ancient course in admiralty proceedings, and has been confirmed by the decisions of the supreme court. See Manro v. Almeida, 10 Wheat. [23 U. S.] 473; Atkins v. Disintegrating Co., 18 Wall. [85 U. S.]

303; and rule 37 in admiralty. This shows that the power of the court is competent to reach this species of property (rights and credits) and to apply it in satisfaction of the libelant's demand. Ordinarily, the respondent, on appearing, is compelled to give sufficient security by stipulators for the payment of the judgment. But where this is not done, and he remains in contumacy, and no corporeal property can be found to answer the execution, there seems to be no good reason why the court should not have power by a supplementary proceeding to cause his rights and credits to be seized by attachment or garnishment, where property of that kind is subjected to the payment of debts by the local law.

In Louisiana, rights and credits, as well as corporeal movables, are liable to seizure on fieri facias. Such effects, therefore, are subjected to execution in ordinary cases at law, in the circuit and district courts of the United States. So that the proceedings instituted in this case for reaching this species of property are neither strange nor unusual, nor contrary to the customs and usages of the district, but entirely in harmony therewith. A rule of the district court of long standing (rule 42) directs that on judgments in admiralty in personam, a writ of execution may issue against the property of the judgment debtor in the same manner as in ordinary civil cases. This rule is in entire harmony with the rule 21 in admiralty, and would probably authorize a seizure of rights and credits under the writ of fieri facias itself. But the course adopted in this case, of garnisheeing the debtors of the defendant and citing them to answer interrogatories as to their indebtedness, instead of proceeding directly under the fieri facias, cannot be complained of. It was more in accordance with the modes of proceeding proper to the district court, as a court of admiralty, and was more favorable to the garnishees than a direct seizure would have been. I think there was no error in attaching the debt in question for the purpose of procuring satisfaction of the libelant's judgment.

II. The next subject to be considered is, the trial of the validity of the transfer from Thompson to Boagni of the claim against Conery, Menge and others. A regular transfer was produced, which, under the laws of Louisiana, conveyed and transferred to Boagni all the right, title and interest of Thompson. The libelant alleged that this was a simulated transfer. Boagni, as has been shown, being cited to sustain it, alleged it to be bona fide and for good consideration, and excepted to its validity being tried in a proceeding in which he could not have a trial by jury. A jury was ordered, and the trial went on between the libelant and Boagni, and a verdict was given that the transfer was a simulated one. Now, first, had the district court, sitting in admiralty, power to try this question? Secondly, if it had, was the mode of trial valid and lawful, so as to bind Boagni? The only direct mode of attacking the bona fides of such a transfer in states where the common law prevails would have been by bill in equity to set it aside as being simulated and fraudulent; in Louisiana, by the revocatory action. But the plaintiff in a judgment, when he finds or believes that his debtor has made a simulated transfer of his property, may treat it as null and no transfer; and require the property to be seized, and leave it to the transferee to take such course as he sees fit to vindicate his right. It is so laid down in 1 Hen. Dig. tit. "Execution," v (a), (3), e, p. 619, as the result of the authorities, which are there referred to, but which I shall not take up time to quote. When the seizure is made, the party affected thereby and claiming the property may intervene or not, as he sees fit. That this is the Louisiana law may be seen by a reference to the same, 2 Hen. Dig. tit. "Pleading," viii (d), (2), p. 1179. If he does intervene, of course he is bound by the decision. Now, although a court of admiralty has no power, by a direct and independent proceeding, to investigate the validity of a man's title to his property, except in petitory suits relating to the title or right of possession of ships or other maritime subjects; yet, as incidental to its general jurisdiction, and for maintaining the same, it has plenary power to decide, and frequently does decide, conflicting claims to property. Without such power its jurisdiction would often be defeated.

In all cases of libels in rem, when a party appears as claimant, the libelant may contest the truth and validity of his claim. Judge Conkling, in his treatise on Admiralty, correctly says: "The libelant has a right, by a suitable exceptive allegation, to contest the proprietary interest of the claimant, and to have it formally decided." 2 Conkl. Adm. p. 205. The power of the court to entertain such contestations upon all seizures made under its authority would seem to be indispensable. It is as necessary that it should have power to decide between conflicting claims to property seized by attachment or on execution as in seizures upon libels in rem. In Benedict's Admiralty (section 459) it is said: "If the property of a third person be attached, he may intervene by claim, for the protection of his property." It seems to me that the proposition can hardly be questioned. Without power to try the validity of conflicting claims, the court could not enforce its judgments for the payment of money. They could always be defeated by fraudulent and simulated transfers. If a third party comes in to claim the property which has been seized, he must submit himself to the jurisdiction of the court. If he does not choose to do this, either voluntarily or upon citation, he must, at his own risk, seek such other remedy as the law may afford him. Perhaps he might sue the marshal for damages, or where a credit is seized, as in this

case, perhaps he might test his claim by further legal proceedings against the garnishees. Whatever remedy he may have when he absolutely declines the jurisdiction of the district court, he loses it by submitting to that jurisdiction. In this case Boagni, although he excepted to the proceeding, nevertheless, after he was allowed a trial by jury, he submitted to it, and went before the jury in litigation of his right. Having failed, however, he now insists that the trial by jury was an illegal mode of trial in the admiralty court, and an unauthorized proceeding.

It is undoubtedly true that a court of admiralty has no power to try causes by jury; but there is no reason why it should not, either on its own motion or at the desire of the parties, submit any question of fact to commissioners, or referees, for their opinion and advice, and the number of these commissioners may be twelve as well as any other number. But their decision, after all, is not like the verdict of a jury, conclusive upon the facts; and no bill of exceptions can be entertained, and no writ of error can be brought to consider such exceptions. The matter must be finally submitted to the judgment of the court, and the court will not be concluded by the verdict, although it may be aided in coming to a conclusion. A state of things precisely similar to this took place in the case of Dunphy v. Kleinsmith, reported in 11 Wall. [78 U. S.] 610. There a creditor's bill was filed in a territorial court to set aside a fraudulent assignment made by the debtor, and an issue was made for trial by a jury. The trial was had and a verdict given, and the court gave judgment upon the verdict, as it would have done in an ordinary jury trial at law, without looking at the evidence or passing upon the facts of the case. The supreme court held that this was not a legal mode of proceeding, and reversed the decree. I should infer from the record in this case that a similar course was pursued, and if it were simply a case to be affirmed or reversed, I should feel compelled to send it back for reconsideration. For whilst the district court might very properly have given much consideration and weight to the finding of the jury, it was bound to come to a conclusion of its own on the facts, and to disregard the verdict if, in its opinion, it was not supported by the evidence. But as, upon this appeal, all the evidence, as the parties have conceded, is contained in the record, and as the case is before this court for retrial, it can do what the district court should have done, if it did not.

Accordingly, I have attentively read the evidence, and whilst Thompson and Boagni both swear that the assignment was made for the consideration of an indebtedness which Thompson had assumed to pay to Boagni on behalf of one Mrs. McHusbands, in 1866 or 1867, and was absolute and unconditional, it appears from the evidence of Boagni that this debt of Mrs. McHusbands was secured by a note with a mortgage, and the property mortgaged not being supposed to be of sufficient value to protect him (Boagni), Thompson secured him still further by the transfer of the claim in question. These statements are inconsistent with each other. An absolute and unconditional transfer is very different from a transfer by way of collateral security. Then there are other circumstances that are calculated to raise a doubt in the mind with regard to the bona fides of the transaction. Both parties say that a former transfer had been made, but when wanted no record of it could be found; and, therefore, a second act of transfer was passed on the 5th of May, 1875, and still another on the 15th of May, 1875. The last act recites that the first transfer had been made several years before. Why were so many successive transfers needed or required? What happened in 1875 that made the transfer to be wanted? The record discloses the fact that the claim, which was a proceeding against the steamboat Great Republic, was about passing into judgment, and the further fact that Thompson informed Boagni that there was a judgment against him in New Orleans, and that he thought the judgment of Thompson against the Great Republic might be garnisheed. Does it not seem most probable that the act of assignment was wanted for the purpose of defeating any such garnishment, especially as Thompson had declared that he owed the libelant nothing, and that if he got a judgment it would be by false swearing. It is to be observed also that no explanation is given of the manner in which, or reason why, Thompson assumed the debt of Mrs. McHusbands, in 1866 or 1867; and Thompson declined to answer the fifth direct interrogatory, inquiring whether he knew or could set forth any other matter or thing which would be of advantage or benefit to the parties at issue, or material to the subject or to the matters in question; and also refused to answer the eleventh cross-interrogatory, which inquired whether he had any property either in his own name or that of other persons; and Boagni also made no answer to the said fifth interrogatory. It is further to be observed that Boagni never took any care of or gave any attention to the suit against the Great Republic, but gave power to Thompson to attend thereto, who still managed and looked after it with the same interest and attention as if he were the proprietor. Putting all these circumstances together, and others which the evidence discloses, it does not seem at all strange that the jury should have come to the conclusion they did, and I am unable to say that it was not supported by the evidence; and as this was the tribunal before which Boagni desired to go, I do not feel disposed to question the justice of the verdict. On the whole matter, it seems to me that the decree of the district court should be affirmed.

Case No. 8,203.

LEE v. THORNTON et al.

[1 Cranch, C. C. 589.] [1]

Circuit Court, District of Columbia. Jan. 31, 1810.[2]

SET OFF IN EQUITY — UNLIQUIDATED DAMAGES — JUDGMENT AT LAW—INJUNCTION.

Unliquidated damages arising from the non-performance of a verbal promise to convey real estate made without consideration and under a mistake of fact, cannot, in equity, be set off against a judgment at law.

[This was a bill in equity by T. S. Lee against William Thornton and Thomas Monroe.]

CRANCH, Chief Judge. The facts of this case, as they appear from the bill, answers, exhibits, and other evidence, are, that the commissioners of Washington had obtained judgment at law against the complainant for $9,333.33. That M. & N. being indebted to the complainant by two promissory notes of $1,500 each, and claiming a right to conveyances in fee to their order from the commissioners, of certain lots in Washington, offered to secure the complainant by an order on the commissioners for a conveyance of those lots; whereupon the complainant applied to the commissioners to know whether they would convey those lots to him in fee upon such an order. The commissioners replied that M. & N. had paid for more lots than had been conveyed to them, and that they, the commissioners, would convey the lots in question to the defendant upon producing the order of M. & N. for that purpose. On the next day the complainant produced the order, and the commissioners promised verbally to have the deeds drawn as soon as their clerks were at leisure. On the next day they discovered that M. & N. had not paid for the lots, and informed the complainant of their mistake, and refused to convey the lots unless the purchase-money should be paid. The complainant had, before receiving this information, delivered up to M. & N. one of the notes, and had promised to deliver up the other; but had taken a new engagement on the part of M. & N. to pay the $3,000, and interest in nine months, in default whereof the complainant was to sell the lots; if they produced more than the debt and interest and costs, he was to pay them the overplus; if less, they were to pay him the balance.

The question, arising upon these facts, is, whether the complainant can, in equity, set off against a judgment at law, unliquidated damages arising from the non-performance of a verbal promise to convey certain lots; which promise was made without consideration and under a mistake of the fact of payment. If the bill had sought a specific performance of such a promise it must have been dismissed upon two grounds:—1st. Because a verbal agreement to convey land is void by the statute of frauds; and 2d. Because a court of equity will not enforce the specific execution of a contract founded upon a mistake of a material fact. In such a case there would be wanting the very essence of an agreement, the assent of the mind. There would also be a defect of consideration. If there be any equity in the case, it must arise, not from the non-performance of a promise founded on a mistake, but from the equitable obligation which a party is under to repair damage which he may have caused by his mistake or ignorance of a fact which it was his duty and in his power to have ascertained or known, and which it was not equally the duty and in the power of the injured party to have ascertained or known. The fact whether the purchase-money had or had not been paid by M. & N. was a fact which the commissioners ought to have ascertained before they made the promise. The ascertainment of that fact was within their power, but not within the power of the complainant. And if, by reason of that promise, the complainant has suffered an injury, the commissioners who rashly or negligently made the promise, ought in equity to repair that injury, although they were ignorant of the true state of the fact, at the time of the promise. The question then is, did the complainant suffer any and what injury by reason of the promise? The only injury suggested by the bill, as arising from the promise, is that the complainant was induced thereby to give up one of the notes for $1,500, and to promise to give up the other, and to desist from arresting Mr. Nicholson; by doing which while he was at Washington, the complainant might have recovered the whole amount of debt and interest; from which he says, it appears to him to be ascertained, that by reason of the promise and refusal of the commissioners to convey the lots, he has lost the debt. The promise to give up one of the notes, certainly could not injure the complainant, because that promise, being founded on a mistake, was not obligatory, and the moment he was informed of the mistake he might have commenced an action upon it; and it appears by the answers that Mr. Nicholson remained at Washington a considerable time after the complainant received information of the mistake, and might have been arrested. Nor did the actual delivery up of the other note injure the complainant, for as the delivery was founded upon a mistake, and upon a consideration which had failed, the debt was not cancelled by the delivery up or destruction of the note which was but evidence of the debt. And although the complainant had lost part of his evidence, yet there was enough left to support the action. The fact of the delivery up of the note; the fact of

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

[2] [Affirmed in 7 Cranch (11 U. S.) 366.]

the mistake; the fact of the failure of the consideration upon which the note was delivered up, were all capable of proof, and would have enabled the plaintiff to support an action at law, immediately, in some form or other, for the amount of the note thus given up. If, therefore, after the discovery of the mistake, the complainant desisted from bringing his action and holding Mr. Nicholson to bail, he desisted at his own peril. Although the complainant had taken a new engagement from M. & N. to pay the debt in nine months, yet as that agreement was also founded upon mistake, it was no bar to an immediate action by the complainant against them for the amount of the notes. As therefore the promise to deliver up one of the notes and the actual delivery of the other, did not deprive the complainant of an immediate right of action upon discovery of the mistake; as the mistake was discovered within two days after the promise and delivery up of the note; as no material alteration appears to have taken place in the affairs of M. & N. during those two days, and as Mr. Nicholson remained at Washington, and liable to process a considerable time after the complainant had notice of the mistake, the court cannot see how the complainant has been injured by the promise of the commissioners to convey the lots. We are therefore of opinion that the injunction should be dissolved and the bill dismissed with costs.

Affirmed by the supreme court of the United States. 7 Cranch [11 U. S.] 366.

[NOTE. Mr. Justice Livingston delivered the opinion in the supreme court, in which he held that the decree, although nominally against public officers, was in reality against the United States. The court would not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners, or whether he had really lost his remedy against Morris & Nicholson. He also announced that the majority of the judges were of the opinion that the communication made by the commissioners to the plaintiff was gratuitous, not within the sphere of their official duties, and that the United States could not be injured by it, and that, if the defendants had made a title to the plaintiff, after the discovery of the mistake except on the terms proposed by them, they would have rendered themselves personally liable to the public. The United States cannot suffer for the mistake of the commissioners. "Were it otherwise," says the learned justice, "an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very valuable and large tracts of real estate, and even produce alienations of them, without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by proper collusions, it should be very difficult for the public to protect itself." 7 Cranch (11 U. S.) 366.]

LEE (TUCKER v.). See Case No. 14,221.

LEE (UNITED STATES v.). See Cases Nos. 15,584–15,588.

Case No. 8,204.

LEE v. WELCH.

[1 Cranch, C. C. 477.] [1]

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

ARREST IN CIVIL CAUSE—AFFIDAVIT TO HOLD TO BAIL—WHOLE DEBT NOT DUE—SURETIES NOT RESIDENT.

When a bond for the payment of money is filed, an affidavit to hold to bail is not necessary, and the court will not mitigate the bail upon affidavit that the whole is not due; nor receive as bail persons not resident in the district.

This was an action of debt on a bond in the penalty of six thousand dollars. There was an indorsement, the precise meaning of which could not well be understood.

F. S. Key objected, that there ought to have been an affidavit to show the precise amount claimed by the plaintiff, and moved for leave to appear for the defendant without special bail.

But THE COURT (nem. con) upon the authority of Smith v. Watson [Case No. 13,124], June, 1806, in this court, overruled the objection.

Mr. Key then moved the court to limit the amount of bail to a certain sum, and said he could produce an affidavit that the whole was not due.

But THE COURT refused, and also refused to receive persons resident in Baltimore as bail. The defendant was committed.

LEE, The EDWARD. See Case No. 4,292.

LEE, The R. E. See Cases Nos. 11,690 and 11,691.

Case No. 8,204a.

LEECH et al. v. FRELIGH.[2]

Circuit Court, S. D. New York. April 21, 1875.

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[Cited in 2 Morgan, Law of Literature, 306.]

[This was a bill for an injunction by Harry Harewood Leech, Felix G. de Fontaine, and Charles Dimetry against William G. Freligh.]

Augustus Van Wyck, for plaintiff.
A. Oakley Hall, for defendant.

Before SHIPMAN, District Judge.

Motion having been made by the plaintiffs in the above-entitled action for a temporary injunction to restrain the defendant from publishing, printing, representing or performing "Round the World in Eighty Days," a comedy drama adapted from the French of Jules Verne, and the said motion having come on regularly to be heard, and on reading and filing the notice of motion, bill of complaint and affidavits of plaintiffs attached, and af-

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

[2] [Not previously reported.]

ter hearing Messrs. Van Wyck, of counsel for the plaintiff, for the motion, and A. Oakley Hall, of counsel for the defendant, in opposition thereto, it is ordered that said motion for a temporary injunction in the above-entitled cause be, and the same is hereby, denied.

LEE CHOI CHUM (SPARK, The, v.). See Case No. 13,206.

LEE COUNTY (UNITED STATES v.). See Case No. 15,589.

LEE COUNTY (ROGERS v.). See Case No. 12,013.

Case No. 8,205

In re LEEDS.

[1 N. B. R. 521 (Quarto, 138);[1] 25 Leg. Int. 140; 1 Am. Law T. Rep. Bankr. 78; 7 Am. Law Reg. (N. S.) 693; 6 Phila. 468; 15 Pittsb. Leg. J. 361.]

District Court, E. D. Pennsylvania. April 23, 1868.

ACT OF BANKRUPTCY—WARRANT TO CONFESS JUDGMENT—CONDITION OF BUSINESS—INTENTION OF WARRANT — SUSPENSION OF PAYMENT OF COMMERCIAL PAPER.

1. In deciding whether giving a warrant to confess judgment is an act of bankruptcy, the character of the alleged bankrupt's business may be taken into consideration; and where it appears that the purposes of the warrant of attorney may have been to enable the debtor to continue in business, and that there was no intention to defeat or delay the operation of the bankrupt law [of 1867 (14 Stat. 517)], it is not a sufficient ground for an adjudication of bankruptcy.

2. A suspension of payment of commercial paper for fourteen days is not, in the absence of fraud, an act of bankruptcy.

[Criticised in Baldwin v. Wilder, Case No. 806. Cited in Re Hercules Mut. Life Assur. Soc., Case No. 6,402.]

The alleged bankrupt [William Leeds] was a dealer in live stock. His business done through the bank, alone, had exceeded $500,000 per annum. His real estate, worth about $8,000, was incumbered to the amount of less than half its value. The alleged acts of bankruptcy were giving a warrant to confess judgment, and a suspension of payment of his commercial paper for fourteen days.

CADWALADER, District Judge. This case has been ably argued. The peculiar character of the business in which the alleged bankrupt was engaged must be principally considered. He had no such stock in trade as would be swept away through the necessary or ordinary effect of an execution upon a judgment under a warrant of attorney. His real estate was, moreover, of sufficient value to constitute an available partial security for such a judgment. The former course of his transactions also shows that the purpose of the warrant of attorney, which constitutes one of the alleged acts of bankruptcy, may probably have been to enable him to continue his business. The application of much of the evidence would, in an ordinary case, therefore, be different from its application to the case before me. After some hesitation I have concluded that there was neither such an intended preference, nor such an intent to defeat or delay the operation of the bankrupt law, as to make this warrant of attorney a sufficient ground for the adjudication asked. The other alleged act of bankruptcy is a suspension of payment of his commercial paper for a period of fourteen days. I am now required to decide whether, in the absence of any fraud, such a suspension is an act of bankruptcy. This question has, in some cases, been heretofore submitted to me without argument. The decisions in other districts had been that the suspension of payment of such paper, though not fraudulent, was, if continued for this period, an act of bankruptcy. I was not prepared to make definitely such a decision. In the cases which were thus submitted without argument, I followed the decisions in the other districts; but stated on the record in every case, that the adjudication was not to be considered as a precedent. In the case now before me the question has been argued. In the mean time the point has been decided by Judge Field, in the district of New Jersey (In re Jersey City Window Glass Co. [Case No. 7,292]), somewhat differently from the decisions in other districts to which I have referred. My opinion is, that the suspension of payment, unless fraudulent, is not an act of bankruptcy, and that in this case it does not appear to have been fraudulent. The petition is dismissed, but without costs.

[1] [Reprinted from 1 N. B. R. 521 (Quarto, 138) by permission.]

Case No. 8,206.

LEEDS et al. v. CAMERON.

[3 Sumn. 488.][1]

Circuit Court, D. New Hampshire. May Term, 1839.

MORTGAGES — FUTURE ADVANCES — AT COMMON LAW—IN NEW HAMPSHIRE—COSTS IN JUDGMENT OF LESS THAN FIVE HUNDRED DOLLARS.

1. At the common law, a mortgage, bonâ fide made, may be for future advances and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities.

[Cited in Lawrence v. Tucker, 23 How. (64 U. S.) 27.]

[Cited in Ackerman v. Hunsicker, 85 N. Y. 47; Alexandria Sav. Inst. v. Thomas, 29 Grat. 488; McCarty v. Chalfant, 14 W. Va. 547; Louisville Banking Co. v. Leonard, 90 Ky. 111, 13 S. W. 522.]

2. Under the statute of mortgages of New Hampshire, of the 3d July, 1829 [Laws 1829, p. 486], a mortgage is void pro tanto, so far as it is intended to secure the payment of any moneys, or other things, which were not contracted for, or the liability for which did not attach, at the time of the execution of the mortgage; still it is valid for what is actually owing at the time the mortgage is executed.

[Cited in Stearns v. Bennett, 48 N. H. 401.]

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

3. In the circuit court of the United States, if the sum for which judgment is to be entered is less than five hundred dollars, the plaintiff is not entitled to costs.

[Cited in Hamilton v. Baldwin, 41 Fed. 430.]

This was a plea of land, wherein the plaintiffs demanded against the tenant, James Cameron, seizin and possession of certain tracts of land therein described, and alleged that they were lawfully seized of the premises within twenty years last past; and that the said Cameron hath since entered into the premises, and thereof unjustly disseised them, and still unlawfully held the premises from them. Plea, the general issue.

To maintain the issue on their part, the plaintiffs introduced a deed of mortgage to themselves from the said Cameron, dated October 25, 1834, and acknowledged on the 29th of the same October, conveying to them the demanded premises in fee and in mortgage, the condition of which was as follows: "Provided, nevertheless, that if the said Dorcas and James, or either of them, their, or either of their heirs, executors, or administrators, shall pay unto the said James Leeds, Jr., and Timothy C. Leeds, their executors, administrators, or assigns, the sum of five hundred dollars in six months, the sum of one thousand dollars in one year, and the sum of three thousand dollars in two years from the date hereof, respectively, and also shall well and truly pay all sums of money, which now are, or may be, owing to the said James and Timothy C., from the said James Cameron, on account or otherwise, with interest on said sums, at the rate of six dollars per hundred upon every dollar for every year during said term, payable (semiannually), and shall keep the buildings, now standing, or which may be erected on the granted premises, insured in the full sum of thirty-five hundred dollars, until said sum and interest shall be fully paid, at some one or more incorporated insurance companies, by policies payable to the said James Leeds and Timothy C. Leeds, or assigns, in case of loss, or shall pay to the said James and Timothy C. Leeds, or assigns on demand, such sum or sums of money as they may expend as, or for, premiums for such insurances; then this deed, as also three certain promissory notes, signed by the said James Cameron, whereby he promised to pay to the said James Leeds, Jr., and Timothy C. Leeds, or order, the said sum and interest, at the times aforesaid, shall be absolutely void to all intents and purposes." The deed was executed and delivered on the day of its acknowledgment.

At the October term of this court, 1837, an auditor was appointed to audit the accounts between the parties in the above-entitled action, and to report the balance, if any, due on the said mortgage. At the May term, 1838, the auditor reported as follows:

"It was admitted, by the parties, that all the promissory notes described in the mortgage deed, referred to in the said commission, are fully paid and discharged; and that, if any thing remains due, it arises from an account and a due-bill, the originals of which are filed, with other testimony in the case, and are produced to me, annexed to the original mortgage deed, and of which the following are true copies, namely:

James Cameron to James and Timothy C. Leeds, Dr.

1834.	Boston.		
Oct. 20.	To hhd. St. Croix rum	113-4—109 galls. @ 95 cts.	$ 103 55
	To 1 pipe Holland gin.	120-2—124 " @ 110 cts.	136 40
	To 1 qr. cask Sicily Madeira wine	33 " @ 86 cts.	28 05
	To 1 bbl. old Columbia whisky	394 " @ 80 cts.	31 00
	To barrel for whisky		1 00
	To cash paid Lowell Insurance Co.'s policy on building		1 00
Oct. 31.			
1835.			
Jan. 5.	To 2 baskets Champagne wine, @ $12		24 00
Feb. 7.	To 1 bbl. Cognac brandy, 38½ galls. @ 135 cts.		51 97
	To barrel for brandy		1 00
			$378 57
	Interest on bill to Dec. 15, 1836, is		47 23
			$425 80

Nashua, Oct. 29, 1834.—Due to James Leeds, Jr., & Co., forty-one dollars, for balance due on mortgage.
$41. JAMES CAMERON.

Indorsed: Boston, March 6, 1835.—Received twenty-one dollars and fifteen cents, for taxes paid by Cameron.
$21.15.

"It is satisfactorily proved to me that the whole of the said account is justly due from James Cameron to the plaintiffs, amounting, in the whole, with interest to December 15, 1836, to $425 80

"And that there remains due from the said Cameron to the said plaintiffs, on the said due-bill, including interest to Dec. 15, 1836, the sum of.. 22 25

$448 05

"The additional interest on the same, from Dec. 15, 1836, to April 20, 1838, the date of this Report, is..... 36 21

$484 26

"I, therefore, report, that the balance, if any, due on the mortgage set forth in the plaintiff's declaration, was, on the fifteenth day of December, eighteen hundred and thirty-six, four hundred and forty-eight dollars and five cents; and that the additional interest thereon up to the day of this report, is thirty-six dollars, and twenty-one cents,—making, in the whole, the sum of four hundred and eighty-four dollars and twenty-six cents."

It was in evidence, that the first four articles in the said account were sent to the defendant, by his request, "about October 20, 1834." Five baskets of Champagne wine were sent him in January, 1835, and a barrel of brandy was sent to him in February,

1835. That when the defendant was selecting the said goods, about October 20, 1834, it was said by Mr. Leeds, that these liquors were to be secured by the mortgage, and Mr. Cameron agreed and assented to it. That when the said mortgage deed was executed, the plaintiffs took from the defendant a due-bill for forty-one dollars, payable to them for the balance of rent due from him to them. It was agreed by the parties, that judgment should be rendered for the plaintiffs or defendant, as the opinion of the court might be, upon the above facts.

Mr. Emery, for plaintiffs.

Mr. Hale, Dist. Atty., for defendant.

Before STORY, Circuit Justice, and HARVEY, District Judge.

STORY, Circuit Justice. This is a suit brought upon a mortgage, and the only question, which arises upon the facts agreed by the parties and the report of the auditor is, for what sum the judgment is to be entered. Nothing can be more clear, both upon principle and authority, than that, at the common law, a mortgage bona fide made, may be for future advances, and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities. I need not do more upon such a subject than to refer to the case of U. S. v. Hooe, 3 Cranch [7 U. S.] 73, and Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 448.

The only point requiring consideration is, whether the fourth section of the statute of mortgages of New Hampshire of the 3d of July, 1829 (Laws N. H., Ed. 1830, tit. 105,) has in this respect changed the common law in regard to mortgages of lands in that state. It is argued by the defendant's counsel, that the legislature intended, by the first proviso of the fourth section, to require, not only that the defeasance should be in writing, but that it should contain such certainty as to the money to be secured, or other thing to be done, as would supersede the necessity of any resort to parol evidence to ascertain the extent or amount of the mortgage. It does not appear to me, that this is the true or reasonable exposition of the language. The words of the first proviso are, "That no title or estate in fee simple, &c., of any lands, &c., shall be defeated or encumbered by any agreement whatever, unless such agreement or writing of defeasance shall be inserted in the condition of said conveyance, and become part thereof, stating the sum or sums of money to be secured, or other thing or things to be performed." Now, if we were to give to these words the restricted construction contended for, one effect would be, that the statute would defeat all mortgages, given as indemnity to sureties and others upon bonds and agreements; for it could not appear in certainty upon such mortgages, what loss or injury the surety or other person would sustain, as that must depend upon future contingencies. So, if a father should receive from a son a mortgage to provide suitable maintenance and support for him during his life, the conveyance would, upon this same construction, be void; for it would be utterly impossible, with certainty, to ascertain, what money would from time to time be required for such maintenance and support, or what loss or damage the breach of the condition might occasion. It must depend upon future events. There is a large class of cases, which would be in this very predicament, occurring familiarly in the community. Upon the same ground also, no mortgage would be good, given to secure "all debts due" to the mortgagee, or indeed any debt the amount of which was not specifically ascertained and stated in the condition. It does not appear to me, that the legislature had any such broad prohibition in view. It would impose great inconveniences and embarrassments in the common transactions of life. The whole language of the proviso is perfectly satisfied by considering it to require the nature and extent of the claim, for which the mortgage is given, to be so far set forth, as to leave no doubt as to its identity. In short, that the statute meant to require, that all mortgages should be in writing, and constitute a part of the conveyance, by which the estate was to pass. This was in itself most reasonable; as it would enable creditors in all cases to ascertain, whether an estate granted was absolute or conditional, and would cut off many of the temptations to create secret, undefined trusts, or fraudulent and collusive securities. But when a mortgage is to secure a present debt, or a present liability, its true character is just as well ascertained, as if the specific sum were pointed out. Indeed, if the sum were stated, or the other thing to be performed were set forth, still it would be necessary to ascertain by parol evidence, what portion of the agreement had been performed or money paid since the giving of the mortgage. If a mortgage were to secure the payment of a certain bond or note, contemporaneous with or antecedent to the conveyance, it would still be necessary to resort to parol evidence to ascertain the exact sum due thereon at the time of the mortgage, or afterwards, when it was sought to be enforced. I cannot, therefore, adopt the construction contended for. The present mortgage, in my judgment, falls directly within the first proviso of the fourth section of that act; for the condition of the mortgage does state "the sum or sums of money to be secured, or other thing or things to be performed," in perfect compliance with the requisitions of that proviso.

The second proviso, in the same section, is in substance that "no title or estate, &c., in any lands, &c., which shall hereafter be conveyed in mortgage, as aforesaid, shall be held by the mortgagee for the payment of any sum or sums of money, or the perform-

ance of any other thing, the obligation or liability to the payment or performance of which shall arise, be made, or contracted after the execution or delivery of such mortgage." Now, it seems to me, that the legislature have here expressly intended to cut off all mortgages for the payment or security of any moneys or other things, which were not contracted for, or the liability for which did not attach at the time of the execution of the mortgage. It seems to me, therefore, very clear, upon the words and intent of the act, that no mortgage can be valid for any future advances or accounts between the parties, which were not a matter of right and positive obligation between them at the time of the mortgage. A mere provision for prospective advances or accounts, resting in the discretion of the parties or either of them, would seem to be the very mischief against which the second provision is aimed. Whether the enactment be founded in a wise public policy, or not, is a question with which this court has nothing to do. The judgment must, therefore, be restricted to the items of the account which were contracted for and delivered before the date of the mortgage. The two items of account, reported by the auditor, under the dates of the 7th February and the 5th of May, 1835, and also the due-bill of the 29th of October, 1834, must be rejected. Judgment ought to be given for the other items and interest. The district judge concurs in this opinion; and, therefore, let the conditional judgment be entered accordingly. If the sum, for which the judgment is to be entered, is less than five hundred dollars, the plaintiffs are not entitled to costs. The defendant is not entitled to costs in a case of this sort; for the defence is grossly inequitable, and contrary to the positive agreement of the defendant.

Case No. 8,207.

LEEF v. GOODWIN et al.

[Taney, 460.] [1]

Circuit Court, D. Maryland. Dec. 2, 1841; Jan. 7, 1842.

MARITIME LIEN — REPAIRS — JOINT OWNERSHIP — UNKNOWN OWNER — APPROPRIATION OF PAYMENTS — RUNNING ACCOUNTS.

1. Where work was done upon a vessel owned by two persons, but registered in the name of one only, and the libellants, who did the work, had no knowledge, at the time, of the interest of the other owner; *held*, that the owner, whose name did not appear in the register, was liable, as well as the other.

2. According to the principles upon which payments are appropriated, the debtor, if he pleases, has a right to make the appropriation; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice.

3. In cases of running accounts between the parties, unless there are some particular circumstances to vary the rule, the payments ought to be applied to extinguish the debts according to priority of time.

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

The appellees in this case [Caleb Goodwin, Andrew Flannigan, and Samuel Trimble] filed their libel in the district court against the appellant [Henry Leef] and Luke League, as joint owners of the schooner Light, to recover for work and materials furnished said vessel. The appellant resisted the claim on the ground that the work and materials were contracted for by Luke League, the other owner; and on the further ground that the whole amount claimed had been paid. Luke League, the other defendant, admitted the allegations of the libel to be true. The district court (Heath, J.) rendered a decree for the libellants for the sum of $275 88, with interest from the 1st of June, 1840, and costs; from which decree the appellant appealed to this court.

Stewart & Baker, for appellant.

Wm. H. Gatchell, for appellees.

TANEY, Circuit Justice. In this case, it appears from the accounts, that the libellants are ship-carpenters, carrying on business at the city of Baltimore, and that there was a running account, for several years, between them and Luke League, who was one of the respondents in the district court, and who has not appealed from the decree of that court.

The account consists of charges for work done for different vessels, and materials found by the libellants, at the request of Luke League, and of sundry credits given, from time to time, some of which are appropriated to the work done upon particular vessels, and some of them without any specific appropriation. There are a few items in the account not charged for work upon any particular vessel; but generally the vessel is named. The claim made by the libellants in this case is for repairs and alterations of the schooner Light; and this claim is a part of the charges against Luke League, in the running account above mentioned. The principal items in relation to this controversy are charged in June and July, 1839, at which time, the schooner underwent considerable alterations, so as to convert her from a vessel suited to the navigation of the Chesapeake Bay, to one fitted for the sea. There are two inconsiderable charges in the March preceding, and one in the October following, but the principal part of the claim appears to have arisen in June and July, 1839.

At the time the work was done upon the schooner, the appellant and Luke League, the two respondents in the district court, were joint owners of the vessel, but she was registered in the name of League only, and the libellants had no knowledge of the interest of the appellant. Acting under the impression that League was the sole owner,

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

the charges were made against him, as before mentioned; he has since become insolvent, and the libellants insist that a balance is still due to them for the work done upon the Light, which they are entitled to recover from the appellant.

Undoubtedly, the appellant as well as League, is answerable for this claim, if it has not already been discharged. But the appellant contends that it has been discharged; and as there is no controversy about the original amount of the debt, the whole dispute turns upon the application of the payments which were, from time to time, made by League; and whatever credits would have been applicable to this particular claim, in case League had been the sole owner of the schooner, must enure also to the benefit of the joint owners. His admissions, in his answer in the district court, do not bind the appellant.

The general principles upon which payments are to be appropriated, are clearly stated by the supreme court in the case of the United States v. Kirkpatrick, 9 Wheat. [22 U. S.] 737. The debtor, if he pleases, has a right to make the appropriation; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. And in cases of running accounts between the parties, unless there are some particular circumstances to vary the rule, the payments ought to be applied to extinguish the debts according to the priority of time.

In applying this principle to the case before the court, it appears from the books offered in evidence, that the account continued between the libellants and League, until July 1841, being about two years after the work was done to the Light; sundry charges, during this period, are made against League, and credits given him to a considerable amount. One of these credits is specifically appropriated to the account; the others appear to be general credits; but it is difficult, from the short entries in the books, to determine whether some of the credits may not have been intended by the entries to be specifically appropriated, and they may, perhaps, be more satisfactorily explained by further proof.

The auditor of this court is, therefore, directed to state from the books of the libellants, the account between the parties to the present controversy, applying the credits, according to the principles hereinbefore laid down. It is unnecessary to go further back with the account than January 13th, 1839, when a balance appears to have been struck, and League found to be indebted in only the small sum of $10 44. The auditor is also directed to take such further evidence as may be adduced by either party, in explanation of the credits in the account, or any of them; and to state such account as either of the parties may deem conformable to the rules herein prescribed for the application of the payments; and to report his proceedings under this order, to the court, as soon as conveniently may be done.

On the 31st of December, 1841, the auditor filed the following report:

"The auditor humbly reports to the court, that in obedience to the order of the 2d day of December, 1841, passed in this cause, he has examined such witnesses as were produced by the parties, together with the documentary testimony laid before him; and therefrom stated two accounts, No. 1 and No. 2, which are hereto annexed.

"The documentary testimony, in addition to the books of the appellees, consisted of a receipt of Luke League filed by the appellant and herewith returned; and the oral evidence was furnished by two witnesses produced and sworn on the part of the appellees. To one of these, Luke League, the proctor for the appellant objected, as incompetent, and his examination was taken subject to exception.

"Hooper was examined in chief, to prove that the item of credit in the books under date of July 8th, 1840, was fifty dollars too large; it appeared by him, that League had done work on a vessel to the amount of $800 and upwards, and had a claim, accordingly, one-half of which was assigned to the appellees; he afterwards, however, agreed to deduct $100 from the bill, and the appellees, in consequence, submitted to the deduction; received $50 less than the amount of the credit. Upon cross-examination, the witness stated, that the agreement to make the deduction, was concluded about three months after the work was done, that is, late in the spring.

"Luke League swore that the appellant and himself owned jointly the Leander, Neptune and Light, and that they, together with one Mason, owned the O'Kelly, which is mentioned in one of the bills, by the name of the new schooner; that he paid the whole of the Neptune and Leander's bills, and all that was paid on the Light's bills; that his account against the appellees, was nearly as much as their account against him, which is filed among the papers, dated 1st January, 1839; that the balance claimed by the libel and how it was ascertained, was shown to and approved by him before he filed his answer in the district court; that he agreed to deduct $100 from the bill against the B. Sumner, half of which was assigned to the appellees, and did so, some time after the bill was rendered.

"Upon cross-examination, he stated that the bill of the appellees against him, filed with the papers, was rendered by them to him; that he and Leef had a settlement and compromised, he agreeing to take $250, and Leef's assumption of parts of some bills in lieu of 600 or 700 dollars to which he thought himself entitled; that Leef's as-

sumption was of the one-half of two bills against the Light for sails and copper, and amounted to $255 36; that the only bills against the Light, at that time, were these two, and that of the appellees; that deponent assumed to pay the other half of the copper and sails bill, and the whole of the bill of the libellants; that prior to the compromise, Leef had paid some bills, and deponent others, and that the receipt shown him was the one which was given by him to Leef at the time of the compromise.

"Upon the evidence thus furnished him, the auditor has stated two accounts, Nos. 1 and 2. By the first, the debits on the appellee's books are extinguished by the credits there, according to the priority of the charges; and by the second, it is shown, what items of charge against the Light remain unsatisfied, after such an appropriation of credits. The amount chargeable to the Light, is thus ascertained to be the sum of $107 01.

"No evidence was offered to show that any of the several credits were applicable to particular items of charge, and they have been treated accordingly as general payments. The testimony above detailed in reference to the reduction of one credit, by the sum of $50, seemed to the auditor satisfactory, and he has therefore allowed it.

"J. Mason Campbell, Auditor.

"Auditor's fees, $14.

"31st of December, 1841."

No. 1.

Luke League in account with Caleb Goodwin & Co.

1839.		Dr.	
Jan.	13.	To balance	$10 44
		Schooner Sarah Ann	5 17
Feb.	4.	" Neptune	67 50
"	20.	" "	58 81
"	25.	" "	8 22
Mar.	7.	Schooner Light	2 82
		" Hetta Jackson	1 23
"	13.	Caulking boat	1 38
"	21.	Schooner Neptune	50
"	23.	" Sarah Ann	31 39
"	26.	" Light	18 53
April	11.	Sundries D. & L.	2 50
			$208 49
		Deduct credit	20 00
April	20.	To balance	$188 49
"	27.	New schooner	81 40
		Hetta Jackson	5 60
"	24.	"	28 01
"	26.	Sundries	1 60
May	6.	New schooner	49 66
"	23.	Schooner Sarah Ann	2 20
"	28.	Dreger & League, sundries	3 00
June	14.	Schooner New Light	345 59
July	6.	"	159 76
			$365 31
		Deduct credits	864 93
July	6.	To balance	$ 38

No. 2.

1839.		Dr.	
July	6.	To balance unsatisfied of bill charged this day	$ 38
"	13.	Charge this day	100 58
Oct.	16.	Charge this day	6 05
			$107 01

1839.		Cr.	
July	13.	Old mast	$ 7 00
"	22.	Sundries	5 00
1840.			
May	30.	By bill	353 48
July	8.	Sundries, bill	356 60
1841.			
Jan.	28.	Sundries	142 85
			$864 93

TANEY, Circuit Justice. In this case, the court, after hearing the proofs offered by each party, and after the case had been fully argued by counsel on both sides, passed an order, on the 2d day of December last, referring the books and accounts produced in evidence to the auditor, with instructions as to the principles upon which the credits should be allowed. The auditor filed his report on the 31st of December, and the court gave to each party time to file exceptions to the report, until the meeting of the court on this day. Some new testimony has been taken by the auditor, but none that throws any new light upon the subject referred to him, except that of an over credit of $50 in the books of the libellants against themselves, which has been corrected by the auditor. No exceptions have been filed to the report by either party. It is, therefore, this 7th day of January, 1842, by the circuit court of the United States for the Fourth circuit in and for the Maryland district, ordered, adjudged and decreed that the report made by the auditor, be and the same is hereby affirmed; and that the said Henry Leef pay to the libellants the sum of $107 01, with interest from the 16th day of October, 1839, each party to pay their own costs, and each to pay the one half of the auditor's fees. And that so much of the decree of the district court as is inconsistent with this decree, be and the same is hereby reversed.

LEESE (UNITED STATES v.). See Case No. 15,590.

Case No. 8,208.

In re LE FAVOUR.

[8 Ben. 43.] [1]

District Court, E. D. New York. Feb., 1875.

BANKRUPTCY—OPENING ADJUDICATION MADE BY DEFAULT.

1. A motion was made on behalf of a bankrupt, against whom an adjudication had been made by default, to have the default opened and to be allowed to file an answer. The answer proposed did not deny the act of bankruptcy, but denied that the petitioners were creditors or constituted one-quarter in number and one-third in value of the creditors of the bankrupt.

2. The court ordered a reference to the register to examine witnesses on notice as to the fact whether the petitioners did constitute one-quarter in number and one-third in value, and the register reported that they did. *Held*, that the court,

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

being satisfied with the conclusion of the register, would not open the default to allow the interposition of an answer without merit.

[In the matter of Israel Le Favour, a bankrupt.]

BENEDICT, District Judge. This is a motion to set aside an adjudication of bankruptcy entered by default, and for leave to file an answer. The answer desired to be filed contains no denial of the act of bankruptcy, but is simply a denial that the petitioners are creditors of the bankrupt and that they constitute one-quarter in number and one-third in value of all the creditors of the bankrupt. Under a preliminary order of the court, a reference was ordered to the register to examine witnesses, on notice, as to the fact whether the petitioners do constitute one-quarter in number and one-third in value of the creditors of the bankrupt; the result of which reference is a report of the register that the petitioning creditors do constitute one-quarter in number and one-third in value of the creditors of the bankrupt. On this report the motion to open the default and to set aside the proceeding has been renewed. Upon the only issue sought to be raised by the answer, I am satisfied with the conclusion arrived at by the register. I see no reason for setting aside the adjudication, chiefly for the purpose of allowing the interposition of a defense which appears to have little merit. The motion to open the default and set aside the proceedings is therefore denied.

LEFERN (HOLLISTER v.). See Case No. 6,622.

LEFEVRE (UNITED STATES v.). See Case No. 15,591.

Case No. 8,209.

LE FRANC v. RICHMOND.

[5 Sawy. 601.] [1]

Circuit Court, N. D. California. Aug. 18, 1864.

MEXICAN LAND GRANTS—BOUNDARY—INCURABLE UNCERTAINTY VOID—DEED—PRESUMPTION AS TO SEAL—TENANT IN COMMON—RECOVERY AGAINST TRESPASSER.

1. Where the boundary line in the description of land in a conveyance is given as running from a creek which is several thousand feet in length, without other designation of the starting point, and the line can be run so as to comply with the conditions of the description if it start from any position on the creek, the particular tract intended by the grantor is incapable of identification; the description is affected by incurable uncertainty, and the deed is inoperative on that ground.

2. A conveyance of real property in California in 1864 could only be made by deed, and that imports an instrument under seal; but as the statute then in existence, in providing for the record of deeds, did not require any note or entry by the recorder of the existence of a seal to the original, and yet made copies from the records admissible with the like effect as the original, when the latter were beyond the possession and control of the party, the existence of the seal to the original will be presumed from the statement in the concluding clause in the instrument that the grantor affixed thereto his seal, and from the attestation clause that the instrument was sealed in the presence of the witnesses.

[Cited in Todd v. Union Dime Sav. Inst., 118 N. Y. 347, 23 N. E. 301.]

3. One tenant in common of real property can recover in ejectment the entire demanded premises against parties in possession by adverse claim, if he represent the better title.

This was an action [by Charles Le Franc against Frank Richmond] for the possession of a tract of land in Santa Clara county, and was tried by the court without the intervention of a jury, by consent of parties, at the July term of 1864.

Hall & Cutler McAllister, for plaintiff.
Spencer & Jarboe, for defendant.

FIELD, Circuit Justice. This is an action of ejectment to recover a part of the tract known as the "Rancho of San Juan Bautista," situated in Santa Clara county. Both parties deraign their title from a common source—from Augustine Narvaez, the grantee of the Mexican government. The defendant claims under an instrument purporting to be a conveyance, executed in 1847, to Andreas Martinez, a son of the Mexican grantee. This instrument is signed not only by Augustine Narvaez, but by five of his sons; but as it nowhere appears that the sons ever acquired any interest in the rancho, the instrument is treated as the conveyance of the father alone. It described the premises conveyed as part of the grantee's tract of land—"that is to say, from the Capitancillos creek, cutting through the middle of the small hill to a point adjoining José Ernandez, up to the range of Blue Hills." The grantor evidently intended to give to his son that part of his tract which was cut off by a straight line running from some point on the Capitancillos creek, a stream bounding the rancho on the south, through the center of the small hill, the position of which was well understood, to the property held by Ernandez, and thence to the range of Blue Hills. The difficulty with the description arises from the omission to give the starting point of the line on the creek, or the point where the line strikes the property of Ernandez. The creek extends along the rancho a distance of over eight thousand feet, and any position upon it may be indifferently taken as the starting point, and the line run so as to meet the conditions of the description. The tract deeded can not, therefore, be located with certainty until the starting-point is established. Evidence was admitted of the circumstances under which the instrument was executed, but it furnished no aid in determining the matter. The particular tract intended by the grantor remains incapable of identification. The description given is affected by incurable uncertainty,

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

and the deed must be declared inoperative on that ground. 1 Greenl. Ev. 300.

The case must, therefore, rest upon the sufficiency of the title of the plaintiff. He claims through several mesne conveyances from Narvaez, the first of which was executed to one Blanchard, in October, 1852. The original of this conveyance was not in the possession or under the control of the plaintiff; and upon admission of the fact, a copy from the records of the recorder of the county where the land is situated was produced, and offered under the statute. The copy did not show that any seal was attached to the original, and, assuming that such was the fact, the objection was taken that the title did not pass by the instrument.

There is no doubt that a seal is essential to a conveyance of real property. There may be certain possessory rights to mines and water privileges on the public lands, which are held, in this state, to pass by simple unsealed bills of sale, but these are exceptional cases. Ortman v. Dixon, 13 Cal. 36. The general doctrine with reference to instruments by which real property is transferred is the same in California as in other states—the instruments must be sealed. The transfer inter vivos can only be made by deed, and a deed implies sealing; its definition is "a writing sealed and delivered by the parties." 2 Bl. Comm. 295. "But it is not necessary," says Sugden, "that an impression should be made with wax or with a wafer. If the seal, stick or other instrument used be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient; and, therefore, when the instrument is (purports to be?) a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper." 1 Sugd. Powers, 282.

The presumption thus indulged is more just and natural where the original instrument is lost, and resort is had to secondary evidence of its contents. The statute, in providing for the record of deeds, does not require any note or entry by the recorder of the existence of a seal to the original; yet copies from the records are made admissible in evidence with the like effect as the originals, when the latter are beyond the possession or control of the party. The existence of the seal to the original must, therefore, in the majority of cases, where copies are used, be a matter of presumption, and the fact may be fairly presumed from any expressions in the conclusion of the instrument, as in the copy produced in the present case, or in the attestation indicating that a seal was affixed. Smith v. Dall, 13 Cal. 510; Math. Pres. Ev. 39.

From Blanchard, the grantee of Narvaez, the title to one undivided half of the premises is traced to the plaintiff, through several intermediate conveyances, all of which are executed in due form—at least, no objection to their form or efficacy has been urged. The title to the other undivided half is traced through a conveyance by the sheriff, executed upon a sale under a decree rendered in a suit for the foreclosure of a mortgage given by Blanchard to one Sansevaine. The latter assigned the mortgage to Moss, and he brought the suit for the foreclosure. In the suit, personal service of the summons was not made upon the defendant. Service was attempted by publication, but to the affidavit upon which the publication was ordered, various objections are urged. It is unnecessary to consider these objections, for if they should be deemed well taken, and the decree upon which the sale was made held a nullity, the plaintiff would still be entitled to recover as a tenant in common with Blanchard of an undivided half of the premises. The rule has been long settled in this state, that one tenant in common can recover in ejectment the entire demanded premises as against parties in possession by adverse claim, if he represent the better title. Collier v. Corbett, 15 Cal. 183; Stark v. Barrett, Id. 371; Touchard v. Crow, 20 Cal. 162; Mahoney v. Van Winkle, 21 Cal. 583.

I do not find any difficulty in determining the initial point of the land described in the deed to Blanchard, and in the intermediate deeds from him. It is at the junction of the Arroyo de los Capitancillos with the boundary line subsequently established by the surveyor-general of California, under the decree of the district court confirming the grant to Narvaez. It follows that judgment must be rendered for the plaintiff, and it is so ordered.

Case No. 8,210.

LEGER v. RICE.

[28 Leg. Int. 309; 8 Phila. 167; 4 Chi. Leg. News, 7.]

Circuit Court, E. D. Pennsylvania. Sept. 28, 1871.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—DEDICATION—LEGISLATIVE POWER—ACT CONTAINING MORE THAN ONE SUBJECT.

[1. A plot of ground in Philadelphia was dedicated by William Penn to general public use. Subsequently the legislature of Pennsylvania modified the beneficial use of the plot, and provided for the building thereon of municipal buildings. It was claimed that this act violated the constitutions of the United States and of Pennsylvania prohibiting acts impairing the obligation of contracts. *Held*, that the dedication to general public use did not preclude such legislation.]

[2. The mere abuse of constitutional power by the legislature is a subject for legislative repeal, and not for judicial redress.]

[3. The general allotment of a plot of ground for certain municipal purposes, subject to a vote of selection by the voters of this city does not render void the act so allotting, because other provisions of the act take immediate effect.]

[4. The constitution of Pennsylvania prohibits the enactment of a law containing more than one subject, and requires that subject to be clearly expressed in the title thereof. Quaere, whether

an act involving alternatives, mutually dependent, whose title specifies all the purposes except one, and that consequential, is unconstitutional.]

[This was a bill in equity, filed by Henry Leger, a citizen of the state of New York, against John Rice, Theodore Cuyler, Samuel C. Perkins, John Price Wetherill, Lewis C. Cassidy, Henry M. Phillips, William S. Stakeley, Henry W. Gray, Daniel M. Fox, Samuel W. Cattell, Henry Huhn, citizens of Pennsylvania, asking for an injunction against the defendants to restrain them from proceeding in any manner in the construction of certain public buildings in the city of Philadelphia by virtue of an alleged authority contained in an act of assembly of Pennsylvania approved August 5, 1870 (P. L. 1871, p. 1548), and also asking that said act be declared unconstitutional and void.

[The said act provided, according to its title, "for the erection of all the public buildings required to accommodate the courts, and for all municipal purposes in the city of Philadelphia and to require the appropriation by said city of Penn Square, at Broad and Market streets, to certain institutions (such as the Academy of Fine Arts, Franklin Institute, etc.), in the event of said square not being selected by a vote of the people as a site for said buildings."

[The act designated the defendants to be commissioners for the erection of said buildings, giving them power to fix the compensation of employés, elect their own members to fill vacancies, to erect buildings upon either Washington or Penn Squares, as determined by the vote of the citizens, held at an election authorized by the act of March 30, 1870 (P. L. 1870, p. 677), which act provided that the citizens of Philadelphia county should by ballot express their preference for a site for public buildings in said city, provided, however, that the buildings should not be placed in Independence Square.

[The said commissioners were also empowered to make requisitions upon councils for funds, and at the proper time remove certain buildings from Independence Square.

[It was alleged that said act was unconstitutional, because it contained three distinct subjects, the second of which was not mentioned in its title, viz.: (1) The construction of public buildings by the commissioners on either Penn or Washington Squares; (2) the removal of buildings on Independence Square; (3) the contingent donations of Penn Square to four private corporations.

[Also because the legislature had delegated to the voters of Philadelphia the power to legislate upon the question whether certain real estate, of great value, and theretofore used for public purposes by prescription, should be given away to certain private corporations, in violation of the constitution of the United States and that of Pennsylvania.]

CADWALADER, District Judge. Constitutional power, and especially legislative power, may be greatly abused, where it is neither usurped nor exceeded. In such a case the only remedy is legislative appeal. Judicial redress cannot be invoked. The constitutionality of the act of the legislature is disputed on the grounds that: (1) It is a violation of the constitutional amendment of 1864, which prohibits the enactment of a law containing more than one subject, and requires that that subject be clearly expressed in the title. (2) It violates the provisions of the constitution of the United States prohibiting state legislation impairing the obligation of contracts, and the provision of the constitution of the state in nearly the same words. The provision for what was to have been done if Washington Square had been selected by a majority of votes for the location of the buildings, was, in effect, a delegation of legislative power.

First. On the first point it suffices to observe, that the subject was a compound one involving alternatives mutually dependent or consequential. The title specifies all the purposes of the act except one, which is directly consequential. If such a law is unconstitutional, the question is not so clear that it should be decided by a single judge at an interlocutory hearing.

Second. The argument under the second head is that Penn Square having been dedicated by Mr. Penn, the former proprietary, to general public use, the legislature could not constitutionally modify the grant. The proprietary certainly could not have resumed, abrogated, or modified it. Under the frame of government of 1701 all powers of legislation were vested in the provincial assembly. That body could, I think, have modified the beneficial use by such an act as that in question. The argument is, that under the constitution the legislature of the state could not do so. I am of a different opinion. The dedication to public use did not preclude such legislation. Whatever may have been decided in one or two other states, neither the decisions of the supreme court of the United States, nor those of the supreme court of Pennsylvania support the argument.

Third. As the contingency of the selection of Washington Square did not become absolute, the argument that it was inseparably connected with the legislative provisions which took effect is a very refined one, perhaps too refined. I am, however, of the opinion that the question of the allotment of Penn Square to the purposes contingently specified in the act was not unconstitutionally left to a local vote.

LEGG (DEAN v.). See Case No. 3,709.

LEGG (SIMPSON v.). See Case No. 12,883.

Case No. 8,211.

LEGGETT v. STEELE.

[4 Wash. C. C. 305.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1822.

DOWER — LAND ALIENATED — IMPROVED BY PURCHASER—FROM WHAT PART DOWER ASSIGNED.

1. In a bill for dower, against the purchaser from the husband, the dower is to be laid off by metes and bounds, in some part of the land which has not been improved by the purchaser, if this can be conveniently done; and if this cannot be done, then it is to be assigned out of the whole, according to the value thereof at the time it was aliened to the husband.

2. Quaere, if the widow is entitled to rents and profits, damages and costs; and from what time, if at all.

This was a bill for dower in two tracts of land, which had been sold and conveyed by the husband on the 28th of October, 1776, to P. Marchinton, who conveyed the same to General Humpton, under whom the defendant claims, and for rents and profits since the institution of this suit. The answer admits the right of the plaintiff to dower in one of the tracts of land, but insists that considerable improvements have been placed upon the land by the defendant, and by General Humpton under whom he claims. Under a former order of the court, since the institution of this suit, the master was directed to report the value of the rents and profits of the tract of land in which the right of dower is admitted, excluding the improvements made upon the land by the defendant, and those under whom he claims, and also including them; who reported, that the rents and profits in the former instance were of the value of $60 a year, and in the latter $300. The cause now came on upon this report, which was not excepted to, for a final hearing.

Gibson, for defendant, admitted the right of dower of the plaintiff in one of the tracts of land, but insisted that she must take it according to the value, exclusive of improvements; and that, as it would be difficult, if not impossible, to allot it by metes and bounds, the defendant ought to be merely decreed to pay to the plaintiff an annuity of one third of the value of the rents and profits, exclusive of the improvements. He further insisted, that the plaintiff was not entitled to a decree for damages, or for rents and profits, prior to the decree, or to costs. He cited 15 Ves. 543, 545, 552; 1 Taunt. 402.

Rawle, for plaintiff, insisted, that the widow was entitled to dower according to the present value of the land, although he admitted she was not entitled to estimate the value according to the improvements made upon the land by the alienee of the husband, and those claiming under him. 5 Serg. & R. 289. He also insisted, that she was entitled to rents and profits from the time this suit was brought; and was also entitled to have her dower laid off by metes and bounds.

WASHINGTON, Circuit Justice. This cause came on, the 21st day of October, in the year 1822, to be heard upon the bill, answer, replication, depositions and exhibits, and the report of the master of the 23d of March, 1822, to which no exception has been filed, and was argued by counsel, whereupon the court being of opinion that the plaintiff is entitled to dower in the tract of land containing four hundred and thirty-two acres and three quarters, in the bill and answer mentioned, and to have the same laid off to her by metes and bounds, in such parts of the said tract as shall exclude the improvements made upon the said tract by the defendant, and by General Humpton under whom he claims; provided the same can be conveniently done; and if it can not, then to have it assigned to her by metes and bounds out of the whole tract, according to the value thereof at the time it was aliened by the husband of the plaintiff; it is therefore decreed and ordered, that the marshal of this district do lay off and allot to the plaintiff, by metes and bounds, one third part of the tract of land containing four hundred and thirty-two acres and three quarters, situate in the township of West Bradford, in Chester county, in this state, in such parts of the said tract as shall exclude the improvements made upon the said tract by the defendant, and by the said Humpton under whom he claims, provided the same can be conveniently done, and if it can not, then that he assign to her by metes and bounds, one third part of the said tract of land, including the improvements, but according to the value thereof on the 28th day of October in the year 1776, when the said land was sold and conveyed by the husband of the plaintiff to P. Marchinton.

And it appearing by the report of the master, that the rents and profits of the said tract of land, estimating the same without regard to the said improvements, would be one fifth less in value than what they really are in consequence of said improvements, it is further decreed and ordered, that the same proportion be observed in allotting the dower of the plaintiff, in case the same should be so laid off as to include the said improvements. And it is further decreed and ordered, that the said marshal do employ, if necessary, a fit person to survey and lay off her dower to the plaintiff as aforesaid; and that he make report to this court, at its next session, of his proceedings herein, in order to a final decree; and the court reserves till then, the questions of damages, rents and profits since the institution of this suit, and costs.

At a subsequent day of the term, Rawle mentioned the subject of damages (the plaintiff having died since the hearing), and cited

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

2 Saund. 45, note 4, also Jenk. 45, in which it is laid down expressly, that if the husband alien in his life time, the widow may recover damages from the time of her demand of dower, but not from any prior time. He also stated, upon the authority of letters from eminent counsel in New Jersey and Maryland, that such had been the course of the decisions in those states, except that, in the latter state, they are allowed from the time of the bill filed. He cited also 2 Brown, C. C. 620. As to costs, they follow damages.

The counsel compromised, upon the ground of the defendant paying one third of the rents and profits (as estimated by the master) of the land, in its unimproved state, from the time the bill was filed; but without costs.

LEGGETT, The ABRAHAM. See Case No. 4,450.

LEGINGER v. The WELLINGTON. See Case No. 17,384.

Case No. 8,212.

LEGIONARY PAYMASTER v. SPALDING.

[1 Cranch, C. C. 387.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

OFFICIAL BOND — COLLECTOR OF MILITIA FINES — WHAT NOTICE AGAINST SURETY.

Judgment upon ten days' notice. cannot be rendered upon the bond given by the collector of militia fines.

[This was an action at law by the Legionary Paymaster against Enoch Spalding, collector of militia fines.]

Motion on ten days' notice, to recover the amount of militia fines, under the 22d section of the act of March 3d, 1803 [2 Stat. 222]. The notice was a motion for judgment against him and his sureties, on his collector's bond. Refused.

Case No. 8,213.

LEHIGH COAL & NAVIGATION CO. v. CENTRAL R. CO.

[4 Wkly. Notes Cas. 187.]

Circuit Court, W. D. Pennsylvania. April 30, 1877.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS — INJUNCTION BY STATE COURT AGAINST PROCEEDING IN UNITED STATES COURT — WHEN SUCH INJUNCTION HAS NO EXTRATERRITORIAL OPERATION — FINAL DECREE.

[1. A creditors' bill was filed in the chancery of New Jersey by a Pennsylvania corporation, owners and lessors of a railroad situated in Pennsylvania, against the lessee, a corporation of New Jersey. Upon an ex parte application, an injunction was granted, and a receiver appointed to protect the property. Upon application, the appointment of the receiver was confirmed as to the property in Pennsylvania, and the proceedings of the chancery of New Jersey to this end adopted by the circuit court in Pennsylvania. Subsequently the lessor notified the receiver and the lessee that it would proceed to enforce its legal rights against the lessee in the circuit court, upon which the receiver applied for and obtained an injunction from the chancery of New Jersey to restrain the lessors from such action. *Held*, that in Pennsylvania the receiver was the receiver of the circuit court, and subject to its orders, and his appointment by the chancery of New Jersey and the proceeding therein could have no extra-territorial effect.]

[2. Upon a motion to remand to New Jersey chancery, *held*, that the motion should prevail: (1) Because the proceedings were under a local statute of New Jersey, and could not, therefore, be adjudicated in this court; (2) because the decree appointing a receiver was in the nature of a final decree.]

Motion to remand cause removed to the circuit court of the United States, Western district of Pennsylvania, from the chancery of New Jersey, to the latter court. On February 14, 1877, a bill was presented by the plaintiff to the chancery of New Jersey, setting forth, inter alia, that the Lehigh Coal & Navigation Company, a corporation of Pennsylvania, as lessors, had executed a contract of lease of the Lehigh & Susquehanna Railroad, owned by the lessors, and situate in the same state, to the Central Railroad Company of New Jersey, as lessees; that the lessees had occupied and run the leased road since the execution of the contract; that large arrearages of rent were due the lessors by the lessees; that the lessees had become hopelessly insolvent; and praying that the court enjoin the lessees from receiving any debts due them, or paying any money, or assigning any of their property, or exercising any of their corporate franchises; also that a receiver be appointed, and that a subpoena be issued to the lessees to appear and answer before this court. The chancellor ordered the injunction to issue, "upon the filing of this bill and affidavit" annexed, and appointed a receiver "to protect the property of" the company "until the final decree of this court, or other order of this court to the contrary." The bill and affidavit were filed.

Upon application to the circuit court of the Western district of Pennsylvania for confirmation of his appointment, the receiver was also appointed by that court receiver of the Lehigh & Susquehanna Railroad, and the "proceedings in chancery of New Jersey were adopted and confirmed so far as they relate to property of the Central Railroad Company of New Jersey in Pennsylvania, * * * and especially in reference to the leased road." In March, 1877, the receiver and lessees were notified by the lessors to the effect that "the lessees having broken their covenant to pay rent, * * * unless the same be paid [by a certain date], the lessees will terminate the lease, and repossess themselves of their property, including personal property purchased by the lessees and not paid for, * * * and to this end will make application to the circuit court

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

of the United States for the Western district of Pennsylvania for leave to enforce their legal rights against the lessees." On receiving this notice the receiver applied to the chancellor for an injunction to restrain the lessors from making application to the circuit court. The injunction was allowed, and thereupon the lessors removed the cause from the chancery to the United States court. The cause was heard by the circuit court, and held under advisement. This motion to remand was then argued.

J. C. Bullitt, for the motion, argued that the proceedings in the chancery were under a local statute, and could only be litigated before a state tribunal, and that, being analogous to those in bankruptcy, under the New Jersey laws, the decree of the chancellor was final. Nixon, Dig. p. 406.

McMurtrie (with whom was Gibbons), contra. The question is, has this cause been tried? There has been a bill (an ordinary creditor's bill) filed, praying for relief and a receiver. This is said to be a trial. The decree of the chancellor was given "upon filing of this bill," and when there was no bill filed. The order was but a conditional order "until a final order be given from this" or any other court. There are three issues in the case. One is adjudicated, the insolvency of the defendant. But the plaintiff's claim is still in issue. There is also the ultimate administration. The rights of all the parties are not adjudicated. There has been no opportunity for a trial, except what the chancellor may order ex parte. Where plaintiff's claim may still be litigated, the cause has not been tried. The subpoena has not gone out. The defendant is not in court; he only appeared by counsel to enable him to make this provisional order. The object of the act is that, until the result is obtained, either party may remove cause. Act March 3, 1875, 18 Stat. 471; Shelby v. Bacon, 10 How. [51 U. S.] 56. The receiver has not even filed his memorandum of assets necessary by act. There was no answer filed.

McKENNAN, Circuit Judge (orally). The cause is remanded, because first, the proceeding is under a local statute, and could not have been litigated in the United States court; and, secondly, because the decree appointing a receiver was in the nature of a final decree. This has no operation on the cause pending in the circuit court for the Western district, by whom the receiver of the property of the Central Railroad Company in this state was appointed. As to that, the receiver is the receiver of this court, and subject to its orders, and the appointment by the chancellor of New Jersey had no extraterritorial operation. The application for leave to enforce the rights of the lessors, as against the property in Pennsylvania, will be considered and decided by this court.

LEHIGH ZINC CO. (BURROWS v.). See Case No. 2,207.

Case No. 8,214.

LEHMAIER et al. v. MAXWELL.

[N. Y. Times, Jan. 28, 1856.]

Circuit Court, S. D. New York.

CUSTOMS DUTIES—APPRAISERS—PENALTY FOR UNDERVALUATION—PROTEST.

[1. Reappraisers may be sworn by a deputy collector.]

[2. The penalty for undervaluation attaches whether the importer makes the addition to his invoice or not.]

[3. A notice that the appraisement is not satisfactory, and the importers will give evidence "if desired," is not sufficient to entitle them to a reappraisement.]

[4. An appraisement becomes of no effect only when there is another appraisement. The remedy of an importer for the refusal of the collector to appoint a merchant appraiser is an action on the case.]

The plaintiffs [John Lehmaier and others] made two importations of goods in the year 1852. They had purchased the first about two months before shipment, and the price in the invoice was the purchase price. On an appraisal and a reappraisal the value had been raised more than 10 per cent., and the penalty of 20 per cent. was accordingly exacted, and paid under protest. The protest was general, and specified but two exceptions to the reappraisal: First, that the reappraisers were not sworn by [Hugh Maxwell] the collector; and, second, that the penalty cannot be exacted except where the importer has raised his invoice price on entry. The goods of the second importation were also appraised, and their value raised; the penalty exacted, and paid under protest. This protest was also general, but contained a notice as follows: "You should not refuse us the appraisement of a merchant appraiser, under the acts of 1823 [3 Stat. 729], 1830 [4 Stat. 409], and 1832 [Id. 583]." The only evidence of such refusal is a letter of the plaintiffs to the defendant, in which they said: "The appraisement which has been made is not satisfactory, and, if desired, such evidence and statements will be produced to you as can be furnished to satisfy you of the fairness of our invoice."

HELD BY THE COURT (INGERSOLL, District Judge). That in the first case it was sufficient that the reappraisers were sworn by a deputy collector, and that the penalty attaches whether the importer makes the addition to his invoice or not. That in the second case the plaintiffs gave no absolute unconditional notice of dissatisfaction to the collector, which they must do to entitle them to a reappraisal, but only announced that they would give evidence, if the collector desired it; and as he had no desire on the subject, their appeal was in effect aban-

doned. [Bartlett v. Kane] 16 How. [57 U. S.] 263. But if the collector had refused to appoint a merchant appraiser, as claimed, still the appraisement was valid. It becomes of no effect only when there has been another appraisement; and the plaintiff's remedy, if he had refused, would be by an action on the case against him for breach of duty. That neither of the protests, therefore, can avail the plaintiffs.

Verdict set aside, and judgment ordered for the defendant.

Case No. 8,215.

LEHMAN v. BERDIN.

[5 Dill. 340;[1] 7 Cent. Law J. 269; 6 Reporter, 611; 7 Am. Law Rec. 310.]

Circuit Court, E. D. Arkansas. April Term, 1878.

FEDERAL COURTS—FOLLOWING STATE PRACTICE—STATE LAWS—ARKANSAS ATTACHMENT—EXECUTION OF BOND TO GAIN POSSESSION—EFFECT ON BOND OF ATTACHMENT NOT SUSTAINED.

1. The circuit courts of the United States give effect to the attachment laws of the state, and are bound by the construction placed upon such laws by the supreme court of the state.

[Cited in Bates v. Days, 11 Fed. 530.]

2. The execution by the defendant in the attachment, in order to regain possession of the property attached, of a bond, under section 416 of the code of Arkansas, conditioned to "perform the judgment of the court," does not estop the defendant from traversing the affidavits for attachment, and defending against the attachment in every respect as if such bond had not been executed and the property had remained in the hands of the officer.

[Cited in Bates v. Days, 11 Fed. 530.]

[Cited in Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. 713, 717.]

3. If the attachment is not sustained, the plaintiff, though he recover judgment for his debt, cannot resort to the bond to compel payment of such judgment.

[Cited in Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. 713.]

The plaintiffs brought suit against the defendant on a promissory note, and sued out an attachment on the alleged grounds that the defendant had sold, and was about to sell, his property, with the fraudulent intent to cheat his creditors. The marshal levied the writ on certain property of the defendant, who thereupon caused a bond to be executed to the plaintiffs, conditioned as required by section 416, Gantt's Dig., which section reads as follows: "If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff by one or more sufficient sureties, to be approved by the court, to the effect that defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution made of any property taken under it, or the proceeds thereof." At this term the defendant filed an affidavit under section 457, Gantt's Dig., denying the statement of the affidavit upon which the attachment issued. The plaintiffs have filed a motion to strike from the files defendant's affidavits controverting the grounds of attachment.

Cohen & Cohen, for plaintiffs.
Wassell & Moore, for defendants.

CALDWELL, District Judge. The reasons assigned in support of the plaintiff's motion to strike from the files the defendant's traverse of the grounds of attachment are, that the execution by the latter of the bond under section 416, Gantt's Dig., operates (1) to discharge the attachment; (2) estops the defendant from contesting the validity of the attachment on any grounds, or for any purpose; and (3) renders the obligors in the bond liable absolutely for the amount of any judgment the plaintiffs may recover in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out. There are adjudged cases in some of the states that seem to support this view. Hazlerigg v. Donaldson, 2 Metc. (Ky.) 445; Inman v. Strattan, 4 Bush, 445; Dierolf v. Winterfield, 24 Wis. 143; Endress v. Ent, 18 Kan. 236; Payne v. Snell, 3 Mo. 409; Kennedy v. Morrison, 31 Tex. 207.

But the question is one in which the law of this state, as construed by the supreme court of the state, furnishes the rule of decision to this court. The question has not been before that court since the adoption of the Code, but it arose under prior statutes, which were the legal equivalent of section 416 of the Code. Under the Revised Statutes of this state the defendant in an attachment suit might retain the property attached upon giving bond conditioned "that he will pay and abide the judgment of the court, or that his security will do the same for him;" and it was further provided that "when the defendant shall have filed the bond as required in the last preceding section, the attachment shall be released, and the suit proceed as other suits at law." Gould's Dig. c. 17, §§ 13, 14.

In Delano v. Kennedy, 5 Ark. 457, the question was presented, whether giving the bond provided for by these sections precluded the defendant from pleading in abatement the want of a sufficient attachment bond, and the court held it did not, and that the legal effect of giving such bond was to discharge the property from the lien of the attachment and substitute the defendant's bond in its stead; that in all other respects the rights of the parties in the attachment proceeding remained the same as though no bond had been given, and the property had remained in the hands of the officer. Chief Justice Ringo dissented from the judgment of the court, and, in his dissenting opinion, states very concisely the views maintained respectively by the majority and minority

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

of the court. He said: "The majority of this court, if I correctly understand their opinion, hold that the legal operation of this act of the defendants is to release so much of the attachment only as operates upon and binds their property, by substituting instead thereof the bonds and personal security taken by the sheriff, but that it has no effect whatever upon the attachment bond filed by the plaintiff. I hold that the legal operation thereof is to release the whole attachment, and place the parties to the action, respectively, in the same situation as if the original process had been a writ of capias ad respondendum, instead of an attachment, and that the proceedings in the writ thenceforward must be the same as if no such bond had been given, and no process other than a capias issued."

In Childress v. Fowler, 9 Ark. 159, the court was asked to review the ruling in the case of Delano v. Kennedy, supra, and, in view of the dissent of the chief justice in that case, it did so, and, after full argument, reaffirmed the doctrine in that case, in an elaborate opinion, concurred in by all the judges, and which concludes in this language: "We therefore hold that the execution of the bond authorized by the 13th section does not impair any of the defendant's rights of defence, and that, after its execution, he may defend the action either by plea in abatement interposed in apt time and in due form, or by plea in bar, in the same manner in every respect as if he had not executed the bond and had suffered the property attached to remain in the hands of the sheriff."

After these decisions were pronounced, and by act of March 7, 1867 [Laws Ark. 1866-67, p. 294], the attachment law of the state was amended so as to allow the defendant to put in issue the truth of the plaintiff's affidavit to procure the attachment, thus making the law in this respect what it now is under the Code; and this amendatory act further provided that the defendant might "give bond to dissolve the attachment." And section 6 declared: "That the conditions of bonds of persons dissolving attachments shall hereafter be, that he will appear and answer the plaintiff's demand at such time and place as by law he should, and that he will pay and abide the judgment of the court."

It will be observed that the language of this section, like that of the Revised Statutes, is better calculated to support the plaintiff's contention than is the language of section 416. And in the case of Ward v. Carlton, 26 Ark. 662, the very question before the court was presented to the supreme court of the state for its determination. The defendant, whose property had been attached, had given the bond required by the act of March 7th, 1867, and the court below had thereupon declared the attachment "dissolved." Afterwards the defendant filed his plea denying the truth of the plaintiff's affidavit upon which the attachment was issued. The court say: "The plaintiff urges on the court that the giving of the bond precludes all inquiry into the truthfulness of the affidavit. If it be admitted that the defendant, after giving bond, cannot question the truthfulness of the original affidavit, the result is that the plaintiff, by his perjury, is allowed to hold the principal and his sureties for the amount of his judgment." And after entering into a forcible argument to show that such a construction of the statute would not be in harmony with the objects and purposes of the attachment law, and would favor the unscrupulous creditor, and result prejudicially to conscientious creditors and honest debtors alike, the court, in conclusion, say that, after the execution of such bond, "the defendant may show, at any time before judgment, that the original affidavit is not true." These authorities are decisive of the question in this state.

It is argued that the Kentucky ruling on the question should be followed by the courts in Arkansas, because the Code of the latter state is a copy of the Code of the former, and the section under discussion identically the same in both. If the section of the Code in question was new law in this state, there would be some force in the suggestion; but, as we have seen, this provision is in legal effect precisely what the former law of the state was—is, in fact, a mere re-enactment of the old law; and if the legislature is to be credited with legislating in reference to knowledge of the decisions of the courts upon this question, the presumption must be indulged that they were more familiar with the decisions of their own courts than with those of a sister state, and that they did not, by simply re-enacting a statute of the state, intend to change its meaning, or adopt an exposition of such statute by the courts of a sister state opposed to the views of the supreme court of their own state.

Moreover, the provision is not peculiar to the Kentucky Code, but was found in the Codes of New York and Ohio, and probably other states, before its adoption by the former state (see sections 199 and 212, Code Ohio, and 240 and 241, Code N. Y.); and the construction of the section by the New York and Ohio courts is in harmony with the decisions in this state, and opposed to the view of the Kentucky courts.

Under the New York Code the attachment may be discharged upon the execution of a bond by the defendant conditioned that the sureties "will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action." Section 241, Code N. Y. A defendant whose property had been attached gave bond conditioned as required by the section last above quoted; the attachment was thereupon discharged. Afterwards the defendant filed his motion and affidavits to vacate the attachment proceedings, on the ground that sufficient

facts to authorize its issue did not exist at the time it was granted, and the court entertained this motion and sustained it, and an order was made vacating the attachment proceedings. Plaintiff in the action recovered judgment for his debt, and it remaining unpaid, suit was brought on the bond given by the defendant to procure the discharge of the attachment, and the court held that the attachment having been set aside upon the ground stated, the consideration for the execution of the bond had failed, and that it could not be enforced. Bildersee v. Aden, 10 Abb. Pr. (N. S.) 163. And the previous rulings in that state were to the same effect. Cadwell v. Colgate, 7 Barb. 253; Homan v. Brinckerhoff, 1 Denio, 184. And the same doctrine is maintained in Ohio. Fortman v. Rottier, 8 Ohio St. 553; Alexander v. Jacoby, 23 Ohio St. 358. In the case last cited the court say: "The interest of a party may imperatively require that his property shall be released from a wrongful attachment without delay. May he not, in such case, promptly procure the discharge of the attachment by payment of the claim on which it is founded, or by executing an undertaking according to the statute, and thus arrest the threatened ruin, without abandoning his rights to redress for the injury already done?" And the court declares the execution of such bond "cannot be regarded as an admission of record that the order of attachment was rightfully obtained."

The Louisiana Code provides that the defendant may have the property released upon the execution of a bond conditioned "that he will satisfy such judgment to the value of the property attached as may be rendered against him in the suit." And the uniform ruling in that state has been that the giving of such bond does not preclude the defendant from afterwards contesting the validity of the attachment on the ground that it was obtained on a false allegation, or upon any other sufficient ground. Pailhes v. Roux, 14 La. 83; Love v. Voorhies, 13 La. Ann. 549; Myers v. Perry, 1 La. Ann. 372; Brinegar v. Griffin, 2 La. Ann. 154; Avet v. Albo, 21 La. Ann. 349. When a bond is given under section 406, the property is not discharged from the lien of the attachment; the defendant may lawfully retain possession of it, but, until the attachment is disposed of, it cannot be again attached or levied upon, except subject to the prior levy, and the defendant cannot sell it divested of the lien of the attachment. Hagan v. Lucas, 10 Pet. [35 U. S.] 400; Drake, Attachm. § 331. And if the attachment is sustained, the court must, in addition to rendering judgment for the debt, condemn the property attached to be sold to satisfy the judgment (sections 455, 456, Gantt's Dig.; Gass v. Williams, 46 Ind. 253); and now, under the act of November 10, 1875 [Laws Ark. 1875, p. 7], may at the same time assess the value of the property, and "render further judgment that in case said property shall not be delivered," etc., execution shall issue against the sureties, etc.

When the bond is given under section 416, the property attached is discharged absolutely from the lien of the attachment, and the bond stands as security to the plaintiff in lieu of the property; and if the plaintiff recovers judgment for his debt, this alone does not give him a right to enforce the bond; but he must also, in order to bind the obligors in the bond, have judgment sustaining the attachment (section 456), and he is then, under the act of 1875, entitled to a judgment against the defendant and his sureties in the bond for the amount recovered and costs. In such case the property attached is not condemned to be sold, because it has been released from the lien of the attachment and the bond substituted in its place; and this is all the difference in legal effect between a bond executed under section 406 and one executed under section 416. Bell v. Western River Imp. Co., 3 Metc. (Ky.) 558; Gass v. Williams, supra.

In neither case can the plaintiff resort to the security of the bond, unless his attachment is sustained; and in neither case is the defendant estopped from showing, at the proper time and in the proper manner, that the attachment was procured, upon false allegations of fact or otherwise, in violation of law. Sections 456, 457, Gantt's Dig.; Bildersee v. Aden, supra; Delano v. Kennedy, supra; Childress v. Fowler, supra; Ward v. Carlton, supra; Pailhes v. Roux, supra; Cadwell v. Colgate, supra; Homan v. Brinckerhoff, supra; Alexander v. Jacoby, supra.

If the defendant is estopped from contesting the attachment after giving bond under section 416, the estoppel will apply as well after the execution of the bond under section 406; for, so far as relates to the effect of the defendant's bond on his right to contest the attachment, there is no difference in the two sections.

The condition of the bond is that the defendant will "perform the judgment of the court." Judgment of the court upon what, and for what? The answer is found in section 456: "Upon the attachment being sustained, the property attached or its proceeds, or the securities taken upon the attachment, shall be applied," etc.

The judgment, then, which the defendant's sureties must "perform" is a judgment that the plaintiff rightfully attached the defendant's property for the debt found to be due, and is, therefore, entitled to the security resulting from the attachment—in other words, a judgment sustaining the attachment—a judgment which would reach the property attached, if no bond had been given. Gass v. Williams, 46 Ind. 253; Inbusch v. Farwell, 1 Black [66 U. S.] 572, 573.

Indebtedness alone is no ground for attachment; other facts must concur to render the attachment lawful, and giving this bond does not, in this state, supply the place of these

other facts, nor estop the defendant from denying their existence. The motion to strike out the defendant's affidavits traversing the attachment is overruled. Motion overruled.

Case No. 8,216.

LEHMAN et al. v. STRASSBERGER.

[2 Woods, 554; [1] 3 Cent. Law J. 134.]

Circuit Court, N. D. Alabama. Jan., 1875.

BANKRUPTCY—JURY TRIAL OF ISSUE—REVIEW BY PETITION OR IN ERROR—TRIAL OF ISSUE DURING VACATION—DEALING IN FUTURES.

1. Where the issue of bankruptcy vel non, is tried by a jury, the errors of the bankrupt court in the progress of the trial must be reviewed by writ of error, and cannot be reviewed by petition.

2. The bankrupt court has power to summon a jury to try the issue of bankruptcy vel non, during the vacation of the district court proper.

3. Where A. through a factor makes a contract with B. for the purchase or sale of cotton for future delivery, intending that there should be no delivery, but that the contract should be performed by the payment of differences, but this purpose is not shown to be also the purpose of B., *held*, that a note given by A. to the factor for money advanced by him to pay losses on such contracts, and for his commissions in making the same, was a valid and binding obligation.

[Cited in Clarke v. Foss, Case No. 2,852; Gilbert v. Gaugar, Id. 5,412; Third Nat. Bank v. Harrison, 10 Fed. 250; Hentz v. Jewell, 20 Fed. 593.]

[Cited in Baldwin v. Flagg, 36 N. J. Eq. 57; Conner v. Robertson, 37 La. Ann. 814; Pape v. Wright, 116 Ind. 505, 19 N. E. 460.]

[In error to the district court of the United States for the Middle district of Alabama.]

On the 18th of February, 1873, Lehman Brothers filed in the district court of the United States for the Middle district of Alabama, sitting as a court of bankruptcy, their petition in the usual form, and containing the necessary averments, praying that Albert Strassberger might be adjudged a bankrupt. On the 5th of March, the return day of the order to show cause, Strassberger demanded a jury trial of the issue, whether or not he had committed the acts of bankruptcy charged. On the 12th of April, after the sine die adjournment of the district court, the cause was submitted to the court upon the issues of law, and to the jury on the issues of fact raised by the pleadings. During the progress of the trial, exceptions were taken by counsel for petitioning creditors, and at its close a bill of exceptions was signed by the court. In their petition the petitioning creditors alleged that "the nature of their demand against the defendant was as follows, to wit: a commercial paper dated and executed in the city and state of New York, of which the following is a copy: "New York, September 10, 1872. Four months after date, I promise to pay to the order of Lehman Brothers, ten thousand dollars at the office of Lehman Brothers, 133 Pearl street, New York. Value received. A. Strassberger." It was charged against the defendant as an act of bankruptcy, "that within six calendar months next preceding the date of the petition, being a trader, he had failed and neglected to pay said note or any part thereof, and still failed and neglected to pay the same, and had suspended and not resumed payment of his commercial paper within a period of fourteen days, in the suspension and nonresumption of the payment of the note above described." The other acts of bankruptcy charged were a conveyance of real estate to one Proskaur, and to Myer Weiss & Co., creditors, with intent to give them a preference, the defendant at the time of the conveyances being insolvent and contemplating insolvency. To this petition the defendant filed answer by way of defense, in which he alleged: (1) That he had not committed the acts of bankruptcy charged; and (2), that before the maturity of the note mentioned in the petition, defendant consulted his counsel, learned in the law, touching his liability to pay said note, making a full disclosure of all the facts connected with the giving thereof, and was advised by his counsel that he was not legally liable to pay the same, and for that reason he refused to pay the same at maturity. The petitioning creditors joined issue on the first defense, and demurred to the second, and moved that it be stricken out as insufficient in law. The court sustained the demurrer, and struck out the second defense.

The main controversy in the case seemed to turn upon the validity of the note from Strassberger to Lehman Brothers, the defendant claiming that the note was void, and, therefore, that the indebtedness, upon which the petition was based, did not exist, and, as a consequence, there could be no adjudication of bankruptcy.

The facts touching the consideration of this note, appeared from the bill of exceptions to be these: Lehman Brothers were cotton factors in the city of New York; as such they were many times employed by Strassberger to buy and sell cotton for him, for future delivery; they had so bought and sold cotton for him since 1868. It was the understanding between Strassberger and Lehman Brothers that in all sales or purchases of cotton by them for him, there was to be no delivery but that difference should be paid, except when special instructions were given to receive or deliver cotton. The contracts were made by Lehman & Brothers in the city of New York, and according to the rules of the cotton exchange of that city. By those rules, which were given in evidence, an actual delivery of cotton is provided for and required in every contract unless waived in some mode by the subsequent conduct or assent of both parties, or unless the party having the option to make or require an actual delivery, fails or declines to

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

exercise his option or to insist upon delivery. The consideration of the note upon which the proceeding was based, arose out of the transactions of Strassberger in such cotton contracts, and included losses on the contracts paid by Lehman Brothers for Strassberger, and their commissions for buying and selling. Sometime after the losses were incurred, and had been paid by Lehman & Brothers, Strassberger executed the note, and afterwards promised verbally and by letter to pay the same. It did not appear that the names of the parties with whom Lehman & Brothers as factors for Strassberger contracted, were disclosed to Strassberger, or that he knew otherwise who they were, or that they agreed there should be no delivery.

On this state of facts it was insisted by counsel for Strassberger that the note in question was void, because it was executed and payable in New York, and was based on cotton contracts made in New York, and because the statute of New York (2 Rev. St. pt. 1, c. 20, tit. 8, p. 924, art. 3) declares that "all wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance or casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property or thing in action, so wagered, bet or staked, shall be void." Upon the question so raised the bankrupt court charged the jury: "If you believe from the testimony that it was never intended there should be any actual delivery of the cotton in the future, but the understanding and agreement were that upon the day upon which delivery was to be made, the person agreeing to sell should pay to the person agreeing to purchase, the difference between the price at which the cotton was agreed to be sold and the price current on the day when it was agreed to be delivered, then you will find that the defendant has not committed any act of bankruptcy." This was the entire charge given to the jury before they retired. In a few minutes they returned into court and propounded the following question: "Suppose the jury believe from the evidence that there was to be a delivery of some of the cotton embraced by said future contracts, then what ought to be the verdict?" Thereupon the court instructed the jury: "That although they might have this belief, yet, unless they believed that the delivery actually made entered into the consideration of the note read in evidence, such belief ought to have no influence on their verdict. That the question submitted to them was whether the note read in evidence was given in consideration of losses or commissions on transactions in futures, in which there was no actual delivery of cotton intended by the parties; that Strassberger had sworn there was no other consideration for the note, and that it was for the jury to say whether they believed this evidence; if the jury believed this evidence, their verdict should be that the defendant had not committed an act of bankruptcy."

The jury returned a verdict for defendant. The case was brought up both by petition of review and by writ of error.

Samuel F. Rice and David Clopton, for Lehman Brothers.

John A. Elmore, H. A. Herbert, and D. S. Troy, for defendant.

WOODS, Circuit Judge. The first question presented for decision is, which method of bringing the case to this court for review is the proper one, by petition under the second section of the bankrupt act, or by writ of error? In Morgan v. Thornhill, 11 Wall. [78 U. S.] 75, Mr. Justice Clifford remarks: "Whether a writ of error will lie from the circuit to the district court, when the debtor opposes the petition that he may be adjudged a bankrupt, and the question whether he has committed an act of bankruptcy is tried by a jury, is not a question involved in the case before the court, suffice it to say at this time that such cases when tried by a jury, if the circuit court has any jurisdiction upon the subject, must be removed into the circuit court by writ of error." Where the question, whether the defendant has committed an act of bankruptcy, has been tried by a jury, the approved practice seems to be to carry the case to the circuit court on writ of error, and not in petition of review. This was done in the case of Phelps v. Clasen [Case No. 11,074], tried by Mr. Justice Miller, of the supreme court, in the circuit court for the district of Minnesota.

Section 8 of the bankrupt act [of 1867 (14 Stat. 520)] provides, that "writs of error may be allowed to the circuit courts from the district courts, in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars." This must be construed in connection with that clause in the seventh amendment to the constitution of the United States, which declares, "that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The common law here alluded to is not the common law of any individual state, but the common law of England, according to which facts once tried by a jury are never re-examined unless a new trial be granted in the discretion of the court before which the suit is depending, for good cause shown, or unless the judgment of such court be reversed by a superior tribunal on a writ of error, and a venire facias de novo awarded. U. S. v. Wonson [Case No. 16,750]. We must give the clause of the bankrupt act now under consideration such construction as will bring it into harmony with

this clause in the constitution. The fact of bankruptcy when tried by a jury can only be re-examined on motion for new trial or upon writ of error. A petition of review to re-examine a fact tried by a jury is a proceeding unknown to the common law. The fact that the issue is tried by a jury, makes it a case at law; and when the value of the bankrupt's estate exceeds five hundred dollars, the debt or damages claimed may be said to exceed that amount. We must give this construction to section 8, or else hold that when the issue of bankruptcy is tried by a jury the case cannot be re-examined in the circuit court at all. It seems clear that the intention of the bankrupt act was to allow all cases in equity and at law, and all cases and questions of every kind arising under the act, to be re-examined in the circuit court. This is provided for in sections 2 and 8. I think that it was the purpose of the act that the issue of bankruptcy, when tried by a jury, should be re-examined in the circuit court, and that this re-examination should be upon writ of error. When a jury has not intervened, the case may be taken up on petition.

I shall therefore proceed to consider the case as here upon writ of error. A motion is made to dismiss the writ on these grounds: (1) Because no writ of error will lie to remove the judgment of the bankrupt court for error intervening in the proceedings by which the party is adjudged a bankrupt; and (2) because the question of bankruptcy vel non, having been tried during the vacation of the district court proper, the remedy of the plaintiffs in error is by revisory petition under the second section of the bankrupt act, and not by writ of error, and this, notwithstanding the issue, was tried by a jury.

The first ground of the motion to dismiss the writ has been settled adversely by the supreme court of the United States in Insurance Co. v. Comstock, 16 Wall. [83 U. S.] 258, and therefore does not demand further notice.

In support of the second ground it is insisted that no jury trial could be properly had during the vacation of the district court, and therefore the proceeding by petition, and not by writ of error, is the proper one. To sustain this view, we are cited to a clause in the 41st section of the bankrupt act (14 Stat. 537; Rev. St. § 5020), which provides that the court "shall, if the debtor, on the same day," to wit, on the return day or adjourned day, "so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance to ascertain the facts of such alleged bankruptcy." It is insisted that this section only authorizes a jury trial at a term of the district court, and not at a bankrupt court held during the vacation of the district court; that the trial by jury in this case was unauthorized, and that therefore the case should be brought to this court precisely as if no jury trial had taken place, to wit, by petition and not by writ of error. Conceding, for the sake of argument, that the construction given to the clause of the statute is the correct one, we do not think the inferences drawn by counsel for defendant follow.

When a petition is filed to place a party in involuntary bankruptcy, the alleged bankrupt may take issue upon the acts of bankruptcy charged, and have the issue tried either by the court or a jury, at his option. If he chooses the former, he does so with the distinct knowledge that any error committed by the court must be corrected by petition to the circuit court. If he demands a trial by jury, he is entitled not only to such trial, but both parties are entitled to all the incidents which necessarily follow such trial, according to the course of the common law. One of these is the constitutional right to have the facts found by the jury re-examined by the appellate court upon writ of error, and in no other way. In this case, the alleged bankrupt demanded a trial by jury. It is clear that the fact that the court erred as to the time when the trial should take place, and as to the jury by which the issue should be tried, does not deprive either party of the right to a writ of error. The court had jurisdiction of the subject matter and of the parties, although it may not have had authority to summon a jury at that time, still that does not make its proceedings void, but only voidable as for error. The fact stands that there has been a jury trial, and that the judgment of the court is based upon the finding of a jury. To hold that because the court erred in calling a jury in vacation and not in term time, the writ of error must be denied, is to deprive the parties without their consent of a right secured by the constitution of the United States.

The record does not show that the petitioning creditors demanded that the jury trial should take place when it did. The defendant had demanded his trial by jury. So far as appears from the record, neither party objected to the jury on the ground that the court had no authority to impanel it in vacation of the district court. If there has been a waiver by this action of any right, it is not the right to a writ of error, but the right of either party at this day to raise any question touching the legality of the jury. But I think a fair construction of the first and forty-first sections of the bankrupt act shows that the bankrupt court may impanel a jury to try the issue of bankruptcy vel non, during a vacation of the district court.

The first section declares "that the several district courts of the United States be and they are hereby constituted courts of bankruptcy. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time,

and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court." The evident meaning is that the power of the bankrupt court may be exercised as well in vacation as in term time of the district court proper.

Among the powers and jurisdiction of the bankrupt court, is the power to try an issue of bankruptcy vel non, by a jury. The power, by the express words of the act, may be exercised in vacation, unless it is taken away by the expression used in the forty-first section of the act already quoted, that "the judge shall order a trial by jury at the first term of the court at which a jury shall be in attendance." Does this mean the first term of the district court proper? We think not. (1) Because the policy of the bankrupt act is to provide for a speedy and summary settlement of the bankruptcy. If a jury trial is demanded, and no jury can be summoned until the regular term of the district court, the question of bankruptcy may be suspended for a period of five or six months. The fact that the adjudication relates back to the filing of the petition shows that no such delay was contemplated. (2) A construction so opposed to the spirit and purposes of the law should be avoided if possible. The phrase, "at the first term of the court at which the jury should be in attendance," may, without violence to the language of the bankrupt act, be referred to a time when the district judge is holding a session of the bankrupt court, as distinguished from his sittings in chambers. Or, it may be referred to the clause of section one, namely: "Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding the court, there shall have been given notice, as well as at the place designated by law for holding said courts." The construction, that no jury trial can take place except during a term of the district courts does violence to the first section of the bankrupt act, and limits the powers of the bankrupt court in vacation, when that section declares they shall be the same as in term time.

For these reasons, I am of opinion that the bankrupt court may, in its discretion, summon a jury during the vacation of the district court. In every point of view, therefore, the second ground for dismissing the writ of error is not well taken. In my judgment, therefore, the case is here properly upon writ of error, and must be so considered.

The assignments of error, by the petitioning creditors, relate mainly to the charge of the court touching the validity of the note made by Strassberger to Lehman Brothers. It is claimed by petitioning creditors, that the charge is erroneous, and the question is thus presented, whether, under the facts already cited, the note in question was a binding obligation upon Strassberger. Let it be conceded, that contracts for the future delivery of cotton, when it is agreed there shall be no delivery, but that differences shall be paid, are wagering contracts, and void as between the parties. That is not the case shown by the record here. The parties here are not parties to any contract for the sale or delivery of cotton. Lehman Brothers, as far as appears from the record, never at any time sold to or bought from Strassberger a pound of cotton. The parties with whom Strassberger contracted were persons other than Lehman Brothers, whose names are not disclosed. Lehman Brothers were only factors of Strassberger to make contracts with other parties. When, therefore, they sue Strassberger to recover money paid by them for him, on such contracts, and their compensation for their services, the court is not called upon to enforce a contract against the law between the parties to that contract, but simply to enforce the collection of a note, the consideration of which is money advanced and services performed by agents for their principal. If Strassberger was suing the parties with whom he contracted, either to buy or sell cotton for the difference between the contract and the market price, then the case would approach more nearly to what is forbidden by the New York statute.

This is the case, to put it in its strongest light for the defendant, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case, the contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract. Durant v. Burt, 98 Mass. 167; Petrie v. Hannay, 3 Term R. 418; Owen v. Davis, 1 Bailey, 315; Armstrong v. Toler, 11 Wheat. [24 U. S.] 274. It has even been held, that partners who have been engaged in illegal transactions shall be held to account to each other for profits of such transactions. Brooks v. Martin, 2 Wall. [69 U. S.] 78. The fact, that the agent includes in a note given for money paid by him for losses in an illegal transaction, compensation as for his services, does not taint the note. Such commissions would not avoid the note unless given for services as agent in a transaction which is not merely malum prohibitum but malum in se.

We must look at the contract for future cotton, as originally made, to determine its legality or illegality. Strassberger testifies, and in this he is uncontradicted, that it was the understanding between him and Lehman Brothers, that in all sales or purchases of cotton by them for him for future delivery, no cotton should be actually received or delivered, but only the differences paid, except when special instructions were given to receive or deliver cotton; and the record shows that he did, on more than one occasion, elect to deliver cotton. If he reserved

the option to receive or deliver, the contract was legal in all respects, even though he might have had a purpose in his own mind not to receive or deliver, and had communicated that purpose to his agents. The question is, did he communicate that purpose to the parties not named, with whom he contracted? There is no evidence that he did. On the face of his contract, he binds himself to deliver cotton, and the other party binds himself to receive it. Now what effect can the mental purpose of Strassberger to pay or to demand differences instead of delivering the cotton have upon the contract, when that purpose is unknown to the other contracting party? Here is no bet or wager. "It cannot be a wager unless both parties are cognizant of the facts." Hibblewhite v. McMorine, 5 Mees. & W. 462.

[I think, therefore, that the charge of the learned judge now under consideration was erroneous for two reasons: (1) Because the record does not show that the contracts between Strassberger and third parties, referred to in his testimony, were illegal; and (2) even admitting that they were, it does not follow that the note given by Strassberger for losses paid and commissions earned by Lehman Bros. in respect of such contract were void.] [2]

As error appears in the record which may have been to the prejudice of the petitioning creditors, it follows that the judgment of the district court must be reversed, and the cause remanded to that court with directions to award a venire facias de novo. Judgment reversed.

NOTE [from original report in 3 Cent. Law J. 134]. This important opinion was prepared by Judge Woods after an elaborate argument, and is entitled to unusual weight. In view of the popular impression that none of the contracts can be enforced based on "puts" and "calls" and "future deliveries," this opinion comes opportunely. In the course of the opinion, it is declared that if the parties reserved the option to receive or deliver, the contract was legal in all respects, even although a party might have had a purpose in his own mind not to receive or deliver, and have communicated that purpose to his agent. On the face of the contract, it is valid, and the intention of the one party to demand differences in cash, if not mutually agreed to, will not make the contract invalid. The factor, agent, or commission merchant can recover for his advances and commissions, on a contract which is malum prohibitum, provided it be not malum in se, and contracts for "futures" are not of this latter character. The New York statute, quoted above, is far more comprehensive as to the wagering contracts which cannot be enforced than the Missouri statute. See Wag. St. p. 661. And yet this case was conceded to be a New York contract, and was sustained. Importance is attached to the fact that the contract was based on the rules of the Cotton Exchange of New York, which are almost the same as the rules of the Merchants' Exchange of St. Louis. Pari passu, such contracts between members of the Exchange, based on their own laws, which are laws unto themselves, will be enforced in the Missouri courts, the statutes of the state not prohibiting them. The very recent case of Waterman v. Buckland [1 Mo. App. 45], in St. Louis court of appeals, does not affect the question, inasmuch as the contract there, on its face, showed a mere wager as to the rise or fall of mess pork, on a certain day, at which time the difference was to be paid in cash, and both parties expressly contemplated there should be no delivery. Though called by parties an "option contract," only cash could pay the difference. The case of In re Chandler [Case No. 2,590], bankrupts, decided in April, 1874, by Judge Blodgett in United States district court of Illinois, apparently, but does not in fact, conflict with Lehman Bros v. Strassberger. In Chandler's Case, the suit was between the original parties, and the proof showed that both parties contemplated no delivery, and were parties to a scheme to create a "corner" in oats for June, 1872. This precise question, as between the wagering parties, wherein no factor or agent intervened, was not passed upon by Judge Woods in Lehman v. Strassberger, and in Waterman v. Buckland, and in Re Chandler, supra, the right of the factor to recover on such contracts was not involved.

[2] [From 3 Cent. Law J. 134.]

Case No. 8,217.

LEHMER et al. v. SMITH.

[1 Cin. Law Bul. 45.]

Circuit Court, S. D. Ohio. 1876.

BANKRUPTCY—EFFECT UPON EXISTING CONTRACTS.

[A., a grain commission merchant, buys and agrees to hold oats for B. upon margins. Without the knowledge or consent of B., he sells the same, and very soon afterwards becomes bankrupt. Nearly a year thereafter suit is brought by B. against A.'s assignee in bankruptcy, claiming for the margin upon the oats at the valuation of the highest market price attained by oats down to the time of bringing suit. *Held*, that the bankruptcy of A. made it apparent that he could neither replace the commodity nor pay damages. For this reason suit should have been entered at that time, and B. is therefore not entitled to any subsequent rise in price.]

[Error to the district court of the United States for the Southern district of Ohio.

The plaintiffs [James D. Lehmer and J. G. Isham] claimed that they were doing business in Cincinnati, Ohio, in 1873; that the bankrupt M. W. Stone was at that time a grain commission merchant; that he agreed to buy and hold for them, upon margins, in Chicago, 200,000 bushels of oats; that on the 28th day of September, 1873, he sold the oats in violation of his duty, and without their knowledge or consent. The defendant [Thos. G. Smith, assignee in bankruptcy of M. W. Stone] did not admit the fact as to the alleged unauthorized sale, but admitted a balance due plaintiffs, and denied that they had suffered damage, inasmuch as oats were lower during October and November, 1873, than at the date of sale. The main question, therefore, was upon the measure of damages.

Upon this question Judge Swing held, in the district court, that the measure of damages was the difference between the market price at the time when the plaintiffs learned that the sale had been made and the price at which the sale had been made. This discovery was on October 16, 1873. On October 18, 1873, Stone became bankrupt. There was no difference in price between

October 16th and October 18th. The plaintiffs claimed, however, that they were entitled to the highest market price which oats attained down to the bringing of the suit, in the summer of 1874.

G. E. Pugh and D. W. Strickland, for plaintiffs.

Matthews, Ramsey & Matthews, for defendant.

EMMONS, Circuit Judge, held that, in estimating the damages, no references could be had to the market at any time later than the date of the bankruptcy; that that was the date at which the plaintiffs knew that they would be obliged to sue, and that the policy of the law would not permit them to wait longer to take advantage of a further rise; that, even if the rule was as claimed by plaintiffs' counsel, the plaintiffs in such actions were ordinarily allowed a reasonable time in which to sue; that such reasonable time would cease with the bankruptcy of the defendant, as it was then made apparent that he could neither replace the commodity or pay the damages. Judgment affirmed.

Case No. 8,218.

In re LEIBENSTEIN et al.

[4 Chi. Leg. News, 309.]

District Court, D. Kansas. 1872.

WHEN PROCEEDINGS WILL NOT BE STAYED IN STATE COURT—WHETHER DEBT DISCHARGED.

1. When it appears from the proceedings against a bankrupt in a state court that the debt is one which will not be barred by a discharge in bankruptcy, the bankrupt court will not interfere to stay or rest proceedings in the state court, and when the state court has jurisdiction of the matter, the question of fraud for instance, if that be the question before it, and involved in the proceeding, the bankrupt court will not take jurisdiction of that question and hear and determine the question of fact, but will leave it to be decided in the state court.

2. Whether a debt has been discharged by a certificate of discharge will in practice from necessity be much oftener presented for decision after the discharge has been granted in a state court than in a federal court, and if the state court has jurisdiction to determine this question it must have jurisdiction on questions preliminary to it, and having taken jurisdiction it should not be interfered with by the bankruptcy court.

[Cited in Re Stansfield, Case No. 13,294.]

This matter came before the court, on petition of Cochran, McLean & Co., for an order dissolving an injunction previously allowed by the court, restraining them from proceeding to collect a judgment recovered by them in the supreme court of the city of New York against said Friedlander, in July, 1871, and was referred to Hiram Griswold, Register, to hear testimony and report the facts and conclusions of law to the court. The suit in which the judgment was rendered was commenced February 3, 1871, to recover for goods sold to said bankrupts. Petition in bankruptcy was filed March 6, 1871. The same day affidavits were filed in the civil action, charging that the goods were obtained through fraud and misrepresentation, on which an order of arrest was issued and the defendant arrested. March 10th, defendant gave an undertaking conditioned that he would render himself amenable to such process as might be issued to enforce judgment to be rendered, and was released from arrest. June 14th, he filed a motion to vacate the order of arrest, which was overruled. July 24th, judgment was rendered. [Charles] Leibenstein and [Max] Friedlander were adjudged bankrupts March 21st. On the 3d of April, Cochran, McLean & Co. filed their proof of debt. The injunction, sought to be dissolved, was allowed August 8th.

By HIRAM GRISWOLD, Register:

Upon the foregoing facts, I find as conclusions of law that the debt for which the plaintiffs recovered the judgment against said Friedlander, if contracted in the manner and under the circumstances as in the affidavits alleged, is one from which his discharge in bankruptcy would not release him, and that the plaintiffs are entitled to an order dissolving the order of injunction heretofore granted. I am guided in my views of the law by the decisions of Lowell, Judge, in Re Devoe [Case No. 3,843]; of Blatchford, J., in Re Kimball [Id. 7,768]; and of Nelson, J., in Re Robinson [Id. 11,939]. I understand the judge in each of those cases, as basing his decision upon the principle that when it appears from the proceedings in the state court that the debt is one which will not be barred by a discharge in bankruptcy, the bankrupt court will not interfere to stay or arrest proceedings in the state court; and that when the state court has jurisdiction of the matter, the question of fraud, for instance, if that be the question before it, and involved in the proceeding, the bankrupt court will not take jurisdiction of that question, and hear and determine the question of fact, but will leave it to be decided in the state court. And these decisions seem to me to be founded in reason, and to be in harmony with the current of decisions involving questions of jurisdiction between federal and state courts. Whether a debt has been discharged, by a certificate of discharge, will, in practice, from necessity, be much oftener presented for decision, after the discharge has been granted, in a state court than in a federal court, and if the state court has jurisdiction to determine this question, it must have jurisdiction on questions preliminary to it; and, having taken jurisdiction, it should not be interfered with by the bankrupt court.

Counsel for the bankrupt concede that this may be the correct view when the charge of fraud is distinctly made in the petition, that

there being the very matter in controversy in the state court, as was the case In re Devoe [supra]. But they contend that when the allegations of fraud are made by ex parte affidavits only, the question should not be withdrawn from this court and remitted wholly to the state court. The distinction is not well taken. In either case it is a proceeding in the state court in which the question is legitimately brought before it.

The principle is the same in the one case as in the other. The only question is one of practice. We know that by the practice of the state of New York it is the function of the affidavit to charge and specify the fraud, as the basis for the order of arrest. And in Re Kimball [supra], it distinctly appears that the allegation of fraud was found only in the affidavits. And it sufficiently appears that it was so in Re Robinson [supra]. For, in that case, counsel insisted that it should appear from the declaration that the suit proceeded upon the ground of fraud. But the judge held that it might well appear in the affidavits only, a discussion that could not have arisen had not the charge of fraud been found in them only. There is another view of this case, which it seems to me is of no little weight. Friedlander, while the action was proceeding, made no effort in that court to have proceedings stayed, under the provisions of the bankrupt act. He permitted the case, without objection, to take the ordinary course, until it terminated in a judgment. Not only so, he gave an undertaking, after the commencement of proceedings in bankruptcy to the effect that he would render himself amenable to such process as might be issued to enforce the judgment which might be rendered. If the case against Friedlander were one in which he was entitled to a stay of proceedings, under the provisions of the bankruptcy act [of 1867 (14 Stat. 517)], it could be obtained only on his own motion. The benefit they secured to him was a personal one, of which he might avail himself or not at his election. He declined to do so; he waived his personal privilege, and permitted the case to proceed to judgment. Such a judgment is a valid one, and is unaffected by a subsequent discharge. Palmer v. Merrill, 57 Me. 26. As to the effect of his giving the undertaking, see Minon v. Van Nostrand [Case No. 9,642]. In any view I can take of the case, therefore, I am clearly of the opinion the order of injunction heretofore granted, be dissolved. Respectfully submitted.

Howsley & Higinbotham, for Cochran, McLean & Co.

Stillings & Fenlon, for Friedlander.

DELAHAY, District Judge. I have considered the opinion of the register, and concur with him in the conclusions of law as stated by him. Order granted, dissolving the order of injunction heretofore allowed.

Case No. 8,219.

LEIDERSDORF et al. v. FLINT.

[8 Biss. 327;[1] 18 Am. Law Reg. (N. S.) 37; 7 Cent. Law J. 405; 7 N. Y. Wkly. Dig. 360; 6 Reporter, 739; 18 Alb. Law J. 382, 429; 13 Am. Law Rev. 390; Cox, Manual Trade-Mark Cas. 360; 11 Chi. Leg. News, 66; 24 Int. Rev. Rec. 373; 35 Leg. Int. 468.]

Circuit Court, E. D. Wisconsin. Nov. 12, 1878.

TRADE MARKS—CONSTITUTIONAL LAW.

1. The legislation by congress upon the subject of trade marks, of July 8, 1870 [16 Stat. 198], is unconstitutional.

2. It cannot be sustained under the power to legislate in favor of authors and inventors, nor under the power to regulate commerce.

[Followed in Day v. Walls, Case No. 3,692.]

[This was a bill in equity by B. Leidersdorf and others against J. G. Flint for an injunction. Defendant demurred upon the ground that the court had no jurisdiction. The case is now heard upon the demurrer.]

Winfield Smith, for complainants.

Jenkins, Elliott & Winkler, for defendant.

Before HARLAN, Circuit Justice, and DYER, District Judge.

DYER, District Judge. This is a bill for an injunction to restrain an alleged infringement by defendant of complainant's trade mark, used upon packages of tobacco and registered according to act of congress. Both complainant and defendant are citizens of Wisconsin, and the bill is based upon that provision of section 4942, Rev. St., which gives to the party aggrieved by the wrongful use of his trade mark, a remedy by injunction, according to the course of equity, in any court having jurisdiction over the person guilty of such wrongful use, and is filed upon the theory that this court has jurisdiction to entertain such a bill, though both parties are citizens of the same state. The bill is demurred to, on the ground that the court has no jurisdiction, and the demurrer raises the question of the constitutional power of congress to legislate upon the subject of trade marks. The question is of great importance, and appears to be new, since, with the exception of Duwell v. Bohmer [Case No. 4,213], we were referred upon the argument to no reported case in which it has been determined.

The statutory provisions relating to trade marks are contained in title 60, Rev. St., which is entitled "Patents, Trade Marks and Copyrights." They authorize the registration of trade marks, impose restrictions upon such registration, and confer certain remedies for the protection of the rights of parties who have complied with the requirements of the statute. The remedies thus given are mentioned in section 4,942, which provides that "any person who shall repro-

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

duce, counterfeit, copy or imitate any recorded trade mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such wrongful use of such trade mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy, according to the course of equity, to enjoin the wrongful use of his trade mark, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use."

The only clause in the constitution from which it can be well claimed congress derives its power to legislate upon the subject is article 1, § 8, cl. 8, which authorizes congress "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." If the power in question is given by this clause of the constitution, then, inasmuch as by section 629, Rev. St., the circuit courts are invested with original jurisdiction of all suits at law or in equity arising under the patent or copyright laws of the United States, and in view of the act of congress of March 3, 1875 [18 Stat. 470], which confers jurisdiction in all civil causes arising under any law of the United States, where the amount in dispute exceeds $500, and of the provisions of section 4942, Rev. St., above referred to, there is ground for claiming that the courts of the United States have jurisdiction in suits which involve the right to trade marks without regard to the citizenship of parties.

But, in contending that the power to legislate upon the subject of trade marks is derived from the constitutional provision before cited, it must be necessarily assumed that the maker of a trade mark is an author or inventor, and that a trade mark is a writing or discovery within the meaning of that clause.

Argument can hardly be needed to demonstrate that a law regulating trade marks is not, in any just sense, a copyright law. The general meaning of the term copyright, is an author's exclusive right of property in the work which he produces. It includes the right of the citizen who is an author of any book or writing, any literary, dramatic or musical composition, any engraving, painting, drawing, map, chart or print, and of models or designs intended as works of art. It is something which appertains to authors who, by their writings and designs, promote the advancement of literature, science and the useful arts. An author, by standard definition is "one who produces, creates or brings into being; the beginner, former or first mover of anything; hence, the efficient cause of a thing. The term is appropriately applied to one who composes or writes a book" or writing, "and in a more general sense to one whose occupation is to compose and write books" or writings.

So, too, invention implies originality. Originality, not mere mechanical dexterity, is the test of invention. Blake v. Stafford [Case No. 1,504]. It is the "finding out, the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyments of mankind." Conover v. Roach [Case No. 3,125]; Ransom v. Mayor of New York [Id. 11,573]. To entitle one to the character of an inventor, he must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius. Pitts v. Hall [Id. 11,192].

The dissimilar characteristics of trade marks, and copyrights, and inventions for which patents may be granted, have been pointed out or illustrated in various adjudicated cases. A trade mark has been very well defined as one's commercial signature to his goods. It may consist of a name, symbol, figure, letter, form or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry and fidelity. McLean v. Fleming, 96 U. S. 245; Upton, Trade Marks, 9; Taylor v. Carpenter, 2 Sandf. Ch. 604.

The basis of a trade mark right is primarily the encouragement of trade. As the court, in discussing the subject, say in Partridge v. Menck, 2 Barb. Ch. 101, the question in such a case is not whether a person was the original inventor or proprietor of the article made by him and upon which he puts his trade mark, nor whether the article made and sold by another under his trade mark is an article of the same quality or value. But the court proceeds upon the ground, that the complainant has a valuable interest in the good will of his trade or business, and that having appropriated to himself a particular label or sign or trade mark, indicating that the article is manufactured or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who pirates upon the good will of his customers or of the patrons of his trade or business, by sailing under his flag without his authority or consent.

The name, word, mark, device, or symbol constituting a trade mark may be devoid of novelty, originality, and of anything partaking of the nature of invention. As the supreme court say in Canal Co. v. Clark, 13 Wall. [80 U. S.] 322, "undoubtedly words or devices may be adopted as trade marks, which are not original inventions of him who adopts them. Property in a trade mark, or rather in the use of a trade mark or name, has very little

analogy to that which exists in copyrights, or in patents for inventions. Words in common use, with some exceptions, may be adopted, if at the time of their adoption, they were not employed to designate the same, or like articles of production." So in McLean v. Fleming, 96 U. S. 245, it is said that trade marks are not required to be new, and may not involve the least invention or skill in their application or discovery.

As is well shown by a writer who has with evident care collated the authorities on the subject, volume 7, Cent. Law J. 143, the foundation of title to a trade mark is priority of adoption and actual use in trade, and it neither in application nor discovery necessarily possesses the elements of originality, novelty or invention.

"The power given to congress to promote the progress of science and useful arts, is restricted to the rights of authors and inventors, and further, their rights are only to be secured for a limited time." Livingston v. Van Ingen, 9 Johns. 566.

This limitation in time is imposed by the constitutional provision itself. But the right to a trade mark is of common law origin, and as a common law right, it is limited only by the period of its use, and ceases only with its abandonment. Property in inventions and discoveries did not exist at common law, and for their protection we have to look wholly to the constitutional provision on the subject.

The consideration for which a grant is made by the public to the author of a new and useful invention, of an exclusive right, is the benefit resulting to the public from the invention. The consent of the inventor to make his invention known and available to others, and ultimately to give it to the public, constitutes the consideration for which he is entitled to receive protection from the government in the form of the grant of an exclusive right. Curt. Pat. preface. Not so with trade marks. For when the exclusive right to use a trade mark terminates, no corresponding benefits result to the public. Its value is gone when it ceases to be exclusive and becomes the property of the public.

Mr. Browne, in his Treatise on Trade Marks, says (page 75): "The rights of inventors and authors, as long settled in Great Britain, were familiar to the framers of the constitution;" and, as Mr. Justice Story says: "It is doubtless to this knowledge of the common law and statutable rights of authors and inventors that we are to attribute the constitutional provision. It was beneficial to all parties that the national government should possess this power; to authors and inventors, because, otherwise, they would have been subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy, the value of their rights; to the public, as it would promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions, without restraint. In short, the only boon which could be offered to inventors to disclose the secrets of their discoveries, would be the exclusive right and profit of them, as a monopoly, for a limited period."

A copyright is limited by time, a trade mark is not. A copyright is limited territorially, but a trade mark acknowledges no boundaries. They are unlike in their natures.

In every aspect suggested, and in other respects which might be suggested, it would seem that the analogy between property in the use of a trade mark and a patent for an invention, and between a trade mark right and a copyright fails. Property in a trade mark exists independently of statute. It is otherwise with inventions and discoveries. As is said by the court in Rodgers v. Philp, 1 O. G. 31, they "are protected only in consequence of the constitutional provision on the subject, which does not apply to trade marks."

Considering with care the important question involved, and not unmindful that the question, whether a law be void for repugnancy to the constitution, or for want of constitutional authority to enact it, is at all times one of much delicacy, I am constrained to hold that legislation by congress upon the subject of trade marks, is not authorized, either by the letter or spirit of the constitutional provision from which such authority is sought to be deduced. The maker of a trade mark is neither an author nor an inventor, and a trade mark is neither a writing nor a discovery within the meaning and intent of the constitutional clause in question.

It may be added, that the constitutionality of the trade mark statute cannot be sustained under the clause which gives to congress the power to regulate commerce among the several states, nor, in my opinion, under any of the provisions of the constitution which prescribe the legislative powers of congress. From these views, it follows that this court is without jurisdiction to entertain the present controversy, which, as before stated, is between citizens of the same state. Demurrer to bill sustained.

The principle laid down in this decision was affirmed by the supreme court of the United States in U. S. v. Steffens, 100 U. S. 82.

Case No. 8,220.

LEIGH v. HOLT.

[5 Biss. 338;[1] 5 Chi. Leg. News, 528.]

Circuit Court, E. D. Wisconsin. July Term, 1873.

OBSTRUCTIONS IN NAVIGABLE RIVERS — RIGHT TO CONSTRUCT PIERS OR BOOMS — ACQUIESCENCE — DUTY OF BOOM OWNER — RIGHTS — HOW CONSTRUED — BOOM OWNER MAY USE CHANNEL REMAINING.

1. The Oconto river is, in contemplation of law, a navigable stream.

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

2. Individual property owners upon its banks have, strictly speaking, no right to construct booms or piers in it without authority from the legislature.

3. The status of the owner of such boom or pier is not changed by the fact that they were purchased and not constructed by him.

4. Where the construction of such piers and booms had been acquiesced in by the public, their owners must be considered to have acquiesced in their construction and maintenance by one another. One boom owner cannot bring a suit against another simply for the construction and maintenance of a boom.

5. Nevertheless it is the duty of the boom owner not to interfere with the rights of other persons or their property on the river, and he must use unusual diligence in keeping a passage-way clear.

6. It seems, that as to any person not connected with any such obstruction, the construction and maintenance of piers or booms would be illegal, and the owner would be accountable for any damage so sustained.

7. The rights of the public should be liberally, and those of the boom and pier owners strictly, construed.

8. The owner of a pier or boom does not thereby cease to have the right to use the channel which remains—he still retains that right in common with all others.

At law.

Finches, Lynde & Miller and Mr. Tracy, for plaintiff.

E. A. Storrs, for defendant.

DRUMMOND, Circuit Judge (charging jury). This is an action to recover damages sustained by the plaintiff in consequence of obstructions to the Oconto river, placed there, as is alleged, by the defendants. The cause of action as set forth in the declaration is substantially this: That the plaintiff was the owner of a saw-mill on Little river, a tributary of the Oconto river; that he manufactured lumber there, and sent it to market by the river, and also in that way obtained his supplies; that the defendants were the owners of land bordering on the Oconto river, and that they also had a mill upon the river; that along the banks of the river where they owned the land, they had constructed a boom to retain their logs as they might need them for sawing; that there was a large number of logs annually descending the river, of which the defendants owned a considerable portion; that there were piers in the river connected with the boom; and that there was a jam of logs there more or less frequently, which was sometimes continued for many weeks, and which prevented the plaintiff from sending his lumber to market; and he alleges that in consequence of these booms, piers and jam of logs, he sustained special damage during the years 1867, 1868, 1869 and 1870.

The principal damage is, however, said to have been in the year 1867, when, as he states, rafts of lumber were detained several weeks, and in one or two instances particularly the lumber was prevented from reaching the mouth of the Oconto river so that it could be shipped to Chicago and Milwaukee at a time when it was at a very high price, and that in consequence of the delay caused by the obstructions which the plaintiff met in the transit of his lumber from his mill to the mouth of the Oconto river the price fell and he sustained very serious loss.

It is alleged that the obstruction was at the piers of the defendants, and that after the lumber passed the piers the navigation was substantially open to the mouth of the river, and the question is whether these allegations in the declaration have been sustained by the evidence in the case.

And first as to the legal status of the Oconto river, upon which these piers and booms of the defendants were maintained. It is conceded that the Oconto river, although perhaps in one sense not strictly navigable, yet in contemplation of law is to be treated as a navigable river, with all those rights which can be claimed for navigable rivers as connected with the general public. It was a meandered stream, and I think that the court will have to say to you that, strictly speaking, no individual owner of property upon the banks of the river had the right to construct a boom or to place a pier in the river without authority from the legislature. So that we have to assume in the investigation of this case, that although these piers and booms were not placed there by the defendants, but were purchased by them, in point of strict law, their maintenance as well as construction was a violation of the rights of the public; but it would be wrong for us to lose sight of the particular circumstances connected with the construction of piers and booms upon this river, and we must not forget either that the plaintiff is himself a mill-owner upon a stream, as I understand, legally in the same condition as the Oconto. There seems to have been a sort of general public acquiescence, if I may so say, judging from the evidence, in the erection and continuance of piers and booms upon this river. In other words, the state, which undoubtedly would have the right to speak, has never yet spoken, and so far as we know, has never instituted any proceedings to put an end to the piers and booms which are maintained upon the river, and it could hardly be said, if this were an action brought by a mill and boom owner on the Oconto river, that he could maintain a suit against a man simply for the construction or maintenance of piers and booms; so that while it may be true that as against the state and the public, the construction and maintenance of piers and booms are illegal, still parties may waive their right to object to the construction and maintenance of both piers and booms; and it is a question proper for the jury to consider in this case, whether the plaintiff is in such a condition that he can complain of the construction and maintenance of the piers and booms as such. And

we should bear in mind, in considering this part of the case, what probably has caused the silence of the public for so long a time (for you will recollect that these piers and booms have been continued there for a great many years), namely: that there must be some device by which logs cut at the sources of a river shall be detained in their transit down, so that they can be manufactured into lumber and made available; and a great deal, of course, will depend upon the nature and character of the stream down which the logs are floated, and I suppose the true explanation why the state or the common public has never done anything in relation to this matter, is because it has been felt that there should be some arrangement by which the logs could be retained floating upon the river until they are manufactured. So that while we lay down this as the strict rule of the law, we qualify it by calling your attention to the circumstances connected with the construction and maintenance of the piers and booms upon this river; also to the particular facts connected with the position and status of the plaintiff himself as a manufacturer of lumber upon a tributary of the river.

If this were a suit by a person not connected with the booms and mills, and his property was arrested in its transit down the river, I think he would occupy a different position from the owner of a mill or a boom; then he would have the right to call upon the court for an unqualified rule upon the subject, and the court would be compelled to say that, as to him, the construction and maintenance of the piers and booms would be illegal, and for the detention of his property the owner of booms and piers would be held accountable.

With these remarks as to the character of the stream, the silence of the public, and the situation and circumstances of the various parties as to the subject matter of the controversy, we will proceed one step further in the case and determine whether or not, if the plaintiff has waived the right to complain of the mere construction and maintenance of the piers and booms, there has been any act of the defendants causing a detention of his property in its transit to market. If it be true that as respects the plaintiff, the defendants could maintain the piers and booms there, still they could only be maintained in such a way as not to interfere with the rights of other persons or their property in its transit up and down the river, and it seems to me that conceding all that, the court has in one aspect of the case, conceded from the silence of the public, and the position of the parties in reference to the piers and booms, that the rights of the public in relation to the passage-way for the property of each citizen should be liberally, and the rights of the owners of the piers and booms strictly, construed. I think that it would be their duty even to be more than ordinarily diligent in keeping clear the passage-way down the river. If their piers and booms are to stay there at all, it should be so that the passage-way should be kept clear. Of course they are not to perform impossibilities. You are to construe their acts with reference to the circumstances surrounding anything which becomes a matter of investigation on your part. For instance, in the removal of logs on their way down the river, the evidence shows that the logs are thrown into the river loose; that they float down with the current. Of course, in being thus thrown in and floating together in great and small quantities, there is a liability, without any force from human hands, to lodge in the river—to jam, as it is termed. Now, under such circumstances, it is the duty of all parties who own piers and booms on the river, to use unusual diligence in clearing a passage-way, so that they may pass on, and in considering the conduct of the defendants upon this point of the case, it will be for you to determine whether they have done all that skill and labor, under the circumstances, could reasonably do in order to keep the passage-way clear.

The defendants would not be liable for the obstruction of the river below, nor would they be held responsible if logs could not be put through their piers or divided there because they were obstructed below. When they have done all that they can, so far as they and their property are concerned, they, under the aspect of the case which I am now considering, are relieved from responsibility.

It is claimed, on the part of the plaintiff, that conceding the right of the defendants to maintain piers and booms, as the only object of the defendants was to manufacture their lumber, they had no right to use the channel in common with the public for their own logs down the river, if they could have floated them into the boom as, thus removing their own logs from the river, there would to that extent be removed an obstruction to the passage of the logs of others. It is almost impossible for the court to lay down any absolute rule upon this branch of the case. It cannot be said, conceding their right to maintain the piers and booms, that the defendants had ceased to have a right to use the channel which remained. They had that right in common with all others; they would not forfeit it by the fact that they had piers and booms upon the river, but no man would have the right to monopolize the river, or prevent a passage of the property of others. In other words, each man should so use the right which he has as not unnecessarily to interfere with the rights of others, and it is a question which the jury may consider without the court giving any absolute rule upon the subject, if the boom of the defendants was more or less open, whether they might not have transferred to their boom logs which might be interfering with the logs or

lumber of others in their transit down the river. It is for you to determine whether or not there was any obstruction unnecessarily on the part of the defendants with the property of the plaintiff in going up or down the river, and whether the plaintiff was damnified by such obstruction.

The jury found a verdict for plaintiff.

NOTE. As to how far riparian owners may erect wharves and piers, and the limitation by navigability of the stream, consult Dutton v. Strong, 1 Black [66 U. S.] 23; Yates v. Milwaukee, 10 Wall. [77 U. S.] 497. The erection of a dam without legislative authority in a river, in fact navigable, is unlawful, whether it interferes with the navigation of the river or not. Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61. Any erection or obstruction not authorized by competent legislative authority, which materially interferes with the paramount right of navigation, is unlawful. Northwestern Packet Co. v. Atlee [Case No. 10,341], decided by Dillon, J., in the United States circuit court of Iowa.

Case No. 8,221.

In re LEIGHTON.

[4 Ben. 457; [1] 5 N. B. R. 95.]

District Court, S. D. New York. Jan., 1871.

BANKRUPTCY—PETITION FOR DISCHARGE—JURISDICTION—RESIDENCE.

1. A petition in involuntary bankruptcy was filed on January 21st, 1868, and an adjudication was made on February 1st, on default of the debtor to appear, after personal service. The petition stated that the debtor had resided in this district for six months next preceding the filing of the petition; but the testimony showed that, from May 1st, 1867, to December 7th, 1867, he resided in Boston, and that from that time till the filing of the petition he resided at New York, and did not carry on business anywhere during the six months. The debtor applied for a discharge: *Held*, that the court had no jurisdiction over the case, because the debtor had not resided in the district for the longest period during the six months preceding the filing of the petition.

[Cited, but not followed, in Re Ives, Case No. 7,115.]

2. The restrictions in section 11 of the bankruptcy act [of 1867 (14 Stat. 521)] as to the judge to whom the petition is to be addressed, apply to proceedings under section 39.

[Petition for discharge, in the matter of John Leighton, a bankrupt.]

Hawkins & Cothren, for bankrupt.

George Bliss, Jr., for creditor.

BLATCHFORD, District Judge. In this case a discharge is refused because the court has no jurisdiction over the case. The case is one of involuntary bankruptcy. The creditor's petition alleged that the debtor, for a period of six months next preceding the date of the filing of the petition, had resided at the city of New York, in this district. The petition was filed January 21st, 1868. The adjudication was made February 1st, 1868, on default of the debtor to appear, after personal service. The testimony shows that, from May 1st, 1867, to December 7th, 1867, the bankrupt resided at Boston, Massachusetts, and that, from the latter date till January 21st, 1868, he resided at New York. Therefore, he did not reside in this district for the six months next immediately preceding the time of filing the petition, or for the longest period during such six months. Nor did he carry on business in this district for such six months or for the longest period during such six months. He did not carry on business anywhere, within the meaning of the act, during any part of such six months. Certainly he did not carry on business in this district for such six months, and, if he carried on business anywhere during any part of such six months, the place where he carried it on for the longest period during such six months that he carried it on anywhere, was Boston.

It is urged that, under section 39 of the act, it is only necessary that a person should reside within the jurisdiction of the United States, and owe debts provable under the act, exceeding the amount of $300, to enable any creditor of his, to the amount of at least $250, to put him into bankruptcy for a cause specified in that section, by proceedings instituted in any district, without regard to the restrictions as to residence and carrying on of business, imposed by section 11, provided the order to show cause be served as provided in section 40. This is an erroneous view of the law. The restrictions in section 11, as to the judge to whom the petition is to be addressed, apply to proceedings under section 39. If not, there is no authority given to any court to hear involuntary proceedings. The 39th section does not say to whom the petition is to be addressed or where it is to be filed; and the 1st section only gives to the district courts, as courts of bankruptcy, authority to hear and adjudicate upon matters and proceedings in bankruptcy, according to the provisions of the act. Such is the view of the justices of the supreme court. In form No. 54, in the schedules to the general orders in bankruptcy, which is the form for a creditor's petition under section 39, the creditor is required to state the jurisdictional facts as to the residence of the debtor in the district where the petition is brought, for the period specified in section 11. A discharge is refused, for want of jurisdiction.

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

Case No. 8,222.

LEIPER et al. v. BICKLEY et al.

[1 Cranch, C. C. 29.] [1]

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

PRACTICE AT LAW—NOTICE TO TAKE DEPOSITION—SERVICE ON ATTORNEY—REASONABLE TIME.

Notice of the time and place of taking a deposition, given to the attorney at law of the op-

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

posite party, is sufficient; and one hour's notice, when the party lives in the same village or town, is reasonable notice, unless special circumstances should be shown to render it unreasonable.

On the trial of this cause a deposition de bene esse was offered by the plaintiffs [Leiper & Co.].

Mr. Faw, for defendants, objected: (1) That notice was not given to the other party, but to his attorney at law, and that such notice is not good. Buckner, one of the defendants, was a resident of the town of Alexandria, where the deposition was taken, but was out of town at the time, and his house shut up. (2) That the notice was not reasonable, being only one hour before the time of taking the deposition.

But THE COURT was of opinion that the notice to the attorney in such cases is good, and that in this case an hour's notice was sufficient, unless special circumstances should be shown to render it unreasonable.

LEIPER (SIMPSON v.). See Case No. 12,884.

Case No. 8,223.

LEITCH v. The GEORGE LAW.

[6 Am. Law Reg. (1858) 368.]

District Court, S. D. New York.

PILOTS—CLAIM OF LIEN FOR SERVICE OFFERED—STATE STATUTE—PERSONAL DELINQUENCY—HOW COLLECTED.

The steamship George Law coming into the port of New York, was spoken by a licensed pilot, who offered his services as such legally licensed pilot, which were refused; he then demanded a certain sum, claiming to be entitled to it under the pilotage laws enacted by state statute, and libeled the ship: *held*, that he had no lien, and that the ship was not liable.

[Overruled in The Edith Godden, 25 Fed. 511.]

The libel alleges that on the 12th of June, 1857, the libelant [Thomas Leitch] was a pilot, duly licensed and qualified according to the laws of the state of New Jersey and the statutes of the United States, to pilot vessels to and from the port of New York, by way of Sandy Hook; that being then on board the pilot-boat Thomas H. Smith, upon the high seas, and within the admiralty and maritime jurisdiction of this court, about eight miles off Barnegat, seeing the said steamship George Law (sailing under a register) approaching, drawing thirteen feet of water, and bound to the port of New York, said steamship not having been before that spoken by a licensed pilot, he immediately spoke said steamship and offered her master his services as piot, to pilot said steamship into the port of New York as the master of said steamship might direct, which offer and services aforesaid the master refused, and that thereby the libelant became entitled, by law, to demand and receive from the master and owner of said ship the sum of $39.65; that neither the master nor owner of said ship has paid that sum, but it yet remains, though often demanded, due and unpaid. Wherefore the libelant prayed process or attachment against the ship, &c. The owner of the ship intervened in the cause, and filed his exceptive allegations to the libel: (1) That the libel and the matters therein set forth are not sufficient in law to constitute a lien upon the ship; (2) that the libel does not state any service rendered to the ship which constitutes a lien; and (3) that the libel claims a penalty, and that the claim is not within the jurisdiction of the court.

Mr. Nudgett, for libelant.

Bebee, Dean & Donohue, for claimants.

BETTS, District Judge. Congress has not enacted specific regulations governing the subject of pilotage, into or out of the United States. The act of August 7, 1789, § 4, provides that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress. 1 Stat. 54. And by the act of March 2, 1837, it is declared that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port, situate upon the waters which are the boundary between two states, to employ pilots duly authorized by the laws of either of the states bounded on said waters, to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding. 5 Stat. 153. This latter act grew out of the difficulties subsisting at this port between pilots licensed under the laws of this state and New Jersey. In this case the libelant was a pilot, licensed according to the laws of the state of New Jersey, and a grave question might perhaps arise whether his privileges and rights under that license are to be determined in this case by the laws of that state or those of New York, as the libel does not aver that the right he sets up here is given him by the laws of both states; but the decision will be placed in this instance upon other considerations, and that point will not enter into the judgment rendered.

It would seem manifest that congress, in the enactments referred to, contemplated nothing beyond the official doings and liabilities of pilots as subjects of regulations by state laws, which were to be adopted and enforced by the authority of the federal government. It is declared that "all pilots in the ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots shall be." Pilots, as public officers, and the acts of pilots, are provisionally admitted to be governed by the regulations

of state laws until congress shall itself legislate further upon the matter. Subsidiary provisions in state laws, which tend to the advantage of pilots in the enjoyment of their offices, would not seem to be necessarily regulations of the offices themselves, or of the incumbents of the offices; they might rather, as they purport to be in the laws of the state in question (act of April 3, 1857, and of February 19, 1819, § 20), mulcts and penalties inflicted upon third parties, for acts or omissions in derogation of the policy of the laws themselves. This point has been ably discussed, in some of its bearings, in Cooley v. Board of Wardens of Port of Philadelphia, 12 How. [53 U. S.] 299, and decided by a closely divided court, in so far as to determine that the state laws governing pilots are laws regulating navigation and not commerce. The act of congress of 1781, therefore, constitutes such state laws laws of the United States to that effect, and also as such, no doubt, supplies them the force and remedies applicable to statutes of the United States, in declaring and securing the right to pilotage fees when pilotage service, offered as provided in this act, is refused. On that acceptation the statute of a state, subjecting the owners of vessels to half pilotage fees or other penalty for refusing to employ pilots to navigate their vessels, is no infringement of the constitution of the United States, and may be enforced by suits in the state courts, and probably in the federal courts also. But the supreme court has nowhere determined the method of procedure by which the statutory regulation may be enforced, and, accordingly, the forms of process authorized in the United States courts must be used, and those peculiar to the state judicatories. The Robert Fulton [Case No. 11,890]. The rule of decision, in many cases of jurisdiction, is derived by the national tribunals from state laws, but the law of practice in the United States courts is universally dependent upon the authority of federal enactment or usages. The adoption of a general principle of law from the state code or its customs, never carries with it into the United States jurisprudence the remedies or processes through which it was there sanctioned and executed. [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175; [Suydam v. Broadnax] 14 Pet. [39 U. S.] 67; [Wayman v. Southard] 10 Wheat. [23 U. S.] 1. If, then, there is in the state law a provision making such reward to pilots a charge upon the vessels, when masters or owners refused pilotage service, it would not follow that the remedy against the vessel would attend the execution of the law in the federal courts.

The allowance made by the state law is not the pilotage—it is a remuneration exacted from masters and owners of vessels personally, because pilotage service is refused by them, and in that way the reward the officer would be entitled to as compensation for his preparing and offering himself to the performance of this duty is withheld, and thus a provision of law highly important to the public interests of trade and navigation is frustrated. It is not necessary to consider whether it be competent for the legislature to impose this charge as a lien on vessels. It is not made such by positive law, and it does not become such by the marine law. The decision of the supreme court, before referred to,—[Cooley v. Board of Wardens of Port of Phila.] 12 How. [53 U. S.] 299,—rests upon the doctrine that the state laws are regulations of the subject of pilotage and of the owners and masters of vessels in their transactions in relation to pilotage, and is nowhere referred to as affecting the vessels in rem. The liability of the masters and owners to this mulct for a personal delinquency would no way impose a liability upon the vessel to satisfy their obligation; and as the law does not impose the obligation on the ship, no action can be maintained in rem to cover the demand. Besides, this libel is in personam only. It does not charge a liability of the ship to the claim, and although it prays process and a decree against her therefor, there is no averment of a lien which would entitle the libelant to take a decree in condemnation of the ship. The exceptive allegations to the sufficiency of the libel and the right of action against the ship upon the averments of the libel are, therefore, allowed, and the libel is dismissed, with costs.

Case No. 8,224.

LEITCH et al. v. UNION R. TRANSP. CO.

[7 Chi. Leg. News, 291.]

District Court, N. D. Illinois. March 29, 1875.

COMMON CARRIER—LIABILITY OF—HOW LIMITED—BILL OF LADING—WHEN LIMITATION BINDING—EFFECT OF TENDER.

1. The common-law rule that in the absence of express contract a common carrier is liable for all loss or damage sustained by property in his hands as carrier, unless caused by the act of God or the public enemy, affirmed.

2. The carrier may limit his responsibility by special contract with the shipper, in which case the contract, and not the rule of law in the absence of a contract, becomes the measure of the carrier's responsibility.

3. The question as to whether the carrier, in the bill of lading given to the shipper, has inserted a clause limiting his liability to a specified valuation of the goods shipped, is a question of fact for the jury; but the legal effect or construction to be given to such contract is a question of law for the court.

4. Where the carrier has plainly embodied into the contract a clause limiting his liability to a specified amount, as by writing it distinctly in the printed blank used as a bill of lading, with no attempt at concealment, so that it can be read at once by any one reading the contract, the shipper is bound by such limitation, where he accepted the contract or bill of lading without objection or dissent, even though he neglected to read it and was, in fact, ignorant of its particular provisions. Such a case is distinguishable upon principle from those where the carrier has attempted

to limit his liability by an obscure notice, in fine print, or otherwise concealed, so as to escape the attention of the shipper.

5. In the absence of any limitation in the contract, restricting the carrier's liability to a specific valuation of the goods shipped, the jury are authorized, in case of loss, to find the carrier liable for the full value of the goods, as shown by the proof.

6. A tender of a less amount than that due is of no effect. A tender of a sufficient amount, if made after suit brought, only has the effect of stopping costs against the defendant making the tender from the time it is actually made.

At law.

Ward, Stanford & Riddle, for plaintiffs.

F. H. Winston, George Willard, and R. Biddle Roberts, for defendant.

BLODGETT, District Judge (charging jury). This is an action to recover the value of fifty-one barrels of highwines, burned while in the hands of the defendant as a common carrier between this city and the city of New York. The admitted facts seem to be these: That on the 10th of March, 1871, the plaintiffs, who were distillers in this city, shipped by the defendant, who was a common carrier between this city and New York City, one hundred barrels of highwines consigned to New York City. They were loaded into cars; fifty barrels in each car, and when at a short distance from here, on the night of the shipment some part of the train containing said cars took fire and one of the cars containing plaintiffs' wines was wholly destroyed with its contents and one barrel in the other car, so that the plaintiffs lost fifty-one barrels, making an aggregate of 3,294 $^{5}/_{100}$ gallons, which were worth in this market at that time, eighty-six cents per gallon, as is shown by the plaintiffs' proof, which is not contradicted. No special or gross negligence is shown or insisted upon, but the plaintiffs claim that the defendant is liable, as a common carrier, for this loss, and bring this suit to recover the value of the property so burned and destroyed.

The defendant insists by way of defense, that it assumed the transportation of said wines under a special contract, limiting its liability to twenty dollars per barrel in case of loss; and it is admitted that very soon after the loss, acting upon information that the contents of only one car had been burned, the defendant tendered to the plaintiffs one thousand dollars, which the plaintiffs refused to receive, and a few months since, the defendant has paid into this court one thousand and twenty dollars, being, as is claimed by the defendant, the value by express contract in case of loss of the fifty-one barrels of wines in controversy.

Where there is no express contract between a common carrier and shipper, the law imposes upon the carrier a very severe and strict responsibility, making the carrier liable for all loss or damage that property shall sustain while in the carrier's hands as a carrier, except such loss or damage as shall occur by the act of God or the public enemy. It is, however, competent for a carrier to limit his responsibility by special contract with the shipper, and when he does so, the contract, and not the rule of law in the absence of a contract, is the measure of responsibility; that is, you must refer to the contract made between the parties to ascertain the carrier's responsibility, and not to the law.

The defendant claims that the contract between itself and the plaintiffs was by a special bill of lading, by the express terms of which it was agreed that the value of said wines was 20 dollars per barrel; and the important inquiry is: first, whether such an express contract was made; second, whether, if made, it is binding on the plaintiffs, and fixes the measure of the defendant's responsibility.

It is admitted that the wines in question were loaded at the stock yards, and what is called a dray ticket was given to the plaintiffs by the railroad agent who received and loaded the goods. This dray ticket was a simple memorandum showing the amount of property shipped, and the names of the shippers and consignees. It may or it may not have had upon it words indicating a limitation of liability to 20 dollars per barrel. The proof is conflicting on that point. But that, I think, cuts no figure in the case, as it is admitted that by the course of business this ticket was to be presented at the proper city office of the defendant, where a bill of lading, which was the contract between the parties, was to be made out; and on the morning after this shipment was made, one of the plaintiffs presented this ticket at the defendant's office, and a bill of lading was made out and given to one of the plaintiffs who took it away from the office without objection to its contents. So far the parties agree as to the main facts in regard to the shipment, the ticket and the bill of lading. The bill of lading itself has unfortunately been destroyed, and we are compelled to resort to parol evidence to ascertain its contents. The witnesses on the part of the defendant, two of them at least, swear positively that this bill of lading contained a clause fixing the value of the wines shipped at 20 dollars per barrel. This is positive and unequivocal testimony. While the plaintiff, Col. Townsend, who procured the bill of lading, says that he cannot state from his recollection whether the bill of lading contained the clause in question or not, but says that he did not notice it, that his attention was not called to it, and he did not know that the defendant had in any manner limited its liability. The defendant's witnesses state that the bill of lading was substantially like the one offered in evidence in all its terms, and that the clause limiting the liability was written in this instrument as it is in the one before you, instead of being printed in it.

The defendant has also introduced evidence

tending to show that there had been a usage for many years prior to this shipment by all railroad and transportation companies running east from Chicago, to ship highwines as fourth-class freight, with this limitation of liability in the contract, and that this usage was and had been for many years known to and acted upon by all shippers of highwines from this city east, and that one of the plaintiffs had been for several years more or less connected with the manufacture and shipment of highwines here, and was familiar, to some extent, with the rates, if not with the forms of doing business. The testimony also tends to show that when highwines were shipped without this limitation of liability, much higher rates were exacted, and that highwines could not at the time in question be profitably shipped to the Eastern market, except at the low fourth-class rate. The plaintiff, Colonel Townsend, also admits that at the time of this shipment the freight was about fifty cents per hundred pounds on his highwines, which was the fourth class rate. This testimony was allowed to go before you, because it tended to show the general course and manner of doing this kind of business, and thus in the absence of the contract itself tended to show what the bill of lading or contract probably contained, it being but fair to assume that the plaintiffs transacted their business with the defendant in substantially the same manner and on the same terms as others engaged in the same class of business; but this is only circumstantial testimony, and is only to be considered by you as such.

The plaintiffs state that they had no knowledge of the different classification of freight, and did not know whether their wines went as first, second, third or fourth class freight, but this is not the material point in the case, the important question being, did they ship on the same terms that others did, and did their bill of lading contain this clause limiting the defendant's liability. Whether this bill of lading or contract contained this clause limiting the value to $20 per barrel, is a question of fact, to be determined by you from the proof. If you find that the contract did contain this clause, or in other words, if you are satisfied from the evidence by a fair preponderance that the bill introduced in evidence is a substantial copy of the one given by the defendant to the plaintiff for the wines in controversy, then the legal effect or construction to be given to the contract thus presented, is a question of law for the court. It is true the plaintiff Townsend says that he did not read the bill of lading, and his attention was not called to its terms, and it is urged by his counsel that he is not bound by this contract unless he assented to it, but I think the law is—and I so charge you—that if you find from the evidence that the bill of lading was, as is contended for by the defendant, and that one of the plaintiffs, Colonel Townsend, accepted it without objection or dissent, then they are bound by its terms, although he did not read it, and was, in fact, ignorant of the particular provisions of the contract.

If the contract was as is testified by the defendant's witnesses, then the clause limiting the liability was not concealed or covered up by any ingenious arrangement calculated to prevent observation or notice. It was a part of the written portion of the contract, and as such would be much more liable to be noticed by a person taking it than if it had been among the printed matter of the bill. There is a class of cases where carriers have attempted to limit their liability by notice posted in their places of business or elsewhere, or even printed on the back of a ticket or bill of lading, in which the courts have held that it must be made to appear that the limitation was brought in some form to the attention of the shipper, in such manner as will justify an inference that the shipper has expressly or impliedly assented thereto before they will hold him bound thereby. So, too, courts have been very strict in regard to conditions or limitations printed in fine print or in an obscure place on a contract so as not to readily attract attention, considering such devices as practically fraudulent in their tendency; but I think the law is well settled that where the carrier has embodied his limitation plainly into the face of his contract so that it can be read and understood at once, if the shipper will only take the trouble to read it, the contract as a whole is binding according to its terms, and it will not do to let one of the parties have the benefit of another rule of liability because he neglected to read his contract. To do so would subject the carrier, by no fault of his own, to a different contract from the one which he, in fact, understood himself as making. Of course fraud vitiates all contracts, but fraud is not to be presumed, and there is no pretext that any fraud was resorted to or used in this case.

If, then, as I said before, you find from all the evidence in the case that the bill of lading given by the defendant to the plaintiffs for the highwines in question, was substantially like the one offered in evidence, you will find the defendant only liable for the wines lost at the rate of twenty dollars per barrel; but if you find there was no such limitation of value in the bill of lading or contract, then the defendant is liable for the full value of the wines as shown by the proof. The tender in this case was only made in the first instance for the value of the fifty barrels, then supposed to be lost. After that time defendant paid into court the price of fifty-one barrels, and the only effect of this tender is to stop costs from the time that it was actually made; that is, if the defendant tendered to the plaintiffs all which it was liable for, it is not liable for

costs made after that time, and if the plaintiffs, instead of accepting the payment thus offered, saw fit to continue the prosecution of the suit, they must do so at their own cost, if money enough was tendered to them. Of course you will understand that the first tender of $1,000, not being for a sufficient amount, cuts no figure in the case, and the second tender only affects the question of costs. You will not need to refer to the tender in your verdict, because the amount of your verdict will leave the question of costs to be determined by the court. The form of your verdict will be guilty or not guilty. If guilty, you will then assess the damages at the value of the wines, as shown by the proof, if the special contract is not made out, and if the special contract is made out you will then assess the damages at the value of the wines, at $20 per barrel. For convenience I will repeat the figures. The total loss was 3,294 $^{5}/_{100}$ gallons, at 86 cents per gallon. If I have figured correctly, it will amount to $2,833.27; while, if the special contract is made out, it is conceded the value of the wines will be $1,020.

Case No. 8,225.

LEITENSDORFER v. CAMPBELL et al.

[5 Dill. 419.] [1]

Circuit Court, D. Colorado. 1878.

PATENTS FOR LAND — COURTS WILL NOT RESTRAIN THEIR ISSUE, BUT WILL RELIEVE AGAINST FRAUD PRACTISED TO PROCURE THEM — VIGIL AND ST. VRAIN GRANT — RIGHTS OF DERIVATIVE CLAIMANTS.

1. The courts will not interfere with the land department of the general government by restraining the issue of patents or other evidences of title; the complainant must wait until the land department has acted, and then attack the results of such action in a proper judicial proceeding against the person who has improperly acquired the title from the government.

2. Congress confirmed, with a reduced area, an inchoate Mexican grant (12 Stat. 71), and provided that the original and derivative claimants (15 Stat. 275) should establish their claims to the satisfaction of the register and receiver of the proper land district. It seems that an appeal lies from the decisions of these officers to the commissioner of the general land office, the same as in ordinary cases. It was *held* that a bill which alleges that the land department refused to hear the complainant's appeal, and, instead thereof, had issued patents to the respondent, to the plaintiff's injury, and that the decision of the register and receiver had been procured by bribery practised by the respondent, presented a prima facie case for relief.

3. Rights of the derivative claimants of the Vigil and St. Vrain grant, under the act of June 21st, 1860 (12 Stat. 71), and of February 25th, 1869 (15 Stat. 275), discussed.

A demurrer to the original bill of complaint was sustained by Mr. Justice Miller and Judge Hallett, at the July term, 1877, with leave to file an amended and supplemental bill. Such a bill has been filed, and the defendants severally demur to the same. It is on this demurrer that the cause is now before the court. The amended and supplemental bill is filled with redundant and irrelevant matter, but it states in substance the following facts:

1. December 9th, 1843, Manuel Armijo, governor of New Mexico, granted to Cornelio Vigil and Ceran St. Vrain certain lands (nine hundred and twenty-two square leagues—four million ninety-six thousand three hundred and forty-five acres), then in New Mexico, now in Colorado.

2. March 7th, 1844, Vigil and St. Vrain conveyed one-sixth (undivided) of the same lands to Eugene Leitensdorfer.

3. In the same year (1844) Vigil and St. Vrain conveyed other one-sixths (undivided) to Bent Donaciano, Vigil, and Armijo, making in all four interests, of one-sixth each, so conveyed.

4. December 10th, 1861, Eugene Leitensdorfer conveyed his one-sixth interest to Thomas Leitensdorfer, the complainant.

5. June 21st, 1860, congress confirmed the grant to the extent of eleven leagues for each of the claimants, Vigil and St. Vrain (ninety-seven thousand six hundred and fifty and ninety-six one-hundredths acres in all), saving the rights of those who had acquired title from them (12 Stat. 71).

6. February 25th, 1869, congress amended the act of 1860, and provided that all claimants (the original grantees and those who had title from them) should "establish their claims to the satisfaction of the register and receiver of the proper land district," etc. (15 Stat. 275).

7. That thirty-nine claims were presented to the register and receiver under this act, and among them plaintiff's claim for sixteen thousand acres and [William] Craig's claim for one hundred and twenty-seven thousand acres.

8. That these claims (plaintiff's and defendant Craig's) were not for the same tract, but for separate parcels of the original grant.

9. That plaintiff's claim before the register and receiver was well supported by evidence showing the conveyance to him by Vigil and St. Vrain, and occupancy and improvement of the tract by plaintiff and his grantors.

10. That defendant Craig's claim is junior to plaintiff's, and is founded on a deed from St. Vrain alone, executed long after plaintiff's deed was made; that Craig has no title whatever from Vigil, and if his deed from St. Vrain is good, the prior grants of Vigil and St. Vrain, of which plaintiff's is the first, will absorb all of the twenty-two leagues confirmed by congress, and leave nothing for Craig.

11. That, notwithstanding plaintiff's manifest right, the register and receiver illegally, fraudulently, and corruptly allowed Craig's claim to the extent of seventy-three thousand two hundred and fifty-one and

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

fifty-five one-hundredths acres, and disallowed plaintiff's claim altogether.

12. That the consideration for the corrupt agreement between the register and receiver and Craig was a conveyance of a portion of the tract allowed to the latter to one Golden, for the use and benefit of the register and receiver.

13. That plaintiff appealed from the decision of the register and receiver (5 Stat. 107), but was defeated in having the appeal heard, by the president directing the commissioner of the general land office to issue the plat to Craig. The appeal was never heard, and the commissioner of the land office refuses to hear it.

14. That the plat has accordingly been issued to Craig. (The statute makes the plat evidence of title. 15 Stat. § 3, p. 277.)

The plaintiff in his bill says nothing about the other derivative claimants whose claims were wholly or partially allowed. He does not allege that any of these claimants obtained more or less than they were entitled to. He does state in his bill that the "questions arising in this action are of great and general interest to all of said derivative claimants," and that it is inconvenient or impossible to bring them all before this court. No relief is sought in the bill against the other derivative claimants; the only defendants to the bill are Craig and [William L.] Campbell, the surveyor-general of Colorado. The prayer of the bill is that the approved plats of the derivative claim of Craig, signed by defendant Campbell, May 26th, 1877, be decreed void from the beginning and cancelled, or that Craig be decreed to hold the land in trust for the plaintiff and the other derivative claimants, and for all other general and special relief applicable to the case.

J. O. Shackelford, R. H. Bradford, and John Q. A. King, for complainant.

G. G. Symes, for defendants.

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

DILLON, Circuit Judge. In sustaining the demurrer of the defendant Craig to the original bill, Mr. Justice Miller distinctly and expressly held that the complainant had no right, and could have none, to restrain the issue of "approved plats," which are made "evidence of title," and that in no event could he have any relief in this court against the defendant Craig until such plats were actually issued and delivered to him. Since that time such plats have been issued and delivered; and the amended and supplemental bill (to which the present demurrer relates) differs mainly from the original bill in that it avers this fact, and also that the supreme court of the District of Columbia has refused to issue a writ of mandamus, at the relation of the complainant, to the commissioner of the general land office, to compel that officer to hear the appeal taken by the complainant from the action of the register and receiver in allowing the claim of the defendant Craig, and in wholly rejecting the claim of the complainant.

As at present advised, we should be of the opinion that the complainant had the right to appeal from the decision of the register and receiver in rejecting his claim, and also from their decision establishing the claim of Craig, so far as the latter would interfere with the rights of the complainant as they might finally be established. But his appeal, and that of the other derivative claimants who appealed, were never heard by the commissioner of the general land office, or by the secretary of the interior, in consequence of the action of the president, based upon what we are inclined to regard as the erroneous opinion of the attorney-general, of May 15th, 1876, that the decision of the register and receiver was final in such a sense that no appeal would lie therefrom to the commissioner of the land office, and that the secretary of the interior had no jurisdiction to review the decision of the register and receiver.

Without any hearing or decision of the pending appeals, "approved plats" (equivalent, in legal effect, to an ordinary patent as evidence of title) have, nevertheless, been issued to the defendant. While these approved plats remain in force, it is out of the power of the commissioner of the land office or the secretary of the interior to hear and determine the appeals, for if they should decide for the plaintiff, and also decide against the defendant, these decisions would be without any legal value or effect, since the title has, as respects the land awarded and platted to Craig, passed from the government to him. With the delivery of these plats to Craig, the legal title to the land described in them passed to him, and with it passed all control of the executive department over the title. Moore v. Robbins, 96 U. S. 530. For this reason, the commissioner of the land office refuses, as alleged, to hear the appeal, or to take any further action in the matter, thereby remitting the complainant to the courts for redress or relief.

Although the specific land claimed by the plaintiff does not conflict on the ground with that awarded to Craig, since the tracts are many miles apart, yet, on the facts as stated in the bill of complaint, the issue of "approved plats" to Craig does injure the plaintiff, assuming that he is entitled, or shall be found entitled, to the sixteen thousand acres claimed by him. The reason is this: All of the derivative claimants can have no more, in the aggregate, than the ninety-seven thousand six hundred and fifty and ninety-six one-hundredths acres confirmed by the act of 1860. The register and receiver rejected the claims of the plaintiff and twenty-two others, amounting to eighty-five thousand nine hundred and thirty-nine and thirty-two one-hundredths acres. They allowed thirteen claims; and to these successful claimants, including

Craig, they awarded ninety-seven thousand six hundred and fourteen and fifty-three one-hundredths acres—substantially all the amount confirmed. To Craig was given seventy-three thousand two hundred and fifty-one and fifty-five one-hundredths acres. If Craig's plats of the title stand, and particularly if plats are delivered to the other successful claimants—if this has not already been done—then, if the plaintiff should hereafter be found entitled to his land, he cannot get it, for the grant, as confirmed, is already exhausted.

Under the act of June 21st, 1860, as amended February 25th, 1869, the validity and extent of the claims of Vigil and St. Vrain, and all of the derivative claimants, were matters which it was contemplated and provided should be decided by the executive instead of the judicial department of the government. U. S. v. Flint [Case No. 15,121]; Foster v. Neilson, 2 Pet. [27 U. S.] 314. This view finds support in the consideration that the execution of treaty provisions is for the political, and not the judicial, branch of the government, unless otherwise expressly provided, and in the further consideration that the above-mentioned acts of 1860 and 1869 prescribe no rules by which the conflicting rights and equities of the derivative claimants shall be settled; and as there is not, or may not be, enough land (in consequence of the great reduction in the confirmation of the grant) to satisfy the claims of all, it must have been contemplated that their several rights and equities should be determined by the merits of their respective claims, including the extent of actual occupation and value of improvements as primary elements, rather than the mere date of the grants or promises to settle made by Vigil and St. Vrain, under the assumption that they owned nine hundred and twenty-two square leagues, instead of twenty-two square leagues, as diminished by the act of June 21st, 1860.

The amount of land claimed by all the derivative claimants greatly exceeded the whole area confirmed. There is not enough for all, and the reasonable inference would seem to be that congress intended to place bona fide derivative claimants having actual settlements upon an equal footing, irrespective of the date of their several titles or promises to settle, and that the extent to which they should severally be entitled to receive lands (not exceeding, in the aggregate, the amount of the confirmed area) should be decided by the land department of the government. Such decision must, in the very nature of the peculiar circumstances of the case, rest upon special facts and equities appertaining to the several claimants, which the executive branch of the government could as well determine as any one else, and not upon pure or strict principles of law, which could be more appropriately determined by the judicial than by the executive department.

If this is a sound conclusion, it results that the rights of the claimants must be determined by the executive department, and not by the courts; and that the courts can only interfere, if at all, in the results of executive action when such results have been procured by fraud or corruption, or possibly, by a denial of some plain legal right.

It is alleged in the bill that Craig corruptly influenced the decision of the register and receiver in his favor by conveying to a third person, for their use and benefit, twenty-two thousand five hundred acres of the land embraced in their decision. If this is true, a decision thus procured cannot be the basis of any rights which can injuriously affect the plaintiff; and approved plats of title to land upon such a decision have no validity as respects any person injured thereby, and who seeks to avoid them by judicial action.

Mr. Justice Miller decided, at the last July term, that, although such fraud and corruption were practised, it did not warrant the courts in interfering with the action of the officers of the executive department by restraining the delivery of plats, and that the plaintiff must wait for relief until the plats were delivered and the executive department had exhausted its power and its right to act.

Although the point, in view of the anomalous and peculiar nature of the case, is by no means free from doubt, our present opinion (subject to review hereafter) is, that it is not a necessary or fair deduction, from what was then decided, that the courts cannot set aside such plats if it shall be judicially established that they were based upon a decision of the register and receiver procured by fraud and corruption—and this, although this court may not have the power to make any decree or order which the officers at the land department will be bound to obey or respect, and although we may not have the right to withdraw the controversy, on its merits, as between the plaintiff and the defendant, or between all the derivative claimants, from the arena of the executive department into the arena of the courts. The supreme court of the United States, while firmly holding to the principle that the courts could not interfere with and control the officers of the land department in the exercise of their duties, has frequently decided that the courts could correct the result of such action whenever it invaded private rights. This is declared with great emphasis in Johnson v. Towsley, 13 Wall. [80 U. S.] 84. It was reaffirmed at the last term, in Moore v. Robbins, 96 U. S. 530, and is thus stated by Mr. Justice Miller: "The decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterward comes in question; but that in this

class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief."

In the recent case of Shepley v. Cowan, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice Field: "The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with reference to settlements upon the public lands, with a view to secure the right of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

If the alleged bribery is established, and if the approved plats are set aside, and we can go no further, the executive department will again be free to act, and to hear and decide the appeals; and its officers may, perhaps, by mandamus from the proper tribunal, be compelled to act on the appeal, although their judgment cannot be judicially controlled.

We concur in holding that the bill, as amended, may be sustained, on the ground that it is alleged that the decision of the register and receiver was procured by the defendant by fraud, that the title of the defendant rests on that decision, and that, in consequence of it and the issue of the plats, the executive department has disabled itself from hearing the appeals and discharging the duties imposed on it by law. The demurrer admits the facts stated in the bill, and if we should hold differently, the plaintiff would be remediless, and justice might fail.

The case, in many of its aspects, is wholly without a precedent, and on some of the points involved we have had, and still have, grave doubts, and our judgment in relation to them is by no means irreversibly settled. When the proofs come in, we shall be willing to hear further arguments concerning any of the views presented, and as to the extent to which, if at all, the plaintiff will be entitled to relief if the alleged bribery and corruption shall be proved.

If such bribery be established, it will then become a question whether we shall wholly set aside the plats, so as to remove the obstacles to executive action, or whether, having taken jurisdiction for one purpose, we can proceed to give complete relief, and to that end set aside the plats only so far as may be necessary to secure the plaintiff the land to which he may show himself entitled. This may depend as well upon the frame of the bill as upon the power of the court.

The defendant Campbell is improperly made a defendant, and his demurrer is sustained. The demurrer of the defendant Craig is overruled, with leave to answer.

Ordered accordingly.

[NOTE. In October, 1878, William Craig filed his answer to the amended bill. Replication was filed to this answer; issue was joined; and proof taken, consisting of documentary evidence and the testimony of witnesses. In January, 1879, the plaintiff dismissed the bill and the amended bill, so far as by the prayers thereof it was sought to hold Craig liable as trustee for the complainant of the titles of the land conveyed to him by the patent issued by the United States to Craig on January 8, 1878. Upon final hearing of the case, a decree was entered July, 1880, by which it was "ordered, adjudged, and decreed that the decision or award of the register and receiver of the land, described in the bill and pleadings, of date the 23d of February, 1874, in favor of the defendant William Craig, is fraudulent and void; and it is further ordered, adjudged, and decreed that the patent for the said lands issued to defendant William Craig on the 8th day of January, 1878, be, and it is hereby, declared and decreed to be null and void, and that the approved plat or plats delivered to defendant William Craig, as evidence of title to the land described in the bill, by William Campbell, surveyor general, be, and the same are hereby, declared and decreed to be null and void." From this decree the defendant appealed to the supreme court, pending which appeal both parties died, and the cause was revived in the names of their respective personal representatives. Mr. Justice Matthews delivered the opinion, in which he says: "The injury which the complainant alleges is that Craig wrongfully obtained from the register and receiver an award of lands to which he had no rightful claim, whereby the whole quantity of the confirmed grant has been reduced and absorbed so as to exclude the complainant from that share to which he was entitled." Continuing, the learned justice observed: "The charge is that Craig bribed the register and receiver to make the award which they did in his favor. It may, nevertheless, be true that the award ought so to have been made upon the merits. So the register and receiver may have been right in rejecting the claim of Leitensdorfer. This possibility is tacitly admitted, for the bill does not ask a declaration and decree that Craig has no valid claim, nor a decree establishing the claim of Leitensdorfer; and it is plainly not within the jurisdiction of the circuit court to grant any such relief, even if it were asked." Continuing, the learned justice observed that the decree does not remove any obstacles which have been wrongfully and unjustly opposed by the defendant to the prosecution in another forum of the rights which the complainant seeks to recover. The right of appeal, he holds, should have been from the register to the commissioner of the general land office, if it existed in any case. This right is not "hindered by the fraudulent character of the decision appealed from, and the appeal itself is the mode pointed out by law for the correction of any error that may be shown in the decision complained of, whether that error has been produced by the practice of fraud and corruption, or was merely an honest mistake." The fact that complainant "did not appeal from that judgment, because he was advised by counsel that no appeal would lie from such judgment, * * * is not sufficient to confer jurisdiction upon a court of equity." The decree of the circuit court was consequently reversed. 123 U. S. 189, 8 Sup. Ct. 85. The case was again heard by the supreme court upon the question of the payments of costs by certain interveners. 127 U. S. 764, 8 Sup. Ct. 1393.]

Case No. 8,226.

LEITER v. PAYSON.

[The case reported under above title in 9 N. B. R. 205. and 6 Chi. Leg. News, 157, is the same as Case No. 8,227.]

Case No. 8,227.

LEITER et al. v. REPUBLIC FIRE INS. CO.

[7 Biss. 26;[1] 9 N. B. R. 205; 6 Chi. Leg. News, 157.]

Circuit Court, N. D. Illinois. May, 1873.[2]

BANKRUPTCY OF CORPORATION — AUTHORITY OF COUNSEL TO ADMIT BANKRUPTCY.

In order to authorize counsel to appear for a corporation and admit acts of bankruptcy charged, it is not essential that the corporators or shareholders should by vote authorize such action.

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

Certain creditors [Levi Z. Leiter and others] of the insurance company, on the 14th of November, 1872, filed a petition in bankruptcy against it, alleging various acts of bankruptcy, and asking that it be adjudicated a bankrupt. The ordinary proceedings took place in the district court after the filing of the petition. [See Case No. 11,704, where an assessment of 60 per cent. upon the stockholders was ordered, and Case No. 11,705, where the question of certain reissued policies was considered.] The company appeared, and filed a waiver of the return day of the rule to show cause, confessing the acts of bankruptcy set forth in the petition, and consenting to an immediate adjudication of bankruptcy. This paper was signed by counsel on behalf of the company. An adjudication of bankruptcy was accordingly rendered, and the case went on in the usual manner until the 20th of May, 1873, when the petitioners in review in this court filed a petition in the district court, asking that the decree in bankruptcy be set aside on the ground that the company was not insolvent as alleged in the petition, and had not committed the acts of bankruptcy therein declared, but particularly because the authority of the counsel confessing the acts of bankruptcy had not been sanctioned, previously to the confession being filed in court, by the stockholders of the company. The district court dismissed the petition [Case No. 11,706], whereupon the case was taken by petition for review to the circuit court.

Eldridge & Tourtellote, for petitioners in review.

Tenneys, Flower & Abercrombie, for respondent.

DRUMMOND, Circuit Judge. This seems to be the principal question raised in this court—whether when a petition in bankruptcy is filed against a corporation, it is necessary, in order to authorize counsel to appear and admit the acts of bankruptcy charged, that the corporators or shareholders should previously, by a vote, authorize the act, or direct it to be done.

The district court dismissed the petition mainly on the ground that the property of the company had been placed in the hands of an assignee, who was proceeding to collect assessments and claims, and was ready to distribute the proceeds then in his hands among the creditors of the company; and that it was, therefore, not competent for the petitioners, who, it seems, were subscribers to the stock of the company, and who had been called upon to pay their subscriptions, thus to delay the application to the court for so long a time; but declaring that if the petition had been filed in apt time, it might have been the duty of the court to consider the allegations therein contained.

Petitioners here insist that the provisions of the 37th section of the bankrupt law [of 1867 (14 Stat. 535)], which declares that a petition may be filed by a corporation, when authorized by its corporators so to do, at any regular meeting called for the purpose. also apply to the case of an involuntary proceeding, against a corporation, by a creditor; in other words, that inasmuch as, before a petition can be filed by a corporation, there must be a vote of the corporators authorizing it; so, when a petition is filed against a corporation, by a creditor, there must also be a vote of the corporators to authorize counsel to appear and consent to an adjudication of bankruptcy, or to admit the acts of bankruptcy alleged.

I do not think that is the true construction of section 37. Congress, in authorizing the application of the provisions of the bankrupt law to corporations, thought it necessary (inasmuch as there might often be a question among the members of a corporation, whether, in a given case, it would be proper to apply for the benefits of the bankrupt law,) to declare that question should be settled in a particular way, namely, by a vote of a majority of the corporators, and, therefore, provided that application should be so made to the court.

This provision refers to the case of voluntary proceedings. But in case of involuntary proceedings against a corporation it is to be inferred, unless there is some restriction in the law, that the usual course will be adopted, and matters proceed as in ordinary cases where legal measures are instituted against corporations; namely, that they will have the power to appear by counsel, be subject to the rules of pleading known and sanctioned by the courts, and that there will be the usual confidence exist-

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

[2] [Affirming Case No. 11,706.]

ing between counsel and client in such cases; and that counsel will not do any act unauthorized by the corporation.

It might be said, with as much reason, that where a corporation is made an involuntary party, indirectly or collaterally, in a bankruptcy proceeding, counsel could not appear to represent it, unless expressly authorized by a vote of the corporators or shareholders; and that would hardly be contended.

It is conceded by petitioners here, that, if the proceedings had gone on in the usual way—if there had been a default and adjudication in bankruptcy rendered, or an appearance by counsel and a hearing or trial, and verdict and a decision of the court making an adjudication—a vote of the corporators would be immaterial, but it is denied that the rule applies to the case of appearance and of a cognovit made by counsel.

The necessity for resorting to a vote of the corporators would not seem to exist, in as great degree, in one case, as in the other.

The corporation, in this case, was not a volunteer. It was compelled to come into court, and plead, in conformity with the rules of the court. As it could appear by counsel without a vote of the corporators, there was nothing to prevent counsel, when warranted in so doing by the regular agents of the corporation, from admitting the acts of bankruptcy stated in the petition, provided, upon a proper examination they were satisfied that the allegations were true, and that a trial, or hearing, would involve unnecessary expense and delay, and be of no advantage to the corporation itself or its creditors.

There is no question made as to the authority having been given counsel by the proper officers of the corporation, nor of the good faith of either, nor of their having acted upon the subject matter after proper inquiry. All these points must be assumed in favor of the acts of counsel and of the officers of the corporation.

The question is, then, simply as to the authority of the corporation to act through counsel in the manner pursued here, and the case would hardly seem to be one calling very stringently for the exercise of the power of interference of the district court or of this court.

An assignee has been appointed, and has administered upon corporate property, collected debts and distributed proceeds, and it would seem to be manifest that the reason for seeking this interference at this time arises, not from the fact that the petitioners in this court are corporators, and their rights as such are affected, but because of their being called upon to pay subscriptions to the stock for which they are liable, and as to which they are delinquent.

The order of the district court, dismissing the petition, will, therefore, be affirmed.

Case No. 8,228.

In re LELAND et al.

[5 Ben. 168;[1] 5 N. B. R. 222; 4 Am. Law T. 185; 1 Am. Law T. Rep. Bankr. 284.]

District Court, N. D. New York. May 5, 1871.

PROCEEDINGS IN DIFFERENT DISTRICTS—MEMBERSHIP IN DIFFERENT FIRMS—DIFFERENT CLASSES OF CREDITORS.

1. S. L., C. L. and W. L. were partners in business under the name of S. L. & Co., in the Southern district of New York, where all three resided. W. L. and C. L. were partners in business in the Northern district, under the name of L. Brothers. On March 24, 1871, a petition in involuntary bankruptcy was filed in the Southern district against S. L. & Co., under which all three were adjudicated bankrupts on April 1. On April 29th the register executed an assignment of all the estate, real and personal, of all three, and the assignee took possession under that assignment. On April 14 a similar petition was filed in the Northern district against W. L. and C. L., making the firm of L. Brothers, under which a motion was made for an adjudication of bankruptcy. *Held*, that under the proceedings in the Southern district, the assignee had taken all the interests of C. L. and W. L. in the firm of L. Brothers, which firm was ipso facto dissolved by their bankruptcy.

2. A discharge properly granted in those proceedings would be available to C. L. and W. L. in respect to the indebtedness of the firm of L. Brothers.

[Cited in Re Morrill, Case No. 9,820; Amsinck v. Bean, 22 Wall. [89 U. S.] 404; Re Webb, Case No. 17,317.]

3. The creditors of L. Brothers would be entitled to a preference over other creditors of C. L. and W. L., or either of them, so far as the property of L. Brothers would pay the same, and such preference would be secured to them under the proceeding in the Southern district.

4. It was not proper to proceed to an adjudication in this case while the proceedings in the Southern district were pending.

5. Although the creditors of L. Brothers could not vote for assignee in the proceedings in the Southern district, they might, by showing cause, prevent the confirmation of an improper assignee, or apply for his removal.

In bankruptcy.

S. B. Pike, Jr., for creditors.
George Gorham, for bankrupts.

HALL, District Judge. On the 14th April, 1871, a petition in bankruptcy was filed in this court, against Warren Leland and Charles Leland, constituting the firm of Leland Brothers, who had carried on business as hotel keepers, &c., at Saratoga Springs, in this district, for the six months next preceding the filing of such petition, and which business had been carried on by them in such firm name—they being the only members of such firm.

Upon the hearing of the motion for an adjudication in bankruptcy, under such petition, it was shown that on the 24th March, 1871, a petition in bankruptcy had been filed against said Warren Leland and Charles Leland, and one Simeon Leland, as partners

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

under the firm name of Simeon Leland & Co.; that such petition was filed in the Southern district of New York, where they severally resided, and in which they had carried on business as copartners in a firm consisting of said Simeon, Warren and Charles Leland; that under said last-mentioned petition the said Simeon, Warren and Charles Leland were, on the first day of April, 1871, adjudicated bankrupts; that on the 29th day of April, 1871, the register to whom the case had been referred, executed an assignment to Edward B. Wesley (who had been appointed assignee of such bankrupts), of all the estate, real and personal, of the said Simeon, Charles and Warren Leland, including all the property of whatever kind in which they were interested, &c.; and that under such assignment said assignee had taken possession of all the property of said Warren Leland and Charles Leland, in this district, and then held the same, claiming the right so to hold it as such assignee.

It was conceded that the said Simeon, Warren and Charles Leland were all residents of the said Southern district, and that their domicil was in that district during the six months next preceding the filing of each of said petitions, and that the petition so filed against them in the Southern district, was filed before any petition was filed by or against any or either of them in this district.

It was not claimed on the part of the petitioning creditors in this case, nor does it appear from the petition herein, that the acts of bankruptcy charged in this petition were not committed prior to the filing of the said petition in the Southern district; or that Warren Leland or Charles Leland had come into the possession of, or had become entitled to any property, after the filing of such last-mentioned petition and before the filing of the petition in this case. It also appeared by the petition in this case, that the debt of the petitioning creditors, on which such petition was founded, was contracted prior to the filing of the petition in the Southern district.

Under this state of facts it was insisted by the respondents that this court ought not to proceed to an adjudication, and that the assets and property of the firm of Leland Brothers, as well as of the firm of Simeon Leland & Co., and the separate estates and properties of the several members of the firm last named, passed to the assignee so appointed in the Southern district, and should be applied to the payment of the debts of such firms and of such bankrupts individually, under the direction or control of the bankruptcy court of the Southern district.

On the other hand, it was insisted that the firm of Leland Brothers was as distinct from the firm of Simeon Leland & Co. as though the two firms were composed of entirely different persons; that under the proceedings in the Southern district, the assignee appointed therein had no right to the property and assets of Leland Brothers, and that this court should therefore proceed in this case so as to allow the joint estate of the firm of Leland Brothers to be administered by an assignee chosen by the creditors of the firm, and not by an assignee in whose selection they could take no part.

The 36th section of the bankruptcy act [of 1867 (14 Stat. 534)], which relates exclusively to the bankruptcy of partnerships, and which must be considered in connection with the questions under discussion, provides: "That when two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts, and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof, and after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estate of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so apropriated to the separate estate of each partner shall be applied to the payment of his separate debts, and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, the court in which the petition is first filed shall retain exclusive jurisdiction over the case."

General order in bankruptcy 16, which re-

lates to the filing of petitions in different districts, must also be considered. It is in the following words:—"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil; and such petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same firm in different courts, each having jurisdiction of the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and in either case, the proceeding upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions for adjudication of bankruptcy shall be filed in different districts by different members of the same copartnership for an adjudication of the bankruptcy of said copartnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed."

It is apparent that a case like the present was not in the actual contemplation of the persons who dictated the phraseology of this 36th section and this 16th general order at the time such phraseology was adopted, and it must be conceded that, strictly and literally construed, section 36 cannot be said to provide, in express terms, for the taking upon the warrant to be issued against the bankrupt of any property except the joint stock and property of the copartnership and "the separate estate of each of the partners;" or for the keeping of separate accounts of anything but the joint stock or property of the copartnership and of the separate estate of each member thereof; or for the appropriation of the joint property of any two of the members of the firm of three partners who may constitute another and distinct firm with a separate and distinct joint estate, and with separate and distinct copartnership debts, to the payment of the firm debts of such two copartners, in preference to the debts of the other firm of three partners, or the individual debts of the members of such copartnership. But the express provisions of this section, as applicable to the estate and debts of a single firm, and the separate property and individual debts of the members of such firm, are only declaratory of the acknowledged principles of equity upon which the court would marshal the assets in the absence of such provisions, and this fact, as well as the general purpose and provisions, and the entire scope and policy of the bankruptcy act should be considered in determining the questions presented in this case.

It is quite clear under the 11th, 36th and other sections of the bankruptcy act, that when all the members of a firm petition for the benefit of the act, they are jointly and severally bound to make in the proper schedules the required statements of all their debts and creditors, whether such debts are copartnership or individual debts, or debts due by them jointly with other persons not parties to the petition, and also to set forth in their inventories the copartnership and individual property, and also property owned by either of them jointly with persons other than the parties who are joint petitioners. Section 11 and form No. 2 annexed to general orders. The discharge to be granted under a copartnership or individual petition is in form and in law a discharge from all the debts of the bankrupt or bankrupts (except as specially excepted in the act), and it will hardly be claimed that a discharge properly granted to a bankrupt upon his separate petition, would not bar a debt against him for which he was jointly liable with another not a party to the proceeding. Section 32. By the 14th section of the act, the assignment is to vest in the assignee "all the estate, real and personal, of the bankrupt," except, &c., and of course all property owned by him as a tenant in common or a partner with another, would pass to the assignee. And other language in the same section shows that such property and all other rights and interests of the bankrupt not excepted from the operation of the act must pass to the assignee, subject, of course, to any legal or equitable liens which are irrevocably fixed thereon. The 21st section seems to contemplate that a bankrupt may be liable as maker, acceptor, drawer, or indorser, upon a bill of exchange, promissory note, or other obligation, as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, and when such firms are composed in whole or in part of the same individuals; and also seems to contemplate that the distinct estates of separate firms, composed in whole or in part of the same individuals, may be wound up in the same proceeding, and the assets of the different firms properly marshalled so as to be applied to the payment of the debts of the proper firm.

Upon the best consideration I have been able to give this case, I am of the opinion that under the proceedings in the Southern district, the assignee there appointed has taken all the interests of Charles and Warren Leland in the firm property of Leland Brothers, which firm was ipso facto dissolved by their bankruptcy; that a discharge

properly granted to Simeon, Warren and Charles Leland, in those proceedings, will be available to Charles and Warren Leland, in respect to the indebtedness of the firm of Leland Brothers; and that the creditors of the copartnership of Leland Brothers are entitled to a preference over other creditors of Warren and Charles Leland, or either of them, so far as the property and estate of Leland Brothers will pay the same; and that such preference will necessarily be secured to them under the proceedings against the three Lelands in the Southern district. Under these conclusions I think it improper to proceed to an adjudication in this case, while such proceedings in the Southern district are still pending.

In England it appears to be settled that a joint and a separate commission in bankruptcy cannot subsist at the same time (Eden, Bankr. 61), and the bankruptcy court there exercises a discretion of superseding or suspending the separate commission and permitting the estate to be administered under the joint commission; by which means, it is said, great expense is saved, and the joint effects are disposed of to better advantage (Id.; Ex parte Hardcastle, 1 Cox, 397).

There are several American cases and authorities which seem to have some slight bearing upon the questions presented in this case, but, I have not time to state them in detail. The case of Ayer v. Brastow [Case No. 682], and authorities there cited; the case In re Abbe [Id. 4]; Story, Partn. §§ 313, 374–409; the case In re Grady [Case No. 5,654]; the case In re Beal [Id. 1,156], and doubtless many others, may deserve a more careful and deliberate consideration than I am at present able to bestow upon them. See, also, Collier, Partn. bk. 4, c. 2, § 3.

It was strongly urged upon the argument, that there should be an adjudication in this case, because the creditors of Leland Brothers could not participate in the selection of an assignee in the Southern district, and that they should not be deprived of the right to participate in the choice of the assignee who is to administer such joint estate. So far as it is well founded, this objection, or a similar one, exists in every case of bankruptcy proceedings by or against two or more persons as partners, where the members of the firm have separate estates and owe individual debts; for the separate creditors of the individual members of the firm are in that case excluded from any participation in the selection of an assignee by the express provisions of the bankruptcy act. But, although so excluded, they and the creditors of Leland Brothers, in the case pending in New York, may apply for the removal of an improper assignee; and as the selection of an assignee is in all cases subject to the approval of the district judge, creditors who cannot vote on the selection of the assignee may, nevertheless, on showing cause against it, prevent the confirmation of an improper selection, as well as apply, after confirmation, for the removal of an assignee. Besides, the power of the court to appoint an additional assignee in all cases enables it to protect the interests of the different classes of creditors whenever there is the slightest reason to suspect that an assignee chosen by creditors, or appointed by a register, will not regard with equal favor the rights of all the creditors of the bankrupts.

[NOTE. The bankruptcy of Leland Bros. was considered by both district and circuit courts, S. D. New York. The district court passed upon certain bonds secured by the Saratoga Springs property. Case No. 8,229. The circuit court upon review, considered the petition of Platt, assignee, as to certain claims of creditors under a chattel mortgage. Case No. 8,234. The district court passed upon the question of fraudulent preferences upon a petition involving mortgages on the Saratoga Springs property. Case No. 8,230. Again the same court considers a re-examination of the debts in issue in the last case. Case No. 8,231. Upon the question of the discharge of the bankrupt the district court considered certain papers offered for admission by the register in Case No. 8,232. The right of another creditor to prove his claim is denied in Case No. 8,233. The right of the assignee to maintain suits against the fraudulently preferred creditors is sustained in Case No. 11,220. The circuit court, in Case No. 8,235, passes upon the question as to the right of the district court to expunge the claim of a fraudulently preferred creditor.]

Case No. 8,229.

In re LELAND et al.

[6 Ben. 175.] [1]

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

NEGOTIABLE INSTRUMENT—WITNESS.

1. A bond issued by an individual, under seal, with coupons attached for the payment of the interest semi-annually, payable to bearer, and secured by a mortgage of real estate to trustees, is a negotiable instrument, and not a specialty, so as to be subject, in the hands of an assignee, to equities existing against the assignor.

2. L. had issued a series of such bonds, which, after his bankruptcy, were found in the possession of a certain bank. In a reference, ordered at the instance of the assignee, a witness was under examination, to whom questions were put relating to the original consideration of the bonds. He refused to answer, and an application was made to the court to compel him to answer: *Held*, that, as the bonds in question were negotiable, and the bank appeared to be a bona fide holder for value, the original consideration could not be inquired into, and the witness need not answer.

[In the matter of Simeon Leland and others, bankrupts.]

This was an application to compel a witness to answer certain questions put to him on a reference ordered at the instance of the assignee in bankruptcy. It appeared that Warren Leland, one of the bankrupts, had, before the bankruptcy, issued five hundred bonds of $1,000 each, with coupons attached, secured by a mortgage of real estate. The form of the bonds was as follows:

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

"One Thousand Dollars Bond of Warren Leland, secured by real estate at Saratoga Springs, county of Saratoga, state of New York, known as the 'Union Hotel Property,' consisting of the Union Hotel and grounds attached thereto, the Leland Opera House, Union Hotel stores, Union Hotel cottages, Union Hotel water works, Union Hotel gas works, Union Hotel stable, and all the furniture and personal property belonging and appertaining thereto, conveyed for that purpose to D. Randolph Martin and Edward B. Wesley, by trust mortgage bearing even date herewith, this bond being one of a series of five hundred of like tenor and date.

"Know all men by these presents, that I, Warren Leland, of the city, county, and state of New York, am held and firmly bound unto A. T. Stewart, or bearer, for moneys loaned or advanced to me, in the sum of one thousand dollars, which I do hereby promise and agree to pay at the Ocean National Bank, of the City of New York, on the first day of October, one thousand eight hundred and eighty-five, together with interest thereon at and after the rate of seven per cent. per annum from the day of the date of these presents, on the first days of April and October, in each and every year ensuing the date hereof, until the said principal sum shall be fully paid, upon the presentation of the annexed warrants, as they severally become due, at the Ocean National Bank of the City of New York. The payment of this, with four hundred and ninety-nine other bonds of the same amount, is secured by a trust mortgage to D. Randolph Martin and Edward B. Wesley, of certain lands and real estate and personal property at Saratoga Springs, in the county of Saratoga, and state of New York, known as the 'Union Hotel Property,' bearing even date herewith. In witness whereof, I have hereunto set my hand and seal, and to certify to the number of said bonds, and that they are possessed of the same trust mortgage, the said D. Randolph Martin and Edward B. Wesley have countersigned this bond, this first day of October, one thousand eight hundred and sixty-five. Warren Leland. (Seal.)

"Sealed, delivered, and countersigned in presence of John K. Hackett.

"Countersigned: D. R. Martin. E. B. Wesley."

The coupons attached to each bond were forty in number, and were in the following form, excepting the date:

"Warren Leland will pay to the bearer hereof, at the Ocean National Bank of the City of New York, thirty-five dollars on the first day of October, 1885, being interest to that date on Union Hotel Bond, No. 483.

"$35. Warren Leland."

Certain of these bonds being found in the hands of the Union Square National Bank, to whom they had been pledged, the assignee took proceedings to recover them. A reference to take proofs was ordered. On that reference a witness was under examination, and certain questions were put to him touching the original consideration of the bonds. He refused to answer, and an application was made to the court to compel him to answer.

T. M. North, for assignee in bankruptcy.
D. McMahon, for bank.

BLATCHFORD, District Judge. I think that, on the authority of the decisions of the highest courts of this state and of the United States, the bonds and coupons in question are negotiable instruments, although issued by an individual, under his seal, and not by a corporation, and are not specialties, so as to make them subject, in the hands of their assignee, to equities existing against their assignor. Although under seal, they were issued, as they show on their face, to secure the payment of money on time, and they contain, on their face, expressions showing that they are expected to pass from one person to another by delivery. Therefore, the attributes of commercial paper attach to them. Their character cannot be controlled or varied by the mere fact that their maker put a seal after his name. Brainerd v. New York & H. R. Co., 25 N. Y. 496; White v. Vermont & M. R. Co., 21 How. [62 U. S.] 575; Mercer Co. v. Hackett, 1 Wall. [68 U. S.] 83.

Such bonds and their coupons pass by delivery, a purchaser of them, in good faith, is unaffected by want of title in their vendor, and the burden of proof, on a question as to such good faith, lies on the party who assails the possession. Murray v. Lardner, 2 Wall. [69 U. S.] 110.

The evidence in this case shows, that the Union Square National Bank became, to all substantial intents, the purchaser of these bonds and coupons, in good faith, for a full and fair consideration, in the usual course of business, and without notice of any possible defect in the title of their assignor.

These views proceed on the assumption that the claim of the bank will absorb all dividends on the bonds and coupons, and they apply only to the interest of the bank therein. If there shall be a surplus beyond paying the claim of the bank, questions as to the title and position of their assignor may become material.

The interrogatories which the witness declined to answer were irrelevant.

[NOTE. In this case the chattel mortgage of certain fixtures in the Saratoga Springs property was considered in Case No. 8,234. Fraudulent preferences are considered in a petition involving mortgages on the real estate in Case No. 8,230. A re-examination of the debts in issue in the last case was heard in Case No. 8,231. The admission of certain papers offered in evidence and objected to in the matter of the bankrupts' discharge is considered in Case No. 8,232. The right of certain creditors to prove their claims is passed upon in Case No. 8,233. The action of the assignee in bringing suits against certain fraudulently preferred creditors is sustained in Case No. 11,220, and the right of the district court to expunge the claim of the fraudulently preferred creditors in Case No. 8,235.]

Case No. 8,230.

In re LELAND et al.

[7 Ben. 156; [1] 9 N. B. R. 209.]

District Court, S. D. New York. Feb., 1874.

FRAUDULENT PREFERENCE—WHAT CREDITORS MAY NOT PROVE THEIR DEBTS—SURRENDER OF SECURITY—PARTY.

1. L. & Co. executed a mortgage upon real estate to trustees, as security for certain bonds issued by them. They afterwards went into bankruptcy, and an assignee was appointed. The assignee petitioned the court for an order for the sale of the real estate, and the mortgagees, in open court, surrendered their claim to the possession of the property to the assignee, but without relinquishing, or in any manner affecting, the validity and lien of the mortgage on the proceeds of the sale. The property was sold by the assignee, and the money paid into court. An order was then made for an examination as to the validity of the various liens claimed on the proceeds, and the court, on the hearing of that matter, held that the mortgage above named was void, as having been given by L. & Co. while insolvent, and within four months before the filing of the petition against them, with a view to give a preference to certain of their creditors, the creditors and the trustees having reasonable cause to believe that L. & Co. were insolvent and that such mortgage was made in fraud of the bankruptcy act. Certain of the bondholders thereafter applied for leave to surrender their bonds and file new proofs of debt, as debts without security, for the purpose of sharing as general creditors in the estate. One of the bondholders, R., had originally filed a proof of debt as a debt without security. This debt was re-examined, and, on the the re-examination, it appeared that he had not surrendered his bonds, and had taken part in the proceedings taken by the trustees to establish the validity of their mortgage as a lien on the proceeds: *Held*, that, under the 39th section of the bankruptcy act [of 1867 (14 Stat. 536)], an assignee has power to recover back property in all cases where a person has conveyed property contrary to the act and is afterwards adjudged a bankrupt.

[Cited in Re Dakin, Case No. 3,539.]

2. Under this section, if the assignee recover back the property because it was conveyed by the bankrupt with intent to prefer the creditor, and because the creditor had reasonable cause to believe what is specified in that regard, in that section, such creditor is not allowed to prove his debt in bankruptcy.

[Followed in Re Leland, Case No. 8,235.]

3. This provision of the 39th section is to be construed in connection and in harmony with the provision of the 23d section; and there cannot be such a surrender by the creditor, as is spoken of in the 23d section, after there has been a recovery of the property by the assignee under the 39th section, or under the 35th section.

4. In this case, there had been such a recovery by the assignee, although there had been no direct suit by him against the creditors; because, it had been necessary for the assignee to obtain a legal adjudication, not indeed giving him the possession of the property, but declaring the invalidity of the lien which the creditors claimed to hold upon it.

[Distinguished in Field v. Baker, Case No. 4,762.]

5. It was too late for the creditors to surrender their preferences, because the order declaring the mortgage an invalid one made it res adjudicata that, as to those who took part in the proceeding, the facts existed which authorized the assignee to recover back the property.

6. Such creditors, therefore, were debarred from proving their debts in the bankruptcy proceedings.

7. R. had been a party to the proceedings taken by the trustees to sustain the validity of the mortgage, and his proof of the debt for which he had taken the bonds as security must be stricken out.

[In the matter of Simeon Leland, Warren Leland, and Charles Leland, composing the firm of Simeon Leland & Co., bankrupts. A petition in bankruptcy was filed in the district court for the Western district of New York against Warren and Charles Leland, composing the firm of Leland Bros. At this time bankruptcy proceedings were pending in this district against these two and Simeon Leland, composing the firm of Simeon Leland & Co. The district court for the Western district dismissed the petition, so that the matters might all be adjudicated together in this district. Case No. 8,228. Leland Bros. mortgaged their Saratoga Springs Hotel property to secure certain bonds made by them. These bonds are considered in Case No. 8,229. Chattel mortgages of Nichol & Davison on certain fixtures of the hotel property were construed and declared void in Case No. 8,234. A decree was entered November, 1873, declaring the mortgages upon the real estate to be void. The case is now heard upon petition of those holding the bonds secured by these void mortgages to be allowed to prove their debts.]

T. M. North, for assignee.
C. B. Sedgwick, for Rouse.
D. Campbell, for A. T. Stewart & Co.
S. G. Courtney, for Monteath & Son.
O. Smedberg, for Paulding, Kemble & Co.

BLATCHFORD, District Judge. In this matter, an order was made by this court, on the 10th of February, 1872, reciting that Edward B. Wesley, as assignee of the bankrupts, had theretofore filed his petition in this court, setting forth that the Grand Union Hotel, situated at Saratoga Springs, was owned by Warren Leland and Charles Leland, two of the bankrupts constituting the firm of Leland Brothers, and that a sale of the said property was necessary, and praying the direction of the court in regard to a sale thereof, and also reciting that, after the filing of such petition, this court had removed Wesley from his office as assignee, and had appointed John H. Platt as assignee in his stead, and that counsel for the assignee and for Alexander T. Stewart and others, and D. McMahon as counsel for Edward B. Wesley and D. Randolph Martin, as mortgagees in trust of the premises in question, under two trust mortgages mentioned in said petition, had been heard, and

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

that said Wesley and Martin, as such mortgagees in trust, had, in open court, for the purpose of enabling said property to be lawfully sold and proper title therefor given, surrendered their claim to the possession of the said premises to the assignee, without relinquishing or in any manner affecting the validity and lien of their several trust deeds on the proceeds of such sale, and that said assignee was then in actual and undisputed possession thereof, and there was no adverse claimant to the possession, and then ordering, that the assignee sell at auction, in one parcel, the said real estate, describing it, free and clear of all liens and incumbrances which had attached to the premises since the 30th of September, 1865 (the said two trust mortgages having attached thereto since that date), and that such liens and incumbrances were thereby transferred to the net proceeds of such sale, and that the fund produced by such sale should stand in the place and stead of said real estate for all purposes, so far as respected said liens and incumbrances, and subject thereto, and that the net proceeds of the sale be deposited on interest to the credit of this matter, to abide the further order of this court, not to be drawn out without notice to the said trustees or their attorneys, and that, for the purpose of marshaling the proceeds of said sale, assets of the said bankrupts, among the different lien claimants, whether by mortgage or otherwise, to said fund, it be referred to the register, after the completion of the purchase under the sale, to take any evidence which the parties in interest, or any of them, might offer or introduce before him, upon the validity of the various liens and incumbrances existing or claimed to exist upon the property ordered to be sold, the extent to which such liens are valid, if valid only in part, the amount due or secured by each of such liens or incumbrances, the persons in whose favor such liens exist, or to whom such amounts are due or secured, and the dates at which such amounts became or will become due, also as to the nature, situation and value of the said real estate, and whether the said liens and incumbrances cover the whole thereof, and what portions, if any, are affected by some of said liens and not by others, and that the said register have authority to issue summons for witnesses and orders for the attendance of the bankrupts, with the same effect as on the examination of bankrupts according to the bankruptcy act, and the rules and practice of this court, and that the bankrupts attend upon such order, and that all witnesses attend upon such summons, and that reasonable notice of such reference be given to all parties claiming any interest in said proceeds of sale, and that the said register report the evidence so taken to this court, and that, until the coming in and confirmation of said report, the said moneys remain on deposit as aforesaid, at interest.

The premises in question were sold, and the net proceeds of sale were deposited, and the reference so provided for was had, a large body of testimony being taken. The matter was brought to a hearing on such testimony, and on the 1st of November, 1873, the court made an order, which recites the provisions of the former order and that the sale had been had and the proceeds had been deposited, and then proceeds: "And all the persons and corporations hereinafter named having attended in person or by counsel upon the said reference before the said register, and the said register having taken all the evidence offered or introduced by them respectively, as to the liens and incumbrances claimed by them respectively, * * * and the said register having reported to this court the testimony so taken, and the matter having been brought on for final hearing before this court * * * and all the persons and corporations hereinafter named * * * having appeared upon said hearing by their respective counsel, and having, in open court, waived all objections to the form of the proceedings, and submitted all the questions involved herein to the decision and decree of the court * * * and after hearing * * * counsel for Alexander T. Stewart & Company * * * and D. McMahon, of counsel for all the other persons and corporations hereinafter mentioned * * * this court * * * does hereby order, adjudge and decree * * * that the mortgage upon said Grand Union Hotel property, commonly called the second mortgage" (being one of the two trust mortgages mentioned in the order first above mentioned), "dated November 1st, 1870, executed by Warren Leland and Charles Leland to Edward B. Wesley and D. Randolph Martin, in trust to secure certain bonds commonly called second mortgage bonds, was made, executed and delivered by said Warren Leland and Charles Leland, being insolvent, within four months before the filing of the petition in bankruptcy against them, with a view to give a preference to certain of their creditors, and, among others, to * * * A. T. Stewart & Company, Simeon Rouse, Paulding, Kemble & Co. * * * Monteath & Son * * * holders of bonds issued under and purporting to be secured by said mortgage, the said Edward B. Wesley and D. Randolph Martin receiving such conveyance, and the said bondholders above named to be benefited thereby, having reasonable cause to believe that the said mortgagors were insolvent, and that such mortgage was made in fraud of the provisions of the bankruptcy act, and that said mortgage is not a valid lien upon or security against said property, nor upon or against said fund in court, and that the bonds issued under the provisions of said mortgage are not liens upon, and are not entitled to be paid out of, said fund, that Edward B. Wesley and D. Randolph Martin, claimants,

as trustees under said mortgage, are not entitled to any lien upon said fund, nor to be paid any money therefrom, that * * * A. T. Stewart & Co., Simeon Rouse, Paulding, Kemble & Co. * * * Monteath & Son * * * claimants, as holders of bonds issued to them respectively, under the provisions of said mortgage, are not, nor is either of them, entitled to any lien upon said fund, or to be paid any money from said fund."

The 23d section of the bankruptcy act provides, that any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference." The 35th section of the same act provides, "that, if any person, being insolvent, * * * within four months before the filing of the petition by or against him, with a view to give a preference to any creditor, * * * makes any * * * transfer or conveyance of any part of his property, * * * the person receiving such * * * transfer or conveyance, or to be benefited thereby, * * * having reasonable cause to believe that such person is insolvent, and that such * * * conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited." The 39th section of the same act provides, "that any person residing and owing debts as aforesaid, who, after the passage of this act, * * * being * * * insolvent, * * * shall make any * * * conveyance or transfer of * * * property, * * * with intent to give a preference to one or more of his creditors, * * * shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, * * * and, if such person shall be adjudged a bankrupt, the assignee may recover back the * * * property so * * * conveyed * * * or transferred contrary to this act, provided the person receiving such * * * conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy."

A. T. Stewart & Co., Rouse, Paulding, Kemble & Co., and Monteath & Son, the persons named in the above order, now present for determination the question whether they are or are not entitled to prove, in bankruptcy, the debts for which they received as security the bonds referred to, secured by such mortgage. They all of them have valid debts, but, by said order, the mortgage is declared to have been made in fraud of the act, and not to be a valid lien on the property or on the fund in court, and the bonds issued under the mortgage are declared not to be liens on the fund, and the terms of the order declare the existence of facts which, under the 35th and 39th sections of the act, give the assignee the right to recover back the property transferred.

The proper construction of the 39th section seems to me to be, not that it gives power to the assignee to recover back property conveyed contrary to the act, only when the bankrupt is adjudged an involuntary bankrupt because of the conveyance of such property as an act of bankruptcy, or even only when he is adjudged an involuntary bankrupt, but that it gives such power to recover back in all cases where a person has conveyed property contrary to the act, and is afterwards adjudged a bankrupt. Under such construction, it is of the same scope, in regard to the recovery or recovery back of property, as the 35th section. But, the 39th section contains the further provision, not found in the 35th section, that "such creditor shall not be allowed to prove his debt in bankruptcy." This means, the creditor to whom the preference was given by the conveyance, when the assignee recovers back the property transferred contrary to the act. The entire provision of the 39th section is to the effect, that, if a person has conveyed property contrary to the act, and if he is afterwards adjudged a bankrupt, the assignee (as to transactions within the times limited by the 35th section) may recover back the property, and that, if the conveyance is one for preference to a creditor, and if the assignee recovers back the property conveyed, because it was conveyed by the bankrupt with intent to prefer such creditor, and because such creditor had reasonable cause to believe what is specified in that regard in the section, such creditor shall not be allowed to prove his debt in bankruptcy. This provision is to be construed in connection, and in harmony, with the provision of the 23d section, before cited. If, under the 23d section, the preferred creditor were allowed to surrender to the assignee the property received in preference, even after it had been recovered back by the assignee, as mentioned in the 39th section, so as to be able to prove his debt, no creditor taking a preference would ever be debarred from proving his debt. If, under the 39th section, it were held that the mere taking of a preference by a creditor would debar him from proving his debt, without the precedent necessity for a recovery back by the assignee of the property conveyed in preference, there never could be any scope for the operation of the 23d section in respect to a surrender. The interpretation heretofore

given by this court to these provisions of the 23d and 39th sections has been (In re Davidson [Case No. 3,599]) that the clause in the 39th section, in respect to not allowing the creditor to prove his debt in bankruptcy, applies only to cases in which the assignee is compelled to resort to legal proceedings to recover the property transferred in violation of the act; that the creditor who claims to retain the property makes himself conclusively a party to the fraud against the act, by resisting the claim of the assignee to recover the property, in case the assignee is successful; but that, where the creditor avails himself of the locus poenitentiae given to him by the 23d section, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud, and may prove his debt in bankruptcy and receive dividends on it. This view is concurred in by Judge Longyear, in Re Scott [Case No. 12,518], and in Re Kipp [Id. 7,836]; by Judge Deady, in Re Walton [Cases Nos. 17,128, 17,130]; by Judge Hopkins, in Re Stephens [Case No. 13,365]; and by Judge Dillon, in Re Richter [Id. 11,803]. It being impossible, therefore, that there should be such a surrender as is referred to in the 23d section after there has been a recovery by the assignee under the 35th section, or a recovery back by him under the 39th section, the question is presented, whether, in respect to the creditors named, there has been such a recovery, or such a recovery back, of property transferred as a preference for such creditor.

It is contended, for the creditors, that a direct suit by the assignee against them is necessary, and a recovery of property from and out of their possession by a decree to that effect in such suit, in order to constitute the recovery referred to in the statute. This is not so. The assignee, in this case, has recovered back the property. He has recovered it back free and clear from the preferences, and against the efforts of these creditors to establish such preferences, in a litigation instituted and carried through by him, with a view to recover back the property. In order to recover back the property, it was necessary for him, not merely to obtain possession of the real estate, so as to be able to turn it into money, but to go further and obtain an adjudication that he was to enjoy the fruits of the sale free from any lien of the preferences. Until the latter adjudication, his recovery back was not complete. By the 35th section, it is declared, that the preference shall be void and the assignee may recover the property. Until there is substantially an adjudication as to the invalidity of the preference, there can be no recovery of the property free from the preference. Mere possession of the property by the assignee is not a recovery of it, unless he obtains such an adjudication as to the preference. This is the case under both the 35th and 39th sections, although the latter section says nothing as to any preference being void, but only speaks of a recovery back by the assignee. But the two sections are substantially one, and are to be construed together in regard to the invalidity of transfers and a recovery by the assignee of property transferred.

In the present case, the assignee, by petition, instituted the proceedings for a sale of the real estate, which have resulted in such sale, and, through the order of reference and the litigation thereunder, in the order of November 1st, 1873. The mortgagees in trust surrendered to the assignee their claim to the possession of the premises, but they surrendered nothing else, and they surrendered that, as the order of February 10th, 1872, expressly states, for the purpose of enabling the property to be lawfully sold, and proper title therefor given, without relinquishing or in any manner affecting the validity and lien of their trust mortgage on the proceeds of sale; and the lien and encumbrance of such trust mortgage was, by such order, transferred to the net proceeds of the sale, and it directed that the fund produced by the sale should stand in place of the real estate for all purposes, so far as respected such lien and encumbrance, and subject thereto. The reference to ascertain the liens on the property and the fund, and marshal the fund, under the power given to the court by the 1st section of the act, was, to all intents and purposes, a litigation to which the bondholders were parties, if they consciously came in, either directly or through the mortgage trustees, asserting and maintaining, against the resistance of the assignee, their right to maintain their preference. Undoubtedly, even after the order of reference was made and the property was sold, they might have surrendered their preferences. But, if they were parties to the litigation in the reference, they are bound by the order of November 1st, 1873, and it is too late for them now to surrender their preferences, because the terms of that order make it res adjudicata between them and the assignee, that the facts existed, as respects them, which gave the assignee the right to recover back the property and its proceeds, and that he has so recovered it back, so that it must follow that they must be debarred from being allowed to prove the debts in respect of which they accepted the preferences. That order recites that the four creditors attended in person, or by counsel, upon the reference, that the register took all the evidence offered or introduced by them respectively as to the liens and encumbrances claimed by them respectively, that they appeared by their respective counsel upon the final hearing of the matter before the court, and waived, in open court, all objections to the form of the proceedings, and submitted all the questions involved to

the decision and decree of the court, and were heard by counsel, who are named. Then follows the judgment of the court. After this, it is too late to go behind such final order, on this question as to the provability of the debts, and inquire whether the evidence warranted such order, provided the four creditors were parties to the litigation, so as to be bound by it.

As to A. T. Stewart & Co., it is not alleged that they did not appear on the reference, or that they did not endeavor, by testimony introduced by them, to maintain their preference, or that they did not so contend, by counsel, on the hearing, or that they did not continue their resistance to the asserted claims of the assignee until after the final order was made. The same is true as to Monteath & Son, and Paulding, Kemble & Co. The motion of A. T. Stewart & Co., for leave to withdraw their former proof of debt, and file in place thereof a new proof of debt, without security, must be denied. The assignee has done nothing to waive the benefit of the final order, or to debar himself of the right to insist that A. T. Stewart & Co. shall not be allowed to prove their debt. The motion of Monteath & Son, for leave to surrender their bonds, and to have their proof of debt, which has been stricken out, restored, and then amended, so as to be an ordinary proof of debt, without security, or for leave to prove their claim anew, as an unsecured claim, is denied. As to Paulding, Kemble & Co., the issues certified are determined in favor of the assignee, and their second proof of debt must be expunged.

As to Rouse, the case comes up on issues as to whether he can be allowed to prove the debt for which he received the mortgage bonds as security, and whether the proof he has made, and which is under re-examination before the register, should be diminished by rejecting such debt. He also applies, by petition, for the opening of the order of November 1st, 1873, and its modification, so as to give him the right to claim a dividend on such debt, and to be paid such dividend as upon an unsecured debt. The facts in the case of Rouse are somewhat peculiar. He resides in Syracuse, N. Y. On the 1st of January, 1872, he went before the register in bankruptcy at Syracuse, and signed and swore to, before him, a proof of debt against Charles Leland and Warren Leland, two of the bankrupts, based on two drafts, for $3,000 each, drawn on the said two bankrupts, as Leland Brothers, and accepted by them (being the two acceptances for which he held the mortgage bonds as collateral security), and also on a promissory note for $632.06, made by the said two bankrupts, as Leland Brothers. The proof set forth that Rouse had not received any security for the drafts or note. The original drafts and note were annexed to the proof. The said register certified on the proof that it was satisfactory to him. The proof found its way into the hands of the assignee, but when does not appear. The reference as to the disposition of the proceeds of sale of the property commenced on the 22d of May, 1872, the record for that day stating that Mr. D. McMahon appeared for the trustees under the mortgage, and for certain named claimants of the fund, the name of Rouse not being among them. On the 8th of July, 1872, Mr. McMahon, subscribing himself as "counsel for the trustees," sent a letter to the Syracuse National Bank at Syracuse, saying that he understood it held bonds of the Grand Union Hotel at Saratoga, and that preparation was being made to distribute the fund arising from the sale of the property, and asking the bank to cause the bonds held by it to be presented at his office on the 11th of July, with the checks given in payment therefor, and evidence of ownership, as the inquiry in relation to said bonds would be proceeded with at that time. The bonds intended were those held by Rouse, and the bank communicated to Rouse the contents of the letter. Rouse, on the 10th of July, sent the bonds by express to Mr. McMahon, with a letter, saying: "Inclosed find bonds of Lelands, held by me. After paying expenses on them, send me my dividend, to my address, in draft or certified check." The bonds, six in number, were received by Mr. McMahon on the 12th or 13th of July, and the express charges, $4.50, not having been prepaid, were paid by him. The record, under date of November 26th, 1872, contains this entry: "Counsel for trustees, on their behalf, and on behalf of S. Rouse, a claimant under second coupon bond mortgages, produces and offers in evidence on behalf of said Rouse the following second mortgage bonds, which are read in evidence and marked as follows," being six bonds of $1,000 each. On the 30th of November, Mr. McMahon, subscribing himself as "counsel for the trustees," sent a letter to Rouse, saying that the reference would be proceeded with on the 6th of December, and adding: "Please attend at that time with your notes or account for which the bonds now in my hands are held by you." Rouse went to New York, and, on the 5th of December, had an interview with Mr. McMahon. As part of it, Mr. McMahon gave to Rouse a letter to the assignee, dated December 5th, saying: "Mr. S. Rouse, one of the creditors of Leland Bros., wishes to get his proof of debt and to exhibit it to me. Please to let him have it, so as to see me about it." Rouse presented this letter to the assignee, and received from him the proof of debt, with the drafts and note attached, and gave a receipt therefor to the assignee, dated December 5th. The proof of debt and the attached papers were given by Rouse to Mr. McMahon, and remained in the hands of the latter until the 16th of December, 1873, the

day the order was made by the register for the re-examination of the claim of Rouse, when they were returned to the assignee by Mr. McMahon. On the 6th of December, 1872, Rouse was examined as a witness on the reference. The record of that day says: "Counsel for trustees, on their behalf, and on behalf of S. Rouse, a claimant, calls the said Rouse." He was then sworn, and testified, on direct and cross-examination. On the direct, this testimony is found: "Q. Are you the owner and holder of any second mortgage bonds on the Union Hotel, at Saratoga, and, if so, produce them? A. I own and hold the six bonds now produced," being the bonds before mentioned. He then went on to say that he took the bonds as security for the two acceptances. The original acceptances, with the notarial certificates of protest attached, and the note, were then put in evidence, detached from the proof of debt, and without any mention of any proof of debt. Rouse then went on to state the facts connected with his receiving the bonds, and after saying that the acceptances and the bonds had passed into the hands of the Syracuse National Bank, and that he had taken up the acceptances in 1871, he added: "I have been the holder of these bonds and these pieces of paper ever since. I never received anything on them, and the amount now due me, for which I hold the bonds, is $6,000, and interest from the respective dates of their maturity." He is then asked, whether, in taking the bonds, he intended to defraud the creditors of the bankrupts, and says he did not; and whether, in taking them, he designed to gain a preference over any of the creditors of the bankrupts, and says he did not; and what was his knowledge or belief, as to the solvency or insolvency of the bankrupts, when he took the bonds, and answers; and whether he knew anything about the provisions of the bankruptcy act, and says he did not; and whether he intended, by taking the bonds, to commit any fraud on the provisions of said act, or to defeat or delay its operation, as regarded the bankrupts and their creditors, and says he did not; and what belief he had as to the existence of any intent, on the part of the bankrupts, to dispose of their property in his favor, in fraud of said act, so as to prevent it from coming to the assignee, or from being distributed under said act, or to defeat or delay the operation of said act, and says he had none; and what cause he had to believe, and what knowledge or information he possessed tending to cause a belief, in the existence of any such intent, and says he had not any; and what belief he had, when or before he took the bonds, as to the existence of any intention, view or desire, on the part of the bankrupts, to give him a preference, and says he had not any. He was cross-examined, at considerable length, as to the facts connected with his taking of the bonds, and bearing on the inquiries so made of him on his direct examination. On the 30th of July, 1873, the testimony on the reference having been closed, and the matter being about to come on for hearing, Mr. McMahon wrote a letter to Rouse, inclosing to him a copy of a printed circular, subscribed by Mr. McMahon, as "counsel for trustees and claimants," and addressed to "the owners and holders" of said bonds, which circular said: "It is necessary that due preparation should be made to present your rights and interests before said court. The trustees have no funds in hand out of which to pay counsel, and as I, their counsel, have fully prepared myself to advocate your several rights and interests, and have heretofore presented your proofs on the reference, they instruct me to say to you to make the necessary arrangements with me for counsel fees. In case you prefer other counsel, you, of course, are at liberty to employ them, settling up with me for the services already rendered in your behalf." In connection with this circular, Mr. McMahon suggested to Rouse to send him 5 per cent. on the amount of the bonds, or $300. Rouse, by a letter dated August 4th, replied, saying: "It strikes me that it is proper for the trustees of the second mortgage to defend their trust. If they have not funds or credit sufficient to employ counsel, then they should call the creditors together, and let them make arrangements to take care of themselves and employ their own counsel. I presume the matter will be properly seen to, and that suitable compensation will be made, but I am not, as at present advised, disposed to advance $300 on my bonds." Mr. Rouse paid nothing. The matter was argued in September, Mr. McMahon arguing in support of the claim of Rouse, as holder of the six bonds, to share in the proceeds of sale.

Rouse now takes the ground, that he proved his debt as an unsecured debt, intending thereby to surrender the bonds and all claim under them to any preference; that he supposed and believed he had done all that was necessary to that end; that in this he acted in good faith, under the advice of the register in bankruptcy in Syracuse; that he never has claimed, or intended to claim or secure, any preference on the bonds, but fully intended to surrender them and all claims upon or under them; that the undertaking by the trustees to establish the validity of the bonds, and to secure a lien thereunder, and the employment by them of counsel for that purpose were without his concurrence or consent; that, in sending his bonds to Mr. McMahon, as counsel for the trustees, he supposed that Mr. McMahon had a right to ask for them, and considered them as of no further use or value; that the testimony he gave was given at the request of the counsel for the trustees, to show the good faith of the transaction on which he received the bonds and of his debt; that he

employed no counsel, and refused to recognize Mr. McMahon as his counsel, or as acting on his employment, and has never expected to rely upon anything except his original proof of his debt as an unsecured debt; that, by proving his debt as an unsecured debt, he relinquished and surrendered all claim upon the bonds; that he made such proof understandingly and advisedly; and that what was done by the trustees or their counsel cannot affect his rights, unless the proceedings were taken at his instance, or were prosecuted by his direction, or with his conscious consent.

Mr. Gott, the register in bankruptcy in Syracuse, testifies, that Rouse came before him with the acceptances and the note, and stated that he had some mortgage bonds which he had taken as security for his debt, but which he did not consider of any value; that, at the request of Rouse, he, the register, wrote to a correspondent in New York, to ascertain the value of said security, and was advised by him that such bonds were of no value; that he, the register, thereupon advised Rouse to prove his debt as an unsecured debt, and told him, at the same time, that, by so proving his claim as an unsecured debt, he would, according to the law as held in the Northern district of New York, thereby relinquish his security on the bonds; that thereupon Rouse proved his debt as an unsecured debt; and that he, the register, understood that Rouse thereby intended to relinquish all claim upon the bonds as security. Rouse confirms this testimony of Mr. Gott, and says that he concluded to prove his debt as an unsecured debt, understanding that the effect of so proving it would be to surrender all claim upon the bonds; that he sent the bonds to Mr. McMahon without any instructions in regard to them, supposing that he had authority to ask for them, and was the proper person to send them to, and not considering them of any value; that he supposed the object of his examination on the reference was to establish the validity and honesty of his claim as a general creditor of Leland Brothers, and did not understand that it was to establish a claim for a preference over other creditors; that he never knew that any such claim was to be made in his behalf, and never authorized it; that he never intended to employ Mr. McMahon to act on his behalf to secure any preference for his debt, or to act for him in any way as his counsel; and that he did not know that Mr. McMahon claimed to be acting as counsel for him, until the bill for counsel fees was sent, which he declined to pay on the ground that he had never employed Mr. McMahon. On cross-examination, Rouse testifies that Mr. Gott did not inform him, nor did he know or think, that proving his debt as a secured debt would in any manner, or in any event, injure him or prejudice his claim; and that he had no other reason for proving his debt as an unsecured debt, than that he and Mr. Gott thought the bonds as of no pecuniary value. After Rouse had so testified, Mr. McMahon was examined. He says, that when Rouse came to New York, and before he was examined on the 6th of December, 1872, he, McMahon, read over to Rouse a series of questions which he had put to witnesses who held secured mortgage bonds, relative to his intent to gain a preference (being substantially the same questions before referred to which were put to him on his direct examination), and asked him whether he could answer them truthfully, and he said he could. He also says: "I complained to Mr. Rouse about his sending me his six bonds, and putting me to the expense of $4.50. He said to me, 'Why, you can collect the bonds, and pay yourself out of it, and for your trouble also.' I told him the trustees had no money belonging to the estate in their hands, and, in case nothing was collected, I saw no fund out of which I was to be paid for my services. He said he had been beat out of a good deal of money, but he had a just and honest claim, and he was held for what I did for him. Within ten minutes after, we commenced the examination, and I acted as his counsel during the whole of that examination." After this Rouse was re-examined, and testifies that he did not at any time promise to pay Mr. McMahon for his services as his counsel, and did not ever employ him as counsel.

Irrespective of the proof of debt made by Rouse on the 1st of January, 1872, it is impossible to hold, on the foregoing evidence, that Rouse did not, at least, allow the trustees and their counsel to present and prosecute, on his behalf, his claim, on the bonds, to share in the fund, as a holder of the bonds, and do so consciously, and give testimony to aid such claim. His testimony that he owns and holds the bonds is wholly inconsistent with his having surrendered them. His testimony that the amount for which he holds them is $6,000 and interest, is wholly inconsistent with his having surrendered all claim on them. He had not given them up physically to the assignee. The questions as to a preferential intent, read over to him beforehand, and put to him on the examination, and answered, could—in view of his having testified that he still held and owned the bonds which he had taken, and that he still held them for $6,000 dollars and interest—mean nothing else, to a rational mind, than that he was aiding in an attempt to maintain the validity of unsurrendered bonds, as against an allegation that they were invalid because preferential. His testimony clearly shows that, in proving his debt, without saying anything in the proof about the bonds, he had no idea or information that, if he named the bonds in the proof as security, he could suffer prejudice as to his debt; and that his only reason for saying nothing, in the proof, about the bonds, was, that he regarded them as of no pecuniary value. He

had no idea of surrendering something that was of pecuniary value, and that was worth retaining if not preferential. When he came to the reference, it is manifest he regarded the bonds as likely to have pecuniary value, and therefore he proceeded to attempt to sustain, instead of surrendering, them, and to attempt to make out that they were not preferential.

Rouse now claims that the proof of debt he filed was per se a surrender, made understandingly and advisedly, and that he could not, if he would, afterwards withdraw the proof and claim as a secured creditor. When he came to the reference, if the proof of debt had been brought up by the assignee as an estoppel against the assertion of a claim on the bonds by Rouse, Rouse might very well have applied to the court for leave to prove the debt as one secured by the bonds, or to withdraw the proof as made, on the ground that the debt had inadvertently been proved as an unsecured claim, in the belief and on the assurance that the bonds were of no pecuniary value, even if valid bonds, and that that was a mistaken belief, and that the bonds, if valid, were likely to be of pecuniary value, and that he wished to maintain the bonds as valid. His case, on the very evidence now presented, would have been a proper one for the granting of such application. As between himself and the assignee, he has substantially had that application made and granted, for the purpose of allowing him to attempt to maintain the validity of the bonds as against an objection that they were void as preferential. The assignee waived the objection which he might have taken, arising out of the proof of debt, and Rouse has had the benefit of attempting to maintain the bonds. He stood, in such attempt, as if he never had filed any proof of debt. He must take the risk with the benefit. Having attempted to maintain the bonds, notwithstanding the proof of debt, and having failed because the bonds were preferential, he must incur the consequences which the statute visits on such attempt and failure, and cannot now set up the proof of debt as doing away with such consequences.

The case of Rouse, therefore, is brought within the principles laid down as to the other cases. He cannot be allowed to prove the two acceptances, the proof under re-examination should be diminished by rejecting such acceptances, and the prayer of his petition must be denied.

[NOTE. After this decision a re-examination of the debt of A. T. Stewart was ordered. The case was heard, in addition to the other papers, upon the new proof taken in the re-examination. Case No. 8,231. An appeal upon the point involved, as to these debts sought to be proved, was taken to the circuit court, which affirmed the decision of this court. Case No. 8,235. The bankrupts' discharge is considered in Case No. 8,232; the right of another creditor to prove his claim in Case No. 8,233. The action of the assignee in bringing suits against the fraudulently preferred creditors is sustained in Case No. 11,220.]

Case No. 8,231.

In re LELAND.

[7 Ben. 436.] [1]

District Court, S. D. New York. Sept., 1874.[2]

BANKRUPTCY ACT OF JUNE 22D, 1874—SECTION 39—REPEAL OF STATUTE — RETROACTIVE STATUTE—SURRENDER OF PREFERENCE—ACTUAL FRAUD.

1. A creditor had filed a proof of debt in these proceedings, as a proof of debt with security, the security being mortgage bonds executed by the debtors. The mortgage was subsequently decided by the court to have been given in fraud of the bankruptcy act [of 1867 (14 Stat. 517)], and to be void. The creditor then applied for leave to file a new proof of debt, as a proof of debt without security. The court refused the application, deciding, that, after the mortgage had been set aside, and the assignee had thus recovered back the property, the creditor could not surrender his preference and prove his debt. A re-examination of the proof of debt being had, the assignee claimed that the creditor should not be allowed to prove the claim, and that the proof of debt should be expunged; while the creditor claimed, that, whatever might be the case under the 39th section of the bankruptcy act, as it stood prior to the passage of the act of June 22, 1874 [18 Stat. 178], the debt was, since the passage of that act, provable, and the proof should not be expunged. The case was a case of involuntary bankruptcy, and an adjudication had been made prior to December 1st, 1873. *Held*, that the act of June 22d, 1874, was not retroactive, except where expressly made so.

[Followed in Re Leland, Case No. 8,235.]

2. The new 39th section, passed in the act of June 22d, 1874, was not retroactive as to cases which, though commenced since December 1st, 1873, had passed to an adjudication of bankruptcy prior to the 22d of June, 1874.

3. The old 39th section, not being repealed directly, and not being repealed because of inconsistency, was in force in respect to the present case, and the proof of debt must be expunged.

4. As to the meaning of the words "cases of actual fraud," in the new 39th section, quaere.

[In the matter of the bankruptcy of Simeon, Warren and Charles Leland, composing the firm of Simeon, Leland & Co. Warren and Charles Leland composed a second firm, called Leland Bros., who owned and operated a hotel at Saratoga Springs. After the bankrupt proceedings were instituted against Simeon Leland & Co. proceedings were instituted in the Western district of New York against Leland Bros., but the court then refused to take cognizance of the case, because the bankruptcy of Leland Bros. could be and was being adjudicated in this court in the proceedings in this case. Case No. 8,228. Leland Bros. issued certain bonds secured by real-estate mortgage. These bonds are construed in Case No. 8,229. Leland Bros. also gave chattel mortgages upon part of the hotel fixtures. These are declared void for want of proper recordation in Case No. 8,234. A decree was entered November, 1873, declaring the mortgages upon the real estate void. Those holding the bonds

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

[2] [Affirmed in Case No. 8,235.]

secured by these mortgages were refused the right to prove their debts as unsecured. Case No. 8,230. The case is now heard upon new proofs taken upon re-examination as to one of these creditors.]

In this case, a proof of debt having been filed by A. T. Stewart & Co., March 1st, 1872, as a debt having the security of seventeen mortgage bonds, and the bonds and mortgage having been afterwards, on the 1st of November, 1873, held to be void, an application was made by them for leave to file a new proof of debt, as a debt without security. This application was denied. The decision on this application will be found [Case No. 8,230]. After this decision a re-examination of the debt of A. T. Stewart & Co. was ordered.

On the hearing, on this re-examination of the proof of claim, A. T. Stewart & Co. offered in evidence certain testimony given on the previous reference, and produced said seventeen bonds, and offered to surrender them to the assignee, withdrawing all claim under the same. They also introduced evidence that, on the 20th of January, 1874, which was the day after said bonds were so produced and offered to be surrendered, they delivered the said seventeen bonds to the assignee, and stated to him that they withdrew all claim under them; that the assignee retained the bonds; and that on the same day they delivered to the assignee, and requested him to file and transmit to the register, a new proof of debt, without security, made by them. In reply to this evidence, the assignee, on his own behalf, testified, that the delivery of the seventeen bonds to him was after the commencement of the re-examination of the claim, and long after the said order of November 1st, 1873, adjudging the bonds to be invalid, was made; that, when the bonds were so offered to him, he told the person offering them, that, as the bonds had been adjudged to be void in the hands of A. T. Stewart & Co., he supposed he was the proper person to have the custody of them, and that he accepted them because they belonged to him and unconditionally; that he did not expressly, nor, so far as he knew, impliedly, in any manner waive any of his rights under said order of November 1st, 1873, or the order for the re-examination of the claim; that he expressly stated to the person who brought the bonds, that, if A. T. Stewart & Co. should file any new proof of debt, he should move to strike it out; and that he had no recollection that a new proof of debt was then offered to him. On the part of the assignee, there was also put in evidence a copy of a petition by A. T. Stewart & Co. to this court, dated January 20th, 1874, praying leave to withdraw the proof of debt filed March 1st, 1872, and to file a new proof of debt, and the answer of the assignee to such petition, and the order of this court, made May 9th, 1874, denying the prayer of the petition. This is the application above referred to as having been denied.

Objection having been made to the making of any order by the register in the premises, the parties, in pursuance of the provisions of general order No. 34, formed an issue, to be certified into court for determination. The issue was stated in these words: "The assignee alleges that the bankrupts, Charles Leland and Warren Leland, being insolvent, within four months before the filing of the petition in bankruptcy against them, with a view to give a preference to the said A. T. Stewart & Co., as creditors, in respect to the indebtedness mentioned in their proof of debt, made a conveyance of a part of their property, by way of mortgage, to Edward B. Wesley and D. Randolph Martin, to secure seventeen certain bonds of $1,000 each, which bonds the said bankrupts delivered to the said A. T. Stewart & Co., as security for such indebtedness, the said Edward B. Wesley and D. Randolph Martin, and also the said A. T. Stewart & Co., having reasonable cause to believe that said bankrupts were insolvent, and that said conveyance was made in fraud of the provisions of the bankruptcy act; that the said creditors should not be allowed to prove their debt in bankruptcy; and that the proof now under re-examination should be expunged. The said A. T. Stewart & Co. deny each and every of the above allegations of the assignee, and further allege, that, prior hereto, said A. T. Stewart & Co. have surrendered to said assignee, and said assignee has accepted from them, said seventeen bonds, and that, by said surrender and acceptance, said A. T. Stewart & Co. became entitled to retain their proof of debt, even though the original acceptance of the said bonds had constituted an unlawful preference; and said A. T. Stewart & Co., further allege, that there is no authority, under the bankruptcy act, for expunging the proof of debt made by them; and they further allege, that there has been no recovery, by the assignee, of the property alleged by him to have been transferred to them by the bankrupts in violation of the bankruptcy act, and that, for that reason, they are not debarred from proving their debt against the bankrupts. The said John H. Platt, as assignee, &c., in reply to the answer of A. T. Stewart & Co., denies each and every allegation in said answer contained." The register certified to the court the claim, the order for its re-examination, the proceedings on such re-examination, and the issue thereon.

D. Campbell, for A. T. Stewart & Co.
T. M. North, for assignee.

BLATCHFORD, District Judge. It is contended, for A. T. Stewart & Co., that, since the passage of the amendatory bankruptcy act of June 22d, 1874, there is no authority, under the act, to expunge the proof of debt of A. T. Stewart & Co.; that, whatever authority for that purpose there may have been under the 39th section, as it stood before the act of June 22d, 1874, was passed, the old 39th section was absolutely repealed by the

act of June 22d, 1874, without any saving clause as to pending proceedings; that the new 39th section does not authorize the court to strike out the proof of debt, unless actual fraud on the part of the creditor is proved; and that there is no proof of actual fraud in this case, and no such question is certified to the court.

There is not, in the act of 1874, any direct repeal of the 39th section of the act of 1867. The 12th section of the act of 1874 enacts, that section 39 of the act of 1867 "be amended so as to read as follows:" What follows is a new 39th section. The 21st section of the act of 1874 does not specifically repeal any part of the act of 1867, but enacts, "that all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed." The language of the old 39th section, applicable to the present case, was this: "If such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy." The language of the new 39th section is this: "If such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned or transferred contrary to this act, provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this act was intended, and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt." The difference in language in the two provisions would indicate an intended difference in meaning. But it may be more difficult to say what is the meaning of the words "in cases of actual fraud on his part," in their context. Do they mean anything more than the antecedent words—reasonable cause to believe the debtor's insolvency, and knowledge that a fraud on the act was intended? Do they mean actual fraud on the debtor? A creditor, in obtaining security for, or payment of, his debt from his debtor, rarely commits an actual fraud on his debtor. Do they mean actual fraud on other creditors? Obtaining a preferential payment of a debt may be a fraud on a statute, but it is difficult to conceive of its being an actual fraud on either the debtor or on other creditors. What scope is there for the operation of the provision, unless it be held to mean, that, if the person who received the payment or conveyance was a creditor, and had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on the act was intended, that shall be regarded as a case of actual fraud on the act on the part of such creditor, because, knowing that a fraud on the act was intended, he is to be regarded as a participant in the commission of the fraud on the act, and is not to be allowed to prove for more than a moiety of his debt? So, also, while there may be recognized an intention, in the new 39th section, to draw a distinction between knowledge and reasonable cause to believe, it may be difficult to define the line of distinction, where the one passes into the other. But, in the view I take of the effect of the act of 1874, it is not necessary to discuss the meaning of the new 39th section, in the particular just referred to.

At the beginning of the act of 1874, it is enacted, that the act of 1867 be "amended and supplemented as follows:" Then follow 21 sections. The 12th section is this: "That section thirty-nine of said act of March second, eighteen hundred and sixty-seven, be amended so as to read as follows:" Then follows an entire section (39) for the act of 1867, in substitution for the former section 39 of said act. The new section 39 is too long to be quoted here, but an analysis of its provisions is necessary, in order to determine the scope of its operation, and whether its provisions apply to the matter in hand and supersede the provisions of the old section 39 in respect to such matter, or whether the provisions of the old section 39 still remain in force, unrepealed, in respect to such matter. It is to be borne in mind always, however, that section 39 is so amended only from the time the new act was passed, June 22d, 1874, and is to read in the new form only from such date, unless the contrary is expressed. In other words, the new section operates only from the 22d of June, 1874, and is not retroactive, except where expressly made so.

In the new 39th section we have, in the first place, provisions as to what persons may be adjudged involuntary bankrupts, and for what causes, and in what mode, and within what time the petition must be brought, and by whom. Then, next, the 39th section, speaking of itself as enacted June 22d, 1874, and not before, says, that "the provisions of this section," that is, all its provisions, "shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter." The word "hereafter" must mean, after the passage of the act of June 22d, 1874. It is retroactive to the 1st of December, 1873, as to cases commenced since that day. But it is not thus retroactive, as to cases which, though commenced since the 1st of December, 1873, had, prior to the 22d of June, 1874, passed to an adjudication of bankruptcy. This is the view uniformly held of its effect, and correctly. The point arose as to cases commenced after the 1st of December, 1873, and in which there had been adjudications before the passage of the act of 1874, but where the petitions did not con-

form, as to the number and amount of the petitioning creditors, to the requirements of the new 39th section; and it has been held, in all the decisions, that the provisions of the new 39th section as to the number and amount of petitioning creditors have no application to cases in which there were adjudications of bankruptcy before the passage of the act of 1874. In re Raffauf [Case No. 11,525], and In re Angell [Id. 386]; In re Rosenthall [Id. 12,062]; In re Pickering [Id. 11,120]; In re Obear [Id. 10,395]; and In re Thomas [Id. 13,886]; In re Comstock [Id. 3,077]. But, all the provisions of the new 39th section are made applicable to cases of involuntary bankruptcy commenced since December 1st, 1873, and not merely certain provisions of it. Then, again, the enactment that the provisions of the new 39th section shall apply to all cases of involuntary bankruptcy commenced since December 1st, 1873, implies that its provisions are not to apply to cases of involuntary bankruptcy commenced on or before that day, as the present case was. The new 39th section then goes on to prescribe the mode of procedure to ascertain whether creditors sufficient in number and amount have joined in the petition. It then proceeds to enact that, "if such person shall be adjudged a bankrupt" the assignee may recover back property transferred contrary to the act, provided certain facts exist in regard to the person receiving the conveyance, and that "such person," the person receiving the conveyance, "if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt," and that "this limitation on the proof of debt shall apply to cases of voluntary as well as involuntary bankruptcy." Now, most certainly, the recovery back of the property transferred contrary to the act is a condition precedent to the limitation on the proof of debt, and such recovery back of such property is to take place only if the person who has transferred it "shall be adjudged a bankrupt." But the new 39th section is speaking as of the 22d of June, 1874, and of recoveries back of property and limitations of proofs of debt only in cases where the persons transferring the property "shall be" adjudged bankrupts after the passage of the act of 1874. In this view, there is nothing in the old 39th section, as to the matter in hand, that is inconsistent with anything in the new 39th section, or in any other part of the act of 1874. Hence, the old 39th section, not being directly repealed, and not being repealed because of inconsistency, is in force in respect to the present case.

As to the surrender, even if, after a recovery back of the property by the assignee, he could accept such a surrender, the proof is here that he did not.

An order will be entered determining in favor of the assignee the issue certified, and declaring that A. T. Stewart & Co. are not to be allowed to prove in bankruptcy the debt in question, and expunging the proof of debt filed March 1st, 1872.

[NOTE. An appeal upon the points involved in this case was taken to the circuit court, which affirmed the decision of this court. Case No. 8,235. The bankrupts' discharge is considered in Case No. 8,232, the right of another creditor to prove his claim in Case No. 8,233, and the right of the sheriff for fees in civil cases in Case No. 11,221. The action of the assignee in bringing suits against the fraudulently preferred creditors is sustained in Case No. 11,220.]

Case No. 8,232.

In re LELAND et al.

[8 Ben. 204.] [1]

District Court, S. D. New York. July, 1875.

BANKRUPTCY—EVIDENCE—ATTORNEY—DISCHARGE OF BANKRUPT.

1. Creditors, opposing the discharge in bankruptcy of two of the three bankrupts above named, offered in evidence depositions made by each of the three, in an equity suit brought by the assignee against the bankrupts and other parties, and also the decree made in that action. They also offered to prove statements to other parties made by the third to the bankrupts: *Held*, that the deposition made by each of the two bankrupts was evidence against himself; that the deposition and statements made by the third were not evidence against either of the two; and that the decree was evidence against each of them.

2. The creditors also offered to call as a witness the counsel who appeared for the bankrupts, but he declined to be sworn, requesting the counsel for the creditors to state what they expected to prove by him, and promising to admit it, if it was proper to do so: *Held*, that the counsel must be sworn and examined as a witness.

3. The creditors also offered in evidence a bill of complaint in an equity action brought by the assignee against H. and others, a notice of appearance for H. and for one of the bankrupts and his wife, a withdrawal of that notice, a refusal by the complainant's solicitor to receive the withdrawal, a supplemental bill and the answer of the bankrupt's wife thereto, and a satisfaction of mortgage referred to in the bill: *Held*, that none of said papers were admissible in evidence against the bankrupts.

[In the matter of the bankruptcy of Simeon, Warren, and Charles Leland, composing the firm of Simeon Leland & Co. Warren and Charles Leland composed a second firm known as Leland Bros., who owned and operated a hotel at Saratoga Springs, New York. After the bankrupt proceedings were instituted against Simeon Leland & Co., proceedings were instituted in bankruptcy in the Western district of New York against Leland Bros., but the court there refused to take cognizance of the case, because the bankruptcy of Leland Bros. could be and was being adjudicated in this court. Case No. 8,228. The Leland Bros. issued certain bonds secured by real-estate mortgage. These bonds are construed in Case No. 8,229. They also gave chattel mortgage upon part of the

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

hotel fixtures. These are declared void for want of proper recording in Case No. 8,234. A decree was entered November, 1873, declaring the real-estate mortgages to be void. Subsequently the holders of the bonds secured by these mortgages were not allowed to prove their debts. Case No. 8,230. One of these creditors is heard upon new proof taken in the re-examination of the case in Case No. 8,231. The case is now heard upon the certificate of the register as to the admission of certain evidence before him in the proceeding for the discharge of two of the bankrupts, which discharge was opposed by certain of the creditors.]

In this case the register certified to the court, that creditors, opposing the discharge of Warren Leland and Charles Leland, two of the above bankrupts, had offered in evidence before him, in support of the specifications of opposition to the discharge, the depositions of the three bankrupts, taken in an equity action brought in this court by the assignee against the bankrupts and A. T. Stewart and others, and the decree rendered in that action, and that he had, under the objection of the bankrupts, admitted the evidence; that the creditors had also asked Wright Pomeroy, who was produced as a witness, if he had had a conversation with Simeon Leland, in which the latter had said that the bankrupts did not owe one Bellows $5,000, and that the fictitious claims which Charles and Warren Leland were permitting against the firm were ruining him, and that the register had excluded this evidence; that the creditors had called as a witness Mr. McMahon, the counsel for the bankrupts, who objected to being sworn, saying that he never went on the stand as a witness where he was counsel, and that if the counsel for the creditors would state what they expected to prove by him, he would, if proper to do so, admit it; that the register had ruled that Mr. McMahon must be sworn, but he had refused; and further, that the creditors had offered in evidence, in order to prove that the debt of one Ben Holladay was fictitious, the bill of complaint in an equity action brought in this court by Platt, the assignee, against Holladay and others [unreported], a notice of appearance for Holladay, Warren Leland and Ellen Leland, his wife, a notice of withdrawal of such appearance, a notice of complainant's solicitors declining service of such withdrawal, a supplemental bill in said action, and the answer of Ellen Leland thereto, and a certified copy of a satisfaction of mortgage referred to in the bills of complaint, signed by Holladay and recorded; and that those papers were objected to by the bankrupts and excluded by the register. The register certified to the court each of the questions thus arising.

BLATCHFORD, District Judge. I am of opinion that the deposition of Warren Leland is admissible in evidence against him, and that the deposition of Charles Leland is admissible in evidence against him, and that the decree is admissible in evidence against both of them; but that the deposition of Simeon Leland is not admissible in evidence against either of them. The exclusion of the question put to Pomeroy was proper. I see no reason why Mr. McMahon should not be sworn and examined. The ruling out of the papers in the case of Platt v. Holladay [supra], was proper.

[NOTE. The right of another creditor to prove his claim, passed on in Case No. 8,233. The action of the assignee in bringing suits against the fraudulent preferred creditors is sustained in Case No. 11,220. The right of the sheriff to fees, Case No. 11,221. The right of the district court to expunge the claim of the fraudulently preferred creditors, Case No. 8,235.]

Cas No. 8,233.

In re LELAND et al.

[8 Ben. 254.] [1]

District Court, S. D. New York. Nov., 1875.

LEASE — BREACH OF COVENANT — DAMAGES — PROSPECTIVE PROFITS.

1. W. L. & Co., let a stand for the sale of books, &c., in the Union Hotel, at Saratoga Springs, for five years, for $250 a year. After two years they declined to allow the lessee to continue the occupancy unless he would pay a rent of $500. Bankruptcy proceedings were afterwards taken against them. On a petition by the lessee to be allowed to prove a claim against W. L. & C. L., two of the members of W. L. & Co., the register reported the above facts, and that the value of the rights and privileges secured by the lease to the lessee was $350 for each of the three remaining years, and that the lessee was entitled to prove a claim against the estate for that amount: *Held*, that there was no evidence that the claimant could have rented out the stand for $350 more than the $250 rent.

2. Prospective profits of the business that could have been carried on at the stand could not be allowed, and the claimant had not proved a claim to any amount whatever.

[In the matter of the bankruptcy of Simeon, Warren and Charles Leland, composing the firm of Leland & Co. For the proceeding heretofore had in this case, only incidentally connected with this case, see Cases Nos. 8,228, 8,229, 8,230, 8,231, 8,232, and 8,234.]

Nathan D. Morey presented to the court a petition, setting forth that he had a claim against the estate of the above bankrupts for unliquidated damages, arising out of the following facts, viz.: That, in 1868, the bankrupts made a lease, as follows: "Know all men by these presents, that we have let and rented unto J. E. Lewis & Co. the exclusive right and privilege of a place to locate a stand within the Union Hotel, Sara-

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

toga Springs, for selling books, stationery, &c., &c., with the sole and uninterrupted use and occupation thereof for the term of five years from the 1st day of June, 1868, at the yearly rent of $250. * * * Warren Leland & Co.;" that this lease was assigned to the petitioner, and he occupied under it for the season of 1868, but, after the expiration of the season, the bankrupts refused to allow the petitioner to enjoy any of the rights or privileges conferred by said lease, and he thereby suffered damage to the amount of $3,000 and had the right to prove a claim against the estate to that amount. On this petition the matter was referred to a register to report; and he reported that the lease was executed and assigned as stated in the petition; that, in June, 1870, Warren Leland & Co. refused to allow the petitioner to occupy any longer under the lease unless he would pay a rent of $500 instead of $250, and thereby made a breach of the covenants of the lease; that the value of the rights and privileges secured by the lease to the claimant was $350 a year in each of the years 1870, 1871 and 1872, and in all those years $1,050; and that the claimant was entitled to prove a claim against the estate of the bankrupts for that amount, with interest.

J. A. Shondy, for claimant.
W. F. Scott, for the assignee.

BLATCHFORD, District Judge. The referee reports that "the value of the rights and privileges" secured to the lessee by the lease was $350 a year, in each of the years 1870, 1871 and 1872. What is intended by this is not clear. The counsel for the claimant seems to suppose that the "value" intended is "the difference between the rental value of the privileges conferred by the lease, and the rent reserved during the remaining period of the lease." The counsel for the assignee seems to suppose that such $350 is "the probable profits" of the business that would have been done at the stand leased, if it had been occupied. On the supposition of the counsel for the claimant, the evidence would have to be, that the claimant could have rented out the stand for $600 a year—that is for $350 a year more than the $250 a year rent he was to pay. I see no such evidence. If the $350 is taken as the damages per year, because it is the "probable profits" of the business that would have been carried on at the stand, such probable profits are inadmissible as a measure of damages.

It is impossible for me to confirm the report or to hold that the claimant has established a right to prove a claim to any amount.

[For the subsequent proceedings in bankruptcy of Simeon Leland & Co., only incidently connected with this case, see Cases Nos. 11,220, 11,221, and 8,235.]

Case No. 8,234.

In re LELAND et al.

[10 Blatchf. 503.] [1]

Circuit Court, S. D. New York. March 3, 1873.

BANKRUPTCY—CHATTEL MORTGAGE—NOT RECORDED AT DEBTOR'S RESIDENCE—VENDOR'S LIEN IN BANKRUPT COURT.

1. N. sold to L., and delivered into his possession, certain chattels, taking therefor the note of L., payable one day after date, without grace, and a mortgage on the chattels, to secure the note, and renewals of it, endorsed on it. Four notes, as one renewal of it, made three days after its date, were endorsed on it, the latest of which became due in six months. The mortgage was not renewed, within twelve months, under the law of New York, by filing it in the town where L. resided. Afterwards, L. was adjudged a bankrupt. The chattels were never taken back into the possession of N., and passed into the hands of the assignee. N. claimed their proceeds, the notes not having been paid: *Held*, that N. had no lien as vendor, apart from the mortgage lien, because he had parted with the possession of the chattels, and the sale was not on an agreement that the title should not pass, or that the delivery of possession should be other than absolute.

[Cited in Hutchinson v. First Nat. Bank, 133 Ind. 280, 30 N. E. 952.]

2. The mortgage, because not so filed, was void as against creditors, and as against the assignee in bankruptcy, representing them.

[Distinguished in Field v. Baker, Case No. 4,762. Cited in Platt v. Stewart, Case No. 11,220.]

3. So long as N. did not take possession of the chattels, the statute as to filing the mortgage operated, although the first note was not paid at maturity, and the other notes were not given until two days afterwards.

4. Although the title of the mortgagee of the chattels becomes absolute as between him and the mortgagor, by forfeiture, on default of payment of the mortgage debt, it is, nevertheless, necessary to file the mortgage, if the possession of the mortgagor is suffered to continue.

5. The assignee in bankruptcy represents all the creditors; and, whatever right they might assert as creditors, if they had obtained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupt which are fraudulent and void as against creditors, or which are otherwise, as against them, invalid.

[Cited in Barker v. Barker's Assignee, Case No. 986; Re Werner, Id. 17,416; Miller v. Jones, Id. 9,575; Re Duncan, Id. 4,131; Platt v. Preston, Id. 11,219; Platt v. Mead, 9 Fed. 96; Platt v. Matthews, 10 Fed. 281; Olney v. Tanner, 18 Fed. 636; Jones v. Smith, 38 Fed. 381; Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. 835.]

[Cited in Massey v. Gorton, 12 Minn. 145 (Gil. 83); Tabor v. Cilley, 53 Vt. 488; Edwards v. Entwisle, 2 D. C. 48.]

[In review of the action of the district court of the United States for the Southern district of New York.]

[A petition in bankruptcy was filed in the district court for the Western district of New York against Warren and Charles Leland, composing the firm of Leland Bros. At this time bankruptcy proceedings were pending in this district against these two and Simeon Leland, comprising the firm of Simeon Le-

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

land & Co. The district court for the Western district dismissed the petition so that the matters might all be adjudicated together in this district. Case No. 8,228. Leland Bros. mortgaged their Saratoga Springs Hotel property to secure certain bonds made by them. These bonds are considered in Case No. 8,229. The case is now heard upon petition of John H. Platt.]

This was a petition by John H. Platt, assignee in bankruptcy of Simeon Leland and others, to review and reverse an order of the district court, directing such assignee to pay to Nicol & Davidson the proceeds of certain chattels found in the possession of two of the bankrupts, which the said Nicol & Davidson claimed under and by virtue of a chattel mortgage, and also by virtue of a lien for the unpaid price of the chattels, on a sale thereof to the bankrupts.

Thomas M. North, for assignee.

Amos G. Hull and Henry E. Davies, for Nicol & Davidson.

WOODRUFF, Circuit Judge. In the summer of 1870, and on or before the 17th of June, the claimants, Nicol & Davidson, sold to two of the bankrupts, Warren Leland and Charles Leland, then doing business and conducting a hotel at Saratoga Springs, under the firm name of Leland Brothers, certain chandeliers and gas fixtures, for use in the said hotel, and, on the said 17th of June, they received, for the price, or the chief portion of the price, the promissory note of the said Leland Brothers, for $4,537 75, dated June 17th, 1870, payable one day after date, without grace; and, at the same time, they also received, from the said purchasers, their mortgage, executed by each in his proper name, by which they mortgaged the same chattels, to secure the payment of the note, describing the sum secured as being the purchase money of the chattels. The condition of the mortgage is, that the mortgagors pay, on or before the 18th of June, 1870, the sum of $4,537 75, "according to the condition of a promissory note, bearing even date therewith, and according to the renewals of said note above described, endorsed on the back of said note," with a provision, that, until default, the mortgagors may remain in the possession of the said goods and chattels, and in the full and free enjoyment of the same. Upon the back of the said note appears the following endorsement: "This note is renewed, by the execution of four notes as follows, (three of which are also subject to be renewed,) and are each dated June 20th, 1870, one for $1,009 72, payable forty-five days; $1,012 13, sixty days; $1,300 18, four months; $1,315 51, six months. Nicol & Davidson." This mortgage was filed in the town of Saratoga Springs, and, before the expiration of twelve months, a copy thereof, with the statement specified in the statute of New York requiring the filing of chattel mortgages, was, also, there filed; but, it is admitted, as part of the proof in the case, that, although, during a portion of the summer, the mortgagors attended personally to the conduct and management of the hotel at Saratoga Springs, they, each of them, resided, with their respective families, in Westchester county, where each claimed to reside, paid taxes, and voted as a resident, visiting and remaining at Saratoga temporarily, for the conduct and superintendence of the hotel, between June and September.

It is claimed and insisted by the assignee, that such mortgage is void, under the statute of New York which declares, that mortgages of chattels are void, as against creditors, unless filed in the town in which the mortgagor resides. On the other hand, it is claimed and insisted by the mortgagees, 1st, that, irrespective of the question, whether the mortgage, as such, is valid, they have a valid lien upon the chattels in question, as vendors, for the unpaid purchase money; and, 2d, that, by the non-payment of the principal note, due one day after date, the title of the mortgagors was forfeited, and the title of Nicol & Davidson thereupon became absolute, and that, therefore, it is immaterial whether the mortgage was filed in the proper office, or not, and the title of the mortgagors is good.

I. There is, no doubt, a lien, in favor of the seller of personal property, for the price of the sale; and, notwithstanding a sale which is perfected so as to vest the title in the purchaser, the seller may retain the possession, in virtue of his lien, until the price is paid. If nothing be agreed between seller and purchaser, which operates as a waiver or modification of this lien and right of possession, the right of the seller is not unlike that of a pledgee of personal property. He has a lien accompanied by possession; but, possession is necessary to support the lien, and, if possession be surrendered, the lien is gone. In the case of the seller, there is an apparent, but only an apparent, modification of this rule, where the purchaser becomes insolvent after the sale, and although the seller has parted with the possession, while the goods are in course of transportation to the buyer, in which case the seller has the right of stoppage in transitu, by the exericse of which he may resume the actual possession of the goods. This right is sometimes called an extension of his lien for the price. But, if the goods are actually delivered to the buyer, or, being forwarded to him, actually reach him, so as to come to his possession, as buyer, the lien is gone. Non-payment of the price, in such case, does not entitle the seller to reclaim the goods, there being no fraud vitiating the sale itself. So that, the sellers, in the present case, had not, independent of any special agreement, any lien entitling them to claim or hold the goods as against the assignee in bankruptcy. They could not, unless by special agreement, have

reclaimed them from the bankrupts themselves.

It is, however, competent for buyer and seller to agree upon a conditional delivery, so that, although the title and possession pass to the buyer, the seller may, nevertheless, assert a lien, and reclaim the goods, if the price be not paid according to the terms of sale. Such an arrangement is, however, not to be confounded with a conditional sale. Where it is agreed that, though the price is fixed, the title shall remain in the seller, or shall not pass or vest in the buyer, unless and until the price is paid, according to the terms agreed upon, there the property remains in the seller, as against all the world, if such price be not paid. But, an actual sale in form and effect to pass the title, followed by a merely conditional delivery, is a totally different transaction; and whether, in such case, the seller can reclaim, will depend upon other considerations. As against the buyer, he undoubtedly may, if the price is not paid at the time agreed upon. But, the rights of creditors or of purchasers may intervene, to cut off such right of reclamation.

Without discussing every supposable case in which there is an absolute sale, but with a conditional delivery, for the purpose of preserving the lien of the seller, it must suffice to say, first, that in the present case, the sale by Nicol & Davidson was not a conditional sale. The title passed to the bankrupts. There was no agreement that it should not pass until the price was paid, and they are not entitled to claim the goods, or the proceeds thereof, on the ground that they never parted with the title. Second, seeking to establish their lien for the price, by virtue of a special agreement with the buyers, they must abide by the actual agreement made, and the instrument executed in conformity with that agreement. There is no proof of any other agreement, and, if the instrument expressing their agreement is not effectual, by reason of the failure of the buyers to do what is by law necessary for their protection, they fail to obtain any benefit therefrom. They received from the buyers a mortgage of the goods. That was what the buyers agreed to give them. The delivery of the goods was, in all other respects, absolute, and vested a perfect title in the buyers, only subject to such mortgage. The sellers cannot now fall back upon any other supposed or possible agreement, qualifying the delivery, and securing to them a lien for the price. Their whole right and interest depends upon the terms of the mortgage, its validity and its effect.

II. Does the mortgage entitle them to reclaim the goods? Unquestionably, it does, as between them and the mortgagors, on default of payment according to the condition thereof. But, it not having been filed where the mortgagors resided, the statute of the state of New York declares it void as against creditors; and that statute is equally controlling in this court and in the courts of the state.

It is claimed that, because it is valid, without being properly filed, as against the bankrupts, it is, therefore, good as against their assignee in bankruptcy, and that no creditor but a judgment creditor can impeach or deny its validity. If it were material, it would be sufficient to say, that, in this case, it is proved, that there are judgment creditors, and that the assignee in bankruptcy is acting herein in their behalf, as well as in behalf of all others. But, the claim is erroneous, on a broader ground. The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee in bankruptcy represents them. He is trustee for them; and, whatever right they might assert as creditors, if they had obtained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupts, which are fraudulent and void as against creditors, or which are otherwise, as against them, invalid.

It is next claimed, that, in this case, the title of the mortgagors was forfeited by the non-payment of the note due one day after its date; that, therefore, the title of Nicol & Davidson became absolute on the lapse of that day, so that, after the 18th of June, 1870, the title to the chattels was vested in them, and the subsequent possession of the mortgagors was as mere bailees of the mortgagees; and that, so, no title could pass to the assignee in bankruptcy. The general proposition, that. on breach of the condition of a chattel mortgage, the legal title of the mortgagee becomes absolute, as between the mortgagor and mortgagee, is incontrovertible. Numerous cases from the courts of this state are cited to that proposition. But, it is to be observed, that, in all of them, the mortgage itself is assumed to be valid as against creditors, and the questions were, whether any right remained in the mortgagor, after default of payment, which could be reached by execution or like procedure; and they by no means hold, that mere non-payment cuts off the equitable right to redeem the goods. It may be added, further, that, in the absence of any statute on the subject, it would, I think, be clear, that, after forfeiture, the title would be so fully vested in the mortgagee, that it could only be impeached on the ground upon which any sale or transfer of chattels by a debtor may be impeached, if the debtor is permitted to remain in possession thereof. After forfeiture, the mortgagee would be in no better condition than an assignee or purchaser who took no possession of the goods.

But, here, the statute is the test of the right of the mortgagee. That declares, that a mortgage, unaccompanied by a delivery and a continued change of possession, shall be void, as against creditors, unless the mortgage be filed as therein prescribed. Without

at present denying, that if, after forfeiture, the mortgagee takes possession of the goods, he may hold them against subsequent creditors, though the mortgage be not filed, I think it clear, that, while no such possession is taken, and the goods remain in the possession of the mortgagors, they are subject to the operation of this statute. The mortgagors have the possession, with a right to redeem by paying the debt—a right in equity only, but, nevertheless, a right which leaves the title still within the category contemplated by the statute. The provision of the statute requiring the filing of a copy of the mortgage within twelve months after it is first filed, together with a statement of the interest of the mortgagee under the same, plainly indicates this. It is intended by the statute, that, where a creditor claims title to chattels under or by virtue of a mortgage, but the possession, use and enjoyment are in the mortgagor, who is, by virtue of such possession and use, the apparent owner, creditors and others shall be informed, by the filing of a mortgage, and by the filing of a copy thereof from year to year, not merely that such chattels are subject to a mortgage, but shall be informed of the nature and extent of the interest therein claimed by the mortgagee. This construction of the statute is essential to its usefulness for the purpose for which it was enacted; for, otherwise, it could be rendered wholly useless, and its operation evaded, by making mortgages payable on demand, making an immediate demand, and thence onward suffering the goods to remain in the possession of the mortgagor, without filing the mortgage at all. The maxim, once a mortgage always a mortgage, must, under this statute, apply to the relations of the parties until the mortgagee takes possession. I apprehend, that mortgages payable on demand, and mortgages payable in one year, or at a less period, after date, have been very common in this state; and that it is the generally received construction of the statute, that, if the mortgagee desires to preserve his rights under the mortgage, he must refile it at the end of each year, notwithstanding it has become payable, and the mortgagor has paid nothing, or has paid a part only. It is in accordance with the views above expressed, that the opinion in Ely v. Carnley, 19 N. Y. 496, 499, in the court of appeals of this state, with the concurrence of all the judges, states: "When the title to the property has absolutely vested in the mortgagee, by failure to perform the condition, a refiling is necessary to preserve the title of the mortgagee, when there has been no change of possession. Once a mortgage, it so continues for the purpose of filing, until the rights of the parties have been changed by some new act or contract in relation to the property." The court of common pleas held the same, in Gould v. Bowne, 4 N. Y. Leg. Obs. 423. On this ground, therefore, I am constrained to hold, that the mortgage was invalid, as against the assignee.

III. It was earnestly insisted, on the argument herein, that it was error to hold that the title of the mortgagors was forfeited at law by the non-payment of the note of June 17th, 1870, payable one day after date, because the mortgage itself contemplated the renewals a memorandum of which was endorsed on the note, and showed, in and by the terms of the mortgage itself, that there was, and could be, no forfeiture, by breach of the condition, until the renewal notes or one of them became due. For this reason, it was insisted, that the title of Nicol & Davidson was that of mortgagees before forfeiture, and was most clearly within the statute, and void.

Taking the whole language of the mortgage into view, I am decidedly of opinion, that there was no forfeiture on the expiration of the one day after the date of the principal note. The very instrument which provides for the forfeiture recognizes, in terms, the right of renewal, and the endorsement on the note shows the fact of renewal. There was, therefore, no breach while the mortgagors exercised the right which the mortgage itself recognized. Nicol & Davidson could not, as between them and the mortgagors, have insisted on taking possession of the property, unless and until the mortgagors made default in the payment of one of the renewal notes; and, until then, there was no forfeiture at law. The necessity of filing the mortgage, to preserve the lien, was, therefore, unquestionable. But, I do not find in the papers submitted to me anything to show that this distinction is material in this case. None of the papers inform me when the petition was filed upon which the mortgagors were adjudged bankrupt. If that was after the renewal notes, or one of them, became due, then the condition of the mortgage was broken, and it is wholly immaterial whether forfeiture be deemed to result from that, or from the non-payment of the principal note, which by its terms, was payable one day after date. The foregoing conclusions apply to either. If the petition was filed, and possession was taken by the assignee, before the renewal notes, or either of them, became due, then the case is clearly within the statute, and the mortgagees are in the ordinary condition of a mortgagee of chattels whose mortgage is not filed as the statute requires.

The case is, apparently, a hard one. Both mortgagors and mortgagees appear to have acted in good faith. But, if mortgagees do not file their mortgages as the statute requires, the court cannot relieve them when the statute declares their mortgage void. The order must be modified, so as to exclude them from taking the property as mortgagees, and leave them to prove their debt as general creditors, but without costs.

[NOTE. For a construction of the real-estate mortgages, see Case No. 8,230, and the re-examination of the same debts, Case No. 8,231. The bankrupts' discharge, in Case No. 8,232. The right of certain creditors to prove their

claims, in Case No. 8,232. The action of the assignee in bringing suits against certain fraudulently preferred creditors is sustained in Case No. 11,220. The right of the district court to expunge the claim of fraudulently preferred creditors is considered upon appeal by the circuit court in Case No. 8,235.]

Case No. 8,235.

In re LELAND et al.

[14 Blatchf. 240;[1] 16 N. B. R. 505.]

Circuit Court, S. D. New York. May 25, 1877.[2]

BANKRUPTCY—FRAUDULENT PREFERENCES—RIGHT TO PROVE DEBT.

A determination by the district court, in a bankruptcy proceeding, to which a creditor was a party, that such creditor had received a fraudulent preference, and that, in consequence thereof, he was disabled to prove any part of his debt, is an adjudication which debars him from subsequently proving his debt and authorizes the district court to expunge his claim, when proved.

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

[In the matter of the bankruptcy of Simeon, Warren and Charles Leland, composing the firm of Leland & Co. Warren and Charles Leland composed a second firm, called Leland Bros. These two issued certain bonds secured by real-estate mortgage. These bonds are construed in Case No. 8,229. A decree was entered November, 1873, declaring the real-estate mortgages to be void. Subsequently the holders of the bonds secured by these mortgages were not allowed to prove their debts. Case No. 8,230. One of these, Alexander Stewart & Co., is heard upon new proof taken upon a re-examination of his case. His debt is not allowed to be proven. The case is now heard in the circuit court upon appeal by certain of the creditors from the decision of the district court.]

Henry E. Davies, for creditors.

Thomas M. North, for assignee in bankruptcy.

JOHNSON, Circuit Judge. These are statutory appeals from the decision of the district court, expunging two claims against the estate of the bankrupts. A jury trial was waived in each case, and they were tried before me, in part upon written stipulations as to the facts, and are now to be considered upon the substantial question whether the parties claimant are not concluded by certain proceedings in the district court, in which a determination of that court was had that the claimants had received a fraudulent preference, and that, in consequence thereof, they were disabled to prove as creditors against the bankrupts, for any part of their debts. The proceeding from which the present appeals are taken, was the ordinary proceeding by a creditor to prove his debt in bankruptcy, and the appeals were taken from orders or decisions of the district court against the creditors' claims. But these decisions are vacated by the appeals, and go for nothing against the creditors. The ground of the decisions is, however, not vacated, but may be availed of on this trial in opposition to the creditors' claims, in so far as by law it is in its nature available. Now, a prior adjudication is always available against the defeated party, when made in a competent jurisdiction, and upon a controversy actually decided in that adjudication. If, in a suit in a justice's court, the matter had come to be in judgment between these parties, the defeated party would have been bound everywhere, and could never have been permitted to litigate the point anew. The principle is very familiar, and I refer to the case of White v. Coatsworth, 6 N. Y. 137, only as a striking illustration of its universality. There, a verdict in summary proceedings, to recover the possession of demised premises, finding no rent due, was held conclusive against the landlord, in a subsequent action. The principle was thus stated by the court: "The judgment of a court of competent jurisdiction, upon a point litigated between the parties, is conclusive in all subsequent controversies, where the same matter comes again directly in question." The question then is—was there such an adjudication applicable to the case now on trial? I think it undeniable that such an adjudication did take place. The parties might probably have insisted that the matters in question could only be judicially determined in a plenary suit; but they did not take this ground, and, on the contrary, submitted the whole matter to the decision of the district court, which, by its decree, entered November 1st, 1873, adjudged the claims of the new plaintiffs to be affected by the preferential securities therein referred to, and, upon that ground, debarred them from any participation in the distribution of the fund then being administered. At the hearing of that application the parties now concerned appeared by their counsel, and, in open court, waived all objections to the form of the proceeding, and submitted all the questions involved therein to the decision and decree of the court. The general question which the court was then dealing with, was the distribution of a fund derived from the sale of property which had belonged to the bankrupts, and, as a necessary part of the inquiry, the court was compelled to consider whether the securities charged upon that property, and which those creditors had received, were preferential, and, so, void. The court adjudged the securities preferential, and declared that the creditors who had taken them, including the plaintiffs in these suits, were parties to the preferential purpose, and decreed them to be debarred from any lien upon the fund in question. This adjudication stands in force at this day, and cannot be deprived of its effect upon the rights of these

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

[2] [Affirming Case No. 8,231.]

parties. It cannot come in question in the pending suits. They do not bring up the merits of that decision from re-examination in any way. The facts established in that litigation bring the cases of these plaintiffs within the scope of the provision of the bankrupt law which debars the proof of a debt in respect to which a preference has been received, when the assignee has recovered back the property. Upon this part of the case I refer to and adopt the opinions of Judge Blatchford, in respect to the claims of these creditors, as pronounced and reported in Re Leland [Cases Nos. 8,230, 8,231]. The questions involved are there amply discussed, and I see no advantage to the parties or to the law in going over the same ground and reiterating the same views. Upon all these points the evidence produced by the defendant is not only admissible, but, as it seems to me, also conclusive against the plaintiffs. Under the arrangement at the trial, I do not now proceed to give judgment in the cases.

Case No. 8,236.

LELAND v. AGNEW et al.

[31 Hunt, Mer. Mag. 456.]

District Court, S. D. New York. 1854.

GOODS DETAINED BY QUARANTINE—BILL OF LADING—FREIGHT—WAIVER OF RIGHT TO DEMAND REIMBURSEMENT—USAGE.

[1. Where the bill of lading specifies that certain tobacco is shipped to be delivered at a certain wharf, and the quarantine officials require the ship to undergo quarantine, permitting at the same time the tobacco to be removed from the ship, the owners of the ship are not relieved from the obligation to deliver the tobacco as specified in the bill of lading.]

[2. The receipt of the tobacco under these circumstances does not constitute a waiver of the right of its owners to be reimbursed for their charges in removing the same to the proper wharf.]

[3. Upon the refusal of a ship's owners to deliver tobacco at the wharf specified in the bill of lading, the owners of the tobacco sent lighters, and had the tobacco removed to the wharf at their own expense. *Held*, that they might properly offset the charges of removal against the freight charges.]

[4. Proof cannot be admitted in order to establish a usage, when the usage sought to be proven varies the terms of an express contract.]

The libel in this case is filed by [Francis Leland] the owner of the ship President Fillmore, to recover the freight on 116 hogsheads of tobacco, brought from New Orleans to this port in August, 1853, under a bill of lading which specified that the tobacco was shipped "deliverable at the Tobacco Inspection wharf," to be carried to the port of New York, and there delivered to the respondents [William Agnew and others]. The ship arrived at this port during the latter part of August, and, as the yellow fever then prevailed at New Orleans, she was compelled to undergo quarantine. Tobacco, however, was permitted to be brought up to the city without undergoing quarantine. The ship having been ordered to be discharged, the libelant notified the respondents to get a permit, and take their tobacco from the ship. The respondents insisted that the libelant should lighter it up to the Tobacco Inspection wharf, but the libelant refused to do this, telling them that if they did not send lighters for it, it would be stored at the Atlantic docks at their expense. Thereupon the respondents sent lighters for the tobacco, and brought it up to the city. The libelant then brought this suit for the freight, and the respondents tendered and paid into court the amount of freight, less the expense of lighterage, claiming to deduct that from the full freight.

HELD BY THE COURT (INGERSOLL, District Judge): That the contract of the libelant was to deliver the tobacco at the Tobacco Inspection wharf, and that upon the performance of that contract on his part the payment of freight depends, unless there has been a waiver of performance by the owner of the goods, or some act on his part which prevents performance. That the libelant was not prevented from performing his contract by the necessity of discharging his ship at quarantine; the tobacco was not detained, and he was permitted to tranship it into lighters to bring it to the city, and could have done so. The terms of the contract are express, precise, and unconditional. When no technical mercantile terms are used in it—when there is no uncertainty in regard to it—evidence cannot be introduced to vary its apparent import and to show that by usage and custom, under certain circumstances, the contract need not be kept and performed according to its terms. Usage cannot be set up to vary the terms of an express contract. That the usage attempted to be proved by the libelant, authorizing him to deliver these goods at quarantine under the circumstances, in spite of the clause in the bill of lading, is not consistent with the contract, but contrary to it, and proof of it cannot be admitted. That the proof offered by the libelant is insufficient to establish such a usage, even if it could be admitted. That the receipt of the tobacco by the respondents, after the notice given them by the libelant, was no waiver by them of their right to demand a delivery at Tobacco Warehouse wharf.

Decree, therefore, for libelant for $496.50, the amount tendered by the respondents, and the costs of the respondents subsequent to the tender deducted.

LELAND (BAXTER v.). See Cases Nos. 1,124 and 1,125.

Case No. 8,237.

LELAND et al. v. MEDORA.

[2 Woodb. & M. 92.] [1]

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

MARITIME LIENS — FOR REPAIRS — ALLOWED TO SAIL—BILL OF EXCHANGE TAKEN—BILL OVERDUE—LIEN WAIVED.

1. A lien exists on the vessel for repairs made and supplies furnished when she is a foreign vessel. But it is doubtful whether this lien is to be considered as relied on, if the vessel is allowed to sail without its being enforced; and in case of a foreign vessel without taking any express hypothecation of her from the master, where the person making such repairs and advances is the consignee of the owners, and takes for his debt a bill of exchange by the master on the owners, allowing sixty days' credit. Under these circumstances, if he permits the vessel to depart, and to make a second voyage before attempting to enforce the lien on the vessel, and refrains for one month after the bill is due to collect it of the owners, then in good credit, it is decisive evidence that the lien has been waived, and if it once existed, he is not then permitted to sustain the lien on the vessel, though offering to return the bill of exchange.

[Cited in Packard v. The Louisa, Case No. 10,652; The Bolivar, Id. 1,609; Macy v. De Wolf, Id. 8,933; The Dubuque, Id. 4,110; Griswold v. The Nevada, Id. 5,839.]

2. When a bond provides for no marine interest, or marine risk, and its condition is a mere pledge of a vessel to secure a debt and simple interest, it is not a bottomry bond.

[Cited in Greely v. Smith, Case No. 5,750.]

3. Whether a libel lies on a mere mortgage of a vessel, as a chattel, to secure a debt, if arising out of a maritime contract and business or not, is doubtful here, and is sustained in England now only under an express statute.

[Cited in Deshon v. The Medora, Case No. 3,820; The John Jay, Id. 7,352; The J. B. Lunt, Id. 7,246; The Paola R., 32 Fed. 175; Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, 46 Fed. 398; The Main, 2 C. C. A. 569, 51 Fed. 958.]

4. When the vessel has been previously libelled for a subsequent bottomry bond, and for wages of the seamen, and duly sold to pay them, as such liens have precedence over prior ones, a person holding a mortgage of the vessel to secure a debt for advances made for her last voyage, is allowed to interpose a claim on the balance of the proceeds in the custody of the court, whether he could or could not sustain a libel to enforce it against the ship originally.

[Cited in Almy v. Wilbur, Case No. 256; Carr v. Gale, Id. 2,435; Hill v. The Golden Gate, Id. 6,491; The Sailor Prince, Id. 12,219.]

5. His mortgage is valid, though not recorded till the assignee of the owners, after their going into insolvency, receives an assignment of their property, and gives public notice thereof.

[Cited in Packard v. The Louisa, Case No. 10,652; Bentley v. Phelps, Id. 1,331; Sawyer v. Gill, Id. 12,399; Tufts v. Tufts, Id. 14,233; Webb v. Powers, Id. 17,323.]

[Cited in Golden v. Cockril, 1 Kan. 259.]

6. It is not fraudulent, because possession did not accompany it, when by agreement in the mortgage an immediate voyage by her was contemplated to be made by the owners.

[Cited in Almy v. Wilbur, Case No. 256; Sohier v. Merril, Id. 13,158; Whetmore v. Murdock, Id. 17,509.]

7. And though a part of the consideration was not money actually advanced for the voyage, the obligation for it on a mortgage is still good, however it might be in case of a bottomry bond.

[Cited in Brown v. Noyes, Case No. 2,023; Greely v. Smith, Id. 5,750; Whetmore v. Murdock, Id. 17,510.]

[Cited in Jelison v. Lee, Case No. 7,256, to the point that in admiralty as well as in common law, costs are given to the prevailing party.]

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

This was an appeal from a decree of the district court, dismissing the following libel. It was filed March 30, 1846, and among other things alleged, that the ship Medora was in January, 1845, owned by citizens of the state of Massachusetts, and being at New Orleans, in the state of Louisiana, and needing repairs to make her seaworthy, and requiring money to defray other necessary charges and wages of her seamen, the libellants advanced to the master of her, and paid for such purposes the sum of $1602.95, according to an account thereof annexed. It was further averred, that these supplies were furnished on the credit of the ship as well as of the master, and not having been paid, and the ship having since been absent on a voyage to Manilla, whence she had recently returned, this libel was filed to enforce the payment of the amount due. On the usual notice being given by the court, James Deshon appeared and defended against this claim, and after filing the usual security for cost, set out in his answer, that March 25, 1845, said ship then being in the port of Boston, Benjamin Fisk, Jr., and Isaac W. Bradford, her owners, applied to him for a loan of $6,000, upon the bottomry and hypothecation of the ship, and he loaned the same for six months at six per cent. interest, they creating to him a bottomry bond therefor on said ship, a copy of which is annexed to his answer. That he then knew of no lien or incumbrance on the vessel, but believed her to be free from any, and thus became the purchaser of her in good faith, and for a valuable consideration. That she performed the contemplated voyage to Manilla and back, as named in the libel, and the six months' credit having expired, he has filed a libel in the district court against the vessel to recover the sum due, being $5866. That he entered and took possession of the ship under his mortgage, and caused the same to be duly recorded, July 19, 1845. That he requires the libellants to prove their allegations in respect to their advances and reliance on said vessel for payment, and is informed and believes, that if they paid any thing on her account, it was satisfied in full by a bill of exchange, accepted by them for the same, drawn on the owners by the cap-

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

tain of the vessel, payable in sixty or ninety days after sight, and accepted by them and negotiated away by the libellants. That the vessel was not subject to a lien to the libellants for such advance, either by the laws of Louisiana or the general maritime law; and if one ever existed, it has since been waived or discharged by neglect or payment, and is not now prosecuted within a reasonable time; and that the libel should therefore be adjudged against, and the proceeds of the vessel delivered to him.

The libellants replied, protesting ignorance of what is newly alleged by Deshon, and asking proof thereof, and averring in respect to the bill of exchange named, that the master, Rhodes, drew one on the owners for the amount of the supplies, and with the current rate of exchange added, payable in sixty days from date, and delivered it to them, and it was by them indorsed and forwarded to their agents for collection, and accepted by the owners, but not paid at maturity, they having in the mean time become insolvent. Being protested, it still remains unpaid. They further averred, that this bill was not received by them in payment, or their lien discharged thereby, or they guilty in any way of neglect; and that the bill is now in court in their possession, ready to be cancelled or given up.

The evidence in the case consisted of the bill of exchange, dated Feb. 1, 1845, and of the tenor before named, and the deposition of the captain, proving the amount and necessity of the supplies. He also testified, that the libellants were the consignees of the vessel, and had previously done the business of the owners at New Orleans. That the account for supplies was made out against the ship Medora and owners. The receipt on it of the bill of exchange does not state whether it was received in payment or not, though it is entered on the credit side as balancing the account, and the captain does not remember that any conversation on that point took place at the time. The vessel returned to Boston from New Orleans, and during the month of March, 1845, was fitting out and advertised for a voyage thence to Manilla and back, whither she sailed March 31, 1845. The bill of exchange was negotiated or discounted by their agent, but without their knowledge, and being unpaid when falling due, which was April 2, 1845, was taken up by their correspondents, and has been offered to be cancelled. The drawees were in good credit till their failure, April, 1845, and sixty days is not an uncommon length of credit on bills drawn at New Orleans. The district court on the evidence, decreed that the libel be dismissed. Henry Winsor then interposed a prayer, that he, as assignee of the owners, under the insolvent laws of Massachusetts, might receive the proceeds of said vessel. But his motion was refused, and the libellants then appealed from the decree against them. No order was made on Deshon's claim. In this court Winsor has been permitted to be heard in favor of his prayer, as assignee of the former owners of the ship, claiming the proceeds to be distributed among their creditors.

F. C. Loring, for libellants.
Mr. Goodrich, for Winsor.
Mr. Choate, for Deshon.

WOODBURY, Circuit Justice. Beside the facts proved at the hearing of this case, and others admitted in writing, of which a synopsis has just been given, it was conceded that this vessel had been sold under previous libels. One of these was in favor of persons, who made necessary advances at Manilla on her last voyage, and had taken a bottomry bond therefor, and the other was for the seamen for wages. After satisfying those claims some proceeds are left, and the contest now is, whether the libellants have a prior claim and lien on them, or Deshon, or neither, but Winsor, the assignee of the former owners. The decisions in England may once have been against a lien by the libellants. Abb. Shipp. 115, notes; 1 Salk. 34; The Zodiac, 1 Hagg. Adm. 325; 2 Ld. Raym. 805; 2 Browne, Civ. & Adm. Law, 35. And so here. North v. The Eagle [Case No. 10,309]; Woodruff v. The Levi Dearborne [Id. 17,988]. But here it is now settled, that a lien generally exists on a foreign ship for repairs, or advances of money on her, in case of necessity, though no express hypothecation is made. The Nestor [Case No. 10,126]; Davis v. New Brig [Id. 3,643]; The Aurora, 1 Wheat. [14 U. S.] 96, 105; Bac. Adm. 131, 168, 178; The General Smith, 4 Wheat. [17 U. S.] 438; St. Jago de Cuba, 9 Wheat. [22 U. S.] 409, 416; Gardner v. The New Jersey [Case No. 5,233]; Peyroux v. Howard, 7 Pet. [32 U. S.] 324, 341; The Chusan [Case No. 2,717]; 3 C. Rob. Adm. 288; Rule 17 Adm. Prac.; 1 Hagg. Adm. 324; The Jerusalem [Case No. 7,294].

A ship for this purpose is also deemed foreign in one state, if belonging to another in the Union. The Nestor [supra], and cases cited; Dunl. Adm. Prac. 481; [The General Smith] 4 Wheat. [17 U. S. 438]. So Ireland in Great Britain, is for such purposes deemed foreign. The Rhadamanthe, 1 Dod. 205. It has been said, to be sure, that a vessel repaired abroad, is not liable for a lien, unless an actual hypothecation is made by the master,—see Johnson, J., in [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 614,—or unless some statute creates a lien,—Conkl. Adm. Prac. 155. But this is contrary to the general doctrine now prevailing, as shown by the numerous cases already cited; and conflicts also with the civil law on this point. 1 Hagg. Adm. 325; 2 Browne, Civ. & Adm. Law, 35. If the evidence, however, shows, that the ship was not relied on originally, though foreign, but the master or owners or

other security were, the lien does not attach any where, or under any form. The Maitland, 2 Hagg. Adm. 253; The Nestor [supra]. Thus, if an agent or consignee made the repairs or advances, to whom the owner was known, and with whom he was in good credit, as is contended to be the case here, the lien does not usually arise. Pritchard v. The Lady Horatia [Case No. 11,438]; 1 Dod. 201, 287, 356; Hurry v. The John [Case No. 6,923]; Abb. Shipp. 189, 190; [The Aurora] 1 Wheat. [14 U. S.] 96; Rucher v. Conyngham [Case No. 12,106]; 3 Kent, Comm. 172; 2 Dod. 139; 3 Johns. 352; Harper v. New Brig [Case No. 6,090]; 3 Knapp, 94. If an express hypothecation is not required in such a case, it furnishes some evidence that the vessel is not looked to, because the claim would, under an express hypothecation, stand so much clearer, higher, and undoubted. It may be, however, that the claimant does not choose to risk the bottomry.

And even an express bottomry, if given to a consignee, will not always hold if the credit seems to have been otherwise at first given to the master or owners, and if an express hypothecation was not resorted to originally, because the owners were little known, or their credit was limited. The Hero, 2 Dod. 143, 144; Liebart v. The Emperor [Case No. 8,340]; 3 Hagg. Adm. 102; 1 Dod. 201, 287; Rucher v. Conyngham [supra]. Much less, then, should an implied lien on the ship arise in favor of a consignee, and continue after she sails, and after taking a bill of exchange on time, when an express lien will not always hold, if created in favor of a consignee. And more especially should it not usually hold, as there being a consignee to give credit and make advances, this circumstance repels the necessity of an hypothecation, either express or implied, and which necessity alone empowers the master to make an express one. Tunno v. The Mary [Case No. 14,237]; Boreal v. The Golden Rose [Id. 1,658]; Sloan v. The A. E. I. [Id. 12,946]; Liebart v. The Emperor [supra]; Canizares v. The Santissima Trinidad [Case No. 2,383]; 3 Hagg. Adm. 66, 74, 86, 387. But here no express lien by a bond was asked for or given.

In the next place, whether an implied lien existed here originally or not, (and considering the relation in which the libellant stood as consignee of the vessel, it is somewhat doubtful,) there is much evidence that it was afterwards waived, if once existing. There can be no doubt, that the lien which exists on domestic ships for repairs by material men is waived or lost, if they are only allowed to sail, unless it is otherwise provided by express statutes in particular states. Abb. Shipp. 77, note; The Planter, 7 Pet. [32 U. S.] 345; 2 Dow. 29; 11 Mass. 34; 15 Johns. 298; 16 Johns. 89. See Packard v. The Louisa [Case No. 10,652], and cases there cited; The Nestor [supra].

At common law, a lien generally ceases with the loss of possession. Ex parte Foster [Case No. 4,960]; 6 East, 21, 25, note; 2 East, 227, 235. But in admiralty, liens are lost after possession actual or quasi ceases; as sometimes, after a seaman leaves the ship, or the lender on bottomry allows her to go to sea, or the repairer of a foreign vessel allows it. Ex parte Foster [supra]. So in equity, they are lost sometimes, but it is then when the lien is not so much an interest in re, or, as it is called, jus in re, or jus ad rem, as a charge or incumbrance on the property. 2 P. Wms. 491; 11 Ves. 617; [Conard v. Atlantic Ins. Co.] 1 Pet. [26 U. S.] 386, 441. It is, then, like a lien by a judgment, perfected. 4 Law R. 67. The case of an attachment is not such a lien as those, because it is not perfected by a judgment. A mortgage is a lien in rem, but an execution, on judgment, is not; they being merely a general charge on the property, not an interest in it. In many cases of liens, therefore, it is proper and prudent to enforce them before possession is parted with, though it is not indispensable in all cases. North v. The Eagle [Case No. 10,309]; 3 Hagg. Adm. 253; Packard v. The Louisa [supra], and cases there cited. Thus it has been decided in The Nestor [Id. 10,126], that in this country a lien on a foreign vessel holds after she quits the port, though no bottomry bond is taken for repairs or advances. It should, however, be enforced seasonably. I have met with no cases where the lien has in that class been sustained beyond the close of the next voyage, —The Nestor [supra],—or beyond the time allowed as a credit in the note or bill of exchange given, if one be given,—Id. In The Chusan [Case No. 2,717], the exact time does not appear, but no subsequent sales, or subsequent mortgages without notice, had there taken place before it was enforced. The Louisiana Code allows the lien but one year. Article 3449. In Packard v. The Louisa [supra], decided at this term, no case was found, extending this maritime charge or lien on the vessel for wages, which is the most favored one in courts of admiralty, beyond the next voyage, if she continued in active employment, or if the rights of third persons had intervened.

So, if he who repairs or lends money, takes other security, and no express bottomry bond or mortgage, such as a negotiable note or bill of exchange, it may be some evidence either of not relying on the ship at all, or of having relinquished his lien. [Peyroux v. Howard] 7 Pet. [32 U. S.] 345; 4 Camp. 150, note; Hutton v. Bragg, 2 Marsh. C. P. 339. Whether a note or bill of exchange, taken of an owner or master, will be a discharge of a lien or not, or of a co-owner, is a different question. It has been decided to be a discharge in Massachusetts, 10 Mass. 47; and in Maine, The Eastern Star [Case No. 4,254]. And the

other way, not to be a discharge, in 1 Cow. 299; North v. The Eagle [supra]. Where a bill of exchange is taken and secured in the express bottomry bond, of course it is no discharge of the lien created by the bond, as it is not alone looked to. Such are many of the cases reported. The Augusta, 1 Dod. 286; The Jane, Id. 466. Or, if taken as collateral security drawn on other persons. 3 Hagg. Adm. 1, 13, 253. But if a bill of exchange is taken by a consignee or agent for the amount, it is prima facie evidence, that he looks to it rather than the vessel, and especially if it gives time, and difference in the exchange is deducted as here. 19 Ves. 474; 3 Ves. & B. 135; 2 Hagg. Adm. 136; Murray v. Lazarus [Case No. 9,962]; Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, semb. But if meant as a payment, and if it enables the person giving it to settle with his co-owners, it is to be decreed a payment, and consequently a release of any lien. 5 Esp. 122; 3 East, 147; 15 Johns. 276; 1 Cow. 290; 2 Dow, 29; Riley v. Anderson [Case No. 11,835].

The question here, however, is still different, and is, whether taking such a note or bill of exchange of the master, and to run sixty days, and letting the vessel depart, is not, in connection with the payee's being consignee, satisfactory evidence of a waiver of the lien. The waiver is a fact for the court to settle on all the evidence. Stevens v. The Sandwich [Case No. 13,409], and notes.

Taking a promissory note of the owner or ship's husband for repairs, is a waiver of a suit in admiralty against him. Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611. But the supreme court (Id. 614) declined to go into the question, unless the note was first given up, and it has been stated that no opinion by the supreme court was given or formed on that point; and in The Nestor [supra], it was held, that merely taking a note for the supplies, did not always waive the lien. But it raised a strong presumption to that effect. Because the lien, if remaining, might be in one person, and the note be negotiated and be in another, as the bill was on time in the case now under consideration, and actually negotiated. In The Chusan [supra] it was held, that such a note, except in Maine and Massachusetts, was not prima facie a bar to a suit on the account, and must not be deemed a waiver of the lien on the vessel, unless proved to have been so intended from all the facts. It was decreed no bar in that case. See other cases. 1 Dod. 466; 1 W. Rob. Adm. 421; The Hunter [Case No. 6,904]; Code La. arts. 2180, 2191. It is not a discharge of a lien on a ship for wages, if a sailor takes a mere memorandum to show the owner the amount, and prosecutes before more than one voyage is known to have taken place. The Rebecca [Case No. 11,618]. But it is a discharge, if he takes it in payment in preference to money. The Wm. Money, 2 Hagg. Adm. 136.

In the next place, there is strong evidence here to show the loss of any lien, which may have once existed, by the delay to collect the bill of exchange after due, as well as the delay to enforce the lien against the vessel till a second voyage took place, and till the expiration of a year and some months after the vessel was allowed to depart from Louisiana, where the supplies had been furnished. The evidence finds, that the length of credit given in the bill of exchange terminated April 2, 1845, and the owners were in good credit till the 29th of the same month. This additional indulgence given, and omission to enforce payment of the bill when it could have been secured, is wholly unexplained, and coupled with the permission of a second voyage, and the lapse of near a year and a quarter before proceeding against the vessel, is strong evidence of such neglect in prosecuting the lien as, united with the other facts, ought to dissolve it. The apology for not proceeding against the vessel before the second voyage, because the credit given in the bill of exchange had not expired, is no answer for not enforcing the lien on the vessel. The libellants had agreed only to wait on their claim against the owners and master, but not on their claim against the vessel.

If they did in fact agree to suspend the last, their lien may be lost on another ground, which is, that a lien, once suspended, is lost. If the bill and the length of time given to pay it did not extinguish or suspend the lien, but was mere collateral security, then the lien ought to have been prosecuted at the end of the first voyage, whether the bill, the collateral security, had become due or not. Even in an express lien on a vessel created by a bottomry bond, payable on its face only, in a certain number of days after the arrival of the vessel, it has been held that proceedings may be instituted against her on the lien before those days expire. The Jane, 1 Dod. 463. She may be taken possession of at the end of the voyage, though perhaps not sold till the credit expires; and especially may she be taken if, as here, she was about to proceed on another voyage. Again, if the lien on the vessel be regarded in this case as a collateral security for the bill of exchange, as it must be, or, as before remarked, the lien was satisfied, and probably thus lost, it is like a mortgage for a debt, and not payable by agreement till a particular day. In such case the mortgagee is entitled to possession forthwith, as a general rule. 11 Pick. 77; 23 Pick. 9. And in all cases of personal property mortgaged, the mortgagee ought to take possession, or place his lien on record for notice to the world. If doing neither, it has been long contended, that the lien is void for fraud. Haven v. Low, 2 N. H. 13. And of late, many states make it void by express statute, unless the mortgage is recorded, or possession changed,

where, before such a statute, it has been upheld, as it has been generally when the parties agreed, or the nature of the case showed, that possession was originally intended to be retained for a time by the mortgagor.

Such is the agreement or understanding in bottomry bonds usually by the express compact in them, it being for the obligor or mortgagor there to retain possession so as to carry such a bond into legal effect, by subjecting the vessel to a marine risk, before the right to repayment on the lien can be enforced. Moreover, such possession, it is usually understood, shall be retained for the coming voyage by the maker of the bond in order to earn means for its payment. To be sure it may be said that he who lends or repairs, has a right to hold on to the vessel till he is satisfied, and this will not generally defeat the object of the repairs and advances, a further voyage; because if the captains or owners have not funds nor credit at the foreign port, they can be raised, or the claimant satisfied by the express hypothecation to him or others, which the law authorizes the master in such a case to make. Yet it is to be remembered, that the lender or repairer may not choose to risk his debt on a bottomry bond, and the master may not be able to borrow elsewhere, and repay; and hence the lien is allowed to continue there till the ensuing voyage ends, but seldom longer. The analogies in the case of like liens or charges on vessels for seamen's wages have been considered in the case of Packard v. The Louisa [Case No. 10,652], at this term, where the cases are collected, and the impolicy of the long continuance of such liens unenforced, fully explained. In no case should they extend beyond the next voyage, if they are unknown to the public, and new interests of third persons as to the vessel intervene without notice. Here, the Medora, before the second voyage, became in need of further advances, and they were made by Deshon without notice of the lien now set up, though making special inquiry of the master on the subject of any outstanding incumbrance. This is a new and separate ground against a recovery from that of Deshon being entitled to sustain his claim on the ground, that the conveyance to him was in bottomry, or, if not so, was a mortgage, duly recorded so far as regards the assignee of the owners.[2]

In this view the conveyance was for a valuable consideration without notice, and hence, on general principles, was good between the parties, whether seasonably recorded or not. See post. Such conveyances, as a general principle, are valid against all previous parol trusts or liens, when the maker of the conveyances is in possession of the property. 2 Browne, Civ. & Adm. Law, 143; Ayl. Pand. 548. Yet maritime liens must be considered in some instances as exceptions, but exceptions are often dangerous to be extended beyond what is necessary, and not of course to be encouraged or enlarged beyond what is equitable against subsequent bonâ fide purchasers without notice. Lewin, Trusts, 207; 9 Ves. 100; 2 Story, Eq. Jur. 1215, § 1228. Hence, in the case of Packard v. The Louisa [supra], indulging the lien into a second voyage was considered as usually too great laches, if third persons without notice become in the mean time interested. In this case, had Deshon's conveyance been good as a bottomry bond, as was contemplated probably by the practice, it would have to be first satisfied, though he had possessed notice, or the first voyage had not been completed. For the last bottomry is always to be first paid. See ante. As it is, being, as we shall soon see, only a mortgage, yet Deshon ought to be regarded as a purchaser of this vessel without knowledge of the previous lien; and if so, I think he ought not to be affected by a lien continued after the end of a voyage. Even a bottomry bond, though binding without being recorded, is a lien on the vessel only for a reasonable time, or the time agreed in the bond, and if not enforced then, other creditors or claimants may prevail against it. See Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 332; Packard v. The Louisa [supra]. See, also, The Chusan [supra].

Finally, the libellants, not being entitled to a decree against the vessel, on the grounds of doubts as to their advances having been made on the credit of the vessel, as well as on the strength of the evidence, that it was waived, if once existing, by taking a bill of exchange therefor, and allowing the vessel to depart, and giving sixty days for payment to the owner; and also, that if not waived, it was lost by neglect in not collecting it on the bill for nearly one month after it fell due, and the owners were in good credit, and not prosecuting the ship till after her return from a second voyage, and the lapse of a year and some months, and an intermediate mortgage of her to Deshon without notice of any previous lien; the judgment of the court below, dismissing the libel, must be affirmed. But the funds being now in the district court which remained of the proceeds of the vessel, and there being two other claims made on them, which are still unsatisfied, it is necessary to settle which is entitled to priority in receiving the money. It is objected to the claim by Deshon, in the first instance, that not being on a good bottomry bond, by not placing the loan at risk, by the loss of the vessel, or by being not on marine interest, or on advances exclusively made on account of the voyage, it amounts to a mere mortgage of a personal chattel, and if so, it is a claim not to be enforced in a court of admiralty. It is further contended to be void even as a mort-

[2] [See Case No. 3,820.]

gage, because not recorded till the property of the mortgagor was assigned to Winsor, for the benefit of the creditors of the mortgagor; and for having fraudulent badges about it. I entertain an opinion, that this was not a good bottomry bond, though executed at home by the owners. It is said that such bonds so executed need not be for advances on the ship for the coming voyage. Though the consideration of a bottomry bond by a master abroad, must be repairs or advances at that time for the ship, in order to create the necessity which justifies his acts, yet the owner, it is held, may give a good bottomry for other than advances to the ship. The Draco [Case No. 4,057]. This is contradicted, by Ariadne, 1 W. Rob. Adm. 421; [The Aurora] 1 Wheat. [14 U. S.] 96. But this is not decided by me to be an invalid objection, looking to the true theory of bottomry bonds, though I pass it by on this occasion, there being other clear objections, which are fatal to it as a bottomry obligation. Some views against it may be seen in 2 Browne, Civ. & Adm. Law, 196; Cambioso v. Maffet [Case No. 2,330]; [The Aurora] 1 Wheat. [14 U. S.] 104; 1 Dod. 283.

One of those other objections is the want of a sea risk. It is essential to a good bottomry bond, that the debt be risked on the bottom and loss of the vessel. The Atlas, 2 Hagg. Adm. 48, 52, 65; Abb. Shipp. 558; Jennings v. Insurance Co. of Pennsylvania, 4 Bin. 244; The Draco [supra]; 3 Barn. & Ald. 50; The Mary [Case No. 9,187]; Hurry v. The John & Alice [Id. 6,923]; 2 Hagg. Adm. 57; Park, Ins. 552, 558; Pritchard v. Lady Horatia [Case No. 11,438]; Abb. Shipp. 203, 204; The Draco [supra]; 2 Dod. 8, 9; Rucher v. Conyngham [Case No. 12,106]; Hurry v. Hurry's Assignees [Id. 6,922]; Blaine v. The Charles Carter, 4 Cranch [8 U. S.] 328; 2 P. Wms. 367; Miller v. The Resolution [Case No. 9,588]. An admiralty court also gets no jurisdiction over the case by the instrument being called a bottomry bond, unless it possess the essentials of one, such as the risk on the vessel just named. The Emancipation, 1 W. Rob. Adm. 130. So, if there be no marine interest in it, or if it be to secure a bill of exchange for repairs, it may be valid as a mortgage, but no jurisdiction exists then in admiralty as over a bottomry bond. 2 W. Rob. Adm. 110. There was no pledge of the vessel in that case as a mortgage, but the vessel was described as bound, and held for payment, and it did not give jurisdiction. The contract here has neither any marine interest provided for, or any loss of the vessel stipulated to cause the loss of the debt, and has no feature of a bottomry bond, except its title, and the security being on a vessel; and hence would give no admiralty jurisdiction over it as a bottomry bond in England. 2 P. Wms. 367.

At some of the custom-houses in this country and in India, and perhaps some other places, a bond like this may be called a bottomry bond, when on a vessel's bottom as security, and when only for legal interest, and payable at all events, though such is not the usual definition of such a bond in admiralty courts generally; and though it cannot have the high privileges of a real bottomry bond. The Draco [Case No. 4,057]; Jennings v. Insurance Co. of Pennsylvania, 4 Bin. 255; 2 Hagg. Adm. 52, 54, 55. It may be good as a mere mortgage, but in that event it has no superiority or privileges over other mortgages, unless, as hereafter examined, it has some claims for higher respect in admiralty courts, by being a mortgage of a ship, and for a debt connected with maritime business. It is, then, in this case, a mere mortgage of a chattel. It is, then, of course, to be governed by all the rules, and the law in respect to other mortgages of such chattels, and the rights under it are to be settled at common law, unless the subject-matter being a vessel, or the consideration being maritime, the courts of admiralty can get jurisdiction on that account. In England it seems to be well settled, that her courts of admiralty have no jurisdiction over the mortgage of a vessel, merely because the subject-matter is a vessel. 2 Browne, Civ. & Adm. Law, 95, note 33; Atkinson v. Maling, 2 Durn. & E. [2 Term R.] 462; The Draco [supra]; 1 Kent, Comm. 353; Hall, Adm. 135, 137. Indeed, in England it was well settled before a recent statute, that courts of admiralty had no jurisdiction over mere mortgages of vessels, even to enforce them, if claimed on the ground solely that they related to vessels. This came in question in 2 Hagg. Adm. 65, where the conveyance was void as a bottomry bond, but good, perhaps, as a mere mortgage. So, in 2 Browne, Civ. & Adm. Law, 95, note, it is said, that "a mortgage of a ship at sea," enables the mortgagee to bring trover in a court of law, but he cannot sue for her in admiralty. Id. 133; 2 Durn. & E. [2 Term R.] 64, 642. Admiralty never decides on questions of property, as between mortgagee and owner. "Upon questions of mortgage the court of admiralty has no jurisdiction." The Neptune, 3 Hagg. Adm. 132, 133. By general principles of admiralty law, a similar conclusion is reached. To be sure, it is laid down broadly in some places, that in England the admiralty once had cognizance if the right to a ship was contested. Hall, Adm. 87; 3 C. Rob. Adm. 133. But it has since been restricted to maritime liens on ships, such as the wages of seamen and hypothecation. 2 Browne, Civ. & Adm. Law, 406. The general test in contracts is not the thing pledged, but the subject-matter for which it is pledged. Admiralty jurisdiction in contracts relates to the subject-matter, it is said, and in torts to locality. The Mary [supra]; Thackarey v. The Farmer [Case No. 13,852]; 3 Durn. & E. [3 Term R.] 269; De Lovio v. Boit [Case No. 3,776]; Thomas v. Lane [Id. 13,902]. This means subject-matter of the contract, that is, the thing to be done being maritime, and not the object of a contract, as a ship. 2 Browne,

Civ. & Adm. Law, 107. It does not extend to revenue seizures on land. [The Sarah] 8 Wheat. [21 U. S.] 394. Nor matters of account between part owners of a vessel. 2 Browne, Civ. & Adm. Law, 131, 132; [The Orleans v. Phoebus] 11 Pet. [36 U. S.] 175. But it does, if the matter of the contract itself relates to navigation, though the contract be made on land. 2 Browne, Civ. & Adm. Law, 90, 103; Zane v. The President [Case No. 18,201]. It must be in its essence maritime, or to pay for maritime service. Plummer v. Webb [Id. 11,233]. So are ransoms. Maisonnaire v. Keating [Id. 8,978]. So as to forfeiture of vessel under the state acts. 2 Cro. 406. So, for exporting arms against a prohibition by statute. [U. S. v. La Vengeance] 3 Dall. [3 U. S.] 297. So, as to pilotage. The Anne [Case No. 412]; [Hobart v. Drogan] 10 Pet. [35 U. S.] 108. But a mere dispute about a ship does not make a marine business, when mortgaged at home, or attached by a sheriff; —admiralty has nothing to do with it by a libel. 2 Browne, Civ. & Adm. Law, 116, note. Most of the ancient and quaint distinctions, that to give jurisdiction over a contract, it must have been made at sea and not on land (2 Browne, Civ. & Adm. Law, 72); or must be a contract without seal (Id. 96); or must be one prosecuted in rem, are, in some respects, obsolete, compared with the test, that the matter of the contract itself, and not the object affected by it, must be maritime, or on marine business. 3 Story, Cont. 527–530; 2 Browne, Civ. & Adm. Law, 90, 103, 107; De Lovio v. Boit [Case No. 3,776]; [Martin v. Hunter] 1 Wheat. [14 U. S.] 335.

The present contract is questionable as a maritime one in some respects on these general principles. Thus, a contract to buy or build a ship or a mortgage of one is generally no more a maritime contract than one to build or buy or mortgage a house. Andrews v. Essex Ins. Co. [Case No. 374]. It must be a perfected maritime contract, and not an executory one, to lead to it. But when executed, a vessel may be mortgaged to secure a common note of hand, or liability for goods sold and delivered by a retail trader on shore. 2 Browne, Civ. & Adm. Law, 555, infra arguendo. In point of fact here, however, the consideration of this mortgage appears to have been an account connected with navigation on advances chiefly for a voyage. But they were not so entirely, though that might furnish some ground for interference pro tanto, when a mortgage of a vessel for a different kind of debt would not. But besides the cases before cited on the general principle in 2 Hagg. Adm. 181, 182, —"fruit preserver,"—it was held, that the admiralty court will not enforce a mere mortgage of a ship, by ordering possession to be changed. So, 2 Dod. 288; 3 C. Rob. Adm. 94, 135; 1 Dod. 240. 6 Geo. 4, was passed to enable a mortgagee to have a vessel sold to pay the debt. He is not an owner for any other purpose under that statute. In The Portsea (1827), 2 Hagg. Adm. 84, the court refused to award a share in the proceeds of a vessel before sold, if the mortgagee had never been in possession. It was not deemed proper to settle his interests in admiralty. The Exmouth, Id. 88, note. See Abb. Shipp. 2; 2 Ld. Raym. 983; 4 East, 319; 4 C. Rob. Adm. 1, 4; The Mary [supra]. Now by 3 & 4 Vict. c. 65, § 3, courts of admiralty may decide on the rights of mortgagees to ships, if they are under arrest, or their proceeds be in admiralty. The Dowthorpe, 2 W. Rob. Adm. 80, 81; The Highlander, Id. 109. But they could not do so before. 3 Hagg. Adm. 402; 2 W. Rob. Adm. 82.

There is another objection to deciding such disputes here in admiralty, because they relate merely to a vessel, and without the aid of any statute as in England. It is, that where the title is disputed as to any thing, a court of admiralty will not interfere till that is settled elsewhere, especially if it relate to a vessel only mortgaged, and not hypothecated in bottomry. They consider that they have not jurisdiction to settle disputed titles to property, unless they have possession of the article, and the question as to title arises then incidentally. 2 Browne, Civ. & Adm. Law, 98. On this the rule is more inflexible than in chancery, when asked to annul or enjoin against a contract. 2 Browne, Civ. & Adm. Law, 430; The Warrior, 2 Dod. 288; 3 C. Rob. Adm. 133.

To be sure it must appear to be a real conflict as to title, not a mere plea of it, not a mere colorable title. 2 Dod. 290. Where possession exists, a court will not transfer it to former owners, unless the sale is clearly shown to be fraudulent. An action lies on the instance side for possession of a ship by a former owner against a purchaser abroad, when sold to raise supplies. But it is supposed that cases have occurred here where courts have allowed mortgages of ships to give jurisdiction, if to enforce them in rem, though the title is in dispute. And it is urged, that the English rules as to admiralty jurisdiction are no guide here. The Jerusalem [Case No. 7,293]; De Lovio v. Boit [Id. 3,776]. Rucher v. Conyngham [Id. 12,106]. And it has been said, that an owner may claim or any one interested, and have judgment of restitution of a ship. Dunl. Adm. Prac. 170; Clerke, Praxis Adm. 41. It has been held, that petitory as well as possessory rights may be decided, among several, and thus save several suits at law. Hall, Adm. 81, 87. In The Tilton [Case No. 14,054] jurisdiction was maintained over a libel to get possession of three-fourths of a ship, where the title was withheld from them. The contest was as to the validity of a sale of those parts. But that was a contest between part owners, and on that account gave jurisdiction. The jurisdiction is said to be clear where it concerns owners of ships as such. Godolph. Adm. 43. That is probably as to disputes between part owners. For otherwise it is said in England,

they usually refer the title to some other court to settle, though at times it is decided incidentally in changing possession, as before explained. The Tilton [supra], and cases there cited; 2 Browne, Civ. & Adm. Law, 112. In the United States, admiralty courts have gone into title in cases of salvage, bottomry, and forfeiture of marine interests, &c. The Tilton, and cases cited. But that does not settle the question here. In De Lovio v. Boit [supra], Judge Story says, that the admiralty still continues in England, "to entertain suits for the possession of ships." But if he means, that they do it except in cases of bottomry, or between part owners, or under express statutes, his idea does not seem supported by the books, and hence it will not answer from that case, or any English cases, to infer that a proceeding lies here by a mortgagee of a vessel to obtain possession of, and sell it, to pay the debt, when he is out of possession, and the debt or claim is disputed. Hurry v. The John [Case No. 6,923]. If this can be done, it must be on some other precedent, or on some general principles belonging rightfully to admiralty.

Having thus seen, that the reasoning and practice abroad are against the exercise of jurisdiction by admiralty courts, over mere mortgages of ships, unless authorized by express statutes to do it, and finding to my surprise no reported case here, where the jurisdiction has in such case been taken, and finding that this claim can be disposed of without settling that question, I do not feel disposed to decide on it positively without further examination. My present impressions are against it. The other grounds, on which it can be disposed of, are these. If a mortgagee, like Deshon here, could not prosecute his claim originally in admiralty against the vessel, because his debt is secured merely by a mortgage, and is contested, yet jurisdiction over it as against these funds now already in admiralty, and for further distribution of them, may be upheld there, because that court has already obtained and duly exercised jurisdiction over the vessel and the proceeds on other grounds, and for other parties. Gardner v. The New Jersey [Case No. 5,233.] It has already, in a libel against this vessel, sustained it for seamen's wages, and decreed, that this lien overrides all others, and is to be paid first. See The Sydney Cove, 2 Dod. 13; 1 Dod. 40. Next, that the last bottomry bond is to be paid in preference to any former ones, because the last is founded on the necessity of advances or repairs to preserve the vessel, and insure her return and profitable use, and is thus for the benefit of the holders of all previous bottomry bonds. The Mary [Case No. 9,187]; 1 Dod. 201, 289; 2 Dod. 2; 2 Hagg. Adm. 89; De Lovio v. Boit [supra]. The last shall be first, therefore, in payment. 2 Hagg. Adm. 65, note; Duke of Bedford, 2 Hagg. Adm. 294, 304; 7 Poth. Pandects, 426. Having done this, it seems unobjectionable to order what is left to be paid over to any claimant, who shows a legal and equitable right to it. The only doubt as to this course arises from a remark in Dunl. Adm. Prac. 28; The Maitland, 2 Hagg. Adm. 255. But this remark in Haggard is confined to cases where the claim is contested, and the court do not choose to decide it incidentally. Yet, in their discretion, we have already seen, that they will decide it sometimes, and uphold the mortgage claim. So in equity, sometimes, having got jurisdiction of a case for one purpose, the court can proceed to act as to other objects, which might be prosecuted at law, and would not originally be sustained in equity. Briggs v. French [Case No. 1,870]; [Massie v. Watts] 6 Cranch [10 U. S.] 148; [Peirsoll v. Elliott] 6 Pet. [31 U. S.] 95; 2 Brown, Parl. Cas. 39. On like principles in admiralty, if the court properly has jurisdiction, and sells an article, as a ship, it may decree some of the funds to claimants, whose claim was not an admiralty one, so as to sustain an original sale and jurisdiction to sell. 2 Browne, Civ. & Adm. Law, 81; 2 C. Rob. Adm. 236; 1 Ld. Raym. 152; 2 Ld. Raym. 983; The Mary [Case No. 9,187]; Belt, Adm. Prac. 58; Coulter v. L'Esperanza [Case No. 3,277]; [Ramsay v. Allegre] 12 Wheat. [25 U. S.] 615, Justice Johnson; Conk. Prac. 155; The Mary Ford, 3 Dall. [3 U. S.] 198. If admiralty has possession of property, it may allow to be instituted other supplemental suits to ascertain who it goes to,—the proceeds of it, "remnants and surpluses." Andrews v. Wall. 3 How. [44 U. S.] 568, 573. So it is said: "A mortgagee undoubtedly at that time could not institute proceedings in the court of admiralty, but it is quite a different question whether he could not intervene to protect his interest, when a suit was already instituted by parties competent to do so." 2 W. Rob. Adm. 82. It was held, that he could so intervene before the late act of parliament. Case of The Dowthorpe.

My conclusion, therefore, is, that a court of admiralty, after getting jurisdiction clearly, and selling a vessel, may distribute part of the proceeds to one, who could not have enforced the original sale through his lien, it not being by bottomry. A fund may be given in part to one, who has a lien on it at law, though not such a lien as could originally be prosecuted in chancery. Harper v. The New Brig [Case No. 6,090]; Gardner v. The New Jersey [supra]. This was at first refused in England as to mortgagees not in possession. Dun v. Bates, cited in 1 Hagg. Adm. 84, 88. But in a case like this, I think it would be done there now, and would be deemed harsh and unnecessary to turn a party over to other proceedings, when clearly entitled to the funds now before the court. The Packet [Case No. 10,655]. But it is further and finally urged against paying these proceeds to Deshon, that his mortgage is

void for not being duly recorded as a mere mortgage of a chattel, and not treating his lien as a bottomry. As a mortgage, it is necessary to be recorded. The Draco [Id. 4,057]. Though no notice is required to be given of a lien on a vessel, to make it valid. Daniel, Ch. Prac. 70, 77. Yet a mere mortgage must be recorded in conformity to the statutes of the state of Massachusetts, expressly requiring such conveyances to be recorded, unless possession accompanies the mortgage. This vessel was not taken possession of and retained by Deshon at the time of the conveyance, nor was the latter recorded till the mortgagors had failed, and an assignee been appointed to receive their effects, and public notice given of his appointment. The insolvent system of this state provides for a conveyance to the assignee of all the estate of the debtor. Act April 23, 1838; 2 Eden, Bank. L. 177.

Now this undoubtedly passed a title to all which belonged then to the debtor, but nothing more, except in cases of property, which the debtor may have conveyed to defraud creditors. It does not mean to dissolve valid mortgages, and insolvent systems usually do not dissolve them. 2 Hagg. Adm. 57; Edw. Adm. 118, 239; 2 Metc. [Mass.] 258; 3 Metc. [Mass.] 239; 4 Metc. [Mass.] 346. Here this vessel had been duly conveyed to Deshon in mortgage. The deed, though unrecorded, was valid as between the parties. The assignee stands in the shoes of the debtor in such case. The debtor is civilly dead as to his estate, and the assignee is his representative like an administrator on the estate. Mitchell v. Winslow [Case No. 9,673]; In re McLellan [Id. 8,894]. He is a privy in interest, and he has failed to make any satisfactory proof of fraud in the mortgage by the former owners to Deshon. The assignee has only the equities which the debtor had, except, as he is acting for the benefit of the creditors, when he can, in case conveyances have been made, which are fraudulent or against them, set them aside. He is not like a particular assignee or purchaser for a valuable consideration, but as any other assignee by operation of law, an administrator, or executor, or insurer to whom property has been abandoned. 9 Ves. 100; [Bayley v. Greenleaf] 7 Wheat. [20 U. S.] 56; 2 Story, Eq. Jur. § 1229; 10 Johns. 63; 6 Mann. 24; 2 Hill, 229. In France, by laws of Louis XIV., § 25, art. 2, all vessels are liable for debts of the last owner, till they make one voyage, unless sold by a judicial sale. See Laws, p. 298. It is true, that some of Deshon's claims might not be good, and of a character to sustain a bottomry bond, but they were all proper enough for a mortgage, and though not taking possession by the mortgagee, may be slight evidence of fraud, or some badge of it, as in cases of absolute sales, it has been considered one badge of fraud since Twynne's Case in Coke, yet it is not per se fraud. And, in case of a vessel furnished thus with means to go to sea, the very design and nature of the advances show, that the possession for the voyage was to be retained by the mortgagor. Gray v. Jenks [Case No. 5,720]. Any other sufficient reason for not changing possession in case of a mortgage sufficeth. See cases in Almy v. Wilbur [Id. 256]; Haven v. Low, 2 N. H. 13. But a vessel should be taken possession of after the voyage by the mortgagee or vendee, as was done here. Gray v. Jenks [supra]; 4 Pick. 288, 389; 2 Pick. 599; 17 Mass. 110; 2 Durn. & E. [2 Term R.] 485; 9 Johns. 337; 3 Cow. 166; 4 Bing. 458; Wheeler v. Sumner [Case No. 17,501.] This mortgage did not purport to be an absolute sale on its face; and a secret agreement made and proved to the contrary, like the case cited from Parker v. Pattee. 4 N. H. 176; Wend. 596; but it is on its face a mortgage. If never recorded, then, it would be good against the debtor, and when not fraudulent, good against his assignee in bankruptcy. See Almy v. Wilbur, before cited. Where, under some English registry acts, sales are not valid at all unless recorded, the rule would be different on account of the express language used to the contrary. 2 East, 399, 400; Weston v. Penniman [Case No. 17,455]. See, also, bearing on this, 2 Hill, 628; 5 Hill, 16; 1 Denio, 163. But it is well settled here, that mortgages, whether of real or personal estate, not recorded, are good between the parties. And it is as well settled, that they are good against their assigns under bankrupt and insolvent systems, though not recorded till after their appointment. Briggs v. Parkman, 2 Metc. [Mass.] 267. The assignee of a bankrupt in these cases stands in his shoes. The St. Catherine, 3 Hagg. Adm. 253. Let the claim of Deshon, then, be enforced as to the proceeds, and that of Leland as well as of the assignee be dismissed.

LELAND (MERCHANTS' NAT. BANK v.). See Case No. 9,452.

Case No. 8,238.

LELAND v. PLATT.

[The case reported under above title in 16 N. B. R. 505, is the same as Case No. 8,235.]

LELAND (UNION PAPER COLLAR CO. v.). See Case No. 14,394.

LELAND, The ANNIE. See Case No. 421.

LEMING (CITIZENS' NAT. BANK v.). See Case No. 2,733.

Case No. 8,239.

LEMIX v. HARMONY SOCIETY.

[Cited in Nachtrieb v. Harmony Settlement, Case No. 10,003. Nowhere reported; opinion not now accessible.]

[Decided by GRIER, Circuit Justice.]

Case No. 8,239a.

LEMMONS v. CHOTEAU.

[Hempst. 85.] [1]

Superior Court, Territory of Arkansas. Nov., 1829; July, 1830.

NOTES—ACTION AGAINST ASSIGNOR—DILIGENCE IN PROSECUTING MAKER—MAKER NOT FOUND.

1. The assignee of a note must use due diligence, by prosecuting the maker to insolvency, or show some sufficient excuse for the failure, before he can hold the assignor liable.

2. That the maker is a transient and unsettled person, without averring insolvency, is not sufficient to excuse the holder from using due diligence.

At law.

Before JOHNSON, BATES, ESKRIDGE, and TRIMBLE, JJ.

JOHNSON, J. This is an action brought by [James] Lemmons to recover of [Augustus] Choteau, upon an assignment which the latter made to the former, of a note executed by William S. Williams. The note of Williams bears date the 5th of October, 1824, was payable the 25th of December following, and was assigned by Choteau to Lemmons the 6th of October, 1824. The declaration of Lemmons nowhere suggests that he has exercised any diligence by prosecuting a suit against the maker of the note. It states that when the note became payable, he made diligent search after Williams, the maker of the note, and has continued to make diligent inquiry for said Williams up to the time of bringing this suit, but could not find him; and avers that Williams, at the time of the assignment, was not a citizen or resident of this territory, nor at this time resides in this territory; and that he never did reside in this territory, nor has he any property here whereon to make or collect the amount of the note, or any part of it.

The doctrine has been long settled by a uniform current of decisions in the states of Virginia and Kentucky, upon a statute in all respects analogous to ours, that the assignor of a bond or note is liable upon his assignment in the event of a failure to obtain payment of the bond or note, after due diligence has been used by the assignee to coerce payment. If the question were now presented for the first time, it might admit of great doubt, whether, according to common law principles, the assignor would be responsible where the debt assigned was just and fair, and the failure to obtain payment resulted alone from the insolvency of the maker of the bond or note. It cannot be asserted that there is a failure of the consideration because the right to a just debt is sold and transferred, and the inquiry arises, whether the assignor or the assignee takes upon himself the risk of the insolvency of the obligor or payor. I should incline to the opinion that where the parties were silent, the law would cast the risk upon the purchaser of the bond or note, and would not raise an implied contract on the part of the assignor, that he took upon himself and insured the solvency of the obligor or maker of the note. But this question I consider at rest, by the decisions referred to, as well as by the previous decisions of this court. We have repeatedly held that the assignor is liable to the extent of the sum received by him, upon a failure on the part of the assignee to obtain payment after the use of due diligence. The question in this case is, whether that diligence which the law requires has been used. In the case of Brinker v. Perry, 5 Litt. (Ky.) 194, the court says, "that, in general, due and proper diligence by suit against the maker of a note must be employed by the assignee to enable him to have recourse against the assignor, cannot at this day be doubted." The necessity of doing so has been repeatedly decided by this court, and as a general principle must now be considered as incontrovertibly settled. To this general principle there are, no doubt, exceptions. Does the case at bar fall within any one of those exceptions? The allegations in the case just referred to, were, that when the note became payable, Moody, the maker, had left, and continued out of the state for many months, and is still out, so that the amount could not be recovered of him. The averments in this declaration are, that the plaintiff has made diligent search for Williams, the maker of the note, but has been unable to find him; that Williams at the time of the assignment, and ever since, has not resided within this territory. In the case of Brinker v. Perry, the maker of the note was out of the state when the note became payable, and was out at the commencement of the suit. In the case at bar, precisely the same facts are alleged. The only difference in the two cases is, that it is averred in the present case that the plaintiff has made diligent search for the maker of the note, from the time it became due until the institution of this suit.

The court of appeals of Kentucky, in the case referred to, say: "It is unimportant whether the declaration be understood to allege the fact of the maker of the note having removed from the state, or only absented himself on a temporary occasion. In either case the principle is the same, and in neither case can there be a recovery against the assignor, without due diligence, by suit, having been exercised against the maker of the note. If the absence was merely temporary, there was nothing to prevent Brinker from suing the maker of the note, and if there was a permanent removal, as it is alleged to have taken place before the note was assigned, he must be understood to have undertaken to pursue the maker of the note, by suit, in the country to which he had removed, before recourse could be had against the assignor." Apply this doctrine to the

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

case now before us. If the maker of the note resided out of the limits of this territory, as is alleged in the declaration, at the time the note was assigned to the plaintiff, he must be understood to have undertaken to pursue the maker of the note, by suit, in the country where he did reside, before he could have recourse against the defendant. The two cases are exactly similar, and the only diversity that could be imagined, consists in the allegation of the diligent but unsuccessful search after Williams, the maker of the note, and that is an averment wholly immaterial, and can have no bearing in the case. The case of Brinker v. Perry, I consider as authority of high character, and precisely in point, without a shade of difference; and on that I am clear that the demurrer to the declaration should be sustained. Demurrer sustained.

The plaintiff amended his declaration, to which there was a demurrer, which was determined before JOHNSON, BATES, ESKRIDGE, and CROSS, JJ., July, 1830.

JOHNSON, J. A demurrer having been sustained to the declaration in this case at a former term, an amended declaration has been filed by the plaintiff, to which the defendant has again demurred. The averments in the former declaration were, that the plaintiff had made diligent search for Williams, the maker of the note, and could not find him, and that he never did reside in this territory, nor has he any property whereon the said amount or any part of it could be made or collected. Upon these averments this court decided that the plaintiff failed to show the use of that diligence to recover the debt against Williams, which entitled him to recover upon the assignment made by the defendant. The ground of that opinion was, that as the plaintiff himself alleged that Williams was a non-resident at the time of the assignment of the note, he was bound to pursue him to the country where he did reside, or where he might be found, and there bring suit against him, and pursue him to insolvency, before he could have recourse against the assignor. In this opinion we were fully sustained by the case of Brinker v. Perry, 5 Litt. [Ky.] 194. Is the case materially varied by the amended declaration? What are the averments? That the plaintiff has made diligent search for Williams, and has not been able to find him, or any property upon which to levy an attachment; that he has not been able to find any fixed residence of Williams, but that before the note became due, Williams went beyond the limits of this territory into the Osage Nation of Indians, and has lived there ever since, so that no legal process could be served on him, nor could he be compelled in the Osage country to pay any part of the note, and that Williams is a wanderer in that Nation, and has no special place of residence.

The plaintiff in the preceding allegations does not inform the court that Williams resided in this country at the time the defendant assigned the note. If that averment was made, and also the averment of the subsequent removal of Williams from this territory, and that he had gone to parts unknown to the plaintiff, or that he was insolvent, these allegations might dispense with the averment of the use of due diligence by suit, and entitle the plaintiff to maintain the action. But the averments are, that Williams executed the note in this territory, and shortly after went beyond our limits into the country belonging to the Osage Indians, and has there wandered ever since. The fact that Williams is a transient person or wanderer, and cannot be found, if he was so at the time the note was assigned, does not excuse the use of diligence by suit, for if the plaintiff received the assignment of a note executed by a person thus transient and wandering, he must be understood to have undertaken to search for and find him and bring suit against him to coerce the payment of the note. Where a man receives a note by assignment upon a person residing in a different state or country, he is bound to sue the obligor of the note in the country where he resides, if he cannot be found elsewhere; and where a person takes a note by assignment upon a transient and unsettled person, having no fixed place of residence, he impliedly undertakes to find the obligor or maker of the note, and to bring suit against him before he can have recourse against the assignor. It is, however, contended that in the Osage Nation of Indians, there is no mode of coercing the payment of a debt. The answer is, that the plaintiff has not averred that the payment of a debt cannot be coerced in the Osage Nation, and if he had made the averment it could not avail him, unless he had also averred the insolvency of Williams; for the defendant is liable upon the assignment, only in the event of the maker of the note being unable to pay it. Demurrer sustained.

NOTE. If the maker is notoriously insolvent, so that a suit would be fruitless, the assignee is not bound to sue him, before he can resort to the assignor, because the law never requires an useless act. Saunders v. Marshall, 4 Hen. & M. 455.

Case No. 8,239b.

LEMMONS v. FLANAKIN.

[Hempst. 32.] [1]

Superior Court, Territory of Arkansas. Oct., 1825.

CONTRACT—ABSURDITY—WANT OF CONSIDERATION—CONTRA BONOS MORES.

1. L. and F. agreed to run a horserace, and it was stipulated that if either failed to run the race, the obligation for six cows and calves should be

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

in full force against the other; *held*, that this contract was absurd in its terms; that the court would not reform it according to the supposed intention of the parties, and that no action would lie upon it.

2. Where there is ambiguity in a contract, the court will search out if possible the intention of the parties, and enforce it accordingly; but a construction which would impose a liability on one party when the letter fixes it on the other, cannot be tolerated, and especially where the contract is without a valuable consideration, and immoral in its tendency.

Action of covenant.

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. This was an action of covenant, brought on a penal obligation for failure on the part of Flanakin to run a horserace. The plaintiff has made profert of the obligation, and after setting out the terms of the race, states the condition, substantially as expressed in the obligation. It is also alleged that Lemmons was ready and offered to perform the condition on his part, and that Flanakin failed and refused to run the race according to the condition of the obligation. The allegation as to the failure to run the race is as follows, namely: "And it was then and there by the aforesaid parties further agreed, that should either of them fail to run agreeable to the said obligation, that the same for six cows and calves was to be in full force and virtue against the other." This allegation conforms to the condition of the obligation, and the defendant by his demurrer questions the right of the plaintiff to maintain this action. He urges that, agreeable to the literal reading of the obligation, the party who failed to comply with the condition would have the right of action against the other; in other words, that it is not in force against him who fails to run, but against him who complies with the condition. This unquestionably is the literal reading. For the plaintiff it is urged, that it was obviously a mistake in the scrivener, and that the court should disregard the words and construe the obligation according to what may be supposed to have been the intention of the parties; that is, that it should be in full force and virtue against him who failed to comply, contrary to the letter, that it "should be in full force and virtue against the other." When there is ambiguity we will search out, if possible, the true intention and meaning of the parties, and enforce the contract in conformity with that intention and meaning. 11 Coke, 34; 1 Term R. 313. But certainly we cannot adopt a construction in direct violation of the reading and letter of an obligation, nor can we say that, under certain circumstances, one party shall be liable to the penalty of an obligation when it is expressed that the other shall be. 1 Term R. 51, 52; 6 East, 518; 9 East, 101. The least that can be said of this contract is, that it is absurd in its terms, and however much the court, for the purpose of doing justice to both parties, might be disposed to rectify a mistake in a contract, entered into in good faith and for a full and valuable consideration, yet, we do not feel authorized or required to go the same length in support of one without a valuable consideration, absurd on its face, and immoral in its tendency. We think this action cannot be maintained, and therefore the demurrer must be sustained, and judgment entered for the defendant. Judgment accordingly.

Case No. 8,240.

LEMOINE v. BANK OF NORTH AMERICA.

[3 Dill. 44;[1] 7 Chi. Leg. News, 18; 20 Int. Rev. Rec. 153; 1 Cent. Law J. 529; 22 Pittsb. Leg. J. 47.]

Circuit Court, E. D. Missouri. Sept. Term, 1874.

ACCOMMODATION INDORSEMENTS BY PARTNERSHIPS —POWER OF PARTNER—NOTICE.

1. If the maker of an indorsed note carries it to a bank for discount on his own account, this is notice to the bank that the indorsement thereon appearing is an accommodation indorsement. Such is the presumption of law if there is nothing in the transaction to repel it.

[Cited in Third Nat. Bank v. Harrison, 10 Fed. 252.]

[Cited in National Park Bank v. German-American Mut. Warehouse & Security Co., 116 N. Y. 293, 22 N. E. 567.]

2. If such indorsement be that of a firm, the bank discounting the note under such circumstances must, at its peril, ascertain whether there was any special authority, express or implied, for one partner to sign the partnership name as an accommodation indorser.

[Cited in West St. Louis Sav. Bank v. Shawnee County Bank, Case No. 17,462.]

[Cited in Hendrie v. Berkowitz, 37 Cal. 113; National Bank of Commonwealth v. Law, 127 Mass. 75.]

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

This is a contest between the Bank of North America, of St. Louis, and [J. B. S. Lemoine] the assignee of Earickson & Boyd, bankrupts, respecting the liability of that firm on the indorsement of the name of the firm upon two promissory notes. A copy of one of these notes is as follows: "St. Louis, June 11, 1873. Sixty days after date we promise to pay to the order of Earickson & Boyd thirty-five hundred dollars, &c., at the Bank of North America, St. Louis, Mo. (Signed) White Brothers." Indorsed: "Earickson & Boyd." The other note is for $2,500, dated June 17, 1873, at sixty days, with the same names as makers and indorsers as the note above copied. From the evidence before it the district court found that the bank was entitled to have the amount of the two notes [$6,000 in all][2] allowed against the firm assets. [Case unreported.]

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

[2] [From 7 Chi. Leg. News, 18.]

The assignee appealed under the eighth section of the bankrupt act [of 1867 (14 Stat. 520)], and in this court new pleadings were filed as in an action at law by the bank upon the indorsement. The question is whether the indorsement is binding upon the firm in favor of the bank. From the evidence the court below found the facts to be as follows:

Special Finding of Facts by the Court.

On the first day of January, 1873, the bankrupts, John K. Earickson and J. Will Boyd, formed a partnership under the firm name of Earickson & Boyd, and by articles of co-partnership both partners were prohibited from signing the firm name for the security or accommodation of third parties, and it was further stipulated that Earickson should have exclusive charge of the tobacco factory of the firm, and Boyd exclusive charge of the office and finances. The firm did not need, nor did they obtain any accommodation or borrow any money, except on drafts drawn against their sales of tobacco, which they sometimes discounted in bank. The Bank of North America had no knowledge or notice whatsoever of any of the above facts. The firm of Earickson & Boyd failed about the first of July, 1873, owing about sixty thousand dollars, of which amount only about thirty-five hundred dollars was legitimate indebtedness; the residue of the indebtedness having been created by Earickson, without Boyd's knowledge or consent, by using the firm name on commercial paper for his, Earickson's, private benefit, or by indorsing for White Bros., a firm not connected in any way with Earickson & Boyd. White Bros. were also accommodation indorsers on paper drawn in the name of Earickson & Boyd, by Earickson, and the firm received no benefit therefrom; on the contrary this was done without Boyd's knowledge or consent. The only circumstance coming to the knowledge of Boyd calculated to arouse his suspicions of his partner's wrong doings happened in March, 1873, when two or three bank notices came into their office, and knowing the firm had no paper out, he charged Earickson with having used the firm's name for his own private purposes. Earickson admitted he had done so in that instance, declared he had not in any other and would not again, that he had ample means to take up that paper and would do so. Boyd told him if that occurred again he would dissolve the firm. Earickson took up that paper and Boyd knew of no other paper having been given until after the failure of White Bros. on the 30th of June, 1873. Of these facts, however, the bank had no knowledge whatever. The notes upon which the claim is founded were made by White Bros. payable to the order of Earickson & Boyd and indorsed with the firm name of Earickson & Boyd by Earickson but without the knowledge of Boyd. White, one of the firm of White Bros., met a director of the bank in the street on the way to the bank to attend a meeting of the board, handing him the note, told him there was a note he would like to have "done" for him. The director took the note and laid it before the board and it was discounted, some of the members of the board stating that they understood Earickson & Boyd were a very good and responsible firm; both notes were presented and discounted in the same manner and about their respective dates, but through different directors, the conversation with each being in substance the same, and in each case the proceeds were placed to the credit of Earickson & Boyd, and so entered on the books of the bank, according to the uniform custom of the bank, they being the last indorsers on the paper. The money was drawn from the bank on the checks of Earickson & Boyd, signed in the handwriting of Earickson, which checks were drawn to the order of White Bros. and indorsed by them.

These checks are as follows:

"St. Louis, June 11th, 1873. Bank of North America: Pay to White Brothers thirty-four hundred thirty-seven dollars and seventy-nine cents. $3,437.79. Earickson & Boyd." Indorsed: "White Brothers."

"St. Louis, June 17th, 1873. Bank of North America: Pay to White Brothers, proceeds discount, twenty-four hundred fifty-five dollars and fifty-five cents. Earickson & Boyd." Indorsed: "White Brothers."

The notes were duly protested, and due notice given of their non-payment. Boyd was ignorant of all these transactions nor does it appear that the bank had any knowledge of the connection or relations of the two firms of White Bros. and Earickson & Boyd, except what appears on the paper in question. In this court the counsel for the respective parties filed a stipulation that the case should be submitted to the court upon the above statement, which should be taken as an agreed statement of facts for all the purposes of this case.

J. G. Chandler, for the assignee.
John R. Shepley, for the bank.

DILLON, Circuit Judge. On the facts found by the district court, upon which, by stipulation, the cause is submitted to this court, it is to be taken as true that the notes in question were indorsed with the firm name of Earickson & Boyd solely for the accommodation of White Brothers, the makers, without any consideration to the indorsers therefor.

It is also to be taken as true that this indorsement of the firm name was made by Earickson, without the knowledge or consent of Boyd and against the express stipulation on this subject in their articles of co-partnership, and that the notes when thus indorsed were returned to the possession of

the makers, from whom the bank received them and at whose instance it discounted them, and who, through the checks of Earickson, drawn in the firm name, received the proceeds of the transaction. There is no finding or agreement that the indorsement of the firm name was made in accordance with any habit of dealing of the firm known to Boyd, or that there was with Boyd's knowledge such a course of dealing as respects accommodation indorsements in the firm name as to justify an inference of Earickson's authority to bind the firm in this manner.

I concede that in favor of third persons acting in good faith it is a presumption of law that notes indorsed in the name of the firm were indorsed on the partnership account, and hence the indorsement on the notes in question will bind the firm, unless it appears that the bank had notice that the indorsement was made outside of the partnership affairs. Story Notes, § 72; Byles, Bills, 47; Austin v. Vandermark, 4 Hill, 259, 262, per Nelson, C. J. But inasmuch as the settled rule of law is that it is not within the general scope of one partner to bind the firm by contracts of suretyship or to issue accommodation paper in the name of the firm for third persons, if the bank had notice that this was an accommodation indorsement, the burden of proof is upon it to show the assent of the other partners (either expressly or from the firm's course of dealing in this respect) or their subsequent ratification. Byles, Bills, 47, and cases cited in the notes. If, therefore, the bank discounted these notes without notice of the fact that the name of the firm had been indorsed upon them by one of the partners without the consent of the other and for the accommodation of the makers, it is entitled to hold the firm upon the indorsement, although in point of fact it was placed there by one of the partners in fraud of the rights of his copartner, or without authority from him.

And the question on which the case turns is whether the bank had such notice, for it is not attempted to show that Earickson had authority from Boyd, express or implied, to make the indorsement. The bank is sought to be affected with such notice by virtue of the fact that after the notes bore the indorsement of the firm they were in the hands of the makers, who met one of the directors of the bank when on his way to a meeting of the board of directors, and giving him the notes asked him to have them discounted for the makers. It does not appear that the director informed the board of whom he had received the notes, but this is not material, for the learned counsel for the bank conceded on the argument that he supposed the law to be that the board or the bank would be chargeable with the knowledge of the director thus obtained.

Thus viewed, the real question in the case is reduced to this: Does the fact that the maker is in possession of a note before maturity, indorsed by another, affect the bank that receives it from the maker and discounts it for him, with the notice that it was indorsed for the maker's accommodation?

At the bar counsel stated that they had been unable to find any adjudged cases upon the exact point, and they argued it on general principles. In view of the nature of the notice required to defeat the rights of the holder for value of commercial paper, as settled by the supreme court of the United States in Goodman v. Simonds, 20 How. [61 U. S.] 343, I was at first impressed in favor of the bank; but subsequent reflection has brought me to an opposite conclusion. To make accommodation paper is so entirely extra the business of a co-partnership and the legitimate authority of a partner, that the presumption is against, and properly against, the power of one partner thus to bind his co-partners; for suretyship, it has been well remarked is "a contract which carries with it a lesion by its very nature." Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 294. Therefore when a bank has knowledge that an indorsement of the name of a firm is an accommodation indorsement it is bound at its peril to ascertain whether the members of the firm on whom it intends to rely assented to this use of its name. This it can easily do. While on the other hand, if the bank were entitled to presume that the other members of the firm assented, the presumption would in many instances, as in the case before us, be contrary to the fact, and highly disastrous to innocent partners, who would be without the means of guarding against the fraudulent use of the co-partnership name in unauthorized transactions.

If the facts of the case as found by the district court be considered there can be little doubt that the bank knew the discount was for the benefit of White Brothers, and consequently that the indorsement of Earickson & Boyd was presumptively, as it was in fact, for the accommodation of the makers.

On examination I find several cases distinctly asserting this to be law, and have not met with any holding a different view. When a note not due is taken by the makers to a bank for discount for their account, with an indorsement thereon, the presumption, unless there is something in the transaction to rebut it, is that the indorsers are sureties for the maker, and that they did not indorse it in the ordinary course of business. Upon this subject Mr. Chancellor Walworth, in Stall v. Catskill Bank, 18 Wend. 478, holds this language: "If, therefore, it appears from the face of the paper that the partnership name is signed as surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He

must, therefore, at his peril, make the necessary inquiries and ascertain that there is some special authority for one partner to sign the partnership name as such surety, express or implied. So if the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person, with the name of the firm indorsed thereon, the transaction, on its face, shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank or person who thus receives it from the drawer being thus chargeable with the notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm, who have been made sureties without their consent, are not liable to such holder of the note."

This language was quoted and approved by Mr. Chief Justice Sawyer in giving the judgment of the supreme court of California in Hendrie v. Berkowitz (1869) 37 Cal. 113, and in which the court distinctly held, in a case precisely like the one now before the court, that the presumption was that the indorsement was an accommodation indorsement, and that the burden of proving the consent of the member who did not write the indorsement is upon the holder. So, in Overton v. Hardin (1869) 6 Cold. 375, the supreme court of Tennessee said: "There can be no doubt that the possession of an indorsed note by the maker is presumptive evidence that it was indorsed for his accommodation. Edw. Bills, 103, 105; Brown v. Taber, 5 Wend. 566; Erwin v. Shaffer, 9 Ohio St. 43." In this last case Brinkerhoff, J., says: "That although an indorsed note in the hands of the maker after due is presumed to have performed its office, and to have been paid off and taken up by the maker, yet no such presumption arises in the case of such a note before due; but that on the contrary, in such case, it is a matter of legal presumption that the note is unsatisfied, and is indorsed and placed in the hands of the maker for his accommodation. Wallace v. Branch Bank of Mobile, 1 Ala. 565; Mauldin v. Branch Bank of Mobile, 2 Ala. 502; Stall v. Catskill Bank, 18 Wend. 478." See, also, language of Mr. Justice Nelson in Bank of Rochester v. Bowen, 7 Wend. 159; Byles, Bills, 47, and note.

The amount of the notes less the discount was, in accordance with a usage of the bank, placed to the credit of the last indorsers, in this case Earickson & Boyd, and was drawn out on the two checks of Earickson & Boyd, signed by Earickson, without the knowledge of Boyd, in favor of White Brothers. One of these checks showed on its face that it was for the proceeds of the note discounted, and the amount of each showed that it was for the note transactions. It is insisted that this makes the indorsement binding on both. This view rests upon the ground of ratification by Boyd; but the essential element of knowledge on his part, both of the fact of the indorsement and of the check being drawn, is wanting. The checks do not therefore change the rights of Boyd, or make binding upon him his partner's act in indorsing the firm's name to the notes in question. The district court erred in holding that the two notes were a claim upon the firm assets. The indorsement is alone binding upon Earickson. Judgment accordingly.

The court entered a judgment reversing the judgment below and entering a judgment against Earickson alone, and ordering a transcript thereof to be sent to the district court. Same principle applied: See West St. Louis Sav. Bank v. Shawnee County Bank [Case No. 17,462].

Case No. 8,241.

LEMON v. BACON.

[4 Cranch, C. C. 466.] [1]

Circuit Court, District of Columbia. May Term, 1834.

EVIDENCE—DOCUMENTS—RECORD COPY.

An absolute deed of goods and chattels need not be recorded, and a record copy is not evidence.

[See Bacon v. Bancroft, Case No. 714; Barger v. Miller, Id. 979.]

[Action for freedom by Kitty Lemon, a negress, against Ebenezer Bacon.]

Mr. Key and Mr. Hodgson, for plaintiff, offered in evidence the record of a deed of personal property.

Mr. Taylor, for defendant, objected that a record copy of an absolute deed of goods and chattels, for valuable consideration, need not be recorded, and derives no validity therefrom; and a record copy is not evidence. And such was the opinion of the COURT (nem. con.)

(See statute of frauds of Virginia [1 Rev. Code, 1802] p. 16.)

Case No. 8,242.

LENG v. MURPHY.

[Cited in Kennedy v. Hartranft, 9 Fed. 20. Nowhere reported; opinion not now accessible.]

LENIG (CHILDS v.). See Case No. 2,680.

Case No. 8,243.

LENNIG v. MAXWELL.

[3 Blatchf. 125.] [2]

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

CUSTOMS DUTIES—WASTE, FLOCK OR SHODDY—"MANUFACTURE OF WOOL."

1. Pulverized waste or flock or shodddy, being the refuse thrown off in shearing or finishing of woolen cloths, having been imported and used

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

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

in that state and under those names, prior to the tariff act of July 30th, 1846, and being known in trade and commerce under those names, is liable to a duty of only 5 per cent., under Schedule H of section 11 of that act (9 Stat. 48, 49), as "waste or shoddy," and is not liable to a duty of 30 per cent., as a "manufacture of wool," under Schedule C of section 11 of that act (9 Stat. 44, 45).

[Cited in Seeberger v. Cahn, 137 U. S. 98, 11 Sup. Ct. 29.]

2. A collector is not justified, by the instructions of the treasury department, in imposing duties not warranted by law.

[Cited in Munsell v. Maxwell, Case No. 9,932; Balfour v. Sullivan, 17 Fed. 233.]

This was an action to recover back an excess of duties imposed by the defendant [Hugh Maxwell] as collector of the port of New York, and was removed by the defendant, by certiorari, into this court, from the supreme court of New York. The article imported was a refuse of woolen cloths, used by paper manufacturers in making velvet paper. The invoice was in French, and described the merchandise as "laine à velouter," "belle laine rouge," "belle laine marapa," "belle laine fontaine," "belle laine écarlate." The custom house appraisers returned it as "prepared or manufactured wool," and the collector caused a duty of 30 per cent. to be imposed upon it, as "a manufacture of wool," under Schedule C of section 11 of the tariff act of July 30, 1846 (9 Stat. 44, 45). The plaintiff [Frederick Lennig] paid the duty, making, at the time, his protest in writing, that the article "should be admitted as 'waste,' or excess nap of cloth, at 5 per cent., and not to be charged at 30 per cent., as a manufacture of wool." This rating at the custom-house was proved to have been in obedience to instructions from the secretary of the treasury, directing the charge of 30 per cent. on "waste, flock, or shoddy, ground or pulverized." The article was proved to be pulverized waste or shoddy—the refuse thrown off in the shearing or finishing of woolen cloths—and to be worthless in itself, but to have been imported and used by paper-makers, previous to the tariff act of 1846, in that state, and under the name of waste or flock, and to be known in trade and commerce as waste or flock. Schedule H of section 11 of the act of July 30, 1846 (9 Stat. 48), imposes a duty of 5 per cent. on waste or shoddy.

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

THE COURT held: 1. That the construction of the tariff act by the treasury department, was not conclusive upon either party, and that the collector was not justified by such instructions, in imposing duties not warranted by law.

2. That, on the proofs, the article was entitled to be admitted to entry on payment of a duty of 5 per cent. ad valorem. Judgment for the plaintiff for the difference, with interest, the amount to be adjusted at the custom-house.

LENNOX, The M. A. See Case No. 8,987.

Case No. 8,244.

LENOX v. ARGUELLES.

[4 Cranch, C. C. 477.] [1]

Circuit Court, District of Columbia. Nov. Term, 1834.

CERTIORARI—JUSTICE OF PEACE—SUBSTITUTE FOR EJECTMENT.

A certiorari will not lie to bring up the proceedings of justices of the peace, under the Maryland statute of 1793, c. 43, against tenants holding over.

[Action by Lenox's administrator against Arguelles.]

Mr. Bryce moved for a certiorari to a justice of the peace, to bring up his proceedings against a tenant holding over under the Maryland act of 1793, c. 43.

Mr. Larned, by special permission, stated, that, by the practice in Maryland, a certiorari would be granted in such a case; the proceeding under the statute being considered as a substitute for an action of ejectment.

THE COURT, however (nem. con.), was of opinion, "as at present advised," that it has no power to issue a certiorari in such a case.

Case No. 8,245.

LENOX v. GEORGETOWN.

[1 Cranch, C. C. 608.] [1]

Circuit Court, District of Columbia. Dec. Term, 1809.

LICENSE—FOR HACKS—COMPENSATION FOR SERVICE.

The corporation of Georgetown could not impose a penalty on hack-owners residing out of Georgetown, for bringing passengers into Georgetown from the city of Washington, if they take only the city price for driving to the verge of the city.

Appeal from a conviction before a justice of the peace of Georgetown on the by-law of Georgetown, being a supplement to the act for licensing hacks, for conveying a passenger into Georgetown in a city hack without taking out a license from the corporation of Georgetown.

Mr. Jones, for Lenox. The streets of Georgetown are common highways. If the hack-owner be not a resident of Georgetown, and if he charges nothing for carrying the passenger into Georgetown; if he only charges for carrying him to the western limits of the city; he does not violate the by-law.

F. S. Key, contra. The contract was to take the passenger from the Capitol to the Union Tavern, in Georgetown. It is true he took no more than the price limited by the by-law of the city of Washington, for carrying him to the western limits of the city; but it was part of the contract to carry him to the Union Tavern.

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

There is no fixed price in the city; the by-law of the city is only that the price shall not exceed certain rates.

THE COURT was of the opinion that the corporation of Georgetown could not lawfully pass such an ordinance, imposing a penalty on hack owners residing out of the town of Georgetown for bringing into Georgetown from elsewhere passengers, under the circumstances in the case stated, namely, taking only the city price for driving to the verge of the city. Judgment reversed.

Case No. 8,246.

LENOX v. GORMAN et al.

[5 Cranch, C. C. 531.] [1]

Circuit Court, District of Columbia. Nov. Term, 1838.[2]

PLEADING AT LAW—PLEA—DISTRESS FOR RENT—REPLEVIN-BOND—SET-OFF.

1. To a declaration in debt upon a replevin-bond, setting forth the condition and the breaches, by not prosecuting the writ of replevin to effect, and by not returning the property, and by not paying the damages and costs, a plea that the defendant hath performed, &c., all and singular the matters and things in the said condition mentioned, which he, according to the force, form and effect of the same condition, ought to have observed, performed, &c., is bad upon general demurrer.

2. Evidence that the landlord was indebted to the defendant at the time that the rent was due by the tenant, cannot be given under a plea of set-off.

Debt on replevin-bond in the penalty of $3,400, given by J. B. Gorman upon obtaining a writ of replevin, in his own name, for goods distrained by Peter Lenox for rent due by Mrs. Arguelles, upon which writ judgment was rendered for Mr. Lenox, in 1837, upon the pleas of non tenuit, non dimisit, and no rent arrear; the jury having found the issues for the landlord, and one cent damages, and that the rent arrear was $978.30, and the value of the goods distrained $1,198. The declaration upon the replevin-bond set forth the condition, and alleged, as breaches thereof, that the said Gorman did not prosecute his writ of replevin with effect; and did not return the goods, nor pay the charges and costs. The defendants pleaded "that the said J. B. Gorman hath well and truly observed, performed, fulfilled, and kept, all and singular the matters and things, in the condition of the said writing obligatory mentioned and contained, which he, according to the force, form, and effect, of the same condition, ought to have observed, performed, fulfilled, and kept." To this plea the plaintiffs demurred generally.

The defendants also pleaded, by way of set-off, that at the time of the alleged breaches of the condition of the bond, the said Peter Lenox, in his lifetime, was indebted to the said Gorman, in the sum of $1,238.96, for matters properly chargeable in account, and for goods sold and delivered, and for money lent and advanced, all which still remains due; and that he is willing to set off as much thereof as the damages for the said supposed breaches may amount to. To this plea the plaintiffs replied, "that the said Peter Lenox, in his lifetime, did not undertake and promise in any manner and form as the defendants have above pleaded, and of this they put themselves upon the country," &c. They also replied the statute of limitations.

Upon the demurrer to the plea of general performance THE COURT (Thruston, Circuit Judge, absent,) rendered a peremptory judgment for the debt in the declaration mentioned, to be released on the payment of the rent arrear, with interest and costs. Upon the trial of the issues upon the set-off, the court refused to permit evidence to be given of work and labor, &c., done by the said Gorman for the said Peter Lenox.

CRANCH, Chief Judge, doubting whether the plaintiffs ought not to have demurred; but inclining to think that the issue, whether Lenox was indebted to Gorman at the time of Lenox's judgment for the rent due by Mrs. Arguelles, was an immaterial issue, and, therefore, no evidence should be permitted to be given upon it. Besides, the evidence was offered for the purpose of showing that no rent arrear was actually due from Mrs. Arguelles, as charged in the avowry, in the action of replevin, and found by the jury in that case. The defendants prayed the court to instruct the jury, that the plaintiffs were not entitled to a verdict in this case, for the amount of the rent arrear found by the jury in the action of replevin.

But THE COURT refused to give the instruction.

The defendants took their bills of exceptions.

Verdict for the plaintiffs, $1,088.25.

Brent & Brent, for plaintiffs.

Key & Hoban, for defendants.

The defendant's counsel moved in arrest of judgment:

1. "Because the plaintiffs are not entitled to a judgment on the verdict for the amount thereof; it being the amount of rent arrear found by the former jury in the former record; and there being no breach in the declaration stating that as the plaintiffs' damage."

2. "Because the plaintiffs are not entitled to judgment on the demurrer for any thing but the damages and costs stated in the declaration as the breach of the condition of the bond, for which this action is brought."

3. "Because the plaintiffs, under the breaches set out in their declaration, are not entitled to the amount of rent in arrear, as found in the record given in evidence, but only to the damages and costs stated in the former record; neither on the verdict now rendered nor on the demurrer."

4. "Because the court cannot ascertain the

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

[2] [Affirmed in 15 Pet. (40 U. S.) 115.]

damages on the demurrer; but the same should have been done by a jury."

But THE COURT overruled the motion, and rendered judgment for the penalty of the bond and $3,000 damages; the said debt and damages to be released on the payment of $1,088.25 and costs.

[NOTE. This case, upon error, in the supreme court, was affirmed, Mr. Justice McLean delivering the opinion, in which he says: "The action being brought on a penal bond, under the Maryland practice, it was the province of the jury to assess the damages which the plaintiffs had a right to recover; and the judgment in the replevin suit was given in evidence, to show the amount of damages which the plaintiff had sustained. This was undoubtedly correct; and it is equally clear that the defendants had no right to go into any inquiry as to the evidence on which the verdict was rendered. The jury found in the replevin suit the amount of rent in arrear on which the distress was made; and this was the proper criterion of damages in that case. * * * It is equally clear that the court properly rejected all evidence under the plea of set-off. This was, substantially, an attempt to prove that there was no ground for the verdict and said judgment for damages, in the replevin suit. The offer was not to show that such judgment had been satisfied, but that it ought never to have been given. This evidence was also inadmissible, on the ground that it relates to different parties from those in the present suit." 15 Pet. (40 U. S.) 115.]

Case No. 8,246a.

LENOX v. LENOX.

[1 Hayw. & H. 11.] [1]

Orphans' Court, District of Columbia. Jan. 16, 1841.

WILLS — LEGACY VESTED — DEATH OF LEGATEE — LAPSE.

1. Where in a will a desire is expressed that a legatee should pursue his studies and receive the best education the country could afford, and the expense of the same should be chargeable to the estate, until he should arrive at the age of 21 and be entitled to his proportion, and during the period between his arrival at the age of 21, and the division and the distribution of the estate, he be allowed a sum sufficient for his prudent support, to be after deducted from his proportion, it was *held* that the testator intended that the proportion of such legatee should become vested at the death of the testator, payable at a future day.

2. When such legatee died before the time appointed for the distribution of the estate, leaving a last will and testament by which he bequeathed to his widow the proportion he would have received if he had lived until the time of the distribution, it was *held* that the legacy to the husband did not lapse, and that the widow was entitled to it.

The petitioner [Mary L. F. Lenox,] was the widow of William A. Lenox, who died, leaving a last will and testament, in which he bequeathed to her all of the personal estate left to him under the will of his father, Peter Lenox. She claims that she is entitled to receive under her husband's will the share her husband would have received as one of the distributees under his father's will. The other legatees under the will of Peter Lenox filed a caveat claiming they were the sole legal heirs and distributees of the deceased William A. Lenox, and claiming the whole of the residue of the estate of Peter Lenox, now in the hands of the executors of the said Peter.

The substance of the will of Peter Lenox will appear in the opinion.

Joseph H. Bradley, for petitioner.
Brent & Brent, for caveators.

The case was argued by the counsel on both sides before the judge of the orphans' court, NATHANIEL P. CAUSIN, and EDWARD N. ROACH, Register of Wills.

THE JUDGE. In this case the executors of Peter Lenox, being ordered by the court to make distribution of his estate under the will, the widow of William claims to be entitled, under the will of her husband, to his proportion of his father's estate. It is contended by the executors of Peter Lenox that as the said William died before the time appointed in the will for the distribution of said estate, the legacy to him lapsed, and was not transmissible to his representatives, and that therefore her claim is null and void.

Courts of equity (and courts of law also) will always construe wills agreeably to the intention of the testator, if such intention be not contrary to and inconsistent with the rules of law. The intention of the testator is to be derived from the words used in the will; and in the construction of ambiguous expressions, we are told that the situation of the parties may very properly be taken in view; the ties which connect the testator with his legatees; the affection subsisting between them; the motives which may reasonably be supposed to operate with him, and influence him in the disposition of his property; are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them. Throughout the will a disposition is evinced to secure for testator's family a liberal support. The legatee in question was his eldest son; a desire is expressed in the will that he and testator's other son, Walter, should pursue their classical and other studies, and receive the best collegiate education that the country could afford, and that the expense of the same, together with their maintenance, should be chargeable to the estate until they should, respectively, arrive at the age of twenty-one, and be entitled to their separate proportions thereof, and, during the period between their arriving at the age of twenty-one, respectively, and the division and distribution of the estate, they should be allowed therefrom a sum sufficient for their prudent support, to be afterwards deducted from their separate proportions. Could stronger language be used to convey the idea that the testator intended the gift as debitum in praesenti, solvendum in futuro? If, as is argued, the legacy lapsed in consequence of the death

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

of the said William before the time named for the distribution, how could the amount which was to be allowed him, if over twenty-one at his death, for a support after coming of age, and before the distribution, be deducted from his separate proportion? If the legacy lapsed, his representatives at the distribution were entitled to nothing. What then would be the situation in which the executors would find themselves if, as we will suppose, some five or six years had elapsed after the said William arrived at twenty-one, before his death, under the will, the time not having arrived for distribution, the executors were bound to allow a sum sufficient for his prudent support, and an intimation is given them that if he died before distribution, the legacy will lapse—his representatives will be entitled to nothing? From what fund then is to be deducted the amount paid should such an event occur? To whom are the executors to look for this sum? Might they not hesitate to comply with the directions of the will—could the testator, judging from the whole tenor of the will, so strongly manifesting in every part a desire to look after the comfort and promote the welfare of each and every member of his family, have intended thus to deal with his child and executors? By no means; a fund is named of which the amount is to be deducted; out of this, and this only, it can be taken. There is no such fund unless each child has a separate proportion; he could not have a separate proportion if the legacy lapsed; therefore it was not the intention of the testator that it should fail, but that it should vest at his death, to be reduced into possession at a future time mentioned in the will. Again, the testator gives and bequeaths all his stocks, whether bank, insurance or corporation, to his aforesaid children, share and share alike, but no distribution shall be made until the youngest child shall be of age; or, in other words, that he intends that each and every child named in his will shall be entitled at his death to his proportion of said stock, the possession, however, not to be enjoyed until the time specified; such further appears to have been the intention of the testator from the fact of his not having inserted in the will words (and it is usual when such an intent exists to make it known by language clear and not liable to misconstruction) going to show that only those would be entitled who should be in esse at the time named for the distribution, as for instance: "I give and bequeath all my stock, &c., not to my aforesaid children, but to such of them as shall be living when the distribution takes place." The intention then would clearly seem to favor the claim of the representative of the legatee. It remains to ascertain whether that intention is contrary to or inconsistent with the rules of law.

If the bequest is made payable at a future period, the question arises whether it is contingent and depending upon the event of the legatee being in existence at the time, or whether, in case of his previous death, the right to it is so vested in him as to be transmissible to his representatives. All the authorities to which reference has been had agree that the time being annexed to the substance of the gift as a legacy, "if" or "when" one shall attain twenty-one, it will not vest before that contingency happen, this is a condition annexed to the legacy and the legatee is entitled only upon the fullfilment of the condition, but if the time is annexed to the payment, if complete words of gift direct the executors to pay, the other words only fix the time of such payment, then the legacy vests, and is transmissible as a legacy to be paid at twenty-one. This I conceive to be the case in the present instance; the legacy vested at the testator's death, not to be reduced into possession, however, until the time specified for the distribution to take place, and not being contingent, but vested, the legatee having died before distribution, his representative is entitled to the amount which he would have received had he not died before the happening of that event. In 3 Durn. & E. 41, one Michael Lea devised certain premises to Thomas Lea and Edward Johnson, and their heirs and assigns, to hold to them and their heirs until Michael Lea, second son of his nephew Thomas, then about thirteen, should attain the age of twenty-four, on condition that they should, out of the rents and profits during that time, keep the building in repair; he then devised to Michael Lea, his great-nephew, when and so soon as he should attain the age of twenty-four, the premises in question. Said Michael Lea attained the age of twenty-one, but died under twenty-four, intestate, leaving Thomas Lea, the defendant, his brother, heir-at-law. It was contended that the words "when" and "so soon as," operated as a condition precedent to Michael Lea taking any interest under the devise, and the event of his attaining the age of twenty-four not having happened, the condition was defeated, and consequently his heir-at-law could take nothing. That the words had the same meaning as "if said Lea shall attain, &c.," and "if" was expressly determined to raise a condition precedent. The only question is whether, in the event of Michael Lea dying before he attained the age of twenty-four, this was a vested interest in him descendible to his heir-at-law, and consequently whether a title is derived to the defendant who claimed under him. I conceive that there can be no doubt on this question. It has been argued that it depended on a condition precedent, and that not having happened, that the estate never vested in Michael Lee, and certainly the consequence contended for would follow if this were a condition precedent. The only case cited in support of it is that of Brownsend v. Edwards, but it must be remembered that the words there are very different from the present—there it was, "if he should attain the

age of twenty-one." But the words in this case only denote the time when the beneficial interest was to accrue. But the question does not depend on argument merely. It has been settled ever since the time of Lord Coke —the first case on this subject is in 3 Coke, 19 (Boraston's Case), in which the words were, "when my son shall attain the age of twenty-one." There the court held the remainder was executed in the son immediately after the death of the testator, and that it did not rest in contingency, and that the words "when" and "then" only denote the time when the remainder shall take effect in possession, for when these adverbs refer to a thing which must of necessity happen, then they make no contingency. The same doctrine is found in the case of Mansfield v. Dugard, 1 Eq. Cas. Abr. 195. The last case on the subject is Goodtitle v. Whitby, 1 Burrows, 228. That was a devise to trustees to lay out the rents and profits of the devised premises for the maintenance, education, bringing up, and putting forth into the world of Thomas and John Hayward, sons of the testator's sister, during their minority, and when and as they should respectively attain the age of twenty-one, then to the use of the said sons of his sister and their heirs equally. The testator made the two trustees his executors. One of the testator's nephews died under the age of twenty-one, and the question was whether, as he did not live till the time when the estate was to come into possession, it was a vested remainder. The court, after argument, decided that it was, and Lord Mansfield recognized Boraston's Case and the case of Mansfield v. Dugard, supra, adding that these words could not operate as a condition precedent, but as giving an absolute interest in the fee, and denoting the time when the remainder was to take effect in possession.

Justice Ashhurst, in this case, comes to the same conclusion; he remarks further, "this is like the case of a legacy to be paid when the party attains the age of twenty-one—that is a vested legacy." Justice Goore further remarks, that this construction is consonant to the testator's intention, for otherwise, had Michael Lea left any issue they would not have taken anything under the will; it was doubtless the testator's intention that Michael Lea and his children should take the whole.

Thus it will be seen what construction has been placed upon the words "until when" and "so soon as," in the preceding cases. It has been decided, that in gifts of personal estate, or legacies, it is the same. Here I conceive that complete words of gift directed the executors to pay—"I give and bequeath all my stocks of every description, whether bank, insurance or corporation, to my aforesaid children, share and share alike, but no distribution shall be made until the youngest child shall be of age;" in other words, to vest at the death of the testator, to take effect in possession when the youngest child should come of age,—not to vest in contingency, to be enjoyed by those and those only who should be living at the appointed time for distribution. In view of all the circumstances, equity, not unaccompanied, but calling to her support the decisions in courts at law, would seem to favor the claim of the widow of said William, and declare, as the decision of this court, that the legacy did not lapse by his death, but vested in him on the death of the testator, and that his wife is entitled, under his will, to the proportion he would have received had he lived till the time of distribution, or, in other words, the legacy of William Lenox did not elapse, but vested at the death of the testator, and was therefore transmissible.

An appeal was taken to the circuit court, but the appeal was not prosecuted.

Case No. 8,246b.

LENOX et al. v. NOTREBE et al.

HAMILTON et al. v. LENOX et al.

[Hempst. 225.] [1]

Superior Court, Territory of Arkansas. Feb., 1833.

RECEIVER — WHEN APPOINTED — ACTUAL POSSESSION OF REAL PROPERTY — EQUITY — PURCHASE BY TRUSTEE OF THE TRUST ESTATE — BOND TO PREVENT REMOVAL—WHO BOUND.

1. The application for a receiver pending a litigation is regulated by legal principles, and addressed to the sound discretion of the court, and one will generally be appointed when there is danger that the subject-matter of controversy may be wasted and destroyed, impaired, injured, or removed, during the progress of the suit.

2. Where several persons reside together, and have a joint possession of property, the law casts the actual possession upon the legal owner.

3. A court of equity converts any one who intermeddles with the property of an infant into a trustee for such infant; and a trustee cannot buy an outstanding legal title to the prejudice of his cestui que trust.

4. A bond in chancery cause to prevent the removal of the property in litigation beyond the jurisdiction of the court, and to have the same forthcoming to abide the final order and decree, creates a personal obligation against the obligor merely, and his sureties are not bound for the acts of any other person, or acts committed after his death.

[This was a suit by John Lenox and Hewes Scull, as administrators of William Lenox, deceased, against Frederick Notrebe, Mary Ann Hamilton, and Margaret Hamilton, infants, etc., on original bill; and Mary Ann Hamilton and Margaret Hamilton, infants, etc., by their guardian ad litem, against John Lenox and Hewes Scull, as administrators of William Lenox, deceased, and Frederick Notrebe on cross-bill. Heard on motion for the appointment of a receiver.]

Before CROSS and CLAYTON, JJ.

CLAYTON, J. The original bill in this case was filed by William Lenox and wife, both

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

now deceased, to divest the legal title of certain property therein mentioned out of the defendents, the Hamiltons, then four in number, to have the bill of sale under which they claimed declared void, and to have the title vested in, and the property decreed to, the complainants. The defendants, the Hamiltons being still infants, filed a cross-bill by their guardian ad litem for the discovery of certain facts necessary to their defense of the original bill, and prayed that Lenox may be compelled to give bond not to remove the property, and to have the same forthcoming to abide the decree. The answer to the cross-bill states the death of Mrs. Lenox and of two of the heirs of Hamilton, and sets up a title to the property in question upon two grounds distinct from those stated in the original bill. To determine upon this motion for the appointment of a receiver, it is not necessary to consider the title to the property, or to discuss the merits of the cause. The material affidavit upon which this motion is made, states the administrators of William Lenox, deceased, have failed to inventory the estate and personal property, including the negroes mentioned in the original and cross-bill, in this case, as the property of William Lenox, deceased, and that as the representatives of said William Lenox, deceased, they do not hold themselves responsible for the property mentioned in said bills. The application for a receiver is addressed to the sound discretion of the court, regulated by legal principles, and is exercised by the courts upon many occasions with great benefit to the parties. It is particularly serviceable when there is danger that the subject-matter of the controversy may be wasted and destroyed, impaired, injured, or removed during the progress of the suit. The object is to secure the fund for the party found upon final hearing to be entitled, and to produce as little prejudice as possible to any of those concerned. When one party has a clear right to the possession of property, and when the dispute is as to the title only, the court would very reluctantly disturb that possession. But when the property is exposed to danger and to loss, and the party in possession has not a clear legal right to the possession, it is the duty of the court to interpose and to have it secured. Who is legally entitled to the possession of the property in this case? It will be borne in mind at the time of filing the original bill, it appears from the papers in this cause, that the complainants, Lenox and wife and the infant children of Hamilton, the defendants here, resided together, the possession was joint, and the law would cast the actual possession upon the legal owners of the property. Who were at that time the legal owners? The infant children of Hamilton claiming under Notrebe's deed of conveyance. The very object of the original bill was to divest them of the legal title, to have the deed of Notrebe rescinded, and the property decreed to the complainants. The bill was filed in right of Mrs. Lenox, who had been the wife of Hamilton, and who was the mother of the defendants. In December, 1828, Mrs. Lenox and two of the defendants died, and the suit since has been prosecuted against the remaining defendants without any administration upon her estate. After the death of the mother, the two surviving defendants in February, 1829, ceased to reside with William Lenox, and he kept possession of the property. He had not the legal right to do so. The law cast the right of possession with the legal and apparent right of property, and it was his duty to have given up the possession to them. Having failed to do so, he became a trustee as to the legal estate for them, for a court of equity converts any one who intermeddles with an infant's property into a trustee for such infant. The answer to the cross-bill states that in January, 1831, the complainant Lenox purchased an outstanding legal title to the same property, and claims to hold it by virtue of this purchase. It is believed that upon well-settled principles this was a breach of trust upon his part, and that an implied trustee cannot purchase an outstanding legal title and claim the trust property under it, at least until he restores possession to the party for whose use as trustee he holds. At the time of the death of Lenox, he held possession in this manner, and so confident were his administrators that he had not either the right of property, or the right of possession, that they refused to return the property in their inventory as his, and state expressly, according to the affidavit, that they do not hold themselves responsible for it, as his administrators. If they are not responsible for it as his administrators, they are not, in the present aspect of the cause, responsible for it at all. They are only before the court in their representative character, and if it should ever become necessary to proceed against them individually, they must be before the court in their individual character. If they do not hold the property as administrators, they have no right to the possession, so far as this court can see from the facts before it. They may waste and destroy it, and at the end of this suit the party declared entitled may have to institute new proceedings against new parties, and travel the weary round of a chancery cause a second time. The appointment of a receiver will prevent this, and will have no other effect than to secure property which seems to be cast upon the world without any legal protector. The only circumstance which has interposed the slightest obstacle to our coming to the conclusion to appoint a receiver in this cause, grows out of the bond executed by William Lenox, in his lifetime, to have the property in question forthcoming to abide the final decree in this cause. The words in the condition of the bond are these: "Now if the above bound William Lenox, shall keep said

negroes and property safe, and not remove them beyond the jurisdiction of this territory, until the final hearing of this cause, and to abide the final order and decree of the court in this suit, then this obligation to be void." This obligation is merely personal. It rests upon and binds William Lenox alone. His securities in the bond are not bound for the acts of any other person. If he committed no breach, they would not be bound in our opinion for a breach committed by any third person after his death. But if we are mistaken in this opinion, enough doubt hangs over the matter to authorize the court to interpose and place the property beyond doubt, to render the parties safe instead of leaving them to uncertain controversy in a court of law. We think, therefore, the motion ought to be allowed, and a receiver appointed.

Order. It is hereby directed and ordered that Benjamin Desha be appointed receiver in this cause, upon his entering into bond with Frederick Notrebe, William Cummins, Samuel J. Hall, and Emzy Wilson, as his securities in the penal sum of $10,000, payable to William Field, the clerk of this court, and his successors in the office of clerk of this court, for the use and benefit of such person or persons as this court may finally decree to be entitled to this property, and upon his so giving bond and security within sixty days from this time, his power and authority and duty as receiver in this cause shall be full and complete; and it shall be the duty of said Lenox and Scull to deliver up all the property in the proceedings mentioned, together with the issue and increase of the slaves and stock or such part thereof as is in their possession, to the said Desha, upon his producing to them a certified copy of the order.

[The court subsequently dismissed the bill and granted the prayer of the cross-bill. Case No. 8,246c.]

Case No. 8,246c.

LENOX v. NOTREBE et al.

HAMILTON et al. v. NOTREBE et al.

[Hempst. 251.] [1]

Superior Court, Territory of Arkansas. July, 1834.

EQUITY—BILL TO SET ASIDE DEED—HOW FRAUD ALLEGED AND PROVEN—PURCHASE BY TRUSTEE OF THE TRUST ESTATE — FRAUDULENT CONVEYANCE—CREDITORS — DOWER IN TRUST ESTATE—PROMISE TO CONVEY—RES JUDICATA—PRACTICE—EFFECT OF ANSWER AS EVIDENCE — ANSWER OF CODEFENDANT.

1. In the absence of fraud or mistake, distinctly alleged and clearly proved, a court of equity will not set aside a deed regularly executed.

2. A deed, or judgment, or decree, of twenty years' standing, may be set aside for fraud; but the fraud must be clearly alleged, and satisfactorily proved, either by positive or circumstantial testimony.

3. An equity is not subject to execution, unless by statute.

4. A trustee cannot become the purchaser of the estate or property of which he is trustee, nor can he buy an outstanding claim or title for his own benefit; and it will enure to the benefit of the cestui que trust.

5. A fraudulent conveyance is good as between the grantor and grantee, and their heirs and representatives, but is void as to creditors and purchasers.

6. Infants cannot be prejudiced by misstatements or omissions of their guardian in his answer, and equity will decree according to the facts of the case.

7. The answer of one defendant is not evidence for or against a codefendant.

8. An answer responsive to the bill is evidence against the complainant.

9. A widow is nor dowable of a trust estate.

10. A promise by a purchaser after a sheriff's sale to reconvey property purchased by him is without consideration, and he cannot be required to perform the agreement.

11. Persons not parties or privies to a judgment are not bound by it.

[This was a suit by John H. Lenox, surviving administrator of William Lenox, deceased, against Frederick Notrebe and others on original bill; and Mary Ann Hamilton and Margaret Hamilton, by their guardian, against Frederick Notrebe and others, on cross-bill. A receiver was appointed in this case. Case. No. 8,246b.]

Bills in chancery.

Before JOHNSON, CROSS, and LACY, JJ.

LACY, J. The complainants filed their original bill to set aside and cancel a mortgage which they allege was executed by James Hamilton in his lifetime to Frederick Notrebe, and also to set aside and cancel a deed of sale made by said Notrebe to the legal representatives of said Hamilton; they pray all the title and interest of the property contained in said deed be vested in themselves. The bill states that Hamilton became indebted to Notrebe in the sum of about $500, for which he executed a mortgage on two slaves, Phillis and Caroline, which they have fully satisfied. It charges that all the property belonging to Hamilton was exposed to sheriff's sale in 1825, and that Notrebe became the purchaser for the sum of $220, and that he agreed that Hamilton might redeem the property one year thereafter, by his paying to Notrebe the purchase-money and interest, and also whatever else was owing by Hamilton to Notrebe. It alleges that Drusilla Hamilton during her widowhood, and Lenox since his intermarriage with her, have fully paid off and discharged Notrebe's debt. Notrebe and the heirs of Hamilton are made defendants to the original bill. Notrebe answered, and admitted generally the allegations set forth. The fund by which the payment was made, is alleged to have been a gift from Sarah Blanton to Drusilla Hamilton, for her sole benefit and use, and the remainder out of individual means of Lenox. The heirs answered by their guardian, and denied the al-

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

legations generally and specifically. It is stated by them, after the purchase by Notrebe of Hamilton's personal estate at sheriff's sale, it was agreed between Hamilton and Notrebe that the latter was to reconvey the property to them by Hamilton's paying whatever might be owing to Notrebe; that Hamilton in his lifetime never did pay off the debt and take a conveyance to himself, nor did he redeem the property for their benefit; that in 1826 their relative, Sarah Blanton, furnished to their mother, Drusilla Hamilton, now Drusilla Lenox, $1,100 for their sole use and benefit, and upon express conditions that Notrebe's bill of sale was to be paid off with it, and all the property therein contained conveyed to them. Accordingly the said Drusilla did pay the $1,100 to Notrebe for their use, and took a deed of conveyance, which was regularly acknowledged and recorded in 1826, conveying all the right, title, and interest to the legal representatives of James Hamilton, deceased. They afterwards filed a cross-bill against Lenox and Notrebe (his wife, Drusilla, having previously departed this life), setting forth the same material facts as contained in their answer, and prayed that the slaves be surrendered to their guardian for them, and that a decree be rendered in their favor, for the rents and profits accruing upon the estate. Lenox answered, and set forth in addition to his original bill, that the money advanced for the redemption of the mortgage and bill of sale was furnished by his wife and himself individually, and that a judgment had been rendered in the state of Mississippi against him, in favor of Sarah Blanton's administratrix, for the $1,100 furnished his wife Drusilla, to pay off Notrebe's debt, and on that judgment suit had been instituted against him in the Arkansas circuit court, and judgment obtained, for which he was then liable. He also claimed title to the same property, by a bill of sale executed by James Hamilton to Pugh, in 1825, and prior to the sale by the sheriff to Notrebe. Pugh conveyed to William Rainey in 1825, and Rainey to the complainant in 1831. It was admitted that Mrs. Lenox and her two infant children, Sarah E. and Isaac Francis, departed this life in December, 1828. Notrebe answered, and admitted the conveyance to Hamilton's heirs and representatives, and the full satisfaction of his debt. He stated the $1,100 was paid by Mrs. Blanton, for the benefit of the heirs of Hamilton, and that he made the conveyance to Hamilton's legal representatives. The proof in the cause clearly demonstrated that the $1,100 was the consideration of the deed from Notrebe to Hamilton's representatives, and was furnished by Sarah Blanton, for the sole use and benefit of the children and representatives of James Hamilton, deceased, and also that Mrs. Hamilton herself manifested some displeasure at the conveyance not having been made to the children. The object of the advancement, as shown by the testimony, was to vest in the children all right and title to the property.

The pleadings in this cause present considerable confusion and some contradiction. The parties seem to have changed their ground in their complaint and defence, and herein the court have found no little embarrassment in examining the record. The questions presented are numerous and highly important, and we have given to them a careful consideration. In their investigation, the court have derived much assistance from the highly satisfactory arguments of all the counsel concerned. The complainants' bill is mainly a claim to set aside a deed or bill of sale, regularly executed and recorded, and to vest title in themselves, without charging expressly that the conveyance was made through mistake or fraud. It is difficult for the court to conceive by what means they propose to effect their object. It is not pretended that Notrebe, in conveying the property to Hamilton's representatives, acted fraudulently. The proof shows that he was governed by the most scrupulous honor, that his object was to protect the rights of the children, without prejudicing the interest of creditors. And hence, though he knew that it was the wish and intention of Mrs. Blanton and Mrs. Hamilton to convey the property to the children by name, he chose to employ descriptive terms in the conveyance, for fear they might by possibility be injured. Was it by mistake that the term "legal representatives" was used in the conveyance? Certainly not; for he had a full knowledge of all the facts, and even incurred the expense and trouble of consulting counsel upon the subject. It is contended that the conveyance was improperly made. In what way? The court is not aware that a deed or bill of sale can be impeached, except for mistake or fraud. The defendants claim the property as the legal representatives of Hamilton, and they show a deed or bill of sale, regularly executed and recorded, to protect their title. Even where fraud is alleged to set aside a deed, it must be satisfactorily proven, either by positive or circumstantial testimony. This doctrine is so fully and ably examined in the leading case of Hildreth v. Sands, 2 Johns. Ch. 36–56, by Chancellor Kent, and the authorities there cited are so numerous and conclusive, that it is deemed unnecessary to refer to others.

A deed, or even a judgment, or a decree of a court of chancery of twenty years' standing, can all be set aside on the ground of fraud; but then it must be clearly alleged in the bill, and supported by proof. In this case there is no charge of fraud, nor is there any attempt to prove it. The defendants are clothed with the legal title, and until that title is destroyed by a superior equity, they are the rightful owners of the estate. It is not denied but what they are the legal representatives of Hamilton, and if so,

all the right, title, and interest of the estate attached immediately to them, on the execution of Notrebe's bill of sale. It is contended that the purchase by Notrebe, at the sheriff's sale, conveyed no more than an equitable interest, and that the mortgagee held the property subject to redemption. An equity is not subject to execution, unless by some particular statute. This principle is too familiar and salutary to require argument or authority to sustain it. Hamilton's legal estate was sold by the sheriff, and Notrebe became the purchaser; and that estate, whatever it may be, the defendants are in law and equity entitled to. It is difficult to conceive how it can be considered a mortgage, when the complainant does not charge in his bill that it was one, though the defendants treat it in the character of a mortgage in their answer. It was, to all intents and purposes, a legal sale, and a legal title was conveyed. And if there was a latent equity, constituting it a mortgage, even a court of chancery would never consider it so, unless for beneficial purposes. This sale was good against Hamilton and his heirs, and the agreement of Notrebe afterwards to reconvey did not change its character, though it might have incumbered it with conditions. Both the complainant and the defendants claim through the purchase of Notrebe, and it is good against them both and all the world. It can be impeached only on the ground of fraud or mistake by creditors or purchasers. Is the present complainant a creditor or purchaser? Can a court of equity view him in that light? When did Hamilton's estate become indebted to him, or at what time did he constitute himself creditor or purchaser? The property remaining in Hamilton's possession, or coming to him, could not make him the one or the other. It might and did constitute him a trustee. 1 Atk. 489. A trustee cannot acquire any advantage by possession of property, but holds it for the benefit of his cestui que trust. 2 Johns. Ch. 30; 1 Dow. 269; 1 Ch. Cas. 191; 1 Ball & B. 46, 47; 2 Johns. Ch. 269. It is a settled principle, that a trustee can gain no benefit by any acts done by him as trustee, but that it shall accrue to him for whom he holds. He is not permitted to become a purchaser of part or the whole of the estate, for which he is trustee for a valuable consideration. Lord Hardwicke determined that a trustee could not buy at a sale by auction, and Lord Eldon has followed that decision. The reason is apparent. So jealous is the court of a trustee's taking advantage of his situation to benefit himself, that he could not even purchase property which the owner refused to sell to the cestui que trust. So a trustee who purchases a mortgage or judgment which was a lien upon the trust estate, is not allowed to turn such purchase to his own advantage. 1 Madd. 90-93; 1 Johns. Ch. 27; 2 Johns. Ch. 252. In 2 Caines' Cas. 183, it is decided that a trustee cannot purchase an outstanding claim or title for his own benefit. If this doctrine be true, and of that there can be no doubt, then what sort of title did Lenox acquire, when holding the property for Hamilton's children, by this purchase from Rainey? If the purchase from Rainey was fair and for a valuable consideration, it could not avail the complainant any thing, for he was holding as trustee for the defendants, and hence he could take nothing by his purchase, and it would enure to their benefit. How much stronger is the case against him when he comes into equity and sets up a title which, by his own showing, is fraudulent on its face, and that, too, to defeat the rights of infants, acquired for a valuable consideration. Besides, this fraudulent deed or bill of sale was executed long after the suit was commenced, and even after the filing of the cross-bill, and for the avowed and express purpose of defeating a legal and equitable title.

The defendants claim as purchasers for a valuable consideration, which is proved to have been advanced and paid to Notrebe in discharge of his demand against their ancestor, and this title is attempted to be disturbed and overthrown by a voluntary conveyance, fraudulently entered into, to defeat the rights of innocent purchasers or creditors. The rule of law, that a fraudulent conveyance between the grantor and grantee is obligatory upon himself and his heirs, so far from prejudicing the right of the infants before the court, will shield and protect them. They are purchasers, and claim the estate as such, and do not derive title by descent. The conveyance of Rainey to Lenox, as to them, is fraudulent and void. But it is said that Notrebe and the defendants treated the sheriff's sale as a mortgage in their cross-bill and answer, and it being such will enable the complainant, in right of himself and his wife, to take the estate. The bill nowhere charges the sheriff's sale, in express terms, to be a mortgage. It is true it often has reference to a mortgage, but when that is the case, it is confined to the mortgage of the two slaves, Phillis and Caroline. Infants cannot be prejudiced by the misstatements or omissions of their guardian in his answer. Hence a court of chancery will decree according to the facts of the case. 3 Johns. Ch. 367. The answer of one defendant cannot be evidence for or against a co-defendant. [Clark v. Van Riemsdyk] 9 Cranch [13 U. S.] 153; [Leeds v. Marine Ins. Co. of Alexandria] 2 Wheat. [15 U. S.] 380. In this instance, the original answer of Notrebe responds in general terms affirmatively to the complainant's bill. The defendants, not deeming it satisfactory and complete, asked in their cross-bill for a full disclosure of all the facts, and hence his answer may be considered an amended answer to the complainant's original bill, and although it

is not evidence against his codefendant, is nevertheless evidence against the complainant. Field v. Holland, 6 Cranch [10 U. S.] 8; 2 P. Wms. 453. Notrebe's answer confirms the other testimony in the cause, which is abundant without it, and therefore there can be no doubt that the fund that redeemed the property sold at the sheriff's sale was advanced upon the express condition that it was to be conveyed to the children of Hamilton, and the deed shows upon its face by whom and for what purposes it was so advanced. If the property was held as collateral security subject to redemption, before Lenox and wife could ask a conveyance, they would have to show that they had actually paid the incumbrance. The solvency or insolvency of the estate can make no difference, for the view here presented considers the infants as purchasers, and the complainant and wife claiming as representatives of the estate. Besides, the deed from Notrebe to the children was procured through the agency of Mrs. Hamilton, and she entirely approved of its contents. Whatever right she had or possessed before that time was, by that conveyance, relinquished and given up to her children, and her husband, who claims through her, can in no possible event derive title. The widow cannot be endowed of a trust estate. 1 Har. Ch. 7, 22. The property remaining with Hamilton during his lifetime, and with her afterwards, and coming finally into the possession of Lenox, did not at all change the nature of Notrebe's purchase. He was the legal owner, and no one could possibly have any title to it, except in equity. As the case stands, Notrebe could not have probably been compelled by any one to have reconveyed, for his promise was made after the sale and without consideration; and above all, there can be no pretence that he could be compelled to convey to Lenox and wife. If creditors have lain dormant and lost their rights, or can even yet assert them, that cannot be any reason why those should be preferred who have no shadow or pretext of right in their favor. The estate vested in the defendants is both a legal and an equitable one, so far as the complainants are concerned; and they will not be permitted to disturb it without showing right or title in themselves. It is no answer to say that a judgment is rendered against Lenox by the administratrix of Sarah Blanton, deceased, which remains yet unsatisfied and enjoined by the complainants. That record could not be evidence in any point of view against the defendants, for they were neither privy nor parties to it (1 Starkie, Ev. 217); but if it even could be, still it would weigh nothing against the mass of testimony in the cause. Though the judgment and the purchase by Lenox of Rainey, after the filing of the cross-bill, throw a dark and dishonoring shade over the whole of this transaction, and demonstrate its true nature and complexion, yet the court will forbear, and not indulge in expressions of harshness and severity which might be called for, and would be justified on this occasion,—requiescat mortuum manes in pace.

Every aspect in which the court is capable of viewing or considering this subject, constrains them to believe that both the law and equity of the case are with the defendants. It will, therefore, be decreed, that the original bill be dismissed with costs, and the prayer of the cross-bill granted. Decreed accordingly.

LENOX (SCOTT v.). See Case No. 12,538.
LENOX (UNITED STATES v.). See Case No. 15,592.

Case No. 8,247.

LENOX et al. v. WILSON.

[1 Cranch, C. C. 170.] [1]

Circuit Court, District of Columbia. June Term, 1804.[2]

CONFLICT OF LAWS—NOTES AND BILLS—LEX LOCI CONTRACTUS.

The indorser at Alexandria, of a foreign bill of exchange, to a merchant in New York, is only liable for damages according to the law in force in Alexandria.

[See Bank of Illinois v. Brady, Case No. 888.]

This was an action by the holder against the indorser of a foreign bill of exchange, indorsed by the defendant [William Wilson], in Alexandria (where the damages fixed by law are ten per cent.), to the plaintiff [Lenox & Maitland], who resided in New York, where the damages were fixed by law at twenty per cent. The jury gave their verdict for the New York damages.

A motion by the defendant for a new trial, on the ground of excessive damages, was overruled by THE COURT, on the plaintiffs' releasing the difference, which was about 444 dollars.

Mr. Simms, for plaintiff.

E. J. Lee and C. Lee, for defendant.

[NOTE. This case, upon error, in the supreme court, was reversed, Mr. Chief Justice Marshall delivering the opinion of the court, in which he held that under the Virginia statute the charges of protest constituted an essential part of the debt, and should be set out in amount in the declaration. The declaration in this case declared for the charges of protest, but did not give the amount. Upon this ground—that the declaration does not state the demand with certainty—the judgment was reversed. 1 Cranch (5 U. S.) 194.]

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

[2] [Reversed in 1 Cranch (5 U. S.) 194.]

Case No. 8,248.

LENOX v. WINISIMMET CO.

[1 Spr. 160; [1] 11 Law Rep. 80.]

District Court, D. Massachusetts. May, 1848.

COLLISION — DARK NIGHT — CROWDED HARBOR — COMPASS — VESSEL AT ANCHOR — NO LIGHTS — BOTH IN FAULT.

1. It is culpable negligence in a ferry boat, to run on a dark night, through a crowded harbor, relying solely on a brass compass, which would not traverse so well as a lighter one, which was on board at the time.

2. By the maritime law, a vessel at anchor, in a thoroughfare, in a dark night, is bound to exhibit a light.

3. In a case of collision, both vessels being in fault, the aggregate damage and costs were equally divided.

[Cited in The Mary Patten, Case No. 9,223; The City of Hartford, Id. 2,750; Vanderbilt v. Reynolds, Id. 16,839; The Pennsylvania, 15 Fed. 817.]

In admiralty.

SPRAGUE, District Judge. The schooner Tiberius, while lying at anchor between East Boston and the navy-yard at Charleston, was, at about 10 o'clock p. m., on the 8th of September last, run into by the steamer Winisimmet, plying as a ferry boat between Chelsea and Boston.

The first question is, what was the position of the Tiberius? Upon this point there is a distressing and irreconcilable conflict of evidence, and the best conclusion at which I can arrive is, that she lay somewhere from three hundred to five hundred feet from the edge of the channel at East Boston, and from five hundred and fifty to seven hundred and fifty feet from a straight line, drawn from the ferry-ways in Chelsea to the ferry-ways in Boston. The Tiberius came to anchor, at that place, between 7 and 8 o'clock a. m., on the 8th, and lay there during the day, in full view of the steamer. To repel the inference of negligence from the Winisimmet's being so far from her usual track, it was proved by the respondents that the night was extremely dark, from clouds and fog, so that the boat, for the greater part of the distance, could be steered only by the compass; that there was very little wind, not exceeding a three-knot breeze, the water smooth, so that the compass would not traverse quickly, and the boat might vary her course from one to two points, before the compass would indicate a change in direction; and also, that the varying currents setting up the harbor, and into Charles and Mystic rivers, increased the difficulty. The steamer had two compasses, a brass and a wooden one. At the time of the collision, she was passing from Chelsea to Boston, and was steered solely by the brass compass; and it is proved by the testimony of Captain Reed, who commanded her at the time, that this did not traverse so well as the wooden one.

Considering the darkness of the night, the difficulties of navigation, and that there were vessels lying at anchor on both sides of the usual track of the steamer, and that those off the navy-yard were so near as to compel her to deviate from a straight course, I think she must be holden to the utmost care and vigilance, and that the omission to make use of the lighter compass, which was best adapted to the occasion, and which would have been the quickest to exhibit a deviation from the proper direction, and most likely to indicate her true course, must be imputed to her as culpable negligence.

The next question is, whether the Tiberius was also in fault. Between 7 and 8 o'clock, the officers and crew all turned in for the night, leaving no light. The general rule of the maritime law is, that a vessel lying at anchor, in a channel which is a thoroughfare, which other vessels have frequent occasion to pass, is bound to exhibit a light, when the night is dark. The Scioto [Case No. 12,508]. See the authorities collected in 1 Pars. Mar. Law, p. 192, note 3, and the following additional cases: The Mary Campbell, Stu. Adm. 225, note; The Miramichi, Id. 240; The Dahlia, Id. 242; Nelson v. Leland, 22 How. [63 U. S.] 54; The Louisiana, 21 How. [62 U. S.] 1.

By the evidence in this case it appears, that there is no uniform custom in Boston harbor, as to keeping a light. The larger vessels, and those engaged in the foreign trade, generally do so; but the eastern coasters, the class to which the Tiberius belonged, generally do not. Mariners have given different opinions, on the stand, as to the prudence or imprudence of a vessel lying without a light, in the position of the Tiberius. Most of the ship-masters and all three of the pilots who have been introduced, have strongly expressed the opinion that it was imprudent for a vessel to lie in that place, without a light; and considering that the Tiberius lay in the channel, at a place where, or at least very near which, vessels have frequent occasion to pass, and that she had seen the steamer plying as a ferry boat, during the whole day, and ought to have known that her usual time of running extended beyond the time of collision; and considering also the extreme darkness of the evening, I think it was not justifiable in the officers and crew of the Tiberius to go to rest for the night, exhibiting no light, and leaving no person on deck.

Both vessels, therefore, were guilty of negligence; and the rule in the admiralty in such cases is, that the aggregate damage to both shall be divided equally between them, as was decided by this court in the case of The Rival [Case No. 11,867]. As to the costs, each party will be decreed to pay one-half.

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

Case No. 8,249.

LENOX et al. v. WRIGHT.

[2 Cranch, C. C. 45.] [1]

Circuit Court, District of Columbia. June Term, 1812.

BILLS AND NOTES — NOTICE TO INDORSER — TIME ALLOWED—DELIVERY TO POST OFFICE.

Upon a note due 23d and 26th July, demand and notice after the 28th are too late; but demand and notice on the 27th is not.

[See Bank of Alexandria v. Wilson, Case No. 856; Bank of the Metropolis v. Walker, Id. 903.]

Assumpsit against the indorser of a promissory note due 23d and 26th July, 1809. The defendant lived in Georgetown, D. C., about three miles from the plaintiffs.

THE COURT instructed the jury that notice given to the defendant, or left at the post-office, after the 28th was too late, but refused to instruct the jury that demand and notice on the 27th was too late. The notice was not, in fact, put into the post-office in Washington until the 30th of July. Verdict for the defendant.

LENT (UNITED STATES v.). See Case No. 15,593.

Case No. 8,250.

The LEO.

[3 Ben. 569.] [2]

District Court, E. D. New York. Dec., 1869.

COLLISION IN A SLIP — PROPELLER'S SCREW—NOTICE—COSTS.

1. A canal-boat was moored at a bulkhead, by lines sufficient to enable her to withstand all the ordinary forces of wind and tide. A large propeller, with a screw 11 feet 9 inches in diameter, was lying at the pier, with her stern towards the canal-boat, and 40 to 75 feet distant. A short time before the sailing of the propeller, her engine was put in motion, making about 30 revolutions a minute. This was done without any notice to the canal-boat, and the current made by her screw parted the canal-boat's fasts, whirled her round in the slip three times, and drove her against the bulkhead with such force as to sink her: *Held*, that the propeller had no right to set in motion such a current of water, in a crowded slip, without, in some way, notifying vessels likely to be affected by it, so as to give them opportunity to protect themselves from it, by getting out extra fasts, and that the propeller was liable for the damages.

[Cited in The Daniel Drew, Case No. 3,565.]

2. The question being a new one, no costs were awarded against the propeller.

In admiralty.

O. Frisbie, for libellant.

J. K. Murray, for claimant.

BENEDICT, District Judge. This is an action brought to recover of the steamer Leo, the value of the canal-boat Almira, sunk in the slip at pier 16, in the East river, on the 13th of April, 1869.

As to the facts, there is little dispute. They are as follows: The canal-boat was moored at pier 16, and was there securely fastened to the bulkhead, by two strong lines, sufficient to enable her to withstand all the ordinary forces of wind or tide.

The Leo, an ocean propeller, having a screw 11 feet 9 inches in diameter, was lying, at the same time, at pier 16, her stern towards the canal-boat, and from 40 to 75 feet therefrom. On the 13th of April, which was the sailing day of the steamer, and about three-quarters of an hour before her sailing hour, the Leo, while moored as above described, started her screw, which was caused to revolve at the rate of about 30 revolutions per minute. The water was low, and this action of the screw threw a strong current of water directly towards the bulkhead, at which the canal-boat was moored, with sufficient force to part the lines holding the canal-boat, which was whirled around in the slip some three times, in spite of the efforts of the crew to check her, and then driven against the bulkhead, whereby she was so injured that she sank and was wholly lost. No notice, of any kind, was given from the propeller, of her intention to start her screw, but, as soon as those on board were notified that the canal-boat had broke loose, the screw was stopped—not, however, in time to prevent the accident which followed.

These facts present a novel question, as to the proper mode of using the large screws, which have, of late, to so great an extent, superseded side-wheels, as the propelling power of ocean steamers. It would appear, from the evidence in this case, that it is a usual precaution, adopted by ocean steamers in this port, just before starting for sea, to slowly work their engines for a while, in order to ascertain their exact condition, and insure their being in proper running order, when the ship proceeds to sea. With side-wheels, this action of the engines, while the vessel is fast in the slip, does not seem to have been attended with any considerable danger to other vessels in the same slip; at least, I have never known of any such cases, and feel quite confident that I should have known, if such had occurred with any considerable frequency. That no damage has arisen from this practice of the side-wheel steamers, is owing, no doubt, to the fact, that side-wheels, while they move only the surface of the water, are also near midship, and the force of the current caused by them is, therefore, much broken before it reaches the stern. But the screw is at the stern, and it there combines, at a single point, all the power which, in side-wheels, is distributed between the two wheels. It is, moreover, under water, and, when in motion, its necessary effect is, to drive a

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

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

column of water directly aft. This current of water, which acts with sufficient power to propel the large vessel at high speed, against the heavy head-seas of the ocean, of course, when the steamer is fast to the wharf, is driven aft the vessel with very great force, and, almost necessarily, involves danger to surrounding vessels, as the facts of this case, as well as those in the case of The Washington, 2 Marit. Law Cas. 23, clearly show. And a question might, perhaps, arise, as to the legal right of any vessel to set in motion, in the crowded slips of this port, a force so powerful. Such action is expressly forbidden in the river Thames. See Thames Conservatory By-Laws, 1860. But, upon the evidence in this case, the question is narrowed to determining whether such a force can be set at work, without giving previous notice to surrounding vessels, so as to enable them to protect themselves against it. To such a case, the maxim, "sic utere tuo, ut alienum non laedas," applies, and it must be held that, if the propellers have any right at all to turn their screws, when the vessel is fast in the slip, it is certainly accompanied with the duty of, in some way, notifying vessels likely to be affected, so as to give them the opportunity, by getting out extra lines, or otherwise, to protect themselves against the current, which must flow from the motion of the screw.

In the present case, it is not pretended, that any previous notice of intention to set the screw in motion was given by the steamer, and she must, accordingly, be held liable for the damage which ensued.

On account of the novelty of the question raised, I award no costs against the steamer.

Case No. 8,251.

The LEO.

[5 Ben. 261.] [1]

District Court. E. D. New York. June 24, 1871.[2]

COLLISION AT SEA—STEAMER AND SCHOONER—SPEED—FOG HORN.

1. A schooner was sunk by a steamer at night, some fifteen or twenty miles off Sandy Hook. The night was boisterous and dark, and, as the steamer claimed, foggy. The steamer was running six or seven knots an hour, although, as she claimed, an approaching vessel could not be seen more than a length ahead. No fog horn was blown on board the schooner, and she claimed that the night, though dark, was not foggy. *Held*, that the steamer was in fault in keeping up such a rate of speed in such a locality on such a night, whether it was foggy or not.

2. The schooner could not be held in fault for the omission to blow a fog horn, for the reason that a horn, if blown, would not have been available, on such a night, to give any useful notice to the steamer.[2]

In admiralty.

BENEDICT, District Judge. This is an action brought to recover the damages caused by the sinking of the schooner Saxon by the steamship Leo, in a collision which occurred some fifteen or twenty miles below Sandy Hook, on the night of the 13th of November, 1870.[3] The steamer, at the time, was bound to the southward, and the schooner was under double-reefed foresail and jib, running before the wind, which was south-southwest. The night was dark, and the sea high, and the wind a moderate gale. Both vessels were carrying the proper lights, and a proper lookout is proved by each vessel. The presence of the schooner was not known to those on the steamer till the vessels were close together, and the schooner was struck upon her port quarter before the engine of the steamer could be reversed. The effect of the blow was such that the schooner very shortly rolled over, but being loaded with lumber she floated, and the crew clung to her till morning, when they were taken off by a pilot-boat.

The charge against the steamship is that she was running in a dark and thick night, at too high speed and without a proper lookout. The defence is that there was a dense fog, and that the accident arose from the failure of the schooner to blow a fog horn.

The evidence, as to the presence of fog, and as to the darkness of the night, is conflicting, but I conclude from the weight of the evidence that the night was very dark and thick, so that lights of approaching vessels could with difficulty be seen at any considerable distance; and I hold the steamer to be in fault for keeping up her full speed on such a night, in such a locality, whether there was or was not fog. The assertion of the steamer is that an approaching vessel could not be discovered more than a length ahead, and yet she kept up her full speed, which was six or seven knots, although her master says she could have been kept on her course at a speed of two knots. After the collision she was more careful, and ran for some time under one bell.

By reason of this neglect to reduce her speed, the steamer must be held liable in this action. The only doubt I have had in the case is as to the liability of the schooner also, because of the failure to blow a fog horn. The answer to this on the part of the schooner is that although the night was dark and thick, there was no fog, and, consequently, no obligation to blow a fog horn.

I have examined the evidence with some nicety, and, looking at the whole case, am satisfied that the schooner cannot be held guilty of fault for the omission to blow a fog

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

[2] [Reversed in Case No. 8,254.]

[3] [The date of this collision was November 30, 1869. In the printed copy of Judge Benedict's opinion filed with the records of the court, the date is given as November 30, 1870, which has been changed with a pen to 1869.]

horn, for the reason that a horn, if blown, would not have been available, on such a night, to give any useful notice to the steamer. It is proved by the claimants to have been clear weather at 7½ p. m., when the steamer passed the lightship, the wind then blowing from the south and west, and freshening. At 10½ p. m. it was blowing heavily from south-southwest, and by 2 p. m. blew from north-northwest. At the time of the collision rain was falling, according to the evidence for the steamer, and the wind south-southwest. These circumstances are calculated to raise doubts as to the night being one to be properly termed foggy, but there is no doubt that it was a bad night. "About as bad a night as I ever saw," says the engineer of the steamship. The value of the fog horn signal must depend upon the weather, and the obligation to blow it cannot attach, if it be clearly shown that there were attending circumstances which would render it a useless precaution.

Doubts have been expressed as to the ability to hear a fog horn on a steamer at any time when the steamer is in full motion (The Bay State, 18 How. [59 U. S.] 92), but the truth I take to be that it depends upon circumstances whether the horn can be made of use. Under some circumstances, a hail even can be heard at a long distance by attentive ears on a steamer in full motion. Under other circumstances, a loud horn cannot be heard. On this occasion the night was undoubtedly boisterous. The evidence shows that the loudest hails made after the collision by those on the wreck, whose lives were apparently dependent on making themselves heard, failed to reach the steamship, although she must then have been near by, and at times still. The loud hails of the chief mate of the steamship directed to those on the wreck, were also unheard by them. They could not even hear the whistle and the blowing steam, both of which sounded loudly after the accident. These circumstances show quite plainly, to my mind, that a fog horn, if blown on the schooner, would have been of no use. The whistle of the steamer, which is shown to have been blowing while the schooner was approaching, was of no use, for it was not heard by the hands on the schooner till the steamer was on the point of striking them.

My conclusion, therefore, is that the schooner cannot be held guilty of fault for omitting to blow a fog horn, and that the steamship must be held solely responsible, because of her unlawful speed.

[A final decree awarding the libelant $10,849.41 damages and $416 costs was entered December 5, 1871. The case was again heard upon a question of taxation of witnesses' fees in Case No. 8,252. An appeal was taken by the claimant, and the decree above reversed by the circuit court on the ground that both vessels were in fault. An apportionment of the damages was ordered. Id. 8,254. The case was again heard upon a libel of the seamen for wages. Id. 8,253.]

Case No. 8,252.

The LEO.

[5 Ben. 486.] [1]

District Court, E. D. New York. Jan. Term, 1872.

WITNESS FEES — TRAVEL FOR MORE THAN A HUNDRED MILES.

Travel fees for a witness subpoenaed out of the state can only be taxed for a hundred miles.

[Cited in U. S. v. Sanborn, 28 Fed. 304; Buffalo Ins. Co. v. Providence & Stonington S. S. Co., 29 Fed. 237; The Vernon, 36 Fed. 116; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282; Pinson v. Atchison, T. & S. F. R. Co., Id. 465.]

[This was a libel by the owners of the schooner Saxon against the steamship Leo for damages on account of collision. There was a decree in favor of the libelants. Case No. 8,251. The case is now heard upon the question of witness fees.]

BENEDICT, District Judge. The appeal from the clerk's taxation of witnesses' fees in the case raises the question, whether, as against the adverse party, traveling fees of a witness subpoenaed out of this state for a greater distance than one hundred miles can be taxed. The point has been decided by Mr. Justice Nelson, and the practice in the Southern district, in conformity with that decision, is to tax traveling fees for no greater distance than the subpoena would run, which is a distance of one hundred miles from the place of trial out of the district. The practice in this district must conform to the same decision, and accordingly the appeal in this case is sustained, and a retaxation must be had in accordance with this opinion.

Case No. 8,253.

The LEO.

[8 Ben. 506.] [2]

District Court, E. D. New York. July, 1876.

COLLISION—STALE CLAIM—LACHES—SEAMEN'S EFFECTS.

1. The owners of a schooner filed a libel against the steamship Leo, owned by a corporation, to recover for her loss by collision. Before the trial of the cause, libels were filed against the Leo, on behalf of the seamen on the schooner, to recover for the loss of their effects by the collision. No process was issued however on these libels until nearly five years thereafter, during which time the suit of the owners had been carried by appeal to the supreme court of the United States, which had held both vessels in fault. After such decision processes were issued on the seamen's libels against the steamship, which still continued to be owned by the same corporation, although nearly all its stock had in the meantime been transferred to other hands: *Held*, that, if the libellants were ordinary persons, or if the libels had not been filed within a reasonable time, the

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

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

claims would have been held to be lost by neglect to prosecute: but, the libellants being seamen, it was the duty of the court of admiralty to prevent their losing their claims by reason of the negligence of their proctor, if it could be done without injustice.

2. No injustice would be done here by a decree in favor of the seamen, as the claimants were the same and were chargeable with knowledge of the fact of the loss of the seamen's effects.

3. The transfer of the stock of the corporation made no difference, for it could not be supposed that such claims as these could have made any difference in the value of the stock.

4. The seamen therefore must have a decree for half their damages without interest or costs.

In admiralty.

Beebe, Wilcox & Hobbs, for libellants.
John Sherwood, for claimants.

BENEDICT, District Judge. These are actions by the crew of the schooner Saxon to recover of the steamship Leo the value of their clothes lost in a collision between those vessels, which occurred in November, 1869. The merits of this collision first came before this court upon a libel filed by Jed. Frye, the owner of the schooner. That case [Case No. 8,251] was tried on the 4th of March, 1871. The libels in these causes were filed on February 28th, 1871, after the filing of the libel of Frye and before the trial of that case. But no process was then issued upon such libels, or other proceeding taken in these causes until December 28th, 1874. During this period the question as to the liability of the Leo for the collision in question was pending before the courts, the case of Frye having been taken by appeal to the supreme court,[2] where the collision was held to have resulted from negligence on both the schooner and the steamer. Shortly after the final decision as to the question of liability, demand was made for the payment of these claims of the crew for their clothes; and the same being refused, process was then issued upon the libels which had been filed some five years before. The steamship, having been seized upon such process, now defends upon the ground that these claims are stale.

As to the question of fact upon which any liability depends, it has been assumed that the decision thereof in these cases will follow the opinion as to the fact expressed by the supreme court in the action brought by Frye, inasmuch as by consent the evidence in that case has been made the evidence in these cases.

The only question then is whether the libellants have lost their rights by laches. If the libellants were ordinary persons, or if these libels had not been filed within a reasonable time, there would be no doubt that these claims should be held to have been lost by neglect to prosecute. But the libellants are seamen. In due time they placed their demands in the hands of a proctor, and they swore to their libels, which were then filed. Moreover, they knew that the question of the liability of the steamer was before the court undetermined, for they were witnesses; and they may well have supposed that their rights were dependent upon the proceeding which they knew to be pending. The omission to make enquiry as to their actions, and to ascertain that process had not been issued upon their libels, cannot therefore be imputed to seamen as negligence. They had done all that was to be done by them, and they cannot justly be compelled to lose their claims, by reason of the neglect of their proctor sooner to move for process. In behalf of seamen in such a case, it is the duty of a court of admiralty to prevent the loss of their claims by the negligence of their proctor, if it can be done without injustice. Here no injustice will arise, for the claimants are chargeable with the knowledge that the seamen's clothes were lost with the vessel. The liability of the steamship is no greater now than it would have been had the processes been issued, and these causes tried with the case of Frye. The proof, that a considerable part, but not all, of the stock of the corporation, which owned the steamer at the time of the accident and still owns her, has been sold since the accident to persons having no knowledge of this demand of the crew, does not change the case. The same corporation is the claimant before the court, and it cannot be supposed that any difference in the value of the stock of that corporation would be caused by demands such as these under consideration.

There must therefore be a decree for the libellants for one-half the value of the property set forth in the libels, which may be proved to have been lost, without interest or costs. A reference can be had to ascertain the amounts, if that be not agreed to, in which case the costs of the reference will be left to be determined upon the coming in of the report.

[NOTE. There is no report of either of these cases in the supreme court, and an examination of the supreme court docket fails to show any such case having been docketed. The records of the circuit court show that on October 2, 1873, a petition and bond on appeal were filed, but the proceedings appear to have been carried no further. In Case No. 8,254 the circuit court held (reversing Case No. 8,251) that the collision was the result of negligence of both vessels.]

Case No. 8,254.

The LEO.

[11 Blatchf. 225.][1]

Circuit Court, E. D. New York. July 2, 1873.[2]

COLLISION — STEAMER AND SAIL VESSEL — THICK AND STORMY—FULL STEAM—LOOKOUT—DUTY OF SAIL VESSEL TO BLOW FOG-HORN.

1. In a dark, thick and stormy night, and against a strong wind, a head sea, and the tide,

[2] [See Case No. 8,254 and note at end of this case.]

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

[2] [Reversing Case No. 8,251.]

a steamer was making all the speed she could, carrying steam up to the limit of her right. She collided with a sailing vessel: *Held*, that she was in fault for not slackening her speed.

2. Under articles 15 and 16 of the act of April 29, 1864 (13 Stat. 60, 61), the positive duty of avoiding collision with a sailing vessel is imposed on a steamer, and the speed of the steamer should be so regulated that she may be under control, and a collision be avoided, after the presence of the other vessel is ascertained.

[Cited in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 26 Fed. 602.]

3. A steamer *held* in fault for not keeping a sufficiently careful lookout to discover the lights of a sailing vessel which she ought to have seen at a distance within which a collision could have been avoided by her after seeing such lights.

4. A sailing vessel under way *held* in fault for not blowing a fog-horn in a fog.

5. Neglect to blow a fog-horn being established, the vessel must show affirmatively that the horn, if blown, could have produced no effect.

6. Both vessels being in fault, the damages were apportioned.

[Appeal from the district court of the United States for the Eastern district of New York.] In admiralty.

Charles Donohue, for libellants.

Edward H. Owen and John Sherwood, for claimants.

HUNT, Circuit Justice. On the night of November 30th, 1869, at about 10½ o'clock, a collision took place between the steamer Leo and the schooner Falcon,[3] off the coast of New Jersey. The schooner and her cargo were an entire loss. The district court made a decree in favor of the schooner. [Case No. 8,251]. Upon a reference, the damages were established at $10,849 41, which were confirmed by the court.

It is agreed by both parties, all the witnesses concurring on that point, that it was wet, dark and thick weather. Some of the witnesses testify that the stars were to be seen from time to time, while others testify that it was so dark that a light was visible at a very short distance only. The wind was from the southwest, and the sea was high. I will consider, in the first place, whether there was fault in the conduct or condition of the steamer.

1. It is alleged that the steamer started from Sandy Hook in a fog, and that she was in fault in so doing, and took all the risks resulting from that action. The evidence does not sustain the fact assumed in this position. It is disproved by all the witnesses who were on board of the steamer, and by Captain Blakeman of the Niagara. It is not proved positively by any witness, and the inferential evidence in favor of it cannot stand for a moment against the direct evidence to the contrary.

2. It is said that the steamer was going at too great a rate of speed, carrying 27 pounds of steam. The engineer testifies, that this was the limit of his right to carry steam, and that the owners directed him to carry 27 pounds only, although he did carry more, in his discretion, with their knowledge and assent. The evidence is, that the steamer, against a strong wind, a head sea and the tide, was making six or seven miles an hour, while nine or ten was her maximum, under favorable circumstances. She carried the same amount of steam under these unfavorable circumstances, as when in daylight, she was in the smooth water of the bay, and this in a night confessedly dark and stormy, and, as stated by her own officers, in a thick, heavy fog.

By the statute regulations for preventing collisions on the water, article 16 (13 Stat. 61), it is provided: "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed." The district judge held, that, under the circumstances established by the evidence, the steamer failed sufficiently to slacken her speed, and did not limit herself to a moderate speed. As already stated, she was making about all the speed she could make. She did not slacken any further, or otherwise, than that, notwithstanding her efforts, the wind, the seas and the tide enforced a lower rate of speed. That it was not sufficiently moderate, the unfortunate collision tends strongly to establish. The speed should be so moderate that the steamer may be under control, and collision avoided, after the presence of the other vessel shall have been ascertained. This provision of law is to be construed in connection with article 15 of the same statute, which enacts as follows: "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." The positive duty of avoiding collision is imposed on the steamer, and her speed must be so regulated as to enable her to perform that duty. I agree with the court below, that, in this respect, the steamer failed in the performance of her duty.

3. Did the men on board of the steamer keep a good lookout? That she ran into the schooner is beyond doubt. That this arose from some other cause than an intention to injure, is to be assumed. The reason is assigned by the steamer's officers and crew, that the weather was such that it was impossible to discover the schooner in time to avoid the collision. It is expressly proved, and not contradicted, that both vessels carried the lights required by statute, and that they were in good order. The question then is—if a careful lookout had been kept, could the lights on board the schooner have been seen by the steamer in time to prevent the collision?

Of the schooner's crew, John Herd testifies,

[3] [The name Falcon appears only in Judge Hunt's opinion. Reference to the court files discloses the name of the schooner to be the Saxon, as reported in Cases Nos. 8,251 and 8,253.]

that he saw the steamer's lights a quarter of a mile off, and about four minutes before the collision. In another place, he says he saw the lights a quarter of an hour before the collision, and at the distance of nine times the length of the steamer. Thomas Cassidy makes about the same statement, but under circumstances less favorable for understanding the facts, having been aroused from sleep by the captain's shouts that a steamer was upon them. Captain Parrott, of the schooner, was at the wheel at the time of the collision, and testifies that he saw the steamer's lights at the distance of half a mile, and saw her hull at the distance of a quarter of a mile, and that, when he saw her, he hailed for all hands to come on deck. It was this hail that brought out the witness Cassidy.

On the part of the steamer, her master testifies that he was in his cabin, near the pilot-house, at the time the report of a "light under the bow" was made, that he jumped for the pilot-house, ordered the helm hard a-port as soon as he saw the light, and rang the bells to slow, stop and back; and that, almost instantaneously, the collision occurred. He testifies that he had been on the lookout himself the most of the time after eight o'clock, but that, just before the collision, he had gone down into his own room to make some change in his clothing. He does not state that immediately before the collision he was on the lookout, but states facts from which it is obvious that he could not have been. Benjamin Wood, the second officer of the steamer, testifies that he was near the wheel in the pilot-house, at and before the collision; that he had been keeping a good lookout; and that there was not the lapse of more than half a minute between seeing the schooner's light and the collision. He states, however, that the weather was such that he could see distinctly the two men on the lookout of the steamer, who stood at thirty feet distance from him. John Andrews, a seaman, testifies, that he was on the lookout of the steamer from eight o'clock until after the collision; that he was the first one on board of her who saw the schooner's lights; that he gave notice; and that he could not see a light further than the length of the vessel. It is, perhaps, to be inferred, that he means it to be understood that he was careful in his watch, and was vigilantly looking out in the direction of the schooner, and that he did not see her sooner because it was so dark and foggy that he could not. It would have been more satisfactory if he had so stated in words.

Unless I am in error, these are all the witnesses who speak of the power to see the lights of either vessel, who were on the deck of either vessel at the time of the collision or immediately before. The evidence of the witnesses who speak on this point from observations after the collision, and whose attention had not been directed to the point of whether the lights could be seen, is less forcible than evidence of the character I have adverted to. The affirmative evidence of those who did see lights at a distance within which the steamer could have been stopped or her course altered, and the circumstances attending the evidence of the steamer's witnesses, render it beyond any reasonable doubt that the steamer could and ought to have seen the schooner's lights at a distance of at least a fourth of a mile. Her second officer testifies that she could have been stopped within twice and a half of her length, a distance probably of five or six hundred feet. I am satisfied, upon this review of the evidence, that the lookout of the steamer was not well kept, and that she was in fault in this respect.

Assuming the steamer to have been in fault, it is argued that the schooner was also in fault, in not using the fog-horn immediately preceding the collision. The statute already cited, in article 10, provides as follows (13 Stat. 60): "Whenever there is a fog, whether by day or night, the fog signals described below, shall be carried and used, and shall be sounded at least every five minutes, viz.: (a) Steam ships under way shall use a steam whistle placed before the funnel, not less than eight feet from the deck. (b) Sailing ships under way shall use a fog-horn. (c) Steamships and sailing ships when not under way shall use a bell." The schooner had on board an ordinary fog-horn and a patent fog-horn, but did not use them on this occasion. The steamer insists that there was a fog then prevailing. The schooner insists that there was not. That there was a thick, heavy fog is sworn to by Captain Dearborn of the steamer, first officer Perry, second officer Wood, engineer Wagner, and seaman Andrews. Their evidence is corroborated by Captain Blakeman of the Niagara, who was going in the same direction with the Leo, and about two hours in advance of her. He says, that, when he passed Sandy Hook, at 5.17 p. m., there were strong indications of thick fog; that, soon after, the wind increased almost to a gale; that the fog came on thick, heavy, and so dense that he could scarcely see; and that it so continued until after 1 a. m. It is argued, and is altogether probable, that, to a greater or less extent, the same fog prevailed, as the same wind certainly did, where the Leo and the schooner were, and at the time the collision occurred. Captain Dearborn says: "It continued foggy, continued very foggy, up to two o'clock in the morning. There was still a thick fog. The ship was making water." Perry, the first officer of the steamer, says: "Was it or not foggy or misty? Yes. Was there any rain? Yes, light drizzling rain. It was very thick. I could not see the length of the vessel. Was there any fog or mist at that time? Yes, very thick indeed."

Wood, the second mate, says: "I went on deck to look at the vessel we had collided with. She had passed out of sight, the fog was so dense. * * * You might see forty or fifty feet in that fog; it would be hard to say, but the distance would be very short." The seaman Andrews says: "It was a dark, dirty, foggy night, raining a drizzling rain the whole night."

The evidence on the part of the schooner is scarcely in contradiction of this evidence. It seems to be founded chiefly upon the distinction between a fog and a mist. No doubt, it may sometimes be difficult to say when the watery vapor surrounding a ship ceases to be fog, a damp heavy vapor, and becomes a mist, where the drops fall, but in size so small that they are almost imperceptible. The one form is easily changed into the other and as readily rechanged to its former condition, and, at times, the vapor may well be partly fog and partly mist. Thus, the witness Herd, of the schooner, says: "There was a kind of mist. You could not call it a heavy fog." A fog may well be termed a kind of mist, and, in saying that it was not a heavy fog, he implies that it was a fog of some kind. Captain Parrott, of the schooner, says: "I did not see any fog, not enough to blow any horns or whistles. It was thicker at half-past ten than at eight." The captain here almost admits that there was fog, but thinks there was not enough of it to require the horn to be blown. Cassidy, the mate of the schooner, thus states it: "What was the weather when you went below (two hours and a half before the collision?) Dark and overcast. How was it about there being any fog? I should not call it foggy—dark and overcast." Cassidy, the sick captain, who came on deck after the collision, says: "When you went below, what was the character of the atmosphere; how about there being a fog? I didn't call it foggy. How was it when you got on deck, with the way it was when you went below? I should say it was about the same. Was there any fog? No. Was there any haze on the water? No. Was there any thickness of fog sweeping along? No." The testimony of Captain Parrott is somewhat affected by the evidence of Mr. Wilbour, that Parrott had, on a previous occasion, stated that, at the time of the collision, it was very foggy, so much so that he could not see the length of his vessel.

It is argued, that there cannot be a fog during the prevalence of a gale of wind. No evidence is found in the case to sustain this theoretical proposition. On the contrary, Captain Blakeman testifies, that, on his passage, there prevailed, at the same time, a dense fog and a gale of wind. It is not known to me to be correct, as a theory of natural philosophy.

Upon the whole evidence, there is scarcely room for a fair doubt, that a fog prevailed at the time of the collision. It was, therefore, the duty of the schooner to have sounded her horn as often as once in every five minutes. This, it is conceded by the captain of the schooner and the others on board of her, was not done.

The appellants insist, that, for this negligence, in violation of the positive direction of the statute, the right of recovery on the part of the owners of the schooner is gone; and that, having contributed themselves to the injury, they cannot recover against another, who has also been negligent.

It is insisted, on the other hand, that, if blown, the horn could not have been heard on board the steamer, and thus that no injury was caused by its negligent omission. Neglect to obey the positive injunction of the statute being established, it is the duty of the schooner, or her owners, to establish affirmatively, that the horn, if blown, could have produced no effect. Water is a ready communicator of sound. A hail, a shout, or a horn can be heard much further upon the water than upon the land. On smooth water, and with a favorable breeze, the sound can be heard much further than upon a rough sea or against a head wind. On this occasion the night was boisterous. The sea was high, and the machinery of the steamer may be assumed to have made the rattling and the noise usual in a large vessel of that character. On the very front of the steamer were two men stationed as a lookout. I have stated that I believe them to have been negligent in the discharge of this duty, and that they might have seen the schooner at a distance of half a mile, or, certainly, at the distance of a fourth of a mile. If the patent fog-horn on board the schooner had been sounded, when within a half-mile of the steamer, would they not have heard it, and given immediate notice to the officer in charge? If the notice had reached them when within a fourth of a mile, or even an eighth of a mile, of the schooner, the disaster could have been avoided. It is testified, that the steamer could be stopped entirely within twice and a half her length. This, however, was not necessary, as a slowing, or a slight sheering to the east by the steamer, would have been sufficient to avoid a collision. These men may have been negligent in not seeing the schooner's lights, but I see no reason to think that, sitting on the stem of the steamer, with the wind directly from the schooner, they would not have heard the horn, if it had been blown, and been roused to their duty. The schooner would be less likely to hear the steamer's whistle, its sound coming directly against the strong gale. The men on board the steamer, at and after the collision, may have been unable to hear shouts and cries coming from the schooner. The alarm and confusion incident to the occasion, and the adverse wind after the schooner had left them, may well explain this. I am compelled,

however, to think, that there is no ground for the argument, that, if blown, the fog-horn could not have been heard. The evidence strongly impresses me with the belief, that it might have been, and probably would have been, heard, in time to have enabled the steamer to avoid the disaster. The vessels were in the track of the great coasting trade of this continent. Every vessel bound to or from the commercial emporium of the continent and the Southern States would pursue this track. Every means known to good mariners to give notice of each other's approach, should be used, while in this travelled track. It was, in my judgment, great negligence in the schooner to omit the use of her fog-horn. There is good reason to think that its use might have prevented the present disaster. I hold that both parties were in fault, and that the decree must be reversed, and a decree be entered apportioning the damages.

[This case was afterwards heard in the district court upon the libel of the seamen for wages. Case No. 8,253.]

Case No. 8,255.

In re LEONARD.

[4 N. B. R. 562 (Quarto 182).] [1]

District Court, E. D. Missouri. 1871.

BANKRUPTCY — AMENDED PETITION — WHEN ALLOWED—NEW CAUSES OF ACTION—INTENTION OF BANKRUPT LAW — UNJUST EXACTIONS OF CREDITORS.

1. Although the court has, in furtherance of justice, the discretion at any stage of proceedings to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action, and it should not permit, under forms of "amendments," new causes of action to be introduced.

2. If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause should be granted, nor an order of seizure, injunction, or arrest.

[Cited in Re Price, Case No. 11,411; Re Rogers, Id. 12,003.]

3. The bankrupt law [of 1867 (14 Stat. 517)] is intended to uphold amongst bankers, merchants, etc., prompt payment of commercial obligations, but it should not be perverted to the purpose of wrong and injustice by compelling honest debtors, under apprehension, to yield to unjust exactions from alleged creditors.

4. A debtor or defendant has the right to know what are the allegations which are made against him, and may insist that he shall not be tried on charges not made against him in the original proceedings upon which he has joined issue, and especially that he shall not be called upon just before trial to meet an entirely distinct cause of action.

5. Amendments in legal proceedings always presuppose something to amend—something in the record concerning that distinct substantive matter—not an entirely new cause of action to be substituted for the original one. Substitution is not amendment. The defendant may assent to the incorporation of new causes or acts of bankruptcy into the original petition. If consent is withheld, leave should be refused.

[1] [Reprinted by permission.]

On the 7th of January, 1871, a creditor's petition, with proofs, was filed against defendant, praying that he be adjudged a bankrupt, etc. Thereupon a rule upon him to show cause was granted. He appeared, answered, and demanded a jury, and the parties proceeded to take testimony upon the issues made. Within a few days of the time for trial the creditors asked leave to file an amended petition, alleging additional acts of bankruptcy, without notice to the defendant or his attorney. The court granted leave, subject to any objection the defendant might make. He now files his objection in writing, and moves to strike out said amended petition.

TREAT, District Judge. While it is in the discretion of the court at any stage of proceedings, in furtherance of justice, to permit amendments to be made to pleadings, it is a discretion properly limited to the same cause of action—not to permit, under form of "amendments," new causes of action to be introduced, thus perverting the power to amend into a power to substitute one cause of action for another. The petitioning creditor, like a plaintiff, brings a definite cause of action, and makes his allegations accordingly, and the allegata and probata must correspond at the trial. The defendant appears to meet the allegations made, and no others. If there has been an informal or imperfect statement, the court can permit the needed corrections to be made on such terms as justice demands; but it would be an unjust and unjustifiable action on its part to convert, under the name of an amendment, one cause of action into another entirely distinct, calling for different proofs and for different proceedings.

In ordinary actions at law and in equity, the rule is universally recognized, and instead of prescribing a different rule in bankruptcy, there are cogent reasons for enforcing it strictly. When a creditor's petition is filed and proofs submitted to the judge, if he grants an order to show cause why the defendant should not be adjudged a bankrupt upon the alleged acts of bankruptcy, the very terms of the bankrupt act require that, on the trial, the defendant shall prove that the facts set forth in the petition are not true. That provision of the act manifestly depends for explanation on the proceeding, whereby upon the filing of the petition it must be "made to appear" to the court "that sufficient grounds exist" therefor; in other words, that a prima facie case has been established by the proofs offered to sustain the allegations made. It would otherwise be abhorrent to the sense of justice and right that the very stringent proceedings connected often with the creditor's petition should be admissible, viz.: seizure of his property, injunctions, and arrest. If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been

committed, no order on the defendant to show cause can be granted, and the petition falls. If such proof is made allegata and probata corresponding, and the order to show cause is entered, then under proper proofs the court may even grant warrants of arrest and seizure, and issue injunctions. All of the subsequent proceedings are based on the initial proofs "that sufficient ground exists"—that is, that prima facie, the defendant has committed the acts of bankruptcy charged. If no such proof is submitted, no further proceedings follow—the case is at an end, and all ancillary or dependent proceedings, stringent or otherwise, fall to the ground. If, on the other hand, the order to show cause is granted, then defendant has cast upon him the burden of proving a negative (always a difficult and hard matter), unless the courts construe the act to mean that inasmuch as a prima facie case has been made out, the defendant is requested to rebut the same, according to the rules or proceedings familiar to judicial investigations. That construction has been uniformly given to the act by this court, and no room has been suggested which induces a doubt as to the correctness of the rulings upon the point.

It is obvious to all familiar with the operation of the act, that great care and circumspection is required on the part of the courts to prevent its perversion to purposes not within its province. It is not an act for the collection of debts under ordinary circumstances, nor to enable a creditor to hold in terrorem over alleged debtors its stringent provisions, so as to extort compromises or payment of doubtful or unjust demands. While it is designed to uphold among bankers, merchants, etc., prompt payment of their commercial obligations, and thus to secure to commercial paper that force which the "law merchant" requires; and while it also designs, when a debtor is insolvent, or in a state of insolvency, to secure equality among creditors, it is not to be perverted to the purpose of wrong and injustice by compelling honest debtors, under apprehension of the mischiefs to ensue, or the litigation to follow, through its potent and summary modes of proceeding, to yield to unjust exactions from alleged creditors. If such a course should be tolerated through loose or indiscreet rulings of courts, the act, instead of being a system of equality, which is equity, would become an engine of wrong and oppression, to the destruction of commercial business and fair dealing. The duty of courts is two-fold: to guard, on the one hand, against the perversion of forms of proceeding to the injury of honest creditors, and on the other hand, against dishonest contrivances of insolvent debtors, and their favored creditors, to destroy the equitable principle of equality which underiies the whole system. If the act is to be treated in its potential and summary requirements as merely formal and arbitrary, devoid of those established requirements of law whereby justice is administered in judicial tribunals, it would present formidable questions, not as to its expediency, but as to its constitutional validity. These comments are made, not because the question presented, so far as the aspects of the case are concerned, induces any belief that wrong or injustice is now contemplated, but merely to illustrate the general views with regard to the act, in the light of which the court must rule in this case, as it has done in many others. It may be that many cases can be cited, as often they are, on various points, which seem to differ from the conclusions reached by this court; but which, if carefully analyzed, might prove to be fairly in entire accord; but, whether reconcilable or not in all respects with what this court determines, they ought not, unless they involve rulings by the proper appellate tribunals, to cause this court to give them greater weight than, as mere persuasive authority, they are fairly and deferentially entitled to receive. In a system which to a large extent breaks in upon and overturns long settled maxims of law governing the relations of debtor and creditor, it is not remarkable that at first a wide divergence of views should exist, as to its proper construction, and as to its rightful application to the ever-shifting and diversified circumstances of the many cases arising.

Without undertaking to review the various cases wherein such a divergence of judicial opinion appears, it must suffice for the question under review to state that when a creditor resorts to the stringent provisions of this act to divest his creditor not only of the temporary control of his property, or rights of property, legal and equitable, but of all interest therein, he must specially aver the grounds of his action and prove them as averred. Ordinarily, a creditor sues his debtor for a specific sum alleged to be due, and on judgment rendered has his demand satisfied out of so much of his debtor's estate as is sufficient for the purpose. On such a comparatively mild proceeding, the law exacts from a creditor a specific statement of his demand. But when the judgment to be rendered involves not merely the payment of that creditor's demand, but the seizure of all the defendant's property and rights of property, of whatsoever description or nature, and leaves him penniless, except as to the small exemption, permitted to struggle thereafter for the subsistence of himself and family, there certainly can be no adequate reason for relaxing, to his detriment, an elementary principle in judicial proceedings. He has a right to know with what act he is charged, whereby such grave consequences are invoked, and that the charges should be certain to a common intent. He has not only that right, but also the right to insist that he shall not be tried on charges not made against him, or on new

charges not made in the original proceedings upon which he has joined issue, and concerning which he has taken the needed testimony for trial; especially that he shall not be called upon just before trial to meet an entirely distinct cause or causes of action. Amendments in legal proceedings always presuppose something to amend—something in the record concerning that distinct substantive matter; not that an entirely new cause of action is to be substituted for the previous one. Substitution is not amendment.

That there may have been, to some extent, informal and loose modes of proceeding under the bankrupt act, is possible; for, from the newness of the system, the vast number of cases, the numberless questions, incidental and otherwise, presented, and the consequent pressure of business, in many instances demanding the immediate action of the court for the preservation of the rights of those concerned, orders may have been granted which, on fuller knowledge of the facts, or maturer consideration of the legal propositions involved, would have been refused. Those ill-considered orders, if any had been made, should not be permitted to ripen into precedents.

There are due to all judicial inquiries certain requirements, sanctioned by the wisdom of ages, for the protection of all invoking the protection of courts, without which the judge and the bench would be clothed, not with judicial, but with arbitrary authority, over the lives, liberties, and property of the people. No such arbitrary authority is compatible with a free or constitutional government, or is known to American jurisprudence.

In proceedings in bankruptcy, as in all other judicial proceedings, the court must act according to well-settled modes of judicial investigations, and also in accordance with the established law. There is no arbitrary authority vested in any court. "Discretia judicis est per leges discernere,"—the discretion of a judge is a legal discretion. In the exercise of that discretion he is as much bound to follow settled rules as the chancellor is in equity to pursue the course established in equitable causes. "Misera est servitus, ubi jus est vagum aut incertum." It may be that a vague and ill-defined opinion obtains out of courts, that under the bankrupt act more arbitrary and undefined powers are vested in the judges and registers than has existed in other judicial inquiries. If that be so, it is time the error was corrected. No judge or register has arbitrary authority, nor is his discretion other than legal discretion. Where the rights of parties are involved judicially, the parties can justly demand that the investigation be conducted only as the known rules of law exact. Hence, in this case, the defendant cannot have interjected into the petition against him a new cause of action. He was summoned to answer certain specific charges and no other, upon the determination of which not the rights of the petitioning creditors alone rested, but also of all creditors, and of the defendant's own estate in its entirety. If the creditor has not made true charges, the defendant has the right to be exonerated therefrom. If the original or other creditors have new charges to make, let them be made in a proper way and at the proper time. The act provides for such additional proceedings on the part of the creditors; and it also provides for the order of judicial investigation. The rules thus fixed by statute, should be enforced. There should be no judicial legislation with respect thereto, whereby their force is to be impaired, or other, and arbitrary and unjust rules, established. If, after the court has granted the order on a prima facie case made, and the burden of proving a negative has been cast on the defendant, the creditor can, by a so-called "amendment," interject, without process, allegations as to new and entirely distinct acts of bankruptcy, where is the burden or proof as to said new allegations? Shall the court charge the jury that defendant must prove a negative as to the original allegations, and plaintiff as to the others? What legal right has the court to cause defendant to answer at all any allegations except in proof first submitted and deemed sufficient for the purpose? It is a mere evasion of the legal duty to permit that to be done, under color of an amendment, which it had no authority to do originally.

Without elaborating further the many elemental views which are antagonistic to the suggestions of the petitioning creditor, the court states, that the so-called "amended petition" in this case must be stricken from the record, and the parties held to trial on the issues joined upon the original charges preferred. In no other way can the ordinary and essential rules of judicial investigations be maintained. Of course, where the defendant assents to the incorporation of new causes or acts of bankruptcy into the original petition, the court can permit it to be done; but such action rests on the consent of parties. If such consent is withheld, leave should be refused.

Case No. 8,256.

The LEONARD.

[3 Ben. 263; 1 Chi. Leg. News, 313; 3 Am. Law Rev. 779; 1 Leg. Gaz. 30.] [1]

District Court, N. D. New York. April 6, 1869.

ADMIRALTY JURISDICTION — CONTRACT OF AFFREIGHTMENT—WATERS WITHIN A STATE.

Where a libel was filed against a vessel upon a contract to carry cargo on board of her from New York City to Troy, in the same state, to recover

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 3 Am. Law Rev. 779, contains only a partial report.]

damages for an injury, from negligence, received by the cargo on the voyage, the owners of the vessel and cargo all being residents of New York state: *Held*, that the cause was one of admiralty jurisdiction.

This was a suit against the barge Leonard, arising out of a contract of affreightment, for the transportation of certain merchandise, for hire, from the city of New York to the city of Troy. The libel alleged that the claimants, McManus and Smith, were the owners of the barge at the several times in the libel mentioned, and were engaged in the business of common carriers of goods, wares, and merchandise, for hire, between the cities of New York and Troy, in the state of New York, upon the Hudson river, a navigable stream, in which, between the said two cities, the tide ebbs and flows, and which is subject to the maritime laws of the United States, and was so subject during the time thereinafter mentioned. It also averred that the claimants carried on their said business upon said river, in and upon the said barge Leonard, owned by them; and then set forth a contract between the libellants and the owners of the barge, for the carriage and transportation from the city of New York to the city of Troy, upon the said barge, of forty-two barrels of sugar and one hundred and twenty-nine chests of tea, of the value of $6,679.80, then belonging to the libellants, and the receipt of such sugar and tea by the claimants. It also alleged, in the usual form, that the owners of the barge, in consideration of the premises and of a certain reasonable reward agreed to be paid by the libellants, agreed with the libellants safely and securely to carry and transport such sugar and tea, as such common carriers aforesaid, upon the barge Leonard, from New York to Troy, within a reasonable time, and, on the arrival thereof at Troy, to deliver the same to the libellants. It then averred that the claimants commenced the transportation so contracted for upon the said Hudson river, in and upon the said barge Leonard, as such common carriers; that they did not safely and securely carry and deliver such sugar and tea according to their contract, and that, by the unsafe and defective condition of the barge while on said voyage, and while such sugar and tea were therein and in the possession of the claimants, and by the carelessness and negligence of the claimants and their servants in the management of such barge, large quantities of water came into said barge, and upon and into such sugar and tea within this judicial district, whereby the libellants sustained damages to the amount of $5,288.35. The claimants filed, with their claim and answer, an exceptive allegation, in the nature of a demurrer for want of jurisdiction. In this it was alleged that this court had no jurisdiction of the matters contained in the libel; that the same were not matters of admiralty and maritime jurisdiction, the libel being filed to recover upon a contract of affreightment to be performed wholly within the state of New York, and the said barge not being engaged in commerce upon the high seas, or between ports lying in different states, but solely and exclusively engaged in the internal commerce of the state of New York, and the libellants and claimants all being residents and citizens of that state.

Mr. Hale, for claimants, cited Allen v. Newberry, 21 How. [62 U. S.] 224; Maguire v. Card, Id. 148; The Brooklyn [Case No. 1,938]; The Commerce, 1 Black [66 U. .] 574; 3 Story, Const. §§ 1663, 1665; 1 Kent, Comm. 366–377; Thomas v. Lane [Case No. 13,902]; Philadelphia, etc., R. Co. v. Philadelphia & H. de G. Tow-Boat Co., 23 How. [64 U. S.] 209, affirming same case [Case No. 11,085]; The Magnolia, 20 How. [61 U. S.] 296; The Plymouth, 3 Wall. [70 U. S.] 20; Gibbons v. Ogden, 9 Wheat. [22 U. S.] 194, 195.

W. A. Beach, for libellants, cited Conkl. Adm. pp. 21, 26, 166, 167, and notes; The Jefferson, 10 Wheat. [23 U. S.] 428; Peyroux v. Howard, 7 Pet. [32 U. S.] 324, 343; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; The Genesee Chief, 12 How. [53 U. S.] 443; The Hine v. Trevor, 4 Wall. [71 U. S.] 555; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344; The Vanderbilt, 6 Wall. [73 U. S.] 225.

HALL, District Judge. The contract of affreightment set forth in the libel in this case was for the transportation, by water, on board a vessel engaged in the business of commerce and navigation; and it was to be wholly performed within the ebb and flow of the tide. The contract, in its subject-matter and in its whole extent and character, was exclusively maritime; and the waters on which it was to be performed, from the commencement to the termination of the voyage required for its performance, were wholly within the jurisdiction of the admiralty, so far as the question of admiralty jurisdiction can depend upon locality or the character or navigable capacity of the waters on which a marine tort has been committed or a maritime contract is to be performed. Such being the character of the contract, and such the description of the waters upon which it was to be performed, it is supposed that no admiralty judge would have hesitated, during the half century next succeeding the adoption of the constitution of the United States and the passage of the judiciary act of 1789 [1 Stat. 73], to maintain the jurisdiction now invoked. Indeed, it is believed that no suggestion, that the admiralty jurisdiction of the courts of the United States might be restricted by the limitations upon the constitutional power of congress to regulate commerce, is reported as having been made, in any court of the United States, until the case of New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. [47 U. S.] 344, came before the supreme court of the United States in 1848. The suggestion then made by Mr.

Justice Nelson, though a mere obiter dictum, was nevertheless entitled to very grave consideration as the opinion of a judge justly distinguished for the soundness and ability of his judicial decisions.

The subsequent case of The Genesee Chief [12 How. (53 U. S.) 443], in which the supreme court overruled prior decisions and decided that the jurisdiction of the admiralty courts was not confined to tide waters, and also decided that congress had the authority, under the constitutional grant of admiralty and maritime jurisdiction, to extend that jurisdiction to the Great Lakes and their connecting waters, although it had no authority to do so under the grant of power to regulate commerce, seemed to be sufficient to more than countervail the force of Mr. Justice Nelson's suggestion in the Merchants' Bank Case; and it was not until the cases of Allen v. Newberry, 21 How. [62 U. S.] 244, and Maguire v. Card, Id. 248, decided in December term, 1858, that the jurisdiction of the admiralty, in cases like the present, was afterwards considered questionable. In neither of the two cases just alluded to does it appear that the question was argued; and though the decisions have been followed in the district and circuit courts, in parallel cases, upon the ground of their paramount authority, it is nevertheless quite certain that they have not, in all cases, received the approval of the bench and bar of those courts.

In the case of Western Transp. Co. v. The Great Western [Case No. 17,443], which was a case of salvage, I had occasion, several years since, to consider the cases of Allen v. Newberry and Maguire v. Card [supra], in connection with the act of 1845, the case of The Genesee Chief, and other cases which appeared to me to be opposed to the doctrine of the two cases just alluded to. In speaking of these cases I then said: "I confess that I am not able to perceive any solid ground for thus restricting the admiralty jurisdiction of the national courts. The constitutional grant of admiralty jurisdiction has no such limitation. It is an independent grant of judicial power or jurisdiction, unconnected with the grant of commercial power; and, to adopt the language of Mr. Justice Grier, in the case of The Magnolia, 20 How. [61 U. S.] 301, where it is used for another purpose, 'the admiralty jurisdiction, surrendered by the states to the Union, had no such bounds as exercised by themselves, and is clogged with no such conditions in its surrender.' In The Genesee Chief it was said by the chief justice: 'Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations.' It was conclusively shown in that case, that the power of regulating commerce could not be made the foundation of jurisdiction in the courts of the United States, and I cannot satisfy myself that the courts of the Union are justified in interpolating the language or limitations of the grant of the commercial power into the grant of judicial power and jurisdiction, for the purpose of restricting, any more than enlarging, their jurisdiction. That jurisdiction must rest upon the constitutional grant of judicial power, and upon the acts of congress passed in pursuance thereof; and if neither the constitution nor the acts of congress has prescribed a particular limitation to a power conferred in unrestricted terms, such limitations should not be interposed by judicial construction."

Notwithstanding the opinions thus expressed, the decision in Allen v. Newberry, or that in Maguire v. Card, would have been followed in a case of precisely the same character; and although subsequent cases have certainly furnished very strong additional reasons for rejecting the authority of at least one of those decisions, it is not intended to intimate that they would not now be followed in like cases. It is sufficient to say that the case now under consideration is distinguishable from both. The case of Allen v. Newberry, which is, in other respects, most like the present, not having arisen upon tide-water, it is probable that it was for that reason held to be excluded from the jurisdiction of the admiralty by the act of 1845 [5 Stat. 726]. And several cases reported since the decision in the case of Western Transp. Co. v. The Great Western [supra] have furnished additional and entirely sufficient reasons for declining to apply the doctrines, apparently deducible from the decisions in Allen v. Newberry, and Maguire v. Card, to this case. The cases which justify this course will now be referred to.

In a case of collision against the propeller Commerce, decided by the supreme court, in December term, 1861, 1 Black [66 U. S.] 578, Mr. Justice Clifford, in delivering the opinion of that court, and in answer to an objection that the court had no jurisdiction because it did not appear that the propeller was engaged in foreign commerce, or in commerce between the states, said: "Admiralty jurisdiction was conferred upon the government of the United States by the constitution, and in cases of tort is wholly unaffected by the considerations suggested in the proposition." He also said: "When the district courts were organized, they were authorized by congress to exercise exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well

as upon the high seas. That provision of the judiciary act [1 Stat. 73] remains in full force and unrestricted as applied to the navigable waters of the Hudson, and all the other navigable waters of the Atlantic coast which empty into the sea, or into the bays and gulfs that form a part of the sea. All such waters are, in truth, but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself."

Mr. Justice Clifford, in the case of Carpenter v. The Emma Johnson [Case No. 2,430], decided by him in the circuit court for the Massachusetts district, had previously asserted the jurisdiction of the admiralty in a suit brought upon a contract of affreightment from Boston to Chatham, both being ports of Massachusetts, when a part of the voyage required for its performance was to be made upon the high seas; and he evidently was not inclined to apply the doctrines of Allen v. Newberry and Maguire v. Card to other than parallel cases.

In 1866, in the case of The Mary Washington [Case No. 9,229], Mr. Chief Justice Chase, after citing and considering the cases of New Jersey Steam Nav. Co. v. Merchants' Bank, The Genesee Chief, and Allen v. Newberry [supra], overruled an objection to the jurisdiction in a case like the present. The libel in that case was upon a contract of affreightment, to be performed on tide-waters wholly within the state of Maryland; and the case may, therefore, be considered as in all respects like the present, so far as this question of jurisdiction is concerned. It was heard by the chief justice on an appeal from the district court, and was doubtless fully argued by counsel and deliberately considered by the court. In a carefully prepared opinion, the chief justice affirmed the jurisdiction, notwithstanding the cases of Allen v. Newberry and Maguire v. Card.

In the December term of the same year, in the case of The Hine v. Trevor, 4 Wall. [71 U. S.] 555, the supreme court of the United States, through Mr. Justice Miller, declared that the "admiralty jurisdiction, to which the power of the federal judiciary is by the constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States;" that "the jurisdiction of admiralty causes arising on the interior waters of the United States other than the lakes and their connecting waters, is conferred by the act of September 24th, 1789,"—the judiciary act already referred to; and it necessarily follows that in this case the court has the broad and unrestricted jurisdiction conferred by that act.

In the case of The Vanderbilt [6 Wall. (73 U. S.) 225] in December term, 1867, the supreme court affirmed the decree of the circuit court, awarding to the libellants the damages sustained by them in a collision upon the Hudson, opposite the city of Troy, and no objection to the jurisdiction appears to have been suggested, either by the counsel or by the court.

In the case of The Brooklyn [Case No. 1,938], the learned Judge Blatchford, of the Southern district of New York, not only stated it to be the settled law and practice of the district and circuit courts of that district to maintain the jurisdiction in cases of tort, arising out of the purely internal commerce of the state upon the tide-waters of the Hudson river, like those in which it had formerly been denied by Mr. Justice Nelson under the authority of Allen v. Newberry; but he also stated that he knew that that learned justice did not adhere to the views expressed by him in the cases of tort in which he had denied such jurisdiction. Indeed, the decision of the supreme court in the cases of The Commerce and The Vanderbilt [supra], place the jurisdiction in such cases beyond further question.

The jurisdiction of the admiralty in all cases of maritime tort, arising upon the tide-waters of the Hudson, being thus firmly established, it is hardly possible that the jurisdiction in this case would not be upheld by the court of last resort. As before stated, the contract of affreightment, out of which this suit has arisen, in its subject-matter and in its whole extent and character, was exclusively maritime; its performance required maritime service only; it was to be performed wholly within the ebb and flow of the tide; and the negligence charged as the cause of the damage for which the suit is brought, is likewise of a purely maritime character.

Any action for a marine tort committed on the vessel while engaged in the performance of the contract—from the time the first cask of sugar or chest of tea was put on board, until the last was landed—no matter in what part of her voyage it was committed, would have been within the jurisdiction of the admiralty; and it is impossible, in my judgment, to sustain by any principle of law or of reason, the jurisdiction of the admiralty in such cases of tort, and at the same time to deny it in a case like the present.

To uphold the distinction sought to be maintained in this case, would require a court of admiralty which recognizes no common law forms of action, to maintain its jurisdiction in a case brought by a shipper, against the owners of the Leonard as common carriers for hire, for negligence in the carriage of goods entrusted to their care, when the negligence charged was by proper allegations made the technical basis of the libellant's demand, and to deny it under the same state of facts appearing upon the hearing, if the formal and technical allegations of the libel (though in substance the same) made the contract to carry, and its non-performance, the basis of the alleged right of recovery.

The conclusions stated render it unneces-

sary to consider the point made by the libellant's counsel, that the gravamen of the claim against the Leonard was negligence, and that the action might therefore be properly considered as founded upon a marine tort, and consequently within the jurisdiction of the admiralty under the cases of The Commerce, The Brooklyn, and The Vanderbilt. Upon the whole case I do not doubt that the jurisdiction should be maintained.

Case No. 8,257.

LEONARD v. CASKIN.

[Bee, 146.] [1].

District Court, D. South Carolina. June 10, 1799.

BAIL IN CIVIL CASES—SPECIAL BAIL—PENALTIES—PROBABLE CAUSE ON OATH.

Probable cause on oath must be set forth to justify the court in holding defendant to special bail, under act of congress of 26th February, 1795 [1 Stat. 420].

In admiralty.

BEE, District Judge. The order for bail was grounded on the third section of an act of congress passed 26th February, 1795, which enacts, that "in all suits or prosecutions for the recovery of pecuniary penalties prescribed by the laws of the United States, the persons shall be held to special bail, subject to the rules and regulations which prevail in civil suits, in which special bail is required;" and on the twenty-fourth section of the circuit court law of this state passed in 1769, by which it is provided that "no person shall be held to bail for debt, unless duly attested, &c.; nor for any other cause without a judge's order on probable cause of action shewn, to be indorsed on or annexed to the writ, &c." The only question is whether the affidavit now produced shews sufficient probable cause. Bail not being generally required, in England, on penal statutes, no case from the English books seems to apply here, except that from 3 Burrows, 1569, where a forfeiture was sued for under the 26 Geo. II. c. 21, which expressly authorizes special bail. It was objected that the defendant's offence was not sufficiently specified in the affidavit of the plaintiff, who merely swore that he had cause of action against defendant for £200 forfeited by him for having a quantity of unsealed silk in his possession. It was contended that this was making the plaintiff a judge of the offence, &c. But the court held that the affidavit was sufficient; and added, that the act required no affidavit at all. In the present case it is contended that the affidavit on which this order is grounded is only the opinion and belief of a customhouse officer as to several communications which are set forth; and the only fact sworn to is, that the collector here has received a letter from the collector of Georgia, containing one from the collector of New York, which gives the substance of Captain Leonard's information against this defendant. It is said further, that this information is not on oath, and, if it were, contains no ground of forfeiture or penalty. That the letters amount to nothing more than verbal declarations not sworn to; and that there is no instance of a court's ordering special bail to be taken, without affidavit of facts. On the other side it was alleged by the district-attorney, that the affidavit he had procured was the best he could procure. That the words "probable cause," if they mean any thing, mean more than is admitted on the other side; and that if this construction be admitted, the clause is nugatory, as few suits can be commenced under other than the present circumstances. That the communications in this case authorize bail as fully as an oath merely on appearances; and that prosecutions of this sort will be defeated unless bail is required. The argument ab inconvenienti was much relied upon on both sides; but I cannot see that it avails here. The only matter for my consideration is, whether the affidavit sets forth probable cause. In the case from Burrows, 1569, the plaintiff swore positively that defendant had forfeited £200. In this case there is no positive evidence, on oath or otherwise, that this penalty is incurred. Captain Leonard only says that he boarded this vessel at sea, that she had on board ten slaves, and was going from Martinique to the Havanna. This might give cause for suspicion, but no more. The act of congress declares that the persons on board must be taken and transported with intent and purpose to sell them as slaves. The bare transportation of negroes from one place to another without proof of an intention to sell, will not incur this penalty. If the intention had been sufficiently made out, I should have thought the circumstances amounted to probable cause, and should have continued the order for bail; but as all the matters stated may be facts, and yet not amount to forfeiture, or incur penalty, I direct that the order be rescinded, and the defendant admitted to file common bail.

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

LEONARD (CROUDSON v.). See Case No. 3,439.

Case No. 8,258.

LEONARD v. LYCOMING FIRE INS. CO.

[10 Chi. Leg. News, 22; 6 Am. Law Rec. 194.]

Circuit Court, N. D. Ohio. 1877.

PRACTICE AND PLEADING — CONFORMITY TO STATE COURT UNDER ACT OF CONGRESS — SERVICE OF PROCESS — FOREIGN CORPORATION — WRITTEN CONSENT TO SERVICE FILED—SERVICE ON AGENT.

[1. Rev. St. U. S. § 914, providing that the practice, pleadings, and forms and mode of proceedings in the federal courts shall conform to those of the state courts within which the court is held, does not apply to the service of process.]

[2. A federal court cannot obtain jurisdiction of a foreign insurance company by the service of process on a general agent within the state, under a state statute providing that foreign insurance companies doing business within the state shall file a written instrument with the superintendent of insurance, authorizing any agent of such company in the state to acknowledge service of process for such company, and consenting that such service of process shall be as valid as if made upon the company itself.]

[This was a motion to set aside a writ of summons by one Leonard against the Lycoming Fire Insurance Company.]

Before WALKER, District Judge.

The defendant is a corporation organized under the laws of Pennsylvania, having its principal place of business in said state, and therefore a citizen of Pennsylvania. The defendant had a general agent, who resided and had a place of business in the city of Cleveland. The summons in the case was served on this agent at the city of Cleveland. The defendant files this motion, and alleges as the ground thereof that it cannot be sued outside the district in which it resides in the state of Pennsylvania. The statute of the United States (18 Stat. 470) provided that "no civil suit shall be brought before either of said courts (district or circuit) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings." These are the precise words contained in the eleventh section of the act of 1789 [1 Stat. 78]. Under that section it has uniformly been held that a corporation could not be sued outside of the district of which it was an inhabitant, even though its officers or agents might be found and served in the other district in which the suit was brought; and that corporations cannot change their residence by mere locality of its officers. See Pomeroy v. New York & N. H. R. Co. [Case No. 11,261], and cases there cited. The legislature of Ohio (volume 70, p. 151), in the act regulating insurance companies, provides as to foreign insurance companies doing business in Ohio, that they should file a written instrument with the superintendent of insurance authorizing any agent of such company in said state to acknowledge service of process for such company, and consenting that service of process upon any such agent shall be taken and held to be valid as if served upon the company, etc. This service was made under the provision of this act. It is conceded that if the suit were in a state court the service would be a good one, and the court would have jurisdiction of the case.

The act of congress of 1872 (Rev. St. p. 173) provides that "the practice, pleadings, and forms and mode of proceedings in civil cases, etc., shall conform as near as may be to the practice, and pleadings, and forms and modes of proceedings existing at the time in like causes in courts of record of the state within which such district or circuit court is held." It is claimed that under this statute the state mode of service is adopted and which gives jurisdiction of this court in this case. It has been held that the act of 1872 does not change the jurisdiction of the federal courts in respect to the necessary citizenship of the parties suing therein. Nazro v. Cragin [Case No. 10,062]; Main v. Second Nat. Bank [Id. 8,976]; Chittenden v. Darden [Id. 2,688]; Minot v. Philadelphia, W. & B. R. Co. [Id. 9,645]. The eleventh section of the act of 1789 is re-enacted by congress in 1875 [18 Stat. 470], after the passage of the act of 1872, and if the act of 1872 has changed the act of 1789, it was restored in 1875.

Held: 1st. That the statute of the state does not apply to cases in this court as to the service of process, and that the question made is one of jurisdiction. The statutes of the United States prescribe the jurisdiction of its courts.

2nd. That the court does not obtain jurisdiction of a corporation, an inhabitant of another state, by service of process on its agent in this district. The writ is therefore set aside, and the case dismissed.

Case No. 8,259.

LEONARD et al. v. NEALE.

[1 Cranch, C. C. 493.] [1]

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

EVIDENCE — HANDWRITING OF SUBSCRIBING WITNESS—OF MAKER — SUFFICIENCY OF TESTIMONY —RENT—DISTRESS—CONVEYED TO CREDITORS.

1. If the testimony of the subscribing witness cannot be had, evidence may be given of his handwriting, and of that of the maker of the instrument; and it is not necessary that the jury should be satisfied by the evidence, of the handwriting of the subscribing witness, if they are satisfied as to that of the maker.

2. Property distrained for rent, may be transferred by the tenant to his creditors, subject to the lien for the rent.

Trover for certain goods. John Withers being indebted to the plaintiffs, Leonard & Thomas Cooke, and also intending to indemnify them against their suretyship, in a replevin bond given to release the same property from distress for rent due to L.

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

Summers, it having been seized by Neale as bailiff of Summers, by a writing not under seal, mortgaged to them the property in the hands of Neale. The possession of the property remained with Neale after the release of it by execution of the replevy bond. A few minutes after the release of the property from the distress, a creditor took his fieri facias against the goods of Withers, and put it into the hands of the said Neale, who was a constable, and he levied it upon the goods in his hands. On the day after the fieri facias was laid, the plaintiffs demanded of Neale the possession of the goods, which he refused to give; whereupon the plaintiffs brought their action of trover. On the trial, the plaintiffs proved that it was not in their power to obtain the testimony of the subscribing witness, John Pierson, and offered to prove his handwriting, and that of Withers, the maker of the instrument.

THE COURT suffered them to give such evidence.

E. J. Lee, for plaintiffs, then prayed the court to instruct the jury that if they should not, by the evidence, be satisfied of the handwriting of Pierson, they ought to disregard the evidence of the handwriting of Withers.

Which instruction THE COURT refused to give. It not being a sealed instrument, the court thought that the strongest evidence of the signature of Withers, was, not proof of the handwriting of the witness, but of the handwriting of Withers himself, notwithstanding the case of Barnes v. Trompowsky, 7 Term R. 265, and Adam v. Kerr, 1 Bos. & P. 360.

The defendant's counsel, Mr. Taylor, then prayed the court to instruct, &c., that the plaintiffs, not having had the possession of the goods, cannot recover in this suit, against the claim of the creditor in whose name the fieri facias was issued. Upon this question, THE COURT (DUCKETT, Circuit Judge, absent) was divided. FITZHUGH, Circuit Judge, thinking that upon the bargain being made, Neale was a trustee for the plaintiffs, and that his possession is to be considered as theirs.

CRANCH, Chief Judge, rather inclined to think that such a constructive possession cannot be set up against a creditor. That Neale's possession is to be considered as the possession of Withers, and not of the plaintiffs.

But upon a second argument, (DUCKETT, Circuit Judge, being present,) THE COURT (nem. con.) refused to give the instruction prayed by the defendant's counsel, thinking that Neale's possession after the goods were relieved from the distress, was as a trustee for the plaintiffs.

FITZHUGH, Circuit Judge. The constable, after the distress, held the goods, subject to being restored to Withers on his replevying them. The replevy bond was given before the execution against Withers was delivered to the constable. Before the replevy bond was given, and as a collateral security for the plaintiffs' becoming jointly bound in it, Withers agreed by a written instrument to assign and transfer to them the goods distrained. This was a complete transfer of Withers's right; he could not countermand it. The constable, who never had more than a right to hold the property for the purpose of securing the payment of the rent, must have held it as trustee for the plaintiffs. He could not hold it in trust for Summers, the landlord, because by law he had no lien on it. Withers was estopped by the writing in question. The creditors had no claim to it, because it was restored, or ought by law to have been restored as soon as the replevy bond was given, and their executions were not delivered to the constable until this was done. The constable was not then the agent of the creditors, nor authorized to take this property for their benefit, and cannot be said to hold for their use. He must have held in trust for the plaintiffs. The question is not between Summers and the plaintiffs; he had the first lien, but he is satisfied by the plaintiffs' securing his rent. As between the plaintiffs and those creditors, the plaintiffs have a prior and better right; they are creditors for an adequate consideration, and Withers, who was under a moral obligation to pay them, and under no legal or equitable impediment, (at least on the part of the defendant, or these creditors by judgment,) transfers the property distrained, to the plaintiffs. They ought not to be deprived of the advantage which they have gained over other creditors, by viewing the constable as holding this property for the purpose of satisfying the distress, and therefore considering it as in custody of the law. When it was replevied, this presumption of law ceased. The object of its detention being then answered, it ought to have been released and delivered up to the person entitled to it. Who was entitled to it? Not Withers, because he had transferred it; not the constable, because he never had more than a fiduciary interest, viz., for the sole purpose of securing the payment. On his taking the replevy bond, it was functus officio, and his interest ceased. It could not vest in the judgment creditors whose executions had not been shown or delivered, but the property must have been in the plaintiffs, and the possession of the constable, in contemplation of law, their possession. Lempriere v. Pasley, 2 Term R. 485.

In Atkin v. Barwick, 1 Strange, 165, it was decided that a delivery to A, to the use of B, on a precedent consideration, is not countermandable by A, but vests the absolute property. In the case cited, the goods, to wit, a parcel of silk, were delivered in the absence of B, to his use, without his

knowledge, or the actual delivery to B. In an action by assignees of the bankrupt, the late owner of the goods, it was insisted that they did not pass because B had not accepted them; that though the delivery was stated to be to B's use, yet it did not appear to be in satisfaction of a precedent debt. There was therefore no consideration, and it was a fraud on creditors. But it was decided that this passed the absolute property, subject to a disagreement by B; but the contract is not open till agreement, but complete, unless there is a disagreement, and being for B's benefit, his disagreement shall not be presumed, and Eyre, J., said, "all these cases go on the distinction, where the delivery is with and without consideration; if with consideration, and the delivery is of money, debt lies; if of goods, trover. The precedent debt is a sufficient consideration, and it vests before notice; for it being to his benefit, a disagreement shall not be presumed." Fortescue, J. "Property by our law may be divested without an actual delivery, as a horse sold in a stable. But it is otherwise by the civil law. A general bailment alters no property, but this is not such."

LEONARD (TOBEY v.). See Case No. 14,067.

LEONARD (TOWNSEND v.). See Case No. 14,117.

Case No. 8,260.

LEONARD v. The VOLUNTEER.

[4 Chi. Leg. News, 156.]

Circuit Court, W. D. Ohio. Jan., 1872.

ADMIRALTY—JURISDICTION—COLLISION.

Notes to opinion delivered by Hon. H. H. Emmons, Circuit Judge, in January, 1872, as taken by Benjamin Weaver, stenographer:

That in a case of collision in the Cuyahoga river where the steamer tug, defendant, was engaged in the business of towing within and out of the river, the admiralty had jurisdiction. That it was no objection that the contract of towing was to be performed within the body of a state, or within a harbor, inasmuch as the foundation for this objection, as derived from [The Propeller Commerce] 1 Black [66 U. S. 574] and [Allen v. Newberry] 21 How. [62 U. S. 244] had been removed by the later cases; instancing The Belfast [7 Wall. (74 U. S.) 624], and subsequent cases, which put the admiralty jurisdiction upon broad and rational grounds, viz: that the grant of admiralty jurisdiction to the federal courts includes all cases of maritime contract or tort upon waters navigable between state and state.

Willey, Cary & Terrell, for libellants.
Canfield & Caskey, for respondents.

[See Case No. 16,990.]

Case No. 8,261.

LEONARD et al. v. WHITWILL.

[10 Ben. 638; 14 Am. Law Rev. 164.] [1]

District Court, S. D. New York. Nov., 1879.

COLLISION AT SEA—BRITISH STEAMER AND AMERICAN SCHOONER—FOG — SPEED — TORCHLIGHT—LAW OF THE SEA — APPORTIONING DAMAGES WHERE BOTH VESSELS ARE IN FAULT — CARGO—PARTIES.

1. A schooner belonging to citizens of the United States was sunk and totally lost with her cargo in a collision with a steamer belonging to a citizen of Great Britain, at sea, off the east end of Long Island, on the night of April 17th, 1877. The wind was from the E. S. E., about a two and a half to three knot breeze, and the schooner was on the starboard tack heading N. E. by E. The steamer had been running on a course E. by S. ½ S. from the lightship off Sandy Hook, at a speed of about seven knots an hour. There was a dense fog at the time of the collision, which shortly afterwards cleared up. A fog horn was being blown on the schooner and continued to be blown after the whistle of the steamer was heard, and her course was kept till the instant of collision. Her lights were set, but the steamer was approaching her at such an angle that they were not visible, and she showed no torchlight. The second mate of the steamer was on her bridge in charge of her navigation. The sound of the fog horn of the schooner was heard on the starboard bow of the steamer, her engine was at once slowed and her helm put hard-a-starboard. The captain was also signalled to come to the bridge, and, as soon as he came, he ordered the engines to be stopped and reversed. The lookouts and the officers on the bridge kept a sharp lookout for the vessel whose horn they heard, but they could not see the schooner till she was close under the steamer's bows. The headway of the steamer was almost stopped at the time of the collision, but she struck the schooner on her port side about forty feet from her stern, and the schooner, which was loaded with coal, shortly afterwards sank. The owners of the schooner filed a libel against the owner of the steamer to recover for the loss of the schooner, her freight and her cargo: *Held*, that the schooner having kept her course, it was the duty of the steamer to have kept out of her way.

2. Under the circumstances of the density of the fog, in which the steamer was navigating, and the liability, in that part of the ocean, to fall in with vessels, the speed of the steamer was not a moderate speed, as she was not under such control that she could be stopped in time to prevent a collision with such vessels as she might expect to meet.

[Cited in The Nacoochee, 22 Fed. 857; The Fulda, 52 Fed. 401.]

3. The starboarding of the steamer's helm was proper, but she was in fault in not stopping immediately upon hearing the fog horn.

[Cited in The State of Alabama, 17 Fed. 856; The Normandie, 43 Fed. 157.]

4. The schooner was in fault for her failure to show a torch light on hearing the steamer's whistle, as required by the act of congress of 1871 (16 Stat. 459, now section 4234 of the Revised Statutes), and the facts that the steamer was a British vessel and the collision was on the high seas, did not prevent the respondent from setting up such failure as fault in this action.

[Cited in The City of Merida, 24 Fed. 233.]

5. Whether, independent of the statute, it would have been a fault under the general mari-

[1] [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 14 Am. Law Rev. 164, contains only a partial report.]

time law, that the schooner failed to exhibit a torch under these circumstances, quaere.

6. The schooner being in fault in not having shown a torch, it became necessary for her to show that such fault had not contributed to the collision, and that she had failed to do so.

7. Both vessels being in fault, the damages must be apportioned. The owner of each vessel must bear half of the loss; and the owners of the schooner must bear half of the loss of the cargo and of the seamen's effects; and the decree should be that the whole damages caused by the collision be apportioned between the parties.

[Cited in Duncan v. The C. H. Foster, 1 Fed. 734; The Nahor, 9 Fed. 214; The Canima, 17 Fed. 272; The Hercules, 20 Fed. 206; The Bristol, 29 Fed. 875; The Queen, 40 Fed. 695.]

8. It was unnecessary to make the owners of the cargo of the schooner parties to the suit, they being already virtually before the court through the libellants, the owners of the schooner.

[Cited in Atlantic Mut. Ins. Co. v. Alexandre, 16 Fed. 282; The Wm. Murtagh, 17 Fed. 263.]

[This was a libel in admiralty by Job M. Leonard and others against Mark Whitwill to recover damages for losses sustained by collision.]

Henry M. Scudder and George A. Black, for libellants.

R. D. Benedict and James Thomson, for respondent.

CHOATE, District Judge. This is a suit in personam brought by the owners of the American schooner J. M. Leonard of Fall River, and her master and crew, against the owner of the British steamship Arragon, to recover the value of said schooner and her cargo and freight, and the personal effects of the master and crew, alleged to have been totally lost in consequence of a collision between the schooner and the steamship on the 17th of April, 1877, the total value as stated in the libel being $30,686.25. The schooner, which was of 408 tons register, was bound on a voyage from Philadelphia to Providence, R. I., with a cargo of 549 tons of coal. The steamship, a propeller of 837 tons register, was bound on a voyage from the port of New York to the port of Bristol, England. The collision happened a few minutes after eight o'clock in the evening. The libel puts the place of the collision "in the Atlantic ocean, off the eastern end of Long Island and distant about fifteen miles therefrom." The answer denies this and avers that it was "about fifty-one miles east from Sandy Hook and south of the Long Island shore between Fire Island light and Shinnecock light and about eighteen or twenty miles southeast by east of Fire Island light." This question of the place of the collision is chiefly important, if at all, as bearing on the question of the speed at which the steamer was running. It is admitted by the pleadings that the schooner was heading N. E. by E. on her starboard tack, the wind being E. S. E. The schooner was sailing by the wind with all sail set except the main-top sail and mizzen stay sail, which had been furled upon the setting in of the fog about two hours before. The wind was light but steady. The parties do not differ substantially as to its force. Those on the steamer estimated it to be a 2½ to 3 knot breeze, and the mate of the schooner, the officer of the deck at the time of the collision, at about 2½ knots. Prior to any change by reason of hearing the fog horn of the schooner, the steamer had kept a true east course from the light-ship; by her compass, as testified to by her master, E. by S. ½ S. A fog set in soon after six o'clock which grew quite dense and continued till a few minutes after the collision, when it cleared up. How dense this fog was and how far it obscured the sight of objects on the water and lights at the time of the collision, is a question seriously contested in the case. Before the collision the fog horn of the schooner was heard on the steamer once only, a little on the starboard bow, and, in consequence thereof, the wheel was starboarded and the engine slowed and afterwards stopped and reversed. Before the collision the whistle of the steamer was heard on the schooner, and her masthead and starboard lights were seen, and after the whistle was heard the fog horn of the schooner was several times blown. It is conceded that the schooner kept her course till the instant of collision. Of course it was the duty of the steamer to keep out of the way of the schooner and, prima facie, the responsibility for the collision rests on the steamer. Each party, however, charges the other with faults as causing or contributing to cause the disaster.

The libel charges against the steamer "that the collision occurred solely through the negligence and want of care and improper conduct of those in charge of said steamer Arragon, in that the said steamer was run at a dangerous and excessive speed in said fog, and was improperly and carelessly navigated, and without sounding her whistle at proper intervals, and no sufficient lookout was kept on said steamer, nor proper measures taken to avoid said collision by stopping and backing the said steamer, or avoiding the said schooner." The answer, after denying all these alleged faults or acts of negligence and alleging that so far as the steamer was concerned, the collision was the result of unavoidable accident, charges against the schooner that "she was short handed and over laden, and that when the whistle of said steamer was heard by those on board of said schooner it was their duty immediately to have shown a lighted torch upon the part of said schooner towards which the said steamer was approaching; that as the vessels were approaching each other the side light of the said schooner could not be seen from the steamer before the collision, nor could said schooner herself be seen until she was within a few feet of the steamer; that if said torch had been so exhibited it would have been visible to those on board of said steamer, even before

the said fog horn was heard, and would have shown to them that said schooner was crossing the bows of said steamer from starboard to port, and would have been seen in time so that said steamer's helm could have been ported and her head swung off to starboard, or her swing to port under the starboarding of her helm could have been stopped so that the vessels would have gone clear of each other."

It is very evident from the testimony that at the time the vessels came together the headway of the steamer was nearly stopped. Although, as she approached, she seemed to those on the schooner to be moving rapidly, yet the most satisfactory evidence on this point is the effect of the blow on the schooner. The schooner was passing the steamer's bow nearly at right angles and the stem of the steamer struck the schooner just forward of the mizzen rigging, yet did not strike with force enough to sink her instantly or cut her in two as has happened in some collisions. The steamer seemed to those on the schooner to strike more than once. The vessels brushed by each other, the steamer passing under the schooner's stern as the schooner, still moving forward, came up before the wind on the port side of the steamer after she was struck. The man at the wheel of the schooner remained at his post till the collision. He observed that the blow slewed the schooner so that she headed N. E. ½ E. thus changing her heading a half point to the northward. Most of the crew of the schooner got into her boat which was hanging at the davits. They had time to get into the boat and get her in the water and pull a little way off before she sank. They had no time to save anything. It appears also that the steamer did not get far off from the schooner, and after the collision the schooner was lying on her port quarter a little astern of her. These circumstances show, I think, that while the blow was enough to crush in her port side, so that she rapidly filled with water, it was not delivered with any great velocity. Both vessels were shown to have their side lights properly placed and brightly burning. On the schooner it had struck eight bells when the whistle of the steamer was heard, but the watch had not been changed. It had been the mate's watch and he was still on deck on duty. There was a lookout forward who had charge of the fog horn and there was an able seaman at the wheel. Before the collision the rest of the crew got on deck.

On the steamer it had been the second mate's watch from six to eight o'clock and he was still on the bridge up to the time of the collision. The captain had been with him until a few minutes before eight o'clock, when he went below, but was recalled by a signal by whistle before the collision, given after the fog horn of the schooner was reported, and he returned to the bridge and took charge of the movements of the vessel before the collision. The lookout forward in the second mate's watch had been relieved by the new lookout before the fog horn was reported, but they were both forward, close to the stem, up to the time of the collision. There was, also, a man stationed as lookout just forward of the bridge, on the deck. He was on his station when the fog horn was reported and remained on duty till after the collision. There had been one man at the wheel, and the wheelsman of the mate's watch had come into the wheelhouse before the collision, and both had hold of the wheel and handled it in executing the orders given after the report of the fog horn. The engineer was at his post There were two other men on deck who were called as witnesses.

The first and chief fault imputed to the steamer is that she was running at an excessive rate of speed. The answer alleges that "when the fog set in, two hours previously, the rate of speed of the steamer was slowed down to about six knots an hour, and so continued till the fog horn of the schooner was heard, and when the steamer's company heard the fog horn of the schooner her engines were immediately slowed and stopped and reversed at full speed, and when she collided with the schooner her speed had become so reduced that she had but a very slight forward motion and had almost stopped." The libel does not charge any particular speed but "great" speed, "dangerous and excessive speed in said fog." The answer gives an erroneous impression as to the course of events on the steamer after the hearing of the fog horn. It seems to imply, or might be taken to mean, that the orders to slow, to stop and to reverse, followed each other in immediate succession upon the hearing of the fog horn. It is very evident, however, upon the steamer's proofs, that this was not so; that the order to slow was first given, and afterwards, at an interval of time not exactly fixed, the other orders to stop and reverse at full speed were given in immediate succession.

(The court here set forth at length the evidence as to the speed of the steamer, and then proceeded as follows:) The actual speed of the steamer must therefore be taken to be upwards of seven knots an hour through the fog. To determine whether this exceeded that "moderate" speed, which the laws of England and the United States alike prescribe as the speed of a steamer during a fog, requires a consideration of the circumstances under which she was proceeding, and especially the density of the fog, and the place where she was sailing as respects her liability to fall in with other vessels. (After setting forth the evidence given by the witnesses from the two vessels as to the density of the fog, and the time and distance at which each was seen from the other, the court proceeded as follows:) There is here, apparently, a serious conflict of evidence as to the character and density of the

fog. Making all due allowances for misjudgment as to time and distance, it is still evident from the concurring testimony of those on the schooner that, at the time the steamer's whistle was heard, the schooner was not in a very dense fog, and that the steamer's lights were seen from the schooner much further off than would be deemed possible from the testimony of those on the steamer. I think the testimony shows clearly that at no time before the collision did the port light of the schooner come within sight of those on the steamer. This not only appears from the fact that although so many men were looking out for the purpose of discovering the vessel on the starboard bow, yet they did not see this light, but also from the proved relative courses and positions of the two vessels. The testimony of those on the steamer on this point is rendered very probable, notwithstanding the estimate of those on the schooner as to the bearing of the steamer when first seen as nearly abeam, and possibly so little aft of abeam as to have brought the port light within range. This is their judgment only, about which they may easily have been mistaken. The light which the lookouts on the steamer saw when the schooner was close on to them may have been, upon the proofs, the binnacle light, which is shown to have been on the weather side of the compass and inside the house. There is no reason to believe that this would become visible to any one on the forward deck of the steamer till they could look down on the deck of the schooner.* In considering this apparent conflict of testimony, therefore, it must be remembered that up to about the time of the collision it had been very thick, and that while those on the schooner had the lights of the steamer within range of their vision to aid their judgment just at that time as to the density of the fog, those on the steamer had no such assistance to aid their observation. It appears, also, from the testimony, to be probable that just at that time the fog was clearing up rapidly to windward, and the schooner being all the time to windward of the steamer, it was clearing about her more rapidly than about the steamer. The witnesses of the schooner had already observed that it was clearing up before they heard the steamer's whistle. But so far as those in charge of the steamer were concerned, they had not observed this, even if immediately about the steamer the fog had become any less dense. The place in which the steamer was sailing was a part of the ocean constantly traversed by vessels bound in and out of New York and coastwise.

Under these circumstances I have no hesitation in holding that the speed of the steamer, as proved, or even that admitted in the answer, was much in excess of a "moderate speed." The prudence or imprudence of those navigating her is to be judged by what they knew or observed as to the density of the fog and not by what possibly they might have known or observed, if in consequence of seeing lights in the direction of the schooner they might have had more exact means of observation. For an hour and a half they had been running through a dense fog in a much frequented highway of commerce at a speed exceeding seven knots, and when they heard the fog horn of the schooner they were still doing the same thing, without the fog having cleared at all, so far as they could see. They were liable at any moment to fall in with other vessels, either bound out of New York or coastwise northward, in which case, as the wind was, they were likely to cross the bows of the steamer as this schooner did, or bound inward before the wind, in which case they might come in a nearly opposite direction to her course. The master of the schooner was, by his own reckoning, about sixty-five miles east of Sandy Hook, instead of about 51 as shown by the log of the steamer. I do not perceive that it makes any difference as regards the prudence of the steamer's speed which is right. In either place the speed was excessive and dangerous, and the steamer was not under such control that she could be stopped in time to prevent a collision with such vessels as she might expect to meet. The case is not to be judged by the fact that as it was she nearly stopped in time to avoid this vessel. It was the good luck of the steamer and not the result of her prudence that the schooner was not much nearer when first discovered, and that she was going upon a course which involved little risk to the steamer from the collision. The case is to be judged on this point, not by what did happen, but by what might reasonably have been expected to happen. The Pennsylvania, 19 Wall. [86 U. S.] 125. See also the Eleonora [Case No. 4,335].

I think, also, that the steamer was in fault for not immediately stopping upon hearing the fog horn a little off her starboard bow. The order given by the mate was "half speed." At the same time he gave the order to put the wheel hard-a-starboard. This order to starboard seems to have been proper. It turned the vessel's head away from the direction in which the other vessel was. It tended to reduce the chances of collision. But in the absence of all knowledge as to the direction in which the other vessel was moving, and especially considering that the steamer was already running at a dangerous rate of speed, it was manifestly the duty of her officer in command to reduce that excessive rate in the quickest possible time. Even if he was justified in holding her at some speed, the least compatible with the control of her movements, he was bound to reduce her to that limit at once. This he did not do. Having given these orders he signalled the captain to return to the bridge, and told him the situation. The captain instantly gave the orders to stop and reverse

at full speed, but it was already too late. She was not quite stopped before reaching the schooner. Although the interval between the orders by the mate and those given by the captain was very short, it undoubtedly, on the testimony, was long enough to make such a difference in the distance traversed by her that, if the order to stop and reverse had been given at once, she would not have struck the schooner. But without regard to that fact, which could only be known by the event, the situation at the time the horn was heard called for an instant and most rapid possible reduction of her immoderate speed. This the captain seems to have realized when he reached the bridge. He did then what the mate should have done before.

It remains to consider whether the schooner is also in fault. The fault charged is that she did not show a torchlight to the approaching steamer. It is admitted that she did not show a torch, but it is insisted that she was under no obligation to do so, so far as this steamer was concerned, because the steamer was a foreign vessel, to which the navigation laws of the United States do not apply and on which they are not binding. And it is further contended, that if she had shown a torch there was nothing that the steamer could have done after she could have seen it to have avoided the collision already made inevitable by her own imprudence. By an act of congress, passed in 1871 [16 Stat. 440], it was enacted that "every such" (i. e., sailing) "vessel shall, on the approach of every steamer during the night time, show a lighted torch upon that point or quarter to which such steamer shall be approaching. And every such vessel that shall be navigated without complying with the terms of said act of April 29, 1864 [13 Stat. 58], and the provisions of this section, shall forfeit and pay the sum of two hundred dollars," etc. It is claimed on the part of the libellants that the law which governs the case of a collision between an American and a foreign vessel is the general maritime law, or "those rules of navigation which usually prevail among nations navigating the seas where the collision takes place;" that a foreign vessel cannot attribute as a fault against an American vessel the violation of an act of congress unless the requirement of that law has become a part of the general maritime law or rule of the sea, which it is insisted is not the case in respect to this statute regulation. So far as appears by evidence in this case, no other maritime nation has made this regulation, as to showing a torch-light, a part of its positive statutory regulations for preventing collisions. The rule of law here invoked on the schooner's behalf, is undoubtedly the rule of the English court in respect to their own navigation laws. It was first applied by the court of admiralty, and has received the assent of the privy council. The Dumfries, Swab. 63; The Zollverein, Id. 96; The Chancellor, 4 L. T. (N. S.) 627; The Saxonia, 1 Lush. 410. In the case of The Belle [Case No. 1,269], Judge Shipman, in this court, upon the authority of the first three of these cases, directly applied the same principle in exoneration of a British vessel sued here by the owners of an American vessel, with which she was in collision, refusing to find it as an act of negligence against the British vessel that she had failed to comply with the positive requirement of the British statute in respect to lights; that requirement not being then a part of the maritime law generally nor enacted by our congress. It is to be observed, however, that in that case the judge expressly found that "there was no proof whatever, that the failure to carry the colored lights prescribed by the British act, misled the Belle or in any way contributed to produce the disaster." In the case of The Scotia [Id. 12,513], in this court, these English cases were approved. The question was whether the Scotia being sued here by the owners of the Berkshire, an American vessel, could impute it as a fault to the Berkshire that she had failed to comply with the act of congress prescribing the lights to be carried by American vessels. The collision was attributable to the Berkshire's carrying no colored side lights and showing a white light, at such a height that the Scotia mistook her for a steamer, at much greater distance off than she really was. The case was decided by the district court in favor of the Scotia, on the ground that the establishment of the same regulations as to lights by a very large number of maritime nations, including Great Britain and the United States, showed that this regulation as to lights had become part of the general maritime law in force in that part of the sea where the collision occurred. The case was appealed and the circuit judge, while concurring in the decision, on the ground that whether the Berkshire was bound to observe these rules or not, she was alone at fault and the Scotia was not at fault, distinctly disapproved of the rule of the English cases cited above, on the ground that these regulations for preventing collisions and for the security of life and property, were designed to be observed at all times and in all places by American vessels; that they were designed for the benefit of all mankind in securing the greater safety of life and property at sea; that at any rate they were designed to secure greater safety of life and property on our own vessels, and that therefore public policy requires that they should be always enforced in our own courts. The case then went to the supreme court [14 Wall. (81 U. S.) 170], and the decisions below were affirmed. Mr. Justice Strong, in delivering the opinion of the court, while he seems to put the decision of the case on the ground that in any view of this question the merits were wholly with

the Scotia, yet, as it seems to me, strongly disapproves the rule established by the English cases cited above. He says: "We rest this conclusion, not solely or mainly upon the ground that the navigation laws of the United States control the conduct of foreign vessels, or that they have as such any extra-territorial authority except over American shipping. Doubtless they are municipal regulations, yet binding upon American vessels, either in American waters or upon the high seas." "We concede, also, that whether an act is tortious or not, must generally be determined by the laws of the place where the act was committed. But every American vessel, outside of the jurisdiction of a foreign power, is for some purposes, at least, a part of the American territory, and our laws are the rules for its guidance. Equally true is it that a British vessel is controlled by British rules of navigation. If it were that the rules of the two nations conflicted, which would the British vessel and which would the American be bound to obey? Undoubtedly the rule prescribed by the government to which it belonged. And if in consequence collision should ensue between an American and a British vessel, shall the latter be condemned in an American court of admiralty? If so, then our law is given an extra-territorial effect and is held obligatory upon British ships not within our jurisdiction. Or might an American vessel be faulted in a British court of admiralty for having done what our statute required? Then Britain is truly, not only the mistress of the seas, but of all who traverse the great waters. It is difficult to see how a ship can be condemned for doing that which, by the laws of its origin or ownership, it was required to do, or how, on the other hand, it can secure an advantage by violation of those laws unless it is beyond their domain upon the high seas. But our navigation laws were intended to secure the safety of life and property as well as the convenience of commerce. They are not in terms confined to the regulation of shipping in our own waters. They attempt to govern a business that is conducted on every sea. If they do not reach the conduct of mariners in its relation to the ships and people of other nations, they are at least designed for the security of the lives and property of our own people. For that purpose they are as useful and necessary on the ocean as they are upon inland waters. How, then, can our courts ignore them in any case? Why should it ever be held that what is a wrong when done to an American citizen is right if the injured party be an Englishman?" In this state of the authorities I do not think that the English cases cited or the former decisions in this court, both of which, it will be observed, were rested partly on other and independent grounds, are in any way controlling. And I do not perceive that the cases cited by the libellants, with regard to the construction put upon the English act limiting the liability of ship owners, have any pertinency to this question. They proceed simply on the ground that that act by its terms is to be construed as intended to be limited to British ships. This appears very plainly in the opinion of Vice-Chancellor Wood in Cope v. Doherty, 4 Kay & J. 367. The cases of The Dumfries, The Zollverein, and The Saxonia, proceed not on the principle that a British ship on the high seas is in general absolved from its obligation towards its own government and her subjects to obey the British navigation laws but upon the ground that this is a duty only to her own government and its subjects, and not to foreigners; that the laws were not passed for the benefit of foreigners and are not binding on them, and that it is inequitable to enforce the rules against a British ship in favor of a foreign ship, because if the case were reversed and the foreign ship had committed the same fault, not being a fault by the general maritime law, the British ship could not avail herself of it as a fault against the foreign ship; that this would be to put the British vessel to a disadvantage in her own courts. It is not to be forgotten that the ground of liability in this class of cases is negligence. If a given act is in violation of a positive regulation of statute law, obligatory upon the party, it is, as a general rule, conclusively negligent, and if it may have contributed to the injury the burden is thereby thrown on the guilty party to prove that it did not so contribute to the injury. This is the American as well as the English rule. The Pennsylvania, 19 Wall. [86 U. S.] 137. Now, whatever may be the decision ultimately reached in such cases as The Scotia [supra], where the prescribed act omitted was the observance of a mere artificial mode of signalling to other vessels the character of a vessel or her position and course, by an arbitrary arrangement of certain prescribed lights, it seems to me that the failure of an American vessel to comply with the requirement of the act of 1871, in reference to showing a torch, must be held to be an act of negligence on her part, whether the other vessel is domestic or foreign. That statute seems especially designed to protect our own sailing vessels and to save life and property thereon. It is true that a steamer approaching a sailing vessel under circumstances to which the statute applies will be in some danger, and it may well be, and probably is, true, that her protection, whether foreign or domestic, was also within the purview of the act; but it needs no argument to show that the relative positions of the two vessels must generally be of very unequal peril, greatly to the disadvantage of the sailing vessel. The object of the torch is to give the steamer such information as to the position and course of the sailing vessel that she may not run her down. It seems especially, if not solely, ap-

plicable to the case of a sailing vessel approached from astern or on the quarter where her own lights cannot be seen, and to the case of a vessel, in danger of being thus run down by a steamer. Not only is it apparently designed chiefly for the safety of the sailing vessel but the thing required to be done is not the giving of a mere artificial or arbitrary signal, but is simply such a precaution as prudence might in the absence of any regulation suggest, and such a signal as any steamer would understand, whether aware of the regulation or not. Congress can declare what shall be considered negligence in the mode of navigating an American ship under given circumstances, and this is what I think has been done by this statute. Considering the obvious purpose designed to be accomplished by the act, I have no doubt it was intended to be observed by all American vessels everywhere, approached in the night time in the manner described by any steamer, whether domestic or foreign. The peril in either case is the same and the precaution prescribed would be equally effective. I think the case may be distinguished from the case of arbitrary or artificial signals. As to those there is more reason to say that they are inapplicable between ships of different nations, where they have not become part of the language of the sea. They are of doubtful utility unless understood and used by both parties.

I think, therefore, I am bound to hold as an act of negligence the omission of the schooner to comply with the act of 1871 by showing a torch, and it is unnecessary to decide whether, independently of the statute, it would have been required of this schooner by the general maritime law, as contended by the claimant. Under some circumstances the general maritime law does require a vessel to show other lights besides the regulation lights. See especially The Anglo-Indian, 3 Asp. 1; The Earl Spencer, Id. 4.

It is urged that the rule does not apply in foggy weather; that other regulations are especially made for foggy weather. It is a sufficient answer to say, that according to the state of things observable to those in charge of the schooner, lights could be seen a considerable distance, certainly further than objects lying low in the water like the schooner's hull, or even her sails. And I see no reason for excepting foggy weather, be the fog ever so dense. The rules must be complied with. Fogs may break away suddenly, as we see by this instance.

But it is still a question whether the steamer could have taken any precaution after she could have seen the torch for avoiding the schooner. It is impossible to determine that she could not have done so. The schooner was struck about forty feet from the stern. The steamer was, from the time the fog horn was heard, under a hard-a-starboard wheel. Under this wheel her head began to fall off to port. According to the testimony of the second mate it fell off a point and a half before the captain gave the order to stop and reverse full speed. The effect of backing, even with a hard-a-starboard wheel, was to throw her head the other way. If her wheel had been seasonably thrown to port upon discovering by a torch-light which way the schooner was going, this movement to starboard would have been accelerated so long as she had any headway. The question whether there would have been time for this manoeuvre, depends partly on the question how far off those on the steamer could have seen a torch-light, and partly on the question how much the porting at that time would have changed the steamer's heading to starboard. Unfortunately for the schooner, the elements for determining these two questions are very uncertain and mostly speculative, and her violation of a positive rule, obligatory on her, makes it incumbent on her to produce such evidence as will determine these points with at least reasonable certainty in her favor. I think she has not done so. There was certainly a considerable time before the collision that the lights of the steamer were plainly visible from the schooner. There was time enough for considerable running about, horn-blowing and shouting in the vain endeavor to make those on board the steamer change their course. While it cannot be assumed that a torch-light on the schooner could have been seen on the steamer as soon as the green light of the steamer was seen on the schooner, yet if it had been seen after that time it is still quite possible upon the evidence that the steamer could have reversed her wheel in time to have gone under the stern of the schooner, and the question how far a torch-light could have been seen, must be determined chiefly from the testimony of those on the schooner, since they alone of all the witnesses had any opportunity to form any judgment on that point.

It is claimed that the schooner was negligent in not blowing her horn loud enough or often enough. It is argued that the act of the mate in snatching the horn from the lookout and blowing it himself, shows that he was not satisfied with the way it had been blown. I do not think this is a proper inference from the testimony. It is a singular fact in the case that but one blast of the horn was heard on the steamer, but the evidence is sufficient to prove that it was blown at proper intervals and several times just before the collision.

The result is, that both vessels were in fault, and the libellants will have a decree for half their damages and costs, and a reference to compute the amount of their damages.

An application was subsequently made by the libellants to modify the decree so as to decree that the libellants should recover the

full value of the cargo and of the seamen's effects.

CHOATE, District Judge. It has been determined in this case that both vessels were in fault. The suit is in personam by the owners of the schooner sunk by the collision, against the owner of the steamer. The answer, while alleging the fault on the part of the schooner, which has been found by the court, did not claim any rebate on account of the damage done by the collision to the steamer. It appears, however, by the testimony that the steamer sustained at least slight damage. A question now arises as to the form of the interlocutory decree to be entered. The libellants insist that there should be a decree for half the value of the schooner and the full value of her cargo and of the seamen's effects. It is argued that the steamer is liable to the innocent owner of cargo for its whole value; that as to that part of libellants' claim the libellants sue merely as agents or trustees; that the schooner, being totally lost by the collision, her owners are not, under the statute limiting the liability of ship owners, liable to the owners of the cargo for any part of this damage; that, therefore, the steamer must pay it in full. And the same argument is applied to the claim for the seamen's effects. It is insisted on behalf of the respondent that the loss should be apportioned, and that out of the recovery for the value of their vessel the libellants should pay to the owners of their cargo and to the seamen half of the loss sustained by them. The libellants offer to have the owners of cargo brought in, if necessary, as parties, and the respondent asks leave to amend his answer so as to have the benefit of an apportionment in accordance with his right upon the facts proved.

The prinicple of apportionment, as I understand it, requires, where there is fault on both sides, that the loss or damage caused by the collision should be borne equally by the two parties. Damage done to cargo in either vessel is a part of that loss or damage, and it is wholly immaterial in which vessel the damaged cargo happens to be. It is very true that the owner of the cargo may sue and recover its value from both or either. The Atlas, 93 U. S. 302. And the owners of the schooner have an undoubted right to sue on behalf of the owners of the cargo for its value. It would seem that so suing their rights as bailees must be as great as if the owners of cargo joined as libellants. No final decree should, therefore, it seems, be made which will give the libellants a smaller amount as bailees than the owners of the cargo would be entitled to receive. And I think the same may be said as to the seamen.

But the fact that the suit is in personam ought not to make any difference as to the apportionment of the damage caused by the collision, including the value of any property lost or damaged. And, as between the owners of the two vessels, each must bear his half of the entire loss and damage. Therefore, as between the owners of the two vessels, the owners of the schooner must bear half the loss of the cargo. This is not enforcing a personal liability of the owners of this schooner beyond her value. It is simply apportioning between them and the owner of the steamer the damage caused by the collision and charging them with half of it and the owner of the steamer with half of it. The principle is the same as if the damaged cargo had been on board the steamer. In that case could the owners of the schooner say, We would not be personally liable for this loss because of the statute, therefore there shall be no rebate on this account. If they could say this, they could make the same plea as to the damage to the steamer herself, and so the principle of apportionment would be wholly set aside if one of the vessels is lost. Any other mode of adjusting the damage would not be an equal apportionment of the damage, which is to be regarded as a unit for this purpose, whatever may be the parts of which it is composed. The decree in the case of The Eleanora [Case No. 4,335], seems to have been entered in conformity with this view. The question of the effect of the statute limiting the liability of ship owners, cannot arise unless it shall appear that by such apportionment the libellants will not recover enough to reimburse the owners of cargo on whose behalf they sue. It seems to be unnecessary to make the owners of the cargo parties if that could be now done. They are virtually before the court through the libellants. The amendment asked for by the respondent, setting forth the damage to the steamer, is one that will conform the pleadings to the facts proved. It should therefore be allowed. The decree will be that the damage be apportioned and all questions as to what adjustments may be necessary in consequence of what may be shown as to the respective amounts of damage to cargo and other interests will be reserved till the coming in of the commissioner's report. And the point here decided on this motion may be reconsidered upon application for a final decree, if cause shall be shown for a rehearing. Decree accordingly.

[NOTE. After the decision was rendered in this case the libelants filed a petition alleging that the collision occurred without the proof or knowledge of the petitioners, and claim the benefit of the limited liability act (Rev. St. §§ 4283, 4285), especially in reference to their personal liability to the owners of the schooner for the value of the remaining one-half part of the cargo. The owners of the steamship filed exceptions to the petition, alleging that the petitioners were residents of Massachusetts, and not of this district, and that they, the owners of the steamship, were British subjects and neither residents nor served with notice of these proceedings in this country. They therefore denied the jurisdiction of the court upon the proceedings. Brown,

District Judge, held that the act of congress was intended in the administration of justice in maritime cases to apply as well to foreigners as to citizens of this country. As to the first exception, that none of the petitioners reside within the district, he held that the statute in the use of the words "in any district" clearly brought the case within the jurisdiction of the court, and further, that the parties are in any case virtually within the jurisdiction. In re Leonard, 14 Fed. 53. Exceptions were taken to the commissioner's report ordered to be taken by Judge Choate in the case above reported, assessing the value of the schooner at time of loss at $20,551. The exceptions are overruled, and the report confirmed. Leonard v. Whitwill, 19 Fed. 547.]

LEONARD (WILLIAMS v.). See Case No. 17,726.

LEONARD v. The VOLUNTEER. See Cases Nos. 16,990 and 16,991.

Case No. 8,262.

The LEONIDAS.

[Olc. 12.] [1]

District Court, S. D. New York. Oct., 1843.

PRACTICE IN ADMIRALTY—SEAMEN'S WAGES—SUIT IN REM—MASTER—MATE—CARRIERS—GOODS NOT DELIVERED—PROPER ACTION — CARGO SOLD BY MASTER—RIGHT TO CONTRIBUTION.

1. Where the mate, upon the decease of the master, succeeds to the command of the vessel, he cannot sue, in rem, for the extra compensation he thus becomes entitled to as acting master.

2. According to the English and American cases, the mate must sue in the admiralty as mate. His claim for services as temporary master, either demanded as additional wages or as a quantum meruit, must be agitated elsewhere. By the well-settled rule in admiralty, the master of a ship is entitled only to an action in personam for the recovery of compensation for his services.

3. The holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel in rem, where the goods shipped on board are not delivered.

[Cited in Robinson v. Memphis & Charleston R. Co., 9 Fed. 139.]

4. If part of the cargo be sold in a foreign port by the master, to supply the necessities of the ship, the owner of it may be entitled, in case the ship or owners cannot satisfy his demand, to proceed against other owners of cargo to contribute, in proportion to their respective interests, towards his indemnity.

5. In an action in rem against a vessel, the court cannot take cognizance of collateral equities to enforce them against parties personally, not made parties to the proceedings, where such decree may be prejudicial to their interests.

In admiralty.

BETTS, District Judge. This is an action instituted by two seamen and the chief mate in rem, to recover wages due them. The demands by the seamen and the mate in that capacity are not contested. But it is made a point of controversy whether the mate, succeeding to the command of the vessel, can sue in rem for the extra compensation he thus becomes entitled to as acting master. It is admitted the English rule does not allow such recovery in admiralty (2 C. Rob. Adm. 232; The Favourite, 2 Strange, 937); but it is contended that a different principle is sanctioned in this country, and the case of The George [Case No. 5,329] is relied upon as establishing that doctrine. This point, however, is not touched in that decision, nor does any principle there decided necessarily embrace it. The mate in that case, after the command of the vessel devolved upon him, went ashore and received medical treatment, which was paid for by him out of the funds of the ship; that disbursement was set up by the owners as a sum to be deducted from his wages. Lamson v. Westcott [Id. 8,035].

But it does not appear, from the statement of this case in the district or circuit courts, that the increased wages due him as master were included in his demand. If they were, no objection was raised to their allowance, the cause proceeding upon the admission of the libellants' account, and only seeking a decision as to the justness of that deduction. The court adjudged, that as mate or mariner he was entitled to be cured at the expense of the ship, and that his casual command of the vessel did not deprive him of any of the incidents or privileges appertaining to him as mariner. Judge Story goes further, and intimates that a master is also entitled to be cured at the expense of the ship the same as a mariner. The last suggestion is advanced only to show that the court, in adjudging in favor of the libellants, could not be understood to decide, that because he had such privilege, he was entitled to enforce it in rem, nothing being now more definitely settled than that a master has no remedy against the ship for his services. I do not therefore perceive, that Lamson v. Westcott, [supra,] has any relation to the point in question. It rests on considerations and principles entirely distinct from that of the method by which the mate is to collect the compensation he becomes entitled to as acting master. I find no American case that conflicts with the decisions of the English courts. Judge Peters expressly affirms those cases. He says, the mate "must sue in the admiralty as mate, and his wages, as such only, are recoverable here. His claim for services as temporary master, either demanded as additional wages or as a quantum meruit, must be agitated elsewhere." Atkyns v. Burrows [Case No. 618].

It is difficult to discover any satisfactory principle for limiting the relief of a master in the admiralty to an action in personam, his services being pre-eminently in the vessel and for her benefit; and his contract is technically with the owners, but ordinarily without any personal knowledge of them or their responsibility—perhaps scarcely less frequently than the engagements of the seamen. The reason suggested in the books—"The presumption is that the mariners who contract with the master, contract with him on

[1] [Reported by Edward R. Olcott, Esq.]

the credit of the ship; whereas the master, who contracts with the owners, is presumed to trust to their personal credit"—is by no means universally true as matter of fact, as the employment of a master is as often by a ship's husband, agent or consignee, as by the real owner. They frequently are numerous and widely dispersed, and the ship's papers do not necessarily disclose the names of the actual owners. Whatever may be thought of the principle of the rule, it is not my province to disturb a well-settled doctrine of law, and I do not discover any ground of discrimination upon which a compensation as master can be recovered by a mate in a method different from that established in behalf of the master, taking his authority in any other manner than by casual succession. If his action against the owners in personam is carried to a decree, the court may equitably retain any surplus or remnants out of the proceeds of the vessel in court for its satisfaction, but in this case no such surplus will remain. So much of the libellant's demand as relates to an extra compensation in his character of master must accordingly be disallowed, and the clerk will report the amount due him for wages, as mate, and also the amount due the other parties suing with him, as co-libellants.

At a subsequent day, upon the coming in of the clerk's report in this cause, Mr. Benedict moved for its confirmation. Mr. Cutting opposed the motion, and asked that $62.75 be deducted from the amount reported due the master.

BETTS, District Judge. The libellants, Hill, and Owen, had a remedy in admiralty on their bill of lading against the master on his undertaking, or personally against the owners of the schooner, or against the schooner in rem, because of the non-delivery of the goods shipped on board. Poland v. The Spartan [Case No. 11,246]; 3 Kent, Comm. 207; Smith, Merc. Law, 175; Abb. Adm. 92, 94, 170. The ship is bound to the merchandise and the merchandise to the ship. Cleirac, 72; Malpica v. McKown, 1 La. 259; Aray v. Currel, Id. 539. And because part of the cargo, their property, was sold in a foreign port by the master to supply the necessities of the ship, the libellants might probably be entitled, in case the ship or owners could not satisfy their demand, to compel the other owners of cargo to contribute in proportion to their respective interests towards his indemnity. The Packet [Case No. 10,654]; The Gratitudine, 3 C. Rob. Adm. 240; The Hoffnung, 6 C. Rob. Adm. 383; American Ins. Co. v. Coster, 3 Paige, 323. They brought their action against the vessel alone, and obtained a decree for full compensation out of her proceeds in the registry. But the ship's crew have since interposed their demand for wages, and that right taking precedence of the shipper's claim, and the proceeds in court being insufficient to satisfy both, it is now urged that the mate shall be compelled to apply towards his wages the $62.75, being the surplus of cargo sold and remaining in his hands, or bring that money into court, to be distributed according to the rights of these libellants.

An action properly framed, might possibly have commanded a decree conformably to the latter branch of the application. The money in the hands of the mate, as acting master, being part of the proceeds of the libellant's goods, belongs to them; and as against them, in a suit founded on that fact, he could not retain it, to be applied in his accounting with the owners of the vessel. In an action in rem against the vessel, this court cannot take cognizance of collateral equities, to be enforced against third persons not parties to the suit, and the shape of the case before the court would accordingly prevent the rendition of a decree against the mate, compelling him to perform an act to his own prejudice and the advantage of the libellants. This is not mere matter of form. Marthan, the mate, became, by the decease of the master before in command, actual master of the vessel for the completion of the voyage. For this extra service he demands a compensation beyond his wages as mate; and the judgment rendered in this case by the court admits the validity of such demand as against the owners, only denying him a remedy in rem therefor. The decree accordingly gives him his wages, as mate alone, out of the proceeds of the vessel, and his remedy for his services as master is against the owners personally. In the adjustment of that demand he would be entitled to retain, as against them, any moneys in his hands belonging to them, and the products of the sale of the cargo for the benefit of the vessel, as between them and the mate, is their fund. It is therefore clear, that if, in this mode of proceeding, whether Hill and Owen (the libellants) obtain satisfaction or not of their demand from the proceeds in court, they can have no legal authority to force the mate to an accounting with them in respect to those moneys, and that he would have a lien on them for the satisfaction of his wages as master. Nor can the court order an application of that money towards the satisfaction of the wages decreed him as mate, and accordingly he must take his compensation out of the moneys in court to the amount settled by the report, and it must be left to an amicable adjustment, or to an action, bringing the proper parties before the court, to secure the libellants, Hill and Owen, the benefit of that fund belonging to them.

The motion to confirm the report will, therefore, be granted. The deduction of $62.75, asked for, is denied, but without costs on that motion.

Case No. 8,263.

The LEOPARD.

[2 Lowell, 238.] [1]

District Court, D. Massachusetts. April Term, 1873.

COLLISION—FAILURE TO SHOW LIGHT—OTHERWISE SEEN—MISTAKE OF POSITION.

A steamer and a schooner were approaching each other in the night-time, and the schooner neglected to show a torch, as required by St. 28th Feb., 1871 (16 Stat. 459); but the crew of the steamer saw the schooner at least as early as the torch ought to have been shown; and the collision appeared to have arisen from a mistake of the position of the schooner in the channel, and not from a failure to see the schooner. *Held*, the fault of the schooner did not contribute to the collision.

[Cited in Perkins v. The Hercules, 1 Fed. 928; Farwell v. The J. H. Starin, 2 Fed. 110; Brainard v. The Narragansett, 3 Fed. 256; The Isaac Bell, 9 Fed. 848; The City of Lynn, 11 Fed. 341; The Excelsior, 12 Fed. 203; The Lizzie Henderson, 20 Fed. 528; The Pennland, 23 Fed. 556; The Ogemaw, 32 Fed. 925.]

Libel by the owners of the schooner Brutus against the steamer Leopard for damages, propounded that the schooner, loaded with sand, was coming up Fort Point channel, in the harbor of Boston, at eleven o'clock at night, on the second day of September, 1872, heading about south-westerly, with a light north-westerly wind, not enough to give her steerage way, when she was run into and instantly sunk by the steamer. The answer of the master, who was the claimant of the steamer, set up that she was coming down the harbor in order to proceed to sea, and was making only about three knots an hour; that the master was at the wheel, and the mate on the lookout, and both lights of the schooner were seen about one-eighth of a mile distant; that the schooner presently starboarded, and showed her green light, upon which the steamer's head was turned a little to port, in order to pass between the schooner and the town; that the schooner then began to swing across the steamer's course, showing first both lights, and then only the red light, upon which the engine was reversed as quickly as possible, and they hailed the schooner, but to no purpose. The evidence tended to show that the schooner was a small vessel loaded with sand, which was to be delivered at South Boston; that she intended to come to anchor below the bridge of the Hartford & Erie Railroad Company. On rounding into this channel, the schooner had taken in her mainsail and jib, and dropped the peak of her foresail. Her witnesses testified that her helm was kept at port all the time after she came into the channel, so that she was edging in towards the wharves; but that the wind died away, and she was drifting up with the tide when the collision happened, it being then flood-tide, within about an hour of high water. They hailed the steamer to port her helm; but heard nothing from her, and saw no change in her course or in her speed. The witnesses for the defence insisted that there was a four of five knot breeze; that the schooner changed her course; and that the steamer reversed her engine, as alleged in the answer. It was proved that the schooner's running lights were set, and burning, but that she showed no torch.

I. T. Drew, for libellants.

J. C. Dodge, for claimant.

LOWELL, District Judge. The case turns on the conduct of the schooner; because the night was fine, both vessels were easily to be seen, and were seen. The steamer was bound to avoid the schooner, and cannot excuse her failure to avoid her, except by showing some fault of omission or commission on the schooner's part, which either misled the steamer, or frustrated her manoeuvres, or prevented the schooner being seen soon enough. The charges are, that the schooner changed her course, and that she showed no torch. The former is denied; the latter is admitted, but it is denied that any ill consequences resulted from the neglect.

I cannot reconcile the evidence, nor account for all the differences; but my best judgment is, that the schooner did not make the changes which the master and mate of the steamer say she made. The conclusion that no starboarding took place on board the schooner rests on the positive evidence of her crew, on the statement of two disinterested witnesses looking on from another schooner, and on the very great improbability that a vessel going up this channel with a fair wind should take such a foolish course, without any motive. This point being found for the schooner, very much weakens the case against her; because the whole foundation is taken from under the answer, which makes the schooner's starboarding the reason for a like order on the part of the steamer. How the officers could have made such a mistake, I know not; but the fact detracts very much from the value of their succeeding observations of supposed changes of the lights. As they are the only persons who saw any change, I should feel unwilling to take it as proved on their testimony.

It is argued that the crew of the libellants' vessel virtually admit a change of course, when they say either that they put the helm to port, or that they kept it there at and after the time the steamer's lights were seen, unless we adopt their further statement, that they had no steerage-way. I am rather inclined to think the preponderance of the evidence makes out that the schooner had not steerage-way during the last few minutes before the collision; though I agree that the master must have thought he had wind enough to reach his anchorage ground when he took in most of his sails; but it had, per-

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

haps, died away. Supposing it even a four-knot breeze, I don't know how fast this schooner would work under two-thirds of her foresail, but I suppose she would have not much more than steerage-way. That precise question is not a vital one, in my judgment; because I do not consider that the schooner did change her course in any such way, or to any such extent, as to cause or contribute to this collision. If she kept her helm ported, which I understand she did, I see no reason to believe that this caused any change of course of the least consequence, if it caused any at all, on her part. I do not know that the rule of the road requires a sailing-vessel always to steady herself in the exact direction she is in when she sees a steamer approaching; that is to say, to put her helm amidships at once, and keep it there, if it is at the port or starboard. If she was going very slowly towards the right of the channel, and continued to go, so far as she went at all, in the same direction, I doubt very much whether this would be a change of course in the sense of the law,—even though it were true, as I think it is not, that she had in that way crossed over some considerable part of the channel from the time she was first discovered. I doubt whether the law means to draw any distinctions so fine as to prohibit a vessel that is crossing a channel to continue to cross it when a steamer is discovered. However, I do not believe that any such thing took place, or that the schooner's continuing to keep her head somewhat to the right had any thing to do with the collision. The great fault of conduct was in the steamer's putting her wheel to starboard; and there was no time, in my opinion, after this was done, when any thing on the part of the schooner could have changed the result.

The schooner did not comply with the act of 28th February, 1871, § 70 (16 Stat. 459), requiring every sailing-vessel, on the approach of a steamer during the night-time, to show a lighted torch upon that point or quarter to which such steamer shall be approaching; and the burden is upon the libellants to show that the neglect neither caused, nor contributed to cause, the unfortunate issue. This burden I consider the libellants to have sustained. The master and mate of the steamer appear to have seen the schooner early enough to have avoided her, and as soon as there was any obligation to show a torch; and the mistake which they made of supposing her to be on the easterly side of the channel does not seem to me to have arisen at all from any imperfect view of the schooner, but from a misconception of the situation and character of the channel itself. I suppose the new regulation in the act of 1871 was intended to give an additional warning to steamers, in case of need, and one the use or neglect of which could not well be disputed; so that if the red and green lights were not lighted, or were dim, or were overlooked, there should be still another means of calling attention to the sailing-vessel. But when it is found that the vessel was in fact seen, and her side-lights noted, though mistakenly, and even her foresail visible, as the master of the steamer says it was, I do not see that the torch would have added any thing to the knowledge which, fortunately for the libellants, the steamer's people already had of the position of the schooner. I shall not, therefore, divide the damage; for I find the first and only efficient mistake was committed by the steamer.

On the question of damages, nearly all the evidence comes from the libellants. They estimate their losses in their libel at $2,000 for the vessel, $85 for the cargo, and for clothing, &c., $300. The testimony goes to confirm these valuations, excepting that perhaps some allowance ought to be made for wear and tear of the schooner. She was very old, and had cost, within a year or so, $1,200; and repairs had been put upon her, which, if they were all supposed to add to her value to the full amount, would bring her cost above $2,000. But I suppose a part of these must be set down to current expenses necessary to keep the vessel going from year to year. Making some allowance for this, and, on the other side, giving something for delay of payment, I assess the damages at $2,140, of which $250 is for clothes and other effects of the master and crew. Decree for libellants for $2,140 and costs.

Case No. 8,264.

The LEOPARD.

[2 Ware (Dav. 193), 197.] [1]

District Court, D. Maine. Sept. Term, 1842.

COLLISION — ENGAGED IN ILLEGAL EMPLOYMENT — HAVING FAIR WIND — STEAM CONSIDERED FAIR WIND.

1. Whether a vessel when engaged in an illegal employment can maintain an action for an injury received from another vessel by collision—Quaere?

2. When there is danger of collision between two vessels, the one that is sailing before the wind, or with a fair wind, must give way for one that is close hauled on the wind.

[Cited in Dickenson v. The Gore, Case No. 3,893.]

3. A vessel moved by steam is considered as always sailing with a fair wind, and must, in all cases, give way for a vessel moved by the wind.

This was a case of collision. The libellants were the owners of a small steamboat plying on the Kennebec river, between the towns of Bath and Woolwich, as a ferry boat. On the 28th of April, while she was passing on her usual track from Woolwich to Bath, she was run afoul by the schooner Leopard, and considerably injured, and this libel was filed to recover the damage. The facts, as they appeared in evidence, were that the schooner was coming up the river, with a fair wind from the south-west which

[1] [Reported by Edward H. Daveis, Esq.]

carried her at the rate of six or seven miles an hour, but having the tide in her favor she was actually going at the rate of eight or nine miles. At the time when the accident took place the mate was at the helm, and the master on deck standing between the bulkhead and the mast, in such a position that he could see whatever was before the vessel and on her larboard, towards Bath, and could also see three or four points over her starboard bow, but her sail being spread hid from his view anything that might be approaching from the Woolwich side, nearly opposite to her, and anything in that direction was also by the sail hid from the view of the mate. The boat was approaching from the Woolwich side, with the schooner full in sight. As the two vessels came near to each other, Capt. Delano, who was a passenger on board the boat, seeing that they must come in collision if both held on their way, called out to the helmsman of the boat to put his helm up, and at the same time hailed the man at the helm of the schooner to put his helm down. The helm of the boat was put up accordingly, but the helmsman in the schooner, not hearing the call, she kept on her way, and the vessels immediately came in collision, the bows of the schooner striking against the side of the boat, and doing the damage complained of.

Sewall & Howard, for libellants.
N. L. Sawyer, for respondents.

WARE, District Judge. A preliminary question has been raised in this case as to the right of the libellants to maintain this suit, on the ground that the boat, at the time when the collision took place, was engaged in an illegal employment. It is provided by the Revised Statutes of Maine (chapter 27, § 1) that no person shall keep a ferry and receive pay from passengers without first obtaining a license therefor from the county commissioners, which the commissioners are authorized to grant from time to time, and to revoke when necessary; and the 9th section imposes a penalty on any person, who shall keep a ferry contrary to the provisions of the first section, of four dollars for each and every day it shall be so kept. As the libellants have shown no license for keeping a ferry, the argument is, that, the boat being engaged in an illegal employment, the owners can maintain no action for a tort against her by a vessel which was in the lawful use of the waters.

The libellants, in answer to this objection, claim the right to keep a ferry at this place, under the act of March 7, 1834, incorporating the Sagadahoc Ferry Company [Laws Me. 1834, p. 727]. By that act, John Parshley and others were created a body politic and corporate, under the name of the Sagadahoc Ferry Company, and authorized to establish and maintain a ferry across the Kennebec river, between Bath and Woolwich, at the place where this ferry is established, at any time within two years from the October after the passage of the act. In 1836, an act was passed extending the time for establishing the ferry to 1837 [Laws Me. 1836, p. 167], and under this act the ferry was put in operation. The company having become embarrassed, a suit was commenced against them by a creditor, upon which, in December, 1838, judgment was obtained, and the franchise was seized on the execution and sold on the 7th of March, 1839, to Wm. M. Rogers, for the term of one hundred years, to satisfy the judgment; and Rogers, by his deed of January 26, 1841, conveyed the same to the libellants, who thus became the owners of the franchise, for the term of time mentioned. It is not denied that the corporation, having by a special act of the legislature been created for this express purpose, might well establish and maintain a ferry without a license from the county commissioners, the act itself constituting a license until the franchise should be forfeited, surrendered, or lost, in some mode known to the law. The question is whether this authority passed by the sale on the execution to the purchaser of the franchise, and might by him be assigned to the libellant. In the case of The Maverick [Case No. 9,316], the question arose whether a license to keep a ferry was assignable under the laws of Massachusetts. The court held that it was not. The person who keeps the ferry must have the license. It is a personal trust reposed in him, upon the confidence entertained in his qualifications and fitness for the trust. The whole community have an interest in the character of persons who keep public ferries, which all travellers are obliged to use, and that none should be allowed to keep them but men of sober habits, and such as will be careful and attentive to the safety of those who are obliged to use them. The law, therefore, for the common benefit of all, requires that no one shall keep such a ferry until he has been approved and has obtained a license for that purpose from the prudential court of the county within which the ferry is. The law of Maine appears to be a transcript of that of Massachusetts, having been reënacted in the revision of the laws in 1821, and again incorporated into the Revised Statutes.

The only distinction in this point, between the case of The Maverick [supra], and the present case, is, that in the former the ferry was kept under a license from the court of sessions, and in this it is kept under a special act of the legislature, granting the franchise, and with it the authority to maintain a ferry, to the corporation. But, looking to the general policy of the law with respect to ferries as well as to the special provision of this act, the franchise granted must be considered as clothed with a trust, or at least subject to certain duties to be performed on their part. By the 4th section of the act the

corporation are required to keep good boats and in good repair, suitable and convenient for the accommodation of passengers, and to cause ready and due attendance to be given at all times; and for the neglect of any of these duties, they are subjected to penalties provided by the act. The corporation are bound themselves to keep up the ferry and manage it by their own servants. It would hardly be contended that the corporation, by their own voluntary act, could have transferred with the franchise a right to keep up this ferry without any supervision or control on the part of the county commissioners. Before the purchaser could have kept the ferry, he would be obliged to obtain the approbation and license of the prudential tribunal of the county, which the law has clothed with the authority of supervising and controlling the management of public ferries, and whose duty it is to take care that they are kept by suitable and proper persons. If this would be the case in a voluntary sale, it seems to me that the same reasons apply with equal force to a forced sale under the legal process. Otherwise the policy of the law may be defeated, and a ferry may fall into the hands of a person entirely unfit to be intrusted with its management. It appears to me, therefore, that the purchaser, before he can legally keep the ferry, must obtain a license from the county commissioners. If this be a correct view of the law, then the case of The Maverick is precisely in point, and this objection is fatal to the suit.

But, independent of this consideration, I am not satisfied that upon the general principles of the law of the sea, this suit can be maintained upon the evidence. The rules of the maritime law on the subject of collision are founded in common sense, and have for their object the general security and convenience of navigation. The general principle is this: when two vessels are under sail in such directions that, if both hold on their course, there may be danger of their coming in collision, the vessel that has it most in her power to vary her course and keep out of the way, is bound to do so. If she does not, and a collision ensues, she is liable for the damage. Thus, a vessel that is sailing before the wind, or with a fair wind, is bound to give place to another that is close hauled to the wind, because she has more control over her own motions and can more easily change her course. But a steamboat, that is not moved by the wind, and has her motive power within herself and entirely subject to her control, which can at pleasure be moved backward or forward, and can stop her motion altogether, has her movements more under her control than any vessel that is moved by the wind. It is always in her power to avoid a collision, if she is managed with ordinary skill and prudence, when it may be entirely out of the power of a vessel that is moved by the wind and currents and must go where they carry her. For this reason, when steamboats came into use in the business of navigation, it was decided by the maritime courts, not by making a new rule of law, but by the application of an old and existing rule to a new species of vessel, that a steamboat is to be treated always as a vessel sailing with a fair wind, and is in all cases bound to give way to a vessel that is moved by sails. The Shannon, 2 Hagg. Adm. 173; The Portland [Case No. 8,583], quoted 3 Kent, Comm. (4th Ed.) 231. On this ground it was decided in a recent case by the district court of the United States for the Southern district of New York, that the rule of the maritime law relative to vessels with sails, viz.: that the vessel having the wind must bear away for one that is sailing on the wind, does not apply between steamboats and vessels with sails, but that a vessel moved by steam must in all cases give way to a vessel moved by sails. In that case a vessel having a fair wind, in conformity with the old rule, bore away for the boat, and by that means, through the inadvertence of the master of the boat, a collision took place, and the vessel was damaged. The court ruled that the vessel was in fault for not holding on her course, and consequently could not recover against the boat.

The decision in that case applies precisely to the case at bar. The schooner held on her course; and it was entirely in the power of the boat to have stopped her motion or changed her course so as to have avoided the vessel. And on the principle that has been repeatedly recognized by the maritime courts, both of this country and of England, the collision must be considered as resulting from the fault of the boat, and consequently no action can be maintained by the owners for the damage. Libel dismissed.

LEOPARD, The (CLARK v.). See Case No. 2,828.

Case No. 8,265.

In re LEPPEIN.

[1 Pa. Law J. Rep. 62; 1 Pa. Law J. 223.]

District Court, E. D. Pennsylvania. 1842.

BANKRUPTCY — DISTRESS FOR RENT FALLING DUE AFTER DECREE.

Chattels of a bankrupt remaining, after the decree, on the premises which the bankrupt occupied, are liable to distress; even though the rent fall due after the decree.

Leppein was the assignee of certain bankrupts against whom a decree had passed, on Friday, July 29th. Six days after this decree, but before the property was removed from certain premises, which they rented, the landlord distrained some of the goods for rent, which had fallen due two days after the decree. An affidavit of these facts having been filed by Leppein, the landlord's right

as against the assignee was discussed before the court, on a motion, which had been made by M'Call, for an attachment against the landlord, for contempt. On the hearing of the rule, it was said by M'Call, for his client, that the fifth section of the bankrupt act [of 1841 (5 Stat. 444)] declares, that "all creditors" shall be entitled to share in the bankrupt's effects "pro rata, without any priority or preference whatsoever," except in certain cases mentioned in the act; and among which, that of the landlord is not included. This language was strong; so strong, that the act proceeded to except "liens, mortgages, and other securities," which but for the reservation would be divested by the general words which preceded. Rent, however, was neither "lien," "mortgage" nor "other security." It was a debt, and no way different, and in no way more meritorious than other debts. Now could the court insert in the bankrupt act an exception manifestly excluded by the legislature? Again. The decree "by mere operation of law," divested all the bankrupt property "out of the bankrupt," and vested it in the assignee. This assignee was an agent of this court. The property was in the custody of the law. It was like property seized in execution. In fact a decree of bankruptcy was often called a statutory execution. Now property in the sheriff's hands could not be distrained. The decree fixed all rights. It regulated them justly, and it was important that its equitable and safe operations should not be disturbed by these violent remedies of the feudal law, nor by the dread of them.

W. M. Meredith, for landlord. No part of the bankrupt act gave the assignee greater rights than the bankrupt had before the decree. This question was, however, so well settled that it had passed into text law. "A landlord, having," says Eden (page 303), "a legal right to distrain goods as long as they remain on the premises, neither the issuing of the commission, nor the possession of the messenger, nor even the commissioner's assignment, will deprive him of his legal lien." This was settled by Lord Hardwicke (Ex parte Plummer, 1 Atk. 103), and that decision stood unquestioned. The landlord had his legal rights; the goods were on the premises; they were ordinary goods; and there was nothing in any part of the case, to destroy or to abridge the common law right of distress.

Peter M'Call, in reply, admitted the force of what was said, but remarked, that it was unsafe to rely on such cases as Ex parte Plummer. The report was meager, and the language of the bankrupt act, on which that decision was made, did not appear. Besides, in no part of the common jurisprudence of England and the United States, was the judicial inclination more divergent, than respecting distress for rent. In England, the feudal influences were yet felt. The security of the landed interest, was the security of the kingdom; while here, we were told by the supreme court of Pennsylvania, "that the right to distrain the property of a stranger, rests on no principle of reason or justice." Brown v. Sims, 17 Serg. & R. 138. The same court went still farther in Riddle v. Welden, 5 Whart. 9, and expressed its readiness yet to advance. Other courts had gone as far. See, particularly, Youngblood v. Lowry, 2 McCord, 39. This court was therefore at liberty to carry out the aim and spirit of the bankrupt act, as evidenced by its language already cited.

RANDALL, District Judge, said, briefly, that, notwithstanding Mr. M'Call's argument, he saw nothing to destroy the right of distress, as long as the goods remained on the premises. The assignee could not be in a better condition than a bona fide purchaser. It was accordingly ordered that Leppein should pay the rent, interest, and costs, out of the bankrupt's estate; the value of the property levied on having been more than sufficient for that purpose.

LERCH (MILLER v.). See Case No. 9,579.
LE ROY (BALDWIN v.). See Case No. 800a.
LE ROY (BURTON v.). See Case No. 2,217.

Case No. 8,266.

LE ROY v. CARROLL et al.

[3 Sawy. 66.] [1]

Circuit Court, D. California. June 19, 1874.

MEXICAN GRANT — LIMITATION—VAN NESS ORDINANCE.

The statute of limitations of California does not begin to run against a confirmed Mexican grant, finally located under the act of congress of 1860 (12 Stat. 34), until the patent issues.

[This was an action of ejectment by Theodore Le Roy against John Carroll and others to recover certain property claimed by defendants under a title by possession, and claimed by plaintiff by virtue of a patent from the United States.]

Wm. Mathews, for plaintiff.
Wm. H. Patterson, for defendants.

SAWYER, Circuit Judge. Action to recover a tract of land within the charter lines of the city of San Francisco, as established by the act of incorporation of 1851. The plaintiff relies on a patent of the United States issued upon a confirmed Mexican grant. The defendants and their grantors have been in possession since January 1, 1855, claiming title by possession under the Van Ness ordinance, the act of the legislature confirming the same, and the act of congress of 1864 [13 Stat. 332], ratifying said title under said ordinance and act of the legislature; and they rely upon said possession and acts, and the statute of limitations. The only question

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

is, when did the statute of limitations begin to run under plaintiff's title? The plaintiff's grant was located under the act of June 14, 1860, and the location became final by publication under that act as early as September, 1861; but the patent did not issue till June 1, 1870. This action was commenced May 5, 1873, within five years after the issue of the patent, but more than ten years after the location became final. If, then, the statute began to run from the date of the final location, or from the passage of the statute of limitations of 1863, the action is barred. But if it did not begin to run till the date of the patent, the action is not barred. By the terms of the statute of limitations of 1863, the action is barred, for under its provisions it began to run without regard to the final confirmation of the grant; but in Montgomery v. Bevans [Case No. 9,735], Mr. Justice Field held that, it was incompetent for the legislature of California to pass an act that would cut off the right of action to recover lands under a confirmed Mexican grant after final confirmation, by a statute of limitations commencing to run before the title was finally perfected under the acts of congress relating to the subject—that as against a perfected title under such grant, the "statute of limitations can only begin to run from the date of the consummation of the title;" and this principle was affirmed by the supreme court at the last term in Henshaw v. Bissell, 18 Wall. [85 U. S.] 255. But the question still remains, what constitutes such a "consummation of the title" as will set the statute in motion?

The fifth section of the act of 1860 (12 Stat. 34), under which the grant in question was located, provides that "the plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land so surveyed had been issued by the United States."

It is insisted that, under this provision, the title is perfect from the date when the location becomes final; that the grant has then been irrevocably attached to a specific tract of land; that the decree and record of the proceedings finally locating the land is complete record evidence of a perfect title to the specific tract embraced in the location equal in dignity and effect with the patent; that a patent is unnecessary, and only affords another form of record evidence of no greater efficacy; that its issue is a mere ministerial act, which may be performed, or omitted, without prejudice to the right or title of the confirmee; that every essential act has been performed by the government in thus perfecting the right of the confirmee, and furnishing record evidence of his right: that the confirmee under the act has a legal title upon which ejectment or any other action may be maintained; that if a patent was before necessary to perfect the confirmee's right, it is now perfected by the final location under the further act of 1860, or else the latter act has not the same effect and validity in law as if a patent had issued; that if a patent would otherwise convey the legal estate, the same is accomplished by the final location under this act, and, if a patent would set the statute of limitations in motion, then it is set in motion by such final location, or else the final location under the act does not have the same effect and validity in law as if a patent had been issued, and which the statutes say it shall have. In short, that, whatever be the effect and operation of the patent, the final location under the act of 1860, by the express terms of that act, has the same operation and effect as the patent itself; that the supreme court of California has given full effect to this provision of the act of congress in Seale v. Ford, 29 Cal. 106; O'Connell v. Dougherty, 32 Cal. 462; and has held the location under said act to be the final confirmation of the grant. Mahoney v. Van Winkle, 33 Cal. 448; Hubbard v. Smith, [unreported]; Bissell v. Henshaw [Case No. 1,447]. Such is briefly the argument of defendants, and to my mind it appears unanswerable. I adopted this view on a former occasion; and if there were nothing else, I should adhere to it now. But the learned justice of the supreme court assigned to the circuit, in a case arising under the Sutter grant, recently tried, expressed a different opinion, and held that the title was not so far perfected as to set the statute in motion until the patent issued. Since that time, the case of Henshaw v. Bissell [18 Wall. (85 U. S.) 255], has been decided by the supreme court of the United States, in which the same learned justice delivered the opinion, and, although he does not use the term patent in determining the point of time at which the statute begins to run, but says that the "statute can only begin to run against the title perfected under legislation of congress, from the date of its consummation," I have no doubt, from the general language of the decision, and the previous rulings of the learned justice, that he means by the term, the "date of its consummation," the date of the patent. It is said that in that case the action was not barred in any view, whether the date of the passage of the statute of limitations, the date when the location became final, or the date of the patent, be taken as the point of time, when the statute begins to run, and that the language of the opinion is, therefore, only a dictum of the judge. The fact that the court discussed and decided the point under the circumstances of the case, and the well-known circumstances connected with the question, in this state, satisfies me, that it was intended to deliberately consider and decide the point. I shall, therefore, regard the point as settled by the supreme court. If it is to be reconsidered, and, with deference, I think it worthy a reconsideration, I shall leave the task to that tribunal, where it properly belongs. It follows from

this view that the action is not barred, and that there must be judgment for the plaintiff with costs, and it is so ordered.

[For a suit by the same plaintiff seeking to restrain certain officers of the United States army from taking possession for the United States of property which the plaintiff claims under the Van Ness ordinance, see Case No. 8,273.]

Case No. 8,267.

LE ROY v. CHABOLLA et al.

[2 Abb. (U. S.) 448; 1 Sawy. 456.] [1]

Circuit Court, D. California. Jan. 28, 1871.

CONSTRUCTION OF STATUTES—MEXICAN LAND GRANTS.

1. Where several statutes upon the same general subject are inconsistent or doubtful in meaning, they should be examined together, and the probable intent of the legislature, as ascertained from the acts in their connexion, and from the attending circumstances, should be carried into effect.

2. The act of the legislature of California of March 17, 1866 [St. Cal. 1865–66, p. 246], declaring lands of the city of San Jose "not hitherto disposed of by ordinance," &c., to be vested in the corporate authorities of the city in trust for the use and benefit of the public schools,—was not intended, and therefore did not operate as a confirmation of the previous sheriff's sale of lands in that city attempted to be made under the ordinance of November 10, 1851.

[This was an action of ejectment by Theodore Le Roy against Jose A. Chabolla and others. Tried by the court, the parties having duly waived a jury.]

J. B. Felton and A. J. Moultrie, for plaintiffs.

F. E. Spencer, for defendants.

SAWYER, Circuit Judge. This is an action against some four hundred and fifty defendants, to recover a large portion of the city of San Jose and of the county of Santa Clara. The case is, therefore, one of great importance. The first question presented is, whether section 73 of the act of March 17, 1866,—to "re-incorporate the city of San Jose,"—properly construed, confirms and renders valid the confirmation of sheriff's sale, and release of the corporation to the purchasers thereunder, of all the Pueblo lands attempted to be made by an ordinance of the common council of the city of San Jose, approved November 10, 1851, mentioned in the agreed statement of facts. If not, then, there must be judgment for the defendants; for the plaintiff's title depends upon this provision of the statute.

In order to give a proper construction to this section, it will be necessary to consider the condition of things upon which the act was intended to operate, at the time of its passage. On May 28, 1851, all the Pueblo lands of the city of San Jose, being many leagues in extent, were sold by the sheriff of Santa Clara county in one parcel, and at one bid, under an execution issued upon a judgment against the mayor and common council of the city of San Jose, which municipal corporation had succeeded to the interest of the Pueblo. On June 12, 1851, the mayor of San Jose, assuming to act on behalf of the city, in pursuance of a resolution of the common council, signed a contract with the representatives of the purchasers at said sale, as parties of the first part, under which sales of said land were to be made, and after paying the amount of the judgment, expenses, &c., the proceeds were to be divided in certain designated proportions between the parties and the city; and by the provisions of said contract, the said parties of the second part (the mayor and common council) ratify and confirm the said sheriff's sale, and release to the said purchasers thereunder, the interest of the city of San Jose in said lands. Said ordinance purported to ratify and confirm said contract, and authorized the mayor to sign any deeds or contracts necessary to carry it into effect.

Between the said June 12, 1851, and April 21, 1858, the representatives of said purchasers at sheriff's sale, and the mayor of said city, in pursuance of said agreement, ordinance, &c., sold and conveyed to private parties, tracts of said land, in number more than fifty, and, in the aggregate, amounting to more than five thousand acres. And between said dates last named, said representatives of the said purchasers alone conveyed other tracts of said lands, amounting in the aggregate, also, to more than five thousand acres.

Subsequently, in 1864, it was held by the supreme court of the state, that the said sheriff's sale, contract, ordinance, &c., and the titles derived thereunder, were absolutely void, and that the title of the city of San Jose in the Pueblo lands was in no way affected thereby; the supreme court affirming the judgment of the district court rendered therein early in 1862. But the principles upon which the determination rested had been long before settled by the supreme court in other cases.

On April 21, 1858, the legislature passed an act authorizing the funding of the floating debt of the city of San Jose, and to provide for the payment thereof [St. Cal. 1858, p. 193]. By section 10 of this act, the board of trustees of the city of San Jose were required to convey to the commissioners of the funded debt, provided for in the act, all the lands, and right in and claim to the same, held or owned by the former Pueblo de San Jose, to be held in trust for the payment of said debts, and authorized them to sell and convey the same for said purposes, in such manner as they should deem the interests of the city to require.

In pursuance of this act, on August 4, 1858,

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

the city, by its proper officers, conveyed all said Pueblo lands to said commissioners. The said commissioners of the funded debt, between the last named date and January 17, 1866, in pursuance of the provisions of said act, executed and delivered more than four hundred deeds to private individuals in severalty, of lots within and lands without the city limits, amounting in the aggregate to more than twenty-five thousand acres of said Pueblo lands; and their vendees went into possession thereof. So, also, at divers times between March 27, 1850, and said April 21, 1858, the mayor and common council of San Jose, by ordinances and deeds of conveyance, conveyed in fee to various individuals small lots and tracts of said lands, to the number of more than fifty, and amounting in the aggregate to more than fifteen hundred acres of land.

On January 17, 1866, all the debts of said city existing on April 21, 1858, had been paid off by said commissioners, and, on that day, the legislature passed an act reciting said fact of payment, and abolishing said commission [St. Cal. 1865–66, p. 15]. Said act provided, that said commissioners should reconvey to the mayor and common council of San Jose, all said Pueblo lands not already sold to private parties by said commissioners, and then authorized the mayor, in such manner as the common council should direct, to sell and dispose of all said lands, and invest the proceeds in certain bonds mentioned, for the benefit of the public school fund of said city. In pursuance of the provisions of said act, said commissioners did, on January 26, 1866, re-convey to said mayor and common council of San Jose, all of said Pueblo lands before conveyed to them as before stated, not sold by them to private parties; and at the time of said reconveyance, there remained of said lands, which had not been sold or otherwise conveyed, or disposed of, by said commissioners, more than thirty thousand acres.

This being the condition of affairs on March 17, 1866, on that day the legislature passed the said act to re-incorporate the city of San Jose, section 73 of which is the one to be construed. It provides that "All lots known as the school lots, and all lots and lands, either within or without the corporate limits of the city of San Jose, dedicated and belonging to said city, not hitherto disposed of by ordinance, or sold, and by deed transferred to individual purchasers, either by the common council or by those acting as commissioners of the funded debt of said city (and which sales and transfers are hereby declared valid), are hereby fully vested in the mayor and common council of said city, in trust for the use and benefit of the public schools of the city of San Jose; and the mayor and common council are hereby authorized to sell, transfer, or exchange the same for other lots and lands, if in their opinion the interests of the public schools will be best secured by so doing, and all money received from such sales shall not be diverted from the school fund of said city." St. 1865–66, p. 268, § 73.

This provision, and the several other acts of the legislature referred to, relating to the Pueblo lands, are in pari materia, and should be read together in order to get at the intention, if the construction of the latter provisions can be regarded as doubtful. Did the legislature mean by the term, "not heretofore disposed of by ordinance," to include the said ordinance of November, 1851, by which the sheriff's sale was attempted to be confirmed? If so, then, they might have said so in terms about which there could be no doubt, and have stopped there, for there would have been nothing more to say. There would have been no other lands for the statute to operate upon, and all other provisions would have been useless. If it was intended to make the disposition attempted by that old ordinance valid, it took all the Pueblo lands, and went behind all their subsequent sales and transfers. The truth is, that all the legislation on the subject of the Pueblo lands had, therefore, gone upon the assumption, that those transactions in 1851 were utterly void, as they in fact were, and have been so held by the highest court of the state. The legislature of 1858, which passed the funding act, acted upon that hypothesis. It wholly ignored the existence of those early void acts, and proceeded upon the idea that the Pueblo lands were still owned by the city of San Jose. When it established the fund commission, and provided for funding the debt of the city existing prior to April 21, 1858, it set apart all these Pueblo lands as a fund for securing the payment of said debt, and provided that the city authorities should convey the lands to the fund commissioners for that purpose, and authorized and required said commissioners to sell them for the purposes of the trust. And the commissioners did proceed to execute this trust, and so managed the affairs under the law that, in the course of eight years, during which time they had sold more than twenty-five thousand acres of the same lands to private parties, who settled on and occupied them, they paid off the entire debt, and the object of their trust was fully accomplished.

The legislature, in January, 1866, again legislated upon the subject, wholly ignoring the transactions of 1851, and in an act reciting the full performance by the commissioners, of their trust, abolished the fund commission, for which there was no further use, and directed the commissioners to re-convey the Pueblo lands yet unsold, of which there were more than thirty thousand acres left, to the city of San Jose, and provided that the mayor should sell them, &c., and invest the proceeds in certain bonds for the use of its public schools. It deals with these lands in all respects as if they still belonged to the city. Again, the legislature deals with the subject, as it necessarily must do, in the act under

consideration, to re-incorporate the city. It is the same legislature that passed the act of January 17, 1866, and it was at the same session. They do not return to this subject as a special subject of legislation, but they necessarily have to deal with it as incidental to another act of legislation. Do they indicate any change of purpose? None at all; for in section 73, they still provide that all lands—and there are none other—are hereby fully vested in the mayor and common council of said city in trust for the use and benefit of the public schools of the city of San Jose—the same as provided in the act passed at the same session, some two months before. It was not its purpose, then, to take them from the public schools, and give them to parties who set up a void claim to them, which arose some sixteen years before. If the construction claimed for the provision is to be sustained, this plain intention would be wholly subverted, and by far the largest portion of the provision would have nothing upon which to operate. Whereas, by reading the section in connection with the prior acts, and the proceedings under them, and considering it in connection with the intention before expressed, and the condition of things existing at the time, every word can have effect, and such effect will be in exact harmony with the prior action of the legislature. It was, in my judgment, only intended to carry out to its results the policy before adopted, and to validate such acts as might be thought to have been irregularly performed in carrying out that policy, and to confirm such disposition as the mayor and common council had made by ordinances and conveyances in the ordinary course of the administration of the city affairs in harmony with the legislative policy before adopted. I cannot think it was designed to subvert its prior policy, or to vivify an old, void, extraordinary, and probably long-forgotten claim, so out of harmony with all prior legislation, and the other provisions of the same act. The legislature could not have intended to take from the public schools of San Jose, to the use of which they had already been solemnly dedicated by an act recently passed by the same body, all the Pueblo lands, or all that remained of them, and donate them to the claimants under the purchases at the sheriff's sale of 1851, and at the same time continue to devote them to the use of said schools. It was necessarily intended that one or the other should have them; for both cannot have them at the same time. That construction, then, must be adopted, which is most clearly expressed, and the other rejected. To my mind, it is clearly manifest, from the full and particular language used, that the design was to devote the lands to the public schools, as had been before provided. The other view, then, cannot express the true legislative intent, and to adopt it, would be to give effect to general, loose, and obscure terms, rather than to those that are full, clear, and unmistakably explicit. A construction of the section that would validate the title originating in the sheriff's sale of 1851, would, in my judgment, lead to inconsistent, not to say absolutely absurd results. It is worthy of observation, that this is not the first instance in the legislature of the state of California, wherein a loose, parenthetic grant, or confirmation of grants of lands, carelessly or covertly, as the case may be, introduced into acts passed for other purposes, has given rise to uncertainty and litigation.

Upon the view taken, the plaintiff has no title, and it is unnecessary to examine the other questions discussed. The lands so conveyed to the city of San Jose by said commissioners, have, since the reconveyance, and before the commencement of this suit, been conveyed in small parcels by the mayor and common council of said city, to divers private parties, in pursuance of said act of March 17, 1866, and many of the defendants hold under said conveyances. Let judgment be entered for defendants, with costs of suit. Judgment accordingly.

Case No. 8,268.

LE ROY v. CLAYTON et al.

[2 Sawy. 493.] [1]

Circuit Court, D. California. Jan. 22, 1874.

PATENT DELIVERY—PATENT RECALLED WITH CONSENT OF PATENTEE—PATENT CANCELED WITHOUT CONSENT OF PATENTEE.

1. A personal delivery of a patent to the patentee is not necessary to the vesting of the title.

2. A patent in due form signed by the president, sealed with the seal, and duly recorded in the records of the general land office, issued upon a Mexican grant of land in California confirmed in pursuance of the act of congress of 1851 [9 Stat. 631], and subsequent acts, was sent to the United States surveyor-general for California to be delivered to the confirmee. The party entitled refused to accept the patent, on the ground that it was erroneously located, and of defects in the proceedings prior to the patent, and petitioned the commissioner of the land office on these grounds to recall the patent and order a re-survey, which was granted: *Held*, that the commissioner of the land office had power, under the circumstances, and with the consent of the party in interest, to recall the patent and order a re-survey.

[Cited in Pengra v. Munz, 29 Fed. 835.]

3. Having power to recall the patent, in a proper case, with the consent of the patentee, he had power to determine whether the application and evidence presented a proper case for recall, and his action is not void by reason of any error, if any error there be, in determining that question.

4. Jurisdiction defined to be the power to hear and determine.

5. A subsequent survey having been made, and another patent duly signed, sealed and recorded, being in all respects regular and in due form on its face, the commissioner of the general land office transmitted it to the United States surveyor-general for California for delivery to the proper party; but before its arrival in California recalled it by telegraph, and upon its return, without the knowledge or assent of the claimants, canceled the patent. The claimant as soon as it was

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known acquiesced in, and claimed under, the patent: *Held*, that the patent took effect from the moment when it was signed and duly sealed.

[Cited in Cruz v. Martinez, 53 Cal. 243.]

6. If not, the recording of the patent and its transmission to the surveyor-general for California to be delivered, constituted a delivery, and the title passed.

7. The title having vested under the patent, the secretary of the interior had no power to recall or cancel the patent without the consent of the patentee.

8. The patent, being valid on its face, cannot be collaterally impeached by matter dehors the patent, in an action at law brought in the national courts to recover the land purporting to be granted by it.

9. The only mode of impeaching the patent is by a direct proceeding in the proper form—as by bill or information—in a court of competent jurisdiction, against the patent, to annul or repeal it.

This is an action [by Theodore Le Roy against Charles Clayton and others] to recover land. The premises are claimed to be a part of the rancho "Guadaloupe," situate in the county of Santa Barbara, granted by the Mexican authorities to Diego Olivera and Teodora Arrellanes. The grant was duly presented for confirmation, and confirmed under the act of congress of 1851 [9 Stat. 631], applicable to the subject. It was surveyed under the act of 1860 [12 Stat. 71], and on June 30, 1866, the commissioner of the general land office, in due form, issued a patent which was signed by the president, sealed with the seal of the general land office, and duly recorded in the records of that office. The patent contained all the usual recitals in cases of grants of the kind confirmed under the act of 1851, and finally surveyed under the act of 1860, and was, in all respects, regular and in due form upon the face of the patent. On August 2, 1866, the commissioner of the general land office transmitted said patent to the United States surveyor-general for California to be delivered to the parties owning the grant. Immediately upon receiving notice of the issue of the patent, John B. Ward, then the owner of the grant, refused to accept it, on the ground that the survey was erroneous, and that there had been no legal notice given of the making and approval of the survey and plat, as required by the said act of congress of 1860. He soon after presented to the commissioner of the general land office a petition, with affidavits and other documentary evidence tending to show, that no legal notice of the survey, plats and approval thereof had been given, and that the survey was erroneous; and asked that the patent might be recalled, and a new survey had.

The commissioner of the general land office, acting upon said petition and evidence, and thinking said survey and patent erroneous, on October 22, 1866, recalled the said patent, and directed a re-survey to be made by the surveyor-general. Thereupon a re-survey was made, and such proceedings were had, that on March 1, 1870, a second patent was duly made out, sealed with the seal of the general land office, signed by the president, recorded in the records of the general land office, and afterward transmitted by the commissioner to the surveyor-general for California to be delivered to the parties interested. This patent was in the usual form issued in such cases, containing all the recitals of prior proceedings required by the acts of congress, and was in all respects regular, and in due form upon its face. Afterward, and before said patent reached California, the commissioner of the general land office telegraphed to the said surveyor-general to return said patent to the general land office, and it was so returned, but without the knowledge or assent of the owners of said grant. Afterward the commissioner of the general land office, also without the assent of said owners, by direction of the secretary of the interior, wrote across the face of said patent of March 1, 1870, the following words: "Canceled, see decision dated June 12, 1872, of general land office, affirmed by the honorable secretary of the interior, March 26, 1873. Willis Drummond, commissioner. General land office, April 10, 1873." Afterward, in June, 1873, the said patent, dated June 30, 1866, was again transmitted by the commissioner of the general land office to the surveyor-general for California to be delivered to the owners of said grant, but the said parties have declined to take said patent, and they claim the said patent of date March 1, 1870, to be the only correct and valid patent.

The lands in question are not included in the patent of June 30, 1866, but are included in the patent of March 1, 1870, which last named patent embraces all the lands covered by the former, and other lands in addition. The plaintiff deraigns title from the original grantees of the said Guadaloupe rancho through these proceedings, claiming under said patent of March 1, 1870. The defendants were, at the commencement of this action, in possession, claiming a pre-emption right in the lands as being a part of the public domain of the United States.

W. H. Patterson and J. B. Felton, for plaintiff.

Gray & Havens, for defendants.

SAWYER, Circuit Judge, (after stating the facts.) The patent of March 1, 1870, took effect from the moment it was signed by the president and passed the great seal. Certainly, from the time it was recorded in the proper record and despatched to the surveyor-general for California, to be delivered to the claimants. A delivery in the case of a government patent is not necessary. The patentee takes by matter of record. Lott v. Prudhomme, 3 Rob. (La.) 293, which

is directly in point. Donner v. Palmer, 31 Cal. 513; Marbury v. Madison, 1 Cranch [5 U. S.] 137; Green v. Liter, 8 Cranch [12 U. S.] 247; Chipley v. Farris, 45 Cal. 539; Cunningham v. Browning, 1 Bland. 299, 304, 308, 321; Philips' Lessee v. Irwin, 1 Overt. 235; Lapeyre v. U. S., 17 Wall. [84 U. S.] 191.

But if something in the nature of a delivery were necessary, it has often been held that the recording of a deed by the grantor, even without the knowledge of the grantee, is a constructive delivery. So the giving of it to a third party for the grantee to be delivered to him, is a delivery. In Marbury v. Madison [supra], the court say, upon the hypothesis that a delivery is necessary, that "It is not necessary that the delivery should be made personally to the grantee of the office. It never is so made. * * * If then, the act of livery be necessary, to give validity to the commission, it has been delivered, when executed and given to the secretary for the purpose of being sealed, recorded and transmitted to the party. But in cases of all letters patent certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery is not one of them." [Marbury v. Madison] 1 Cranch [5 U. S.] 159, 160. See, also, 5 Barn. & C. 671; Tibbals v. Jacobs, 31 Conn. 428; Stevens v. Hatch, 6 Minn. 64 [Gil. 19]; Mitchell v. Ryan, 3 Ohio St. 387; 4 Ohio, 74; 19 Ohio, 18; 8 Ohio, 87.

The patent in this case was recorded in the proper records, and transmitted to the surveyor-general for delivery to the owners of the rancho, and the acts mentioned herein were as effectual to pass the title, as if the patent had been delivered by the commissioner of the general land office, to the patentee in person, and had been formally accepted by him. An acceptance is presumed in such cases, unless the contrary appears. See authorities last cited.

If the title vested under the patent, the commissioner of the general land office could not, of his own motion, divest it by canceling the patent, or the record of the patent without the knowledge or consent of those interested. Lick v. Diaz, 30 Cal. 65, 37 Cal. 437.

But it is insisted on the part of the defendants, that the issue of the patent of March 30, 1866, completed the proceeding in the case of the Guadaloupe rancho; that from that moment the commissioner of the general land office was functus officio; that all his subsequent acts were necessarily void for want of power; and that the first patent is the only valid patent. This, to my mind, presents the most difficult question in the case.

If, for instance, the acts of congress upon the subject had been wholly repealed pending the proceedings to confirm the Guadaloupe grant, and the land department had, nevertheless, gone on and completed the proceedings, and issued the patent in all respects, in the form in which it now appears, the patent would, doubtless, have been void for want of any authority to complete the proceeding, and issue the patent. All jurisdiction would have been withdrawn. The patent, although in the semblance of a record in such cases, would really be no public record, for the want of jurisdiction in the officers to make it. And this want of power would be an available defense to an action to recover land depending on the patent. So, if the issue of the first patent, as found in this case, did fully complete the proceeding for the confirmation of that grant, and absolutely vest the title in the confirmees, willing or unwilling; if thereby the power of the commissioner of the general land office under the statute, had been fully exhausted with respect to that specific grant, without authority under any circumstances, to re-open the case, all subsequent proceedings, I think, must be void for want of power; and this want of power is a good defense to the action. Such, I also think, would have been the result had the parties holding the grant acquiesced in the action of the land office, and accepted the patent; but they did not acquiesce or accept it. On the contrary, the patent was at once repudiated when brought to their knowledge, and an application promptly made to have it recalled on the ground that proper notice of the approval of the survey and plat had not been given as required by the statute, and that the survey was erroneous.

In the case of an old grant in Missouri, in Maguire v. Tyler, the supreme court held, that "where a patent has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the secretary of the interior may recall it." 8 Wall. [75 U. S.] 651, 663; so, also, 1 Black. [66 U. S.] 199.

In that case it appeared that the grant had been improperly located. But the power to recall the patent after it has been issued with the consent of the patentee, when it does not cover the land to which the latter is entitled, necessarily involves the power to examine and determine whether the grant has been property located. If the commissioner of the general land office has the power to act at all in such a case, that ends the question, for that constitutes jurisdiction.

Jurisdiction has often been defined by the supreme court to be "the power to hear and determine." Grignon's Lessees v. Astor, 2 How. [63 U. S.] 338.

And again: "The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it, but upon the right to hear and decide at all." Ex parte Watkins, 7 Pet. [32 U. S.] 572. See, also, [U. S. v. Arredondo] 6 Pet. [31 U. S.] 709; [State of Rhode Island v. State of Massachusetts] 12 Pet. [37 U. S.] 718; [Ex parte Watkins] 3 Pet. [28 U. S.] 205; [Kendall v.

U. S.] 12 Pet. [37 U. S.] 633; In re Bogart [Case No. 1,596].

The same definition applies to other officers entrusted with powers, as well as to courts. In the case of Maguire v. Tyler, the proceedings were fully completed, and the patent issued. There was no mere clerical error, or excess of jurisdiction. Just such a patent was issued, and in such a case, and to such a party as was contemplated. It was simply erroneous. An error occurred in the course of the proceeding in the due exercise of jurisdiction as distinguished from a case of want of jurisdiction. The officers of the government misjudged, and determined that he was entitled to the wrong land. Yet, upon the refusal of the patentees to accept the patent, and upon their application it was recalled. The supreme court twice determined that it was properly done. I can perceive no distinction between that case and this. The present case is, in all essential respects, similar. The commissioner of the general land office, acting upon the certificate of the surveyor-general, issued a patent. Immediately the parties in interest refused to accept it, and made a showing which, at the time, satisfied the commissioner of the general land office that the statutory notice had not been given, and that the land was not properly located. If there was, in fact, any error, it was an error in the exercise of jurisdiction—in the determination of the question of fact—like that in the cases cited. He recalled the patent, and other proceedings were had, which ran through a period of nearly four years, embracing a new survey, approval, etc., and resulted in a new patent in accordance with the last survey. Now if the commissioner of the general land office was functus officio on the issue of the first patent, he must have been so on the issue of the patent in question in Maguire v. Tyler, for at the time of the recall, both cases were essentially alike. It is true that, under the fifth section of the act of 1868, the survey, under the circumstances prescribed, becomes final, and has all the force and effect of a patent. But it has no greater force than the patent. The patent is the formal, final and authentic record. If the patent itself can be recalled and corrected upon the application of the patentee, when erroneous, the survey, which is of no greater force, can be corrected by the same authority. Besides, one of the very questions for the commissioner of the land office to determine on the application to recall the patent and correct the survey was, whether all the acts necessary to make the survey final, had been in fact performed. The certificate of the surveyor-general, upon which he acted in issuing the patent was, doubtless, prima facie evidence, which, in the absence of anything to the contrary, justified him in its issue. But it was not necessarily conclusive. The statute does not so provide. On the application to recall the patent, other evidence was offered tending strongly to show that the certificate of the surveyor-general, as to a legal publication, was erroneous in point of fact, and the survey erroneous. The case of Maguire v. Tyler, settles the question, that the power exists to recall a patent, which the patentee declines to accept, on the ground that it was erroneously issued, upon the application and with the consent of the patentee, when there is found to be error; and as a predicate for such action, necessarily, the power remains to determine the question whether such error exists as will justify a recall. And it seems to me to cover this case.

The jurisdiction then had not been wholly exhausted by the issue of the patent; and, as before said, if there was still left power to recall a patent merely erroneously issued, the authority remained to inquire and determine whether it was erroneously issued. There might be error in that determination, but it would be an error in the exercise of jurisdiction in determining whether there had been a legal notice, or a proper survey, and not an act performed without jurisdiction. And such error cannot be reviewed in this court in this kind of action. The patent having been recalled in the exercise of a lawful power, the case stood as if it never had issued, and the subsequent proceedings are all regular and in due form. The patent of 1870 is regular upon its face, and, according to the recitals, issued in a case fully authorized by law. If it is to be defeated, it is by matter dehors the patent, and upon the grounds either of error, mistake, or fraud, in some part of the proceedings resulting in the patent and not from want of power to act upon a proper showing in any of the necessary steps taken. The patent itself is a solemn record of the government, and not subject to be impeached collaterally from without, in an action at law in the national courts. It is so regarded upon principles of public policy resting upon the same grounds that forbid a collateral impeachment of a judgment of a court of competent jurisdiction, valid upon its face, whatever errors or fraudulent practices may have intervened in the proceedings upon which it was obtained. In Doll v. Meader, 16 Cal. 325, Mr. Ch. Justice Field well says: "If the authority to issue a patent depend upon the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment—then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases, the parties without title cannot be heard, and the parties with subsequent title must seek their remedy by scire facias, or bill, or information to revoke the

first patent or limit its operation." And Mr. Justice Grier, in U. S. v. Stone, 2 Wall. [69 U. S.] 535, says: "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by scire facias, but a bill in chancery is found a more convenient remedy."

Upon these principles, no error, if any there is, of the commissioner of the general land office in determining the question whether there was a proper ground for recalling the first patent and in recalling, is subject to review in this case. If there is any ground of mistake, fraud or otherwise, which would justify the repeal, or annulling of the patent of 1870, that object must be accomplished in some direct proceeding in the proper court, taken for that purpose against the patent. An equitable defense to an action at law is not available in this court, and in this action the patent is conclusive. The difference between the first and last patent is this: The last was promptly acquiesced in and accepted, while the first was rejected by the interested parties, and the patent recalled on their application on a showing to the satisfaction of the commissioner of error. The contest between the parties in the same proceeding had not yet ended. There was a re-opening of the proceeding for further hearing before acceptance and with the consent of both parties. I desire it to be understood that I have not considered the effect of a refusal of the claimant to accept a patent issued in this class of cases in any other aspect, than as bearing upon the question of power to recall a patent and re-examine the survey with his assent and upon his application.

The defendants, as authority for cancelling the last patent, cite Bell v. Hearne, 19 How. [60 U. S.] 262; and Doswell v. De La Lanza, 20 How. [61 U. S.] 29.

But these cases are not like the present. They depend upon different principles. In the last case John Bell had purchased the land and got his certificate of purchase. By a clerical error in the land office the name of James Bell was returned, and the patent made out in his name, but delivered to John Bell, the true party. He returned it, and had a new patent issued in the proper name. John Bell was the purchaser. He was the one to whom it was intended to patent the land. The patent was delivered to him. There was no purchase by James Bell, and no proceedings by him, or in his name, upon which to base a patent other than that which by a clerical error accidentally crept into the return to the general land office. There was no error in judgment in determining a matter in the progress of the proceeding, for there was no proceeding at all by the nominal patentee. It was like commencing and prosecuting an action against John Bell till coming to the verdict, which is accidentally returned, and judgment thereon rendered in the name of James Bell, who has never been a party to, or appeared in, the action. Besides, as in the case of Maguire v. Tyler, the patent was returned by and corrected with the assent and at the request of the real party in interest. The other case is similar, only it does not appear, except by implication, at whose request the patent issued in the name of the wrong party was canceled. In both of these cases there were no proceedings by purchase, or otherwise, anterior to the issuing of the patents upon which to base them—nothing upon which the commissioner was authorized to act in these cases—nothing to call the jurisdiction of the land office into action at all in respect to the nominal patentees. The patents were never intended for them.

There must be judgment for plaintiff with costs, and it is so ordered.

[For a subsequent decision in the same court by Circuit Justice Field in which he sustains patent of March 1, 1870, in an action brought by the same plaintiff against defendants who claim under the patent of October 7, 1873, to the overlapping part of the 1870 patent, see Case No. 8,271.]

Case No. 8,269.

LE ROY et al. v. CROWNINSHIELD.

[2 Mason, 151.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1820.

CONFLICT OF LAWS—STATUTE OF LIMITATIONS—LEX LOCI CONTRACTUS—LEX FORI.

A plea of the statute of limitations of the state, where a contract is made, is no bar to a suit brought in a foreign tribunal to enforce that contract. But a plea of the statute of limitations of the state, where the suit is brought, is a good bar. Principles of the lex fori discussed and examined.

[Cited in M'Elmoyle v. Cohen, 13 Pet. (38 U. S.) 327; Egberts v. Dibble, Case No. 4,307; Cook v. Moffat, 5 How. (46 U. S.) 315; Tufts v. Tufts, Case No. 14,233; Townsend v. Jemison, 9 How. (50 U. S.) 413; Davidson v. Smith, Case No. 3,608; Campbell v. Holt, 115 U. S. 626, 6 Sup. Ct. 212; Canadian Pac. Ry. Co. v. Johnston, 9 C. C. A. 587, 61 Fed. 745.]

[Cited in Bulger v. Roche, 11 Pick. 38; Reed v. Northfield, 30 Mass. 99; Varnum v. Camp, 1 Green Law [13 N. J. Law] 331; Hunt v. Fay, 7 Vt. 179; Dudley v. Kimball, 17 N. H. 500. Cited in brief in Hunt v. Gookin, 6 Vt. 469; Briggs v. Hubbard, 19 Vt. 88; Leavitt v. Palmer, 3 N. Y. 28. Applied in Hale v. Lawrence, 1 Zab. [21 N. J. Law] 742. Cited in Paine v. Drew, 44 N. H. 319; Guillander v. Howell, 35 N. Y. 659; Kidder v. Tufts, 48 N. H. 125. Distinguished in Van Dorn v. Bodley, 38 Ind. 418. Cited in brief in Carson v. Hunter, 46 Mo. 467; McMerty v. Morrison, 62 Mo. 141. Cited in Perkins v. Guy, 55 Miss. 153; Chapin v. Freeland, 142 Mass. 390, 8 N. E. 128.]

[See Ames v. Le Rue, Case No. 327.]

Assumpsit with the common money counts. The defendant [Richard Crowinshield,] pleaded in bar of the action the statute of limitations of the state of New-York, where the

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

contract was made, to which the plaintiffs [Harmon Le Roy and others,] demurred.

J. Pickering, for plaintiffs.

The question raised in the present case, is whether the limitation act of the state, where a contract is made, shall govern the decision of this court, sitting in another state, in which judicial proceedings are instituted for the purpose of enforcing the contract. The plaintiffs had supposed, that this general question had been already settled, if not in England, at least in the United States, both by the supreme court of New-York and of Massachusetts, of which states the present parties were respectively inhabitants; and consequently, that so far as this court should feel itself obliged to consider the several courts of those states to be expositors of their own laws agreeably to the law of the United States respecting the federal court, so far it would feel itself under the necessity of considering the question as no longer open. The adjudged cases alluded to are familiar to the court. Pearsall v. Dwight in this state, 2 Mass. 84; and Ruggles v. Keeler, in the state of New-York, 3 Johns. 263; the latter of which is the more important, because it is a re-examination of the question, which had already been before the same court in the case of Nash v. Tupper, 1 Caines, 402. It is suggested, however, that the present case may be distinguished from those. It is therefore necessary to examine the grounds and extent of these and some other decisions on this subject. The mutual necessities of the different states, which constitute the community of Europe, (in which community the United States are, practically speaking, included) have given rise to the well known rule, which is stated by this court in the learned opinion given in the case of Van Reimsdyk v. Kane [Case No. 16,871], "that the law of the place, where a contract is made, is to govern, as to the nature, validity and construction of a contract." The numerous authorities on this point have been collected with much care and research in the case just cited; and an examination of those cases in the order of their adjudication will show how strictly and uniformly the rule has been followed by the courts in England and the United States for a century past. Such is the established general rule in respect to the contract itself, as adopted among all those nations, who acknowledge the same code of international law with ourselves. But as the court justly observe in the case last mentioned, "in respect to the form of the action or the remedy, by which a contract is to be enforced, a different rule prevails, and it seems on all sides conceded, that the recovery must be sought and the remedy pursued not according to the lex loci contractus, but according to the lex fori. The only question, which seems to have arisen is, whether a bar, good by the law of the place, where the suit is brought, and not where the contract originated, and conversely a bar good by the law of the place, where the contract was made, and not where the suit was brought, should fall within the rule as to the validity or as to the remedy of the contract. The current of authority is certainly in favour of the latter construction, where the bar has been a prescription or statute of limitations. In order to have a more distinct view of the principles on which the two rules respecting the contract and the remedy are founded, and to determine, whether any solid distinction can be taken between the present and preceding cases, it may be necessary to consider very briefly some of the classes of cases relative to this point.

1st. A very large and important class of cases consists of those under the bankrupt laws, properly so called, by which both the person and the property of the debtor are released from all liability whatever in the country, where he obtains his discharge. These discharges are respected by foreign nations, as well as by the courts of the nation, where they are granted. In respect to the effect of such discharges it will be sufficient to refer to the following English and American cases. Ballantine v. Golding, Coke Bankr. Law, 515; Hunter v. Potts, 4 Term R. 182; Quin v. Keefe, 2 H. Bl. 553; Smith v. Buchanan, 1 East, 6; Potter v. Brown, 5 East, 124; Emory v. Greenough [Case No. 4,471]; Smith v. Smith, 2 Johns. 235; Van Reimsdyk v. Kane [supra]; Blanchard v. Russell, 13 Mass. 1; Bradford v. Farrand, Id. 18; Walsh v. Farrand, Id. 19; Hicks v. Brown, 12 Johns. 142.

2d. Another class of cases comprises those, which have arisen under the laws denominated insolvent laws, which discharge the person of the debtor and not his property, like the cessio bonorum of the civil law; in other words, which do not in any way extinguish or satisfy the debt itself. Ex parte Burton, 1 Atk. 255, is a leading English case on this point. In our own courts there have also been several decisions, among which are the following: Proctor v. Moore, 1 Mass. 198; Baker v. Wheaton, 5 Mass. 509; Watson v. Bourne, 10 Mass. 337; Blanchard v. Russell, 13 Mass. 1; Wright v. Paton, 10 Johns. 300. These are some of the principal cases under the bankrupt and insolvent laws; and from an examination of the grounds of them it will appear that whenever the contract was actually made, or was to be executed, within the jurisdiction of which both parties were inhabitants, a discharge duly obtained under the bankrupt laws has been considered as a satisfaction or extinction of the debt, and a bar to any action, and it will be accordingly respected by the courts of foreign countries. And that on the other hand, where a discharge does not so extinguish the debt, or the right, as in the case of insolvent laws, the cessio bonorum, &c. but only bars the remedy, the discharge will not be held by foreign states to be a bar to judicial proceedings upon such contract. The cases cited thus far all relate to the effect of the contract itself in foreign coun-

tries. But it is necessary further to consider, when the contract shall be held to be legally barred or extinguished, or cannot be carried into effect consistently with the laws of the country, in which it is attempted to be executed; or what remedies lie for enforcing it in another country than that, where it was made.

The general rule, as this court has observed, in the case of Van Reimsdyk v. Kane, is that the remedy is to be pursued according to the laws of the country, where the action is brought. The authorities on this point may be arranged in two classes: 1st. Those which relate to remedies generally. 2d. Those which relate to the effect of limitation acts specifically.

A principal case in the first of these classes is Imlay v. Ellefsen, 2 East, 453, in which Lord Ellenborough departed from the doctrine held by the court of common pleas in another case, Melan v. Duke of Fitzjames, 1 Bos. & P. 138, in such decided terms, that the counsel abandoned the point he was attempting to support by that case. From the manner, in which that case is treated by the court of king's bench, it is evident that the English tribunals still adhere to the general rule followed by other nations, that the remedy must be pursued according to the lex fori. The case in question has also been considered as a departure from settled principles by a learned court in our own country, and in the state, where both the present parties were domiciled, in the case of Smith v. Spinola, 2 Johns. 198, which has a close analogy to the case at bar. Other English cases on this point are Maule v. Murray, 7 Term R. 470; Pedder v. MacMaster, 8 Term R. 609. The principal cases in our own country are the following, which are in conformity with the English decisions. James v. Allen, 2 Dall. [2 U. S.] 188; Harris v. Mandeville, Id. 256; Sicard v. Whale, 11 Johns. 194.

3d. Statutes of limitation. The remaining class of cases consists of those, in which the particular bar set up in the present action has come under consideration. And it will be found, that the decisions on this point have been in conformity with the general principles established by the preceding cases in relation to the remedy in general. The important case of Williams v. Jones, 13 East, 439, deserves particular attention, on account of its being a very late one, as well as from the high authority of Lord Ellenborough and the other judges who decided it. The decisions in our own courts, relative to the statute of limitations, have been in conformity with the doctrine laid down in the court of king's bench. From a review of the cases it will appear, that there is an established distinction between what are called "rights" and "remedies." This distinction may, it is true, in some cases be difficult to define; but when the court have once decided, to which of these two any question is to be referred, there can no longer be any doubt as to the rule, that must govern its decisions. It does appear clearly from the same cases, that statutes of limitation are universally held to be only an extinction of the remedy, and not of the right.

Upon a review of the whole question, there can be no reason why this court, sitting either as a tribunal, to administer justice according to the general law of nations, or of that part of public law, which is called the "law merchant," or sitting as a court to administer justice between citizens of our own state, according to the laws of their respective states, ought not in the present case to determine, that the limitation act in question is not a sufficient bar to the plaintiff's action.

Prescott, Blake & Webster, for defendant.

STORY, Circuit Justice. This cause was argued in the fullest manner at the last term, and has been held under advisement until the present time, principally from my desire to ascertain upon a review of all the authorities, whether the question raised at the argument was now open for discussion. I have examined all the authorities cited at the bar, (some of which are sufficiently obnoxious to critical commentaries), and if I thought there could be any utility in the task, I should not shrink from the labor of giving them a minute review. But after the ingenuity and learning of the profession have for a half century been exhausted upon the general subject, it would be rashness to expect to throw any new light upon it. In proof of the general principles, therefore, which I shall have occasion to state, I shall content myself with a general reference to the cases cited at the bar, and to those, which on a former occasion it became my duty to examine and compare. Van Reimsdyk v. Kane [Case No. 16,871]. I shall comment particularly on those only, which press directly on the point now in judgment.

Some doctrines are so well established, that it would be a mere waste of time to attempt to defend them. It is, for instance, a principle of public law perfectly beyond the reach of judicial controversy, that personal contracts are to have the same validity, interpretation and obligatory force in every other country, which they have in the country where they are made, or are to be executed. The convenience, nay, the necessities of the civilized and commercial world, rendered it indispensable, that this principle should be adopted in the earliest rational intercourse; and it would not be easy to trace a period, when it was not tacitly adopted as a pledge of public as well as private confidence. An exception coeval with the rule itself, and resting on the same foundation, is, that no nation is bound to enforce or hold valid any contract, which is injurious to its own rights or those of its citizens, or which offends public morals, or violates the public faith.

Another rule equally well settled is, that remedies on contracts are to be regulated and

pursued according to the law of the place, where the action is instituted, and not by the law of the place, where the contract is made. The reason of this rule is extremely obvious. Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation. It is sufficient, if it gives to foreigners the same means to enforce their rights, as it does to its own citizens. In the emphatic language of Mr. Chancellor Kent, I may say, what shall be the course of its judicial proceedings and the limitations of its process, its prescriptions and its exceptions, are "questions of municipal convenience and public utility, which every government has not only a right to consult, but is bound in duty to promote." Decouche v. Savetier, 3 Johns. Ch. 190, 218. There is no hardship or injustice in refusing to foreigners remedies, which do not belong to the genius of the government or its laws, or to repel proceedings or process from its courts, which it does not choose to entertain in cases of domestic litigation. There would be danger as well as inconvenience in a different course; and if it were to produce no other ill effect than the necessary consumption of time in attempting to learn a strange and novel jurisprudence, it would be a sufficient public mischief to justify the rejection of it. In many cases indeed the form of the remedy is perfectly immaterial. The same contract, which at Rome demanded a condictio indebiti or an actio certi, might well sustain an action of assumpsit or bill in equity in England, a suit by petition in France, or an action of debt in some parts of our own country; and each remedy might well be deemed a satisfactory redress. And even where the remedy is more intimately connected with the right, as in the process of execution, there is no absolute reason, why a nation should either by arrest of person or property give more prompt efficiency to a contract, than its own citizens can claim, or its general laws justify.

To another position (which is but a corollary, from what has been already stated) I also unhesitatingly accede, and that is, that as the lex fori ought to regulate the remedy, so the party, who seeks that remedy, must bring himself within the prescription, that limits it, and if he does not, that the prescription is not merely a legal but a just bar to his suit. A question, may very naturally arise, whether the prescription, within the intent of the statute, applies to foreign contracts; because as Lord Kaimes justly observes, "many cases come under the words of a statute, that are not comprehended under its spirit and intendment." But when this is undisputed, the conclusion, to which his lordship comes, seems irresistible, "that every case that comes under our law must be decided by that law, and not by the law of any other country." Kaimes, Prin. Eq. p. 364, § 6; Ersk. Inst. bk. 3, p. 633, tit. 7, § 48. The earliest case to be found on this point in the English courts is Dupleix v. De Roven, 2 Vern. 540, where to a bill for a discovery of assets and satisfaction of the plaintiff's debt, which was contracted in Rome, the English statute of limitations was pleaded, and by the lord keeper was allowed as a good bar, and again upon a re-hearing the decree was confirmed. Id. 541; Raithby's Note3. The doctrine recognized by this case has never since been departed from in England; it has been recognized in the most solemn manner in the state and federal courts in the United States; and though civilians have differed respecting it, it stands approved by the concurrent testimony of the ablest of foreign jurists and courts. Williams v. Jones, 13 East, 439; Nash v. Tupper, 1 Caines, 402; Hubbell v. Cowdrey, 5 Johns. 132; Pearsall v. Dwight, 2 Mass. 84; 1 Emerig. Ass. p. 120, c. 4, § 8; Huberus, De Conflictu Legum, tom. 2, lib. 1, p. 538, tit. 3; Voet ad Pand. lib. 44, p. 877, tit. 3, § 12, tom. 2; Casaregis, Disc. 129, § 58; Id. p. 130, § 33; Ersk. Inst. p. 633, § 48; Kaimes, Eq. p. 363, § 6. Nor was it the intention of the court in the remark cited at the bar from the case of Van Reimsdyk v. Kane [Case No. 16,871], to question the propriety of those decisions, so far as they gave effect to the law of prescription of the place, where the suit was instituted, but merely to state historically the point of debate, and to intimate a doubt, whether the repelling of the foreign prescription in such a case fell within the principle, on which the former was justly founded. This is the very point now in controversy, and to the consideration of it the attention of the court will now be directed.

It is agreed by the demurrer, that the original contract in this case was made, and the cause of action accrued, in New-York, between the parties to the suit, who were then citizens of that state, and that the statute of limitations of that state would be a good bar to the suit, if now brought in any court of that state. In the language of the civil law this temporal prescription would be a sufficient exception to repel the suit. It is not stated in the plea, that the cause of action had accrued more than six years before the defendant ceased to be a citizen of New York, so that the statute would have completely run against the plaintiff and extinguished his remedy there, which would certainly have presented a much stronger case, and of more serious difficulty. And the question, therefore, is, whether the statute of limitations of New-York can now be pleaded in this court as a good bar or defence to the suit.

In considering this question it is material to observe, that it is not a case, where the remedy is partially taken away, and partially remains, as where it is extinguished

as to the person, and retained as to the future effects of the debtor. Such are cases arising under insolvent laws of our own and foreign states, which discharge the debtor from imprisonment, but leave the contract with its full obligation upon his future estate. Such also is the effect of the cessio bonorum of the civil law, and of analogous proceedings of most foreign countries deriving their jurisprudence from the civil law. 1 Domat. lib. 4, p. 495, tit. 5, § 1; Heineccius ad Pand. pars. vi. § 252; 3 Huber. lib. 42, p. 1453, tit. 3; Voet ad Pand. lib. 42, p. 799, tit. 3, § 8; Ersk. Inst. bk. 4, tit. 3, §§ 26, 27; Code de Commerce, lib. 3, tit. 2, art. 568; Poth. Pand. tom. 3, lib. 42, p. 175, tit. 3, § 2; Bruni de Cessione Bonorum. Quest. 3, Straccha. 868. In this class of cases it has been uniformly decided, that as the discharge does not touch the right under the contract, but merely removes one local remedy, leaving all others in force, there is no ground to relieve the defendant from the effect of any process issuing according to the law of any foreign country, where he may be sued. Some of the cases cited at the bar turned upon this distinction. Wright v. Paton, 10 Johns. 300; James v. Allen, 1 Dall. [1 U. S.] 188; White v. Canfield, 7 Johns. 117; Sicard v. Whale, 11 Johns. 194; Peck v. Hozier, 14 Johns. 346. The doctrine, that a remedy against the person may well be maintained upon a contract in a foreign forum, although it would be denied in the place where the contract is made, stands upon analogous reasoning. It was attempted to be shaken in the case of Melan v. Fitzjames, 1 Bos. & P. 138, where circumstances of hardship seemed to have had great influence with the court; but that case stands alone, and the general doctrine is now unequivocally established. Imlay v. Ellefsen, 2 East, 455.

It must be admitted as a general proposition, that the laws of one country cannot in themselves have any extra territorial force; and whatever force they are permitted to have in foreign countries must depend upon the comity of nations, regulated by a sense of their own interests and public convenience. Green v. Sarmiento [Case No. 5,760]; Kaimes, Prin. Eq. bk. 3, pp. 363, 364, § 6; Caseregis, Disc. 130; 2 Hub. lib. 1, tit. 3; De Conflectu Legum, §§ 2, 3. But the same reasons, which have conduced to the establishment of the rule, that personal contracts shall have the same validity in every other country, as in that where made, have ingrafted upon that another rule, that the same law, which creates the charge, is to be regarded, if it operate a discharge of the contract. Green v. Sarmiento [supra]; Kaimes, Prin. Eq. bk. 3, pp. 360, 364, § 6. From the very terms of these rules, it necessarily follows, that they exclude all cases, where the discharge set up is derived from the local laws of a state, where the contract was not made. Hence it has been held, that a discharge from the debt under the bankrupt laws of the place of the contract is good in every other place, when pleaded as an extinction of the debt. Ballantine v. Golden, Coke, Bankr. Law (6th Ed.) 500; Smith v. Buchanan, 1 East, 6; Potter v. Brown, 5 East, 124; Hunter v. Potts, 4 Term R. 182; Emory v. Greenough [Case No. 4,471]; Smith v. Smith, 2 Johns. 235. And on the other hand, that a like discharge under the laws of any place, where the contract was not made, cannot be so pleaded in the tribunals of any other nation. Bradford v. Farrand, 13 Mass. 18; Hicks v. Brown, 12 Johns. 142; Quin v. Keefe, 2 H. Bl. 553; Blanchard v. Russell, 13 Mass. 1; Walsh v. Farrand, Id. 19; Van Raugh v. Van Arsdaln, 3 Caines, 154; Smith v. Smith, 2 Johns. 235; Proctor v. Moore, 1 Mass. 198. Many of the cases cited by the plaintiffs' counsel rest on this foundation, and in this view are susceptible of the most satisfactory vindication.

It is very certain, that discharges under bankrupt acts are not the only exceptions or bars founded on local laws, which are held good in every foreign tribunal. From the reason of the thing many other local defences must be held of equal validity. Chief Justice Parker in his very elaborate opinion in Blanchard v. Russell, 13 Mass. 1, lays it down as a rule affecting all personal contracts, that they are subject to all the consequences attached to contracts of a similar nature by the laws of the country, where they are made, if the contracting party is a subject or resident in that country, where it is entered into, and no provision is introduced to refer it to the laws of any other country. He excepts from the rule cases, where the laws sought to be enforced are unjust or injurious to our own citizens. Within the terms of the rule thus laid down, a bar of the statute of limitations would be included, for it is a consequence attached to the contract in the place, where it is made. I am persuaded, however, that this case was not at the moment in the mind of the learned judge, and that the language used by him ought to be interpreted with reference to the case of insolvency, which was then before him. Emerigon lays down a rule somewhat more precise. He says: "Pour tout ce qui concerne l'ordre judiciare, on doit suivre l'usage du lieu ou l'on plaide. Pour ce qui est de la décision du fonds on doit suivre en regle générale les lois du lieu où le contract á été passe." He then cites a passage from the civil law, "ex consuetudine ejus regionis, in quâ negotium gestum est;" and then adds: "Cette distinction est consignée dans tous nos livres. In his quae respiciunt litis decisionem servanda est consuetudo loci contractûs. At in his quae respiciunt litis ordinationem attenditur consuetudo loci ubi causa agitur." 1 Emerig. p. 122, c. 4, § 8. It has been supposed, that by the expression, "la decision du fonds," (literally the decision of the grounds

or essential points of the suit) Emerigon meant the decision upon the "merits" of the suit. If by "merits" be intended à defence founded in general justice, or going to the essence and obligation of the contract, in contradistinction to a defence standing upon the text of positive law, it appears to me, that the interpretation is too narrow. But if by a decision upon the "merits" be intended a defence forming a perpetual bar of the suit, in contradistinction to a mere dilatory or temporary plea, such as a plea in abatement, there is no reason to contest the interpretation. It appears to me, that Emerigon uses the expression in this latter sense, as equivalent to the phrase, "litis decisionem," which obviously embraces any defence forming a perpetual bar to the suit. 1 Emerig. pp. 125, 126, c. 4, § 8. In this view it would embrace statutable bars, such as that of prescription or the statute of limitations, as well as those resting on the general nature and conditions of the contract.

Take the case of a former judgment between the parties upon the same subject matter of contract. If the plaintiff again attempt to sue upon the same contract in a foreign court, would not the exceptio rei judicatae in the domestic court be a good bar for the defendant? I take it to be generally admitted as a conclusive bar to repel a new suit in a foreign country, whatever may be the differences among nations as to the conclusiveness of foreign judgments in a suit brought to enforce them. Kaimes, Eq. p. 369, c. 8; Ersk. Inst. bk. 4, p. 800, tit. 3, § 4; Poth. Obl. pt. 3, c. 8, art. 1, § 640; Id. pt. 4, c. 3, § 3; Id. arts. 1-3, § 37. If we suppose, that the judgment in the domestic forum was given upon a statutable bar, specially pleaded, as upon the statute of limitations, then we have a case, in which under the shape of an exceptio rei judicatae the domestic prescription is enforced in a foreign forum. But it has been said, that the bar of rei judicatae is admitted to be conclusive in all foreign courts upon the ground of public utility, because there should be some means to put a final issue to controversies, otherwise litigation would be perpetual. Kaimes, Eq. p. 369, c. 8. This is certainly true; and it is curious enough, that the decisions stop far short of the principle; for foreign judgments of dismissal of suits are held conclusive, and no evidence is admitted to contradict them; and so of other judgments set up as bars to new suits; but if a former judgment is sought to be enforced by a new suit, it is no longer conclusive in favor of the plaintiff. The principle, too, of the conclusiveness of the exception of rei judicatae applies to statutes of limitations. They are emphatically called statutes of repose, made to cut off stale demands, and to shelter parties from fraudulent claims after a long lapse of time, when the evidence is no longer within their reach. In their very theory they purport to afford positive presumption of payment and extinction of contracts according to the laws of the place, where they are made. Pothier says, although pleas in bar (of prescription) do not extinguish the claim in rei veritate, yet they cause it to be presumed to be extinguished and discharged, while the plea in bar exists. "Outre cela quoique les fins de non-receivoir n'eteignent pas in rei veritate la creance, neánmoins elles la font présumer éteinte et acquittée, tant que la fin de non receivoir subsiste." And he puts a strong case, where in a suit brought he admits, that a claim so barred cannot be a set off, and gives the reason, "car la fin de non recevoir que subsiste contre ma creance opere la presomption de l'extinction de ma creance." Poth. Obl. pt. 3, c. 8, art. 1, § 677 (642). He adds also that from the principle, that the plea in bar, while it subsists, causes the claim to be presumed to be extinguished, it follows also, that one would ineffectually become a security for a claim, which is already barred. Kaimes, Eq. pp. 363, 364, c. 8, § 6; Ersk. Inst. bk. 3, pp. 633, 634, tit. 7, § 48; Voet ad Pand. lib. 44, tit. 3, § 10. This presents the nature of the presumption in a strong light; and other distinguished jurists admit the same reasoning. Kaimes, Eq. p. 364, c. 8, § 6. Lord Kaimes says, "when a process is brought in Scotland for payment of an English debt, after the English prescription has taken place, it cannot be pleaded here, that the action is cut off by the statute of limitations; but it can be pleaded here, and will be sustained, that the debt is presumed to have been paid. Considering that the statute can have no authority here, except to infer a presumption of payment, it follows, that the plaintiff must be permitted to defeat the presumption by positive evidence, or to overbalance it by contrary presumptions, or to show from the circumstances of the case, that payment cannot be presumed." Now, in the first place, if the statute of limitations does create, proprio vigore, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see, why the presumption of such payment thus arising from the lex loci contractus should not be as conclusive in every other place, as in the place of the contract. It may be admitted, that it might be repelled by any circumstances, which would constitute a good replication to the bar in the country of its origin. But why the parties should be permitted to escape from the conclusiveness of the presumption of payment, which their own laws have made, simply because they are in a foreign country, requires some farther explanation. Payment, or extinction, according to the laws of the place of the contract, is payment or extinction of the debt every where. Why not, then, the presumption of payment or extinction, conclusive every where else, when it would be conclusive at home? Why

should a difference be made between the fact, and that, which the law deems conclusive evidence of the fact? What is there in the principles of national comity, which forbids us to bind the parties by a rule or a prescription, which the laws of their country have made conclusive between them? If a foreign prescription may be given in evidence, as proof of payment, why may it not be pleaded directly as a positive bar?

It is certain, that what would be evidence of a contract in the place where it is made, is admissible to prove it although contrary to the local regulations of the forum, where it is sought to be enforced. Emerigon puts a case in point. Two Englishmen litigated in a cause pending in France, the one prayed to be allowed to prove by witnesses the loan of a sum exceeding 100 livres; the other excepted against it, the 54th art. of the ordinance of Moulins. It was adjudged by the parliament of Paris, that the ordinance did not apply, inasmuch as it goes ad litis decisionem. Emerigon considers this question as to proof, as "pour le decision du fonds," and therefore, "on se reglera par les loix du lieu de contrat," it is to be regulated by the laws of the place of the contract. 1 Emerig. pp. 125, 126, c. 4, § 8. If the article of Moulins had been incorporated into the English law, the objection would have been fatal. Why? Because the law of the place had made it indispensable as evidence of the contract in its original concoction? Why not then apply the same rule as to statutes, which conclusively presume the extinction of the contract?

But it is argued, and has often been argued, that statutes of limitation belong to the regulations of process in every state, and limit the judicial order of proceedings in their courts. To use the expression of Emerigon, they are said to belong "à l'ordre judiciare." This is true as to such statutes regulating remedies exclusively in the courts of a state. But is this the whole effect of such statutes generally? Is this the whole effect of statutes of limitations, purporting on their face to extinguish all right of action in perpetuity, upon contracts made in a country, without reference to any particular court, in which the action may be brought? Statutes of limitation may be so framed, as merely to apply to the jurisdiction of a court. They may prohibit such court from taking cognizance of an action, unless brought within a limited period after the right has accrued. Such statutes, properly and emphatically belong to the regulation of judicial proceedings. Statutes of limitation may, on the other hand, declare, in terms, that contracts not sued for within a limited period shall be held to be utterly extinguished. Such statutes are a complete extinguishment or discharge of a contract, and constitute an universal bar, as much as a discharge under a bankrupt law. Such statutes constitute bars ad litis decisionem; they go à la décision du fonds. Statutes of limitations may proceed in an intermediate course. They may declare, that no action shall be brought upon contracts made within a state, unless within a limited period. In this last case, if they are directory to courts of justice, as to the sustaining of suits, they are properly deemed a regulation of the judicial proceedings in such courts. If, on the other hand, they are considered as defences, or bars, authorized to be made by the debtor, and at his option, they are not otherwise a regulation of judicial proceedings, than any other legal bar set up by the debtor. They authorize a judgment of the court in his favour, as a perpetual bar of any suit. They literally go, therefore, ad litis decisionem. Now the prescriptions of the French law are pleas in bar, which ought to be pleaded by the debtor, and the court cannot supply them (Poth. Obl. pt. 3, c. 8, art. 1, § 679); and in general, the same is true as to our statutes of limitations of personal contracts. They must be pleaded by the debtor, otherwise they are not available in his favor. These are, in my view, important distinctions, which have not hitherto sufficiently attracted attention. The defence, in such case, is given to the debtor against any action after the limited period. When that period is passed, if the parties are still within the state, all right of action is extinguished; and I can perceive no reason, why the right to use that defence, good by his own laws, should not travel with the debtor into every other country. The policy of it is as strong, as that of the rule of the exceptio rei judicatae. It is to put an end to litigation, and to save persons from continual exposure to stale demands.

The leading argument against this doctrine, however, is, that statutes of limitation extinguish the remedy only, and not the right, upon contracts. Let us not deceive ourselves; there is no magic in words. Is the proposition, thus laid down, true to the extent, which the purpose, for which it is introduced, requires? The distinction between a right and a remedy is admitted. But can a right be truly said to exist upon a contract, when all remedy upon it is legally extinguished? Suppose a judgment has passed upon the plea of prescription to a contract in favor of the defendant; there is a perpetual bar of remedy; but could it be said, that the right upon the contract still subsists? The supreme court of the United States, has recently said, in a very elaborate opinion delivered by the chief justice, "the distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified, as the wisdom of the nation shall direct." Again: "Statutes of limitation relate to the remedies, which are furnished in the courts. They rather establish, that certain circum-

stances shall amount to evidence, that a contract has been performed, than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there would be little doubt of its unconstitutionality." Sturgis v. Crowninshield, 4 Wheat. [17 U. S.] 122, 200, 207. And why, may it be asked? Because it takes away all remedy upon the contract, and thereby destroys its obligation. In the opinion of the supreme court, in the case then in judgment, the insolvent laws of states, which absolved the person and future property of the debtor from the contract, impaired its obligation, and were therefore unconstitutional. A statute, therefore, that takes away all remedy upon a contract, cannot be truly said not to affect the right, or obligatory force, of such contract. What is the right of a contract, when the remedy is extinguished in perpetuity? That a debt, barred by the statute of limitations, is not so utterly gone, as that it may not be revived by a new promise, is admitted. And in this respect, it is exactly in the same predicament, as a debt discharged by a certificate of bankruptcy. The right is just as much extinguished in the one case as in the other, and no more. Indeed, a discharge in bankruptcy is but an extinction of all future remedy against the person and effects of the debtor. Pothier, alluding to the bar of prescription, says, that it does not extinguish the debt, but it renders it ineffectual, by not permitting the creditor to bring the action, which results from it; that, while it subsists against any debt, it operates as a presumption of the extinction of the debt; but, he adds, that payment by the debtor, is, notwithstanding, valid, since the debt is not extinguished. Poth. Obl. pt. 3, c. 8, art. 1, § 676. It is obvious, from the whole scope of the observations of Pothier, that he means no more, than that the prescription does not extinguish the claim, if the debtor does not interpose it as a bar; and that a voluntary payment cannot be recovered back, since it is but a waiver of the bar, which the debtor had a right to plead. Strictly speaking, in Pothier's view, a prescription is not per se an extinction of the remedy, but only at the option of the debtor. He asserts, that the plea of prescription ought to be interposed by the debtor; and cannot be supplied by the judge. Id. This is perfectly reasonable, and conforms to the doctrine of the common law, as to the like plea in personal actions. Every one is at liberty to waive a rule or law, introduced for his benefit.

The distinction, which is here alluded to, between the absolute extinction of a debt, and the positive presumption of its extinction, which the law allows to the debtor, and which becomes absolute, when the prescription is pleaded by him, is just in itself. It proceeds upon the ground, not of a strict legal right in the creditor, which he may enforce against the will of the debtor, but upon the notion, that there still exists, notwithstanding the statutable prescription, a moral obligation, binding in foro conscientiae, which, if recognized by the debtor, or discharged by him, repels any imputation, that the transaction is a nude pact without consideration. Payment, therefore, by the debtor, once made, cannot be recalled, for it is an equitable and honest act, and founded in moral obligation. But still there is not, strictly speaking, any right in the creditor to claim payment, for the law has made the bar, if pleaded, an estoppel of the right. Such right is technically extinguished in contemplation of law by the presumption of extinction, until the debtor himself negatives the presumption, by some act or admission. This view is not opposed by Voet, or D'Aguesseau, in the passages cited at the bar. Voet says: "Prescriptioni effectus est, quod jure Romano naturalem obligationem extra omnem juris effectum constituat, licet eam non tollat ipso jure. Unde et obligationi ita prescriptae regulariter neque fidejussor nec pignus accedere potest. Quod ipsum jus de non admittendis pro debito praescripto fidejussoribus aut pignoribus, moribus hodiernis magis obtinet, quia placuit, per praescriptiones ipso jure perimi, quae subfuerant, obligationes." Voet ad Pand. lib. 44, tit. 3, § 10. Now there can be no legal right, where the natural obligation of the contract is gone, or is without any effect. D'Aguesseau observes: "Toute prescription suppose deux choses; l'une que celui, qui prescrit, demeure defendant debiteur du droit, qui'l veut eteindre par la prescription; l'autre, que celui, contre lequel on prescrit, est en état d'agir et d'interrompre la prescription." D'Aguesseau, ouvres de. tom. 5, p. 374. The learned author certainly admits, that the prescription extinguishes the right, if the debtor avails himself of it; and that the creditor is only in a situation to defeat the prescription, if the debtor does not use it.

It is plain, therefore, that when the remedy is said to be extinguished by a prescription, and not the right, we are not to understand the term "right," in its technical legal sense, but merely as a moral obligation and claim in natural justice. In the common law, a right always supposes some mode, by which it can be enforced. It may be by action, or by entry, or retainer. But it is always contemplated by law, that there is some mode, by which it may legally be enforced. Generally speaking, it is used as a phrase less extensive than that of title; and is applied to cases, where a right of action subsists. Co. Litt. 345a, 345b; Sheppard's Epitome, Droit, p. 466. A person's estate is therefore often said to be turned to a right, when it can be recovered only by an action, as in cases

of descents after a dis-seisin, where, as Lord Coke says, jus descendit et non terra. Co. Litt. 345b. And I am not aware, that in any exact legal sense a right can be said to subsist upon a contract, where the law has taken away all the power of enforcing its obligation by any remedy.

The cases already cited, with reference to the effect of discharges under laws of insolvency and bankruptcy, proceed upon this distinction. Where the insolvent laws merely discharge the person, leaving the effects, future as well as present, liable for the debt, the discharge cannot be pleaded as a bar to any action in a foreign court. The reason is, that there remains some remedy; there is not a total, but a partial extinction of remedy; it is gone in personam, but not in rem. But where the effects, as well as the person, are discharged, as in cases of bankrupt laws, there the discharge is held a universal bar; and the reason is, that it extinguishes all remedy of every kind, and consequently, in a legal and exact sense, all right. Now it seems to me, that the doctrine here proceeds upon a plain principle. Where the lex contractus leaves any right of action, foreign courts may enforce that right, according to their own local remedies and modes of proceeding. Where no right of action subsists by the lex contractus, foreign courts do not enforce the original obligation, because it is gone, and to enforce it, would be to create a new obligation, and not to recognize a subsisting one. Now this is precisely the case in respect to statutes of limitation of the lex loci contractus, where they have actually and completely run against a contract. The laws extinguish the remedy in every form, at the option of the debtor; and this right, or presumption of extinction, ought to go with him every where, and to be recognized every where. If it be said, that the remedy being gone does not by the lex loci extinguish the right, I would ask, how that position is made out. It is precisely like the case of bankruptcy. The bar in the latter case is a more positive bar; it does not, and cannot, suppose a real satisfaction of the debt, for then payment might be pleaded. The contract may be revived by a new promise, and it rests in the option of the debtor to plead it or not. It runs, therefore, in a perfect parallel with the case of the statute of limitations; and is not distinguishable from it, except that in the one case, all remedy is extinguished after the lapse of a certain time, and in the other, immediately upon the operation of the law upon the case of bankruptcy. The doubt, which I ventured to throw out in the case of Van Reimsdyk v. Kane [Case No. 16,871], as to the distinction between them, asserted by the current of authorities, still remains with me; and I am not yet able to perceive, that the distinction is in principle sound.

The doubt, which still presses on my mind, and the reasoning, which has been suggested in aid of that doubt, are not without countenance from civilians, and seem at least, in times past, to have divided their opinions. I do not know that Casaregis has given any express opinion. After having adverted to the common distinction between the construction of contracts, and the mode of proceeding judicially to enforce them, he says: "Cui distinctio adstipulatur altera, quod, aut disseritur de qualitatibus et conditionibus contingentibus in ipso contractu et tempore contractus, prout in presenti, et tunc inspiciendus sit locus contractus; aut de qualitatibus contingentibus post contractum ex negligentis vel mora et tunc inspiciendus sit locus, ubi illa mora contracta est." Casaregis, Disc. p. 179, § 60. It is not quite clear, what defence or delay, which should bar the right, is here alluded to; but he seems to consider generally, that if by such negligence or delay the contract be once gone by the lex loci, it affects the contract every where. There is certainly an obscurity in the phraseology, which does not permit us to reason with perfect certainty as to his views. Domat says, "a creditor loses his debt for having omitted to demand it within the time limited by prescription, and the debtor is discharged from it by the long silence of his creditor." 1 Domat (Strahan's Translation, Ed. 1737) bk. 3, p. 464, § 4, art. 1. And again, "there is yet another use of prescription, in which possession is not necessary, which is that of annulling the rights and actions, which one has ceased to exercise during a time sufficient for prescribing. Thus a creditor loses his debt and all rights and actions are lost, although those, who are debtors, possess nothing, if a demand is not made of the debt, or if one ceases to exercise his right during the time regulated by law." Id. bk. 3, p. 466, § 4, art. 10. This language is exceedingly strong and direct, and shows that Domat contemplates, that the right to the debt in a legal sense is lost by the prescription, and this not in a particular place, for he annexes no qualification, but generally; in other words, that it is legally discharged. Erskine in his Institutes (Ersk. Inst., Ed. 1812, bk. 3, tit. 7, § 48) says, "if in the case of an English debt, which is in their law limited to a short prescription, but not in ours, an action shall be brought in Scotland, by the creditor, for payment after the years of the English limitation shall have elapsed, the English statute, which is of no proper authority in the courts of Scotland, cannot be regarded as an extinction of the claim. Nevertheless, it ought in equity to be regarded as a presumption, that the debt is paid, if the creditor shall not elude it either by direct evidence or contrary presumptions. It is hard to quote any decisions of our supreme court, in support of what has been observed on this head, to which contrary decisions may not be opposed. But these and other rules relating to it are laid down with great pre-

cision, and the contrary judgments censured by the author of the Principles of Equity. Kaimes, Eq. bk. 3, c. 8, § 6. By the latest decision, the court of sessions "have made the law of Scotland, the rule of their judgment." Thus far the text. And the editor of the last edition states, "the same has since been repeatedly found, and cites the cases. It is to be observed, however, he adds, that in all these cases, the debtor had left England within the period of the statutory limitation, so that the court had no other rule than the Scots' prescription to go by. In two still later cases, in 1786 and 1792, which he cites, the Scots' prescription was finally overruled. So that it would seem by the latest Scotch decisions, the prescription of the lex contractus, and not that of the lex fori, is now the established rule. After such a variety of fluctuating decisions at a bar and bench so distinguished for learning and talent and discrimination as those of Scotland, one may venture to maintain, that all reasoning and principle are not necessarily on one side of this question, without the imputation of extreme rashness of assertion.

If, therefore, the question were now entirely new, and I were called upon to settle it upon principle, I confess, that the inclination of my own mind, would strongly lead me to adopt the following propositions. 1. That wherever a right to a debt exists by the lex loci contractus, although a remedy in personam be taken away, that right may be enforced in a foreign tribunal by any remedy, which its own modes of judicial proceeding authorize, and exclusively by such remedy. 2. That where all remedies are barred, or discharged by the lex loci contractus, and have operated on the case, there the bar may be pleaded by the debtor in a foreign tribunal, to repel any suit brought to enforce the debt. 3. That where all remedies are barred by the lex loci contractus, there is a virtual extinction of the right in that place, which ought to be recognized in every other tribunal, as of equal validity. 4. That if the prescription by the lex loci contractus be longer than that of the lex fori, the latter may be pleaded in bar to a foreign contract, if it applies to foreign contracts; and that this does not on principle suppose, that the foreign prescription may not also be a well founded bar to the suit.

But I do not sit here to consider, what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides, in whose judgment the most implicit confidence might not have been originally reposed.

It does appear to me, that the question now before the court has been settled, so far as it could be, by authorities, which the court is bound to respect. The error, if any has been committed, is too strongly engrafted into the law, to be removed without the interposition of some superior authority. Besides the incidental recognitions already referred to in other writers, Huberus and Voet speak strongly on the point. The former puts this example: "Frisius in Hollandia debitor factus ex causâ mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit praescriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi praescriptionem non esse receptam, proinde sibi non obstare in hac causa. Sed aliter judicatum est, &c. Ratio haec est, quod praescriptio et executio non pertinet ad valorem contractus sed ad tempus et modum actionis instituendae," &c. 2 Huberus, lib. 1, p. 540, tit. 3, § 7. It is true, that Huberus here applies his doctrine to the case of a prescription of the lex fori, (as to which, I entirely agree with him); but it is apparent from the whole scope of his reasoning in his celebrated chapter de conflictu legum, that he meant to exclude the application of the prescription of the lex loci contractus. Voet is more direct: "Si praescriptioni implendae alia prefinita sint tempora in loco domicilii actoris, alio in lobo ubi reus domicilium fovet, spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur." Voet ad Pand. lib. 44, tit. 3, § 12. He does not put the case of the prescription of the place of the contract, but of the plaintiff's domicil; but it is fairly to be presumed, that he supposed them to be in the same predicament. Lord Kaimes, as we have already seen, asserts the doctrine in the most explicit manner. These opinions are certainly of great weight, and probably indicate the doctrine predominating among civilians. We may now look to the decisions at the common law. In the case of Williams v. Jones, 13 East, 439, the question was directly made at the bar. Lord Ellenborough, in pronouncing judgment, adverting to the argument, said, "It is said that parties, who have contracted abroad, return to this country with the same rights only, which they had in the country, where they so contracted; and, generally speaking, that is so; that is, if the rights of the contracting parties be extinguished by the foreign law, upon the happening of certain events. But here, there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right; and there is no law or authority for saying, that where there is an extinction of the remedy only in the foreign court, that shall operate by comity as an extinction of the remedy here also. If it go to the extinction of the right itself, the case may be different." The case, however, finally turned upon another point, viz. that it was within the saving of the statute of limitations. But the general doctrine stated by Lord Ellenborough is ful-

ly recognized by all the other judges, and puts an end to the question, at least in England.

Then come the decisions in our own courts. One of the earliest cases is Nash v. Tupper, 1 Caines, 402, where to an action on a note, the plea of the statute of limitation of six years of New-York, (where the suit was brought) was pleaded, and the plaintiff replied, that the contract was made in Connecticut, where the limitation was seventeen years. Upon demurrer to the replication, the court held it bad, and the plea in bar good, and referred to an earlier case, where the same point was decided. Mr. Justice Livingston dissented from this judgment in an opinion expressed in his usual clear and forcible manner, and illustrated his views on the general question with a cogency of argument and learning, which in my humble judgment are not easily answered. This decision was confirmed in Ruggles v. Keeler, 3 Johns. 263, and the point directly adjudged, that the statute of limitations of a foreign state could not be set up as a bar to a set off, founded on a contract executed in the foreign state. The facts were special, and did not necessarily require a decision of the point in its most general shape. The action was on a note given by the defendant to the plaintiff Keeler, (as it should seem in Connecticut); it was not negotiable, but was assigned to one Walker, in Connecticut, and there certain services were performed, and goods sold, by the defendant to Walker, while he was owner of the note. The suit was brought in the plaintiff's name for the benefit of Walker. It was, therefore, a case, where the set-off might be justly considered as intended by the parties as an equitable concurrent discharge of the note. It fell, therefore, precisely within the doctrine asserted by Pothier. "If, says he, my debtor of a sum of money, before the time of the prescription against my claim was accomplished, and consequently before the plea in bar was acquired, had become my creditor of a like sum of money, and afterwards, since the time of prescription against my claim was accomplished, should demand the payment of his; although I should not be allowed to bring an action against him for mine, I should be allowed to oppose it to him as a set-off (compensation) against his. This is according to the maxim of the doctors, 'quae temporalia sunt ad agendum perpetua sunt ad excipiendum.' The reason is, that the set-off (compensation) is made of full right, from the time that your claim and mine, which was not yet prescribed, were mutually set off and extinguished." Poth. Obl. pt. 3, c. 8, art. 1, § 677. However, the court decided the question upon the broad ground, stating that statutes of limitations are municipal regulations, founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern. The lex loci applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. Mr. Chancellor Kent has in a very recent case sustained and explained the reasoning of this decision in a very elaborate manner, and has pressed into its service, with his accustomed diligence, a mass of exact authority. Decouche v. Savetier, 3 Johns. Ch. 190, 218, &c.

The case of Pearsall v. Dwight, 2 Mass. 84, decided by the supreme court of Massachusetts, is directly in point. There the defendants pleaded the statute of limitations of New-York to a contract made in New-York. The court held the plea bad; and Chief Justice Parsons, (himself a great authority,) in delivering the opinion of the court, said, "the law of the state of New-York will therefore be adopted by the court, in deciding on the nature, validity and construction of this contract. This we are obliged to do by our laws. So far the obligation of comity extends, but it extends no farther. The form of the action, the course of judicial proceedings, and the time, when the action may be commenced, must be directed exclusively by the laws of this commonwealth."

It appears to me, that these authorities are too stringent and obstinate to be easily resisted. I confess myself unable to resist the conclusion, that they demonstrate the present question to be entirely at rest in the principal state tribunals, where the parties dwell, and by whose laws they are to be governed. I feel myself, therefore, constrained to say, that the plea in bar is bad, and must be overruled.

There is another objection to the plea, (independent of the general ground) which has been already alluded to, and which, if that ground were untenable, might well induce a question of the validity of the plea. It is, that the statute of limitations of New-York does not appear to have run against the action, while the parties were citizens of that state. But it is unnecessary to dwell on this objection, as the plea cannot otherwise be sustained. Plea adjudged bad.

Case No. 8,270.

LE ROY et al. v. DELAWARE INS. CO.

[2 Wash. C. C. 223.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PRACTICE AT LAW — NEW COUNT IN DECLARATION — CONTINUANCE — AFTER COMMISSION TO TAKE TESTIMONY, NEW WITNESS FOUND — SURPRISE.

1. Where the plaintiffs had filed a new count to their declaration, to which no plea had been entered, the court granted a continuance of the cause.

2. The plaintiffs issued a commission to take testimony abroad, and the defendant joined in the

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

same, by filing cross-interrogatories; but the plaintiffs afterwards found a witness to prove the facts they desired to establish by the commission, and abandoned it. The court said, a trial under these circumstances, would be a surprise on the defendant.

Motion by defendant to continue the cause, upon the ground, that the plaintiffs had taken out a commission in this cause, and in another of Gernport v. Union Ins. Co. [unreported], on the same risk; which latter depositions, it had been agreed on record, should be read in this action. Those commissions had not been returned, and were in fact abandoned by the plaintiffs, in consequence of their having, accidentally and lately, discovered, in this place, a witness to serve their purpose. But the defendants, who had joined in putting interrogatories under the above commission, depended upon the evidence to be received under them; and were taken entirely by surprise. Another reason was, that about twelve or eighteen months ago, the plaintiffs, after the plea of non infrigit, &c. pleaded, obtained leave to add a new one of barratry, to which amended declaration, no new plea had been put in; of course, the cause was not ready for trial.

BY THE COURT. The defendants would certainly be taken by surprise, if the cause were now to be brought on. But the other reason cannot be got over. The defendants should have pleaded anew, after the declaration was amended. Let the cause be continued, and an eight day rule to plead be given.

Case No. 8,271.

LE ROY v. JAMISON et al.

[3 Sawy. 369;[1] 2 Cent. Law J. 685; 1 Law & Eq. Rep. 52.]

Circuit Court, D. California. June 23, 1875.

AUTHORITY OF COMMISSIONER OF THE GENERAL LAND OFFICE—FINAL SURVEY OF MEXICAN LAND GRANT — PUBLICATION OF NOTICE — PLACE OF PUBLICATION DEFINED—NOTICE—WHAT IT MUST STATE — CLERK'S CERTIFICATE—OF WHAT EVIDENCE—COMMISSIONER'S DECISION—EFFECT OF—ACCEPTANCE OF PATENT—PATENT WHEN IN CONDITION FOR ACCEPTANCE — OFFICERS' POWERS CEASE WITH RECORD OF PATENT—WHEN PRIOR APPLICATION FOR PATENT EVIDENCE OF ACCEPTANCE—ACCEPTANCE OF PATENT WAIVER OF OBJECTIONS.

1. Previous to the act of June 14, 1860 [12 Stat. 33], vesting jurisdiction in the district court of the United States for California, over surveys of confirmed Mexican land claims, the commissioner of the general land office exercised a general supervision and control of all executive duties relating to private claims to land, and the issuing of patents therefor. Such authority was vested in him by the act of July 4, 1836 [5 Stat. 107], reorganizing the general land office. It embraced the examination of all surveys of such private claims and their correction until made conformable with the right conferred upon the claimant by legislative act or judicial decree. This authority continues under the act of 1864 [13 Stat. 332]. By the act of 1860, and so long as that act was in force, his power in this respect was withdrawn. That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing patents thereon. The course of procedure in such cases stated.

2. To render a survey final under the act of 1860, when not submitted to the district court, it was necessary that the publication required should be made, and though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made. The certificate of the surveyor-general was only prima facie evidence of the fact.

3. By the language "place of publication," in the statute of 1860, requiring the surveyor-general to give notices of surveys made by him by publication once a week for four weeks in two newspapers, one of which was to be in a paper where the "place of publication" was nearest to the land, reference is had to the place where the paper is first issued; that is, given to the public for circulation, and not to the place where the paper is subsequently distributed.

4. A notice published by the surveyor-general that he had examined and approved, under the act of 1860, of a particular rancho confirmed to designated parties, is not a compliance with the law requiring publication of notice that he had caused a survey and plat to be made of —— land confirmed; or had approved of one made by others under his direction.

5. The clerk of the United States district court can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases. His certificate is not evidence of any other facts stated therein.

6. The determination of the commissioner, upon receiving a survey transmitted to him as published, under the act of 1860, as to the regularity and sufficiency of the alleged publication, is conclusive, unless reviewed and corrected on appeal by the secretary of the interior. The right of the commissioner, upon proper application, to reconsider any matter previously determined by him, must be exercised before proceedings upon the original ruling have been taken and concluded.

7. No one can be compelled by the government to become a purchaser, or even to take a gift. In order that the patent of the government may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. The acceptance by the grantee of the conveyance, where no personal obligation is imposed, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance.

[Cited in Alvarado v. Nordholt, 95 Cal. 121, 30 Pac. 213.]

8. The deed of the government, that is its patent, is in a condition for acceptance when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. The record stands in the place of the offer or delivery in the case of a private deed; the instrument is thenceforth held for the grantee.

[Cited in U. S. v. Schurz, 102 U. S. 399.]

[Cited in Cruz v. Martinez, 53 Cal. 243.]

9. With the record of the patent the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office, or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed,

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

unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land office.

10. A previous application for a patent is evidence of its acceptance if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851, and when a patent is issued in conformity with proceedings regularly taken under the act, it takes effect without reference to any subsequent action of the patentee. But if the patent be issued without a final survey conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged.

11. Objections by the patentee to the survey of a confirmed Mexican land claim are waived by his acceptance of the patent.

This was an action to recover the possession of certain real property in the county of Santa Barbara, and by stipulation, was tried by the court without the intervention of a jury. Both parties claimed the demanded premises under patents of the United States, issued upon the confirmation of grants of the former Mexican government. Both patents covered the demanded premises. The patent under which the plaintiff [Theodore Le Roy] claimed bears date in March, 1870, and the grant upon which it is founded was made in March, 1840. The patent under which the defendants [Tobias B. Jamison and others] claimed bears date in October, 1873, and the grant upon which it rests was issued in December, 1844. The plaintiff, having the earlier patent and the elder grant, was entitled to recover, unless the validity of the patent, or the correctness of the survey of the premises covered by it was successfully assailed. The defendants contended that the patent was invalid and that the survey was incorrect. In support of their position that the patent was invalid, they produced the opinion and decision of Commissioner Drummond, of the general land office, made in June, 1872, directing a cancellation of the patent, and the decision of the secretary of the interior, affirming his action. The following is Commissioner Drummond's opinion:

"Department of the Interior, General Land Office, Washington, D. C., June 12, 1872. Sir: I have carefully examined the papers in the case of the Rancho Guadalupe, Diego Olivera and Teodore Arellanes confirmees, granted by Juan B. Alvarado, March 21, 1840, confirmed by the board of land commissioners for California December 6, 1853, and by the United States district court, September 25, 1855, and appeal dismissed February 5, 1857. Under instructions dated January 15, 1858, from J. W. Mandeville, United States surveyor-general for California, United States Deputy Surveyor Brice M. Henry made a survey of this rancho; but, a protest against said survey having been filed July 6, 1859, by Diego Olivera, it was set aside and a re-survey ordered, which re-survey, containing 32,408.03 acres, was made in September, 1860, by United States Deputy Surveyor J. E. Terrell, and the survey and plat approved by Surveyor-General Mandeville on the twenty-ninth of January, 1861. This survey was, on the thirty-first of May, 1861, certified by said surveyor-general to have been published, for four successive weeks in the Santa Barbara Gazette, the first publication being on the fourteenth of February, 1861, and the last on the seventh of March, 1861; and also in the Los Angeles Star, the first publication being on the twenty-third of February, 1861, and the last on the sixteenth of March of the same year, the form of said publication being as follows, as shown by a copy certified, in 1870, by United States Surveyor-General Sherman Day:

" 'United States Surveyor-General's Office, San Francisco, February 12, 1861. In compliance with the first section of an act of congress approved June 14, 1860 [12 Stat. 33], regulating surveys of private land claims, surveyed in pursuance of the thirteenth section of an act entitled "An act to ascertain and settle private land claims in the state of California," approved March 3, 1851 [9 Stat. 631], have been examined and approved by me.

" 'Name of rancho, Guadalupe.

" 'Confirmee, Diego Olivera et al.

* * * * * * *

" 'The plats will be retained in this office subject to inspection for four weeks from the date of this publication.

" 'James W. Mandeville,

" 'United States Surveyor-General.'

"On the twenty-third of May, 1863, John W. Wheeler, clerk of the United States district court for the Southern district of California, certified 'that due notice by publication, in manner and form as required by law, has been made by the surveyor-general of the United States for the state of California, in the matter of the approved survey of the lands called "Guadalupe," confirmed to the claimant in the above-entitled cause of Diego Olivera v. U. S.,' and 'that the full period of six months from and after the completion of said publication has elapsed, and no objections having been made thereto or filed in my office, the said approved survey has become final, and the claimant therefore entitled to a patent for the land therein contained.' In the same year E. F. Beale, then United States surveyor-general for California, transmitted to this office a copy, duly certified, May 25, 1863, of the plat, field-notes, and other documents in the case, as a basis for the issue of a patent, and in those papers the surveyor-general, after stating that the rancho under consideration had been surveyed in conformity with the grant and decree of confirmation, continues as follows:

" 'I do hereby certify the annexed map to

be a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by J. E. Terrell, deputy surveyor, in the month of September, 1860, under the direction of this office, which, having been examined and approved, are now on file therein. And I do further certify that in accordance with the provisions of the act of congress approved on the fourteenth day of June, 1860, entitled "An act to define and regulate the jurisdiction of the district courts of the United States in California in regard to the survey and location of confirmed private land claims," I have caused to be published once a week, for four weeks successively, in two newspapers, to-wit, the Santa Barbara Gazette, published in the county of Santa Barbara, being the newspaper published nearest to where the said claim is located, the first publication being on the fourteenth day of February, 1861, and the last on the seventeenth day of March, 1861; also, in the Los Angeles Star, a newspaper published in the city and county of Los Angeles, the first publication being on the twenty-third day of February, 1861, and the last on the sixteenth day of March, 1861, a notice that the said claim had been surveyed, and a plat made thereof and approved by me. And I do further certify that the said approved plat and survey was retained in this office during all of said four weeks, and until the expiration thereof, subject to inspection. And I do further certify that no order for the return thereof to the United States district court has been served upon me. And I do further certify that, under and by virtue of the said confirmation, survey, decree and publication, the said Diego Olivera et al. are entitled to a patent from the United States upon the presentation thereof to the general land office for the said tract of land bounded and described as follows, to-wit: (Here follows the field-notes of the Terrell survey.)'

"It appears from the foregoing that the Rancho Guadalupe was properly and finally confirmed, and that it was surveyed by Henry, objected to, and re-surveyed by Terrell in September, 1860. Surveyors-General Mandeville and Beale certify that the plat and field-notes thereof were approved in January, 1861, and duly published, according to law, in the months of February and March of the same year in the Santa Barbara Gazette and the Los Angeles Star; and the clerk of the United States district court for Southern California certifies, in his official capacity, that all the requisites of the law had been complied with, and that the survey of the Rancho Guadalupe was final by publication under the act of 1860.

"So far, therefore, as the official records of the surveyor-general's office and courts show, the survey was final. It was so considered by this office, and a patent in accordance therewith, dated June 30, 1866, was prepared, signed and recorded, and sent to the United States surveyor-general for California on the second of August, 1866; but said patent was never delivered, the then owner of the rancho, John B. Ward, refusing to accept the same, alleging that the Terrell survey did not conform to the decree of confirmation, and also that it was not final under the act of June 14, 1869 (12 Stat. 33), the requirements of that act with respect to publication never having been complied with. In this protest Mr. Ward alleges that 'on the twenty-ninth day of January, 1861, the said surveyor-general filed in his said office an approval of the field-notes and plat of the said rancho, and that subsequently to such filing no publication of the notice of the approval was made in accordance with the provisions of the act of congress of June 14, 1860, already recited.' 'That it is true that a notice of the approval of a plat of survey of a certain tract of land, known by the name of Guadalupe, was published in the Los Angeles Star, the first publication thereof being on the twenty-ninth of September, 1860, and the last on the twentieth of October, 1860; also, in the Pacific Sentinel, the first publication thereof being on the twenty-first of September, 1860, and the last on the twelfth of October, 1860; but the field-notes and plat of the rancho, which is the subject of the present memorial, not having been approved until the twenty-ninth of January, 1861, the publication above referred to could have had no application thereto, so that, in point of fact, no publication of the approval by the surveyor-general of the field-notes and plat of the survey of the Guadalupe rancho, granted to Diego Olivera and Teodore Arellanes, has ever been made according to law.'

"In support of these allegations, there were filed three affidavits:

"First. An affidavit signed by John Nugent, one of Mr. Ward's counsel, in which it is stated that up to July, 1866, no other plat of the Guadalupe was ever exhibited or on file as the official plat approved by J. W. Mandeville, except one with the following inscription:

" 'Note.—A notice of the approval of this plat of survey has been published in accordance with the act of congress of June 15, 1860, in the Los Angeles Star, the first publication thereof being on the twenty-ninth of September, 1860, and the last on the twentieth of October, 1860; also, in the paper nearest the land, being the Pacific Sentinel, the first publication thereof being on the twenty-first of September, 1860, and the last on the twelfth of October, 1860. This plat has remained in this office subject to inspection from the date of the approval thereof.'

"Second. An affidavit signed by Vicente A. Torras, who was employed on the Santa Barbara Gazette, in January and February, 1861, and who swears that in those months said paper was published in San Francisco.

"Third. An affidavit, signed by S. B. Brinkerhoff, in which it is stated that said affiant

'was a subscriber to a paper known as the Santa Barbara Gazette, and that of his own knowledge the place of publication of said paper was in the city of San Francisco, and not in the county of Santa Barbara.'

"Upon these affidavits, this office decided, in letter dated October 22, 1866, addressed to the United States surveyor-general for California, that the publication was not in conformity with the law of 1860, and was, therefore, void. A new survey was ordered, made, and subsequently published under the act of 1864, approved by the commissioner of the general land office, and patent issued in accordance therewith, which patent was sent to the surveyor-general's office, but recalled before delivery.

"Although two witnesses, Torras and Brinkerhoff, swear positively that the Santa Barbara Gazette was, in February and March, 1861, published in San Francisco, Doña Longina Yriarte de Torras, widow of V. I. Torras, one of the publishers in 1861 of the Santa Barbara Gazette, swears that from January 1 to October 17, 1861, said paper was printed at San Francisco, and as soon as printed sent to Santa Barbara for distribution; and M. W. Kimberly testified that during the years 1860 and 1861, there was no paper published in Santa Barbara county, except the Santa Barbara Gazette. There is also filed with these affidavits a copy of said paper, headed as follows: 'Santa Barbara Gazette. Organo de la Poblacion Española en California. Santa Barbara, Jueves, 17 de Octubre de 1861.' It would seem, therefore, that said paper was printed at San Francisco, but distributed at Santa Barbara, and that Torras and Brinkerhoff must be understood as testifying in effect that in their opinion the place of printing and publication must be identical. With their conclusions, which seem to have materially affected the opinion of this office when the publication of the Terrell survey was rejected, I cannot agree. The paper on its face purports to be published at Santa Barbara, and it was first circulated in that county, and in my opinion a decision from these facts that said paper was published at San Francisco cannot be reached by an interpretation of the word 'published' in accordance with its usual and ordinary meaning, nor in accordance with the proper interpretation of the word, as used in the act of June 14, 1860. The design of the publication prescribed by the act of 1860, was to convey to parties in interest notice that their claims had been surveyed, and to afford them an opportunity to file objections and contest said surveys; and that object was as well, if not better, accomplished by a publication in the manner stated than it could have been in any other manner under the peculiar circumstances surrounding the case. That would be sufficient to satisfy the requirements of the spirit of the law, but in my opinion the proceedings in the matter were also in strict conformity with the letter of the act of 1860. In Worcester's Dictionary, 'publication' is defined as 'the act of publishing or making public,' etc.; in Webster's Dictionary the same word is defined as 'the act of publishing or making known; notification to the people at large, either by words, writing, or printing;' in Bouvier's Law Dictionary 'publication' is defined as 'the act by which a thing is made public,' and 'publisher' as 'one who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers;' and the same authority defines, 'printing' as 'the art of impressing letters; the art of making books or papers by impressing legible characters.' Many other authorities might be added, but these are considered sufficient to show the marked difference between the generally recognized meaning of the words 'published' and 'printed,' and sufficient also to show that the publication in the case under consideration was properly made under the law; for, while it is admitted that the Santa Barbara Gazette was printed at San Francisco, it is clearly shown that said paper was first 'made public to the people at large' (i. e., published) in the county of Santa Barbara.

"The remaining objections, as heretofore stated, to the publication of the Terrell survey are that said publication was not made in February and March, 1861, in the Los Angeles Star and Santa Barbara Gazette, as certified by the surveyor-general, but that the publication was made in September and October, 1860, in the Los Angeles Star and Pacific Sentinel, which publication was prior to the date when the plat and field-notes of said survey were approved, on the twenty-ninth day of January, 1861. In support of these allegations there is no evidence, except the affidavit of Mr. Ward, then owner of the rancho, and of John Nugent, one of Mr. Ward's counsel in the case. The first named does not positively admit that the survey of the Guadalupe, Diego Olivera et al., confirmees, was ever published, though he says a certain rancho, called 'Guadalupe,' was published; but Mr. Nugent, in effect, swears that as late as July, 1866, no plat and field-notes of the rancho under consideration were ever exhibited as the official plat and field-notes approved by Surveyor-General Mandeville, but one which had on its face a note showing said publication to have been made in September and October, 1860, in the Los Angeles Star and the Pacific Sentinel, and also showing the approval of said plat and field-notes to have been made in January, 1861. By this showing it would seem that, even admitting the facts set forth by the ranch owner and his attorney, the Guadalupe survey was final by publication so far as these objections are concerned, as the honorable secretary of the interior, in the case of the Rancho Tajauta, decided on the twenty-first of February, 1872, that a

publication by the surveyor-general that a certain survey had been approved was in itself a sufficient approval prior to publication to satisfy the requirements of the act of fourteenth of June, 1860, notwithstanding the plat bore upon its face an approval subsequent to said publication. But I am not satisfied of the correctness of the facts stated in said affidavits, for the record evidence of the surveyor-general's office and the district court contradicts said affidavits in every important particular; and let it be once established that the testimony, without cross-examination, of two interested witnesses shall be sufficient to overturn the certificates of three sworn officials of the government, two surveyors-general, and the clerk of a United States district court having jurisdiction in the matter, and the surveys of the numerous ranchos considered final by publication are no longer fixed upon that firm basis contemplated by the law. Nothing but the most clear and positive evidence ought to be admitted to set aside such a record, particularly when, as in this case, it was acquiesced in by the parties in interest, at the date when it was made, and for years thereafter. That the Guadalupe rancho, Diego Olivera et al., confirmees, was published in the Los Angeles Star and the Pacific Sentinel in September and October, 1860, is, in my opinion, not proven; neither is the insinuation in Mr. Ward's protest, that said rancho might have been mistaken for some other Rancho Guadalupe, entitled to any weight, for there is but one rancho of that name confirmed to Diego Olivera et al. in the state of California.

"A careful examination of the papers in the case upon which this office rejected the Terrell survey, and also the papers filed subsequent to such rejection, leads me to the conclusion that such action was erroneous, and that said survey was properly approved on the twenty-ninth of January, 1861, and published in the months of February and March of the same year in the Los Angeles Star and the Santa Barbara Gazette, and no objections thereto having been made within the time allowed by law, it became final by publication under the provisions of the act of congress, approved June 14, 1860 (12 Stat. 33). The patent executed in June, 1866, was therefore correctly executed, and is a good and valid patent for the rancho aforesaid, and is herewith transmitted for delivery to the party or parties properly entitled thereto. Said patent having been legally executed, the subsequent patent was without authority of law, and therefore void ab initio, and, being now in the possession of this office, will be canceled.

"You will give notice of this decision to all parties in interest, allowing sixty days from date of notice for appeal to the honorable secretary of the interior, at the expiration of which time, if appeal be taken, you will forward all the papers in the case, as in other cases of appeal; and if no appeal be taken, you will so notify this office.

"Very respectfully, Willis Drummond, Commissioner."

They also produced an indorsement of that commissioner upon the patent, declaring its cancellation. It is as follows: "Canceled, see decision dated June 12, 1872, of general land office, affirmed by the honorable secretary of the interior, March 26, 1873. Willis Drummond, Commissioner. General Land Office, April 10, 1873." For other facts, see Le Roy v. Clayton [Case No. 8,268].

Subsequently, on the twenty-third of the same month, this cancellation was revoked by order of the secretary of the interior, and the revocation is also indorsed upon the patent. The secretary states, in his communication to the commissioner, that the revocation was directed to enable the claimant to appear in court, and correct what he asserts to have been an error committed against his rights, and not for the purpose of revoking or altering the decision made. In connection with these documents, which were admitted subject to the objection of the plaintiff, the defendants produced another patent to the same parties, issued in June, 1866, which is referred to in the decision of Commissioner Drummond, and this patent, they contend, was the only valid patent which could be issued of the premises confirmed under the Mexican grant to Olivera and Arellanes, from whom the plaintiff deraigns his title. That grant was of a rancho or tract of land known by the name of Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by the board in 1853, and by the decree of the district court of the United States in 1857. This decree became final by stipulation of the attorney-general, abandoning an appeal taken from it to the supreme court of the United States.

In September, 1860, the claim thus confirmed was surveyed under instructions of the surveyor-general for California, by his deputy, Terrell, and the survey and plat of the premises were approved by him on the twenty-ninth of January, 1861. On the thirty-first of May following, that officer filed in his office a certificate to the effect that the rancho confirmed had been surveyed; and that the survey and plat were approved by him on the day mentioned; that he had, during the previous February and March, caused to be published once a week for four weeks successively, in two newspapers, to wit: the Santa Barbara Gazette, published in the county of Santa Barbara, and the Los Angeles Star, published in the city and county of Los Angeles, a notice that the land had been thus surveyed, and that the survey and plat had been approved by him; that the survey and plat were retained in his office during the four weeks, subject to inspection; and that no order for their return to the United States district court had been served

upon him. At the time the survey and plat thus mentioned were made, and this certificate was filed, J. W. Mandeville, Esq., was the surveyor-general of California. On the twenty-fifth of May, 1863, nearly two years after this paper was filed, Edward F. Beale, Esq., who was the successor in office, as surveyor-general, of Mandeville, transmitted to the commissioner of the general land office at Washington a copy of the plat of the tract surveyed, with the certificate contained in the above opinion of Commissioner Drummond, that he had caused the publication of notice that the survey of the tract had been made, in the Santa Barbara Gazette and Los Angeles Star, as stated in the certificate of his predecessor. The new surveyor-general evidently copied the language of his predecessor, and inadvertently ascribed to himself an act which could only have been done by that officer. Upon the transcript of the proceedings for the confirmation of the claim and this certificate of Surveyor-General Beale, a patent was issued from the general land office to the confirmees of the grant, on the thirtieth of June, 1866, signed by the president, under the seal of the United States, and recorded in the proper records of the land office. This patent was, in August, 1866, transmitted to the surveyor-general of California, to be delivered to the parties entitled to its possession. Immediately upon receiving notice of its issue, John B. Ward, at the time the owner of the premises, and entitled to the patent, refused to accept it, alleging that the survey of the premises did not conform to the decree of confirmation, and was not final under the act of 1860, as the requirements of that act with respect to publication had not been complied with. Soon afterwards, he presented to Commissioner Wilson, of the general land office, certain documentary evidence, to establish his allegations, accompanied with a petition that the patent might be recalled and a new survey ordered. That evidence showed that the Santa Barbara Gazette, in which publication was made, was printed and published in the city of San Francisco, and not in the county of Santa Barbara. The evidence at least satisfied the commissioner that the publication was not made in conformity with the law of 1860, and also, that the survey was erroneous. The patent of 1866 was accordingly recalled by him, and a new survey ordered, under the act of 1864. Such survey was made in 1867, and duly advertised; and was forwarded by the surveyor-general, with his approval, to the commissioner. Upon this survey a new patent was, on the eighteenth of March, 1870, issued to the same parties as the original patent, signed by the president under the seal of the United States, and recorded in the proper records of the land office. This patent was then forwarded by the commissioner by mail to the surveyor-general of California, for delivery to the party entitled to its possession. Some days afterwards, and before its arrival in California, the commissioner telegraphed to the surveyor-general to return the patent, and it was accordingly returned. Two years afterwards, in June, 1872, Commissioner Drummond, the successor of Commissioner Wilson, reviewed the latter's action, had in 1866, in directing the new survey, and his subsequent action in issuing a new patent, and, as shown by his decision above given, held that such action was without authority and void; that the Terrell survey of 1861 was conclusive, and accordingly directed a cancellation of the second patent, and in its place a delivery to the patentees of the recalled patent of 1866. Evidence was also given as to the boundary line dividing the grants upon which the two patents were issued, which is sufficiently stated in the opinion of the court. The case was held under advisement for some weeks, when judgment was rendered in favor of the plaintiff.

John B. Felton and Wm. H. Patterson, for plaintiff.

Gray & Haven, D. M. Delmas, and S. F. Lieb, for defendants.

FIELD, Circuit Justice. If the facts stated in the opinion of Commissioner Drummond annexed to the patent of 1870 cannot be considered as facts in evidence, there is nothing before the court impairing the validity of that patent. The indorsements on the copy produced show a revocation by the secretary of the cancellation directed by the commissioner; and if titles can be affected in this irregular way, can be divested and reinvested by indorsements of the officers of the land office upon its records, the revocation is of equal validity with the cancellation. The case, as thus presented, would be that of two patents to the same parties, the second covering a larger tract than the first, with the admission of counsel that the second was issued upon allegations by the owner of error in the survey of the premises covered by the first, and of its insufficient publication under the act of 1860. Without other knowledge on the subject we could not say that the second patent was invalid. Cases may often occur where a second patent would be necessary to prevent gross wrong to the patentee. If, for instance, a confirmation and a survey embraced three distinct tracts, and by mistake the survey returned and the patent issued covered only two of them, we do not see why, upon a proper presentation of the fact, and application of the claimant, the commissioner might not issue a second patent, either for the omitted tract or one embracing the three tracts together. The administration of the land department would be very defective if a mistake of this kind could not be remedied upon the consent of the parties before the acceptance of the patent had rendered the proceeding a closed transaction.

If, then, any consideration is to be given to the argument of counsel, that the second patent in the case was properly cancelled because the first patent was conclusive of the rights of the parties, the facts stated in that opinion must be treated as in evidence; they were apparently so regarded by counsel on the argument, and for the present we shall so treat them.

We are therefore required for the disposition of the case to consider the validity of the action of the two commissioners of the general land office;—that of Wilson in cancelling the patent of 1866 and issuing the one of 1870; and that of Drummond in annulling the action of Wilson and directing cancellation of the patent of 1870.

Previous to the act of June 14, 1860, the commissioner of the general land office exercised a general supervision and control of all executive duties relating to private claims to land and the issuing of patents therefor. Such authority was vested in him by the act of July 4, 1836, reorganizing the general land office. It necessarily embraced the examination of all surveys of such private claims and their correction until made conformable with the right conferred upon the claimant by legislative act or judicial decree. The surveys of private land claims under Mexican grants in California, were thus subject to his control. He was invested with this necessary power to prevent the consequences to individuals, as well as to the public, of accident, inadvertence, irregularity or fraud. Castro v. Hendricks, 23 How. [64 U. S.] 443. His duty in these cases was to compel conformity in the survey made with the decree of confirmation, where that contained a description of the land sufficiently specific to guide the surveyor, but if it contained no such description, then to compel a survey in a compact form, so far as such compactness was consistent with the natural features of the country, and the previous selection of the confirmee as shown by his residence, cultivation and sales. This authority of the commissioner continues under the act of 1864. But by the act of 1860, and so long as that act was in force, his power in this respect was withdrawn.

That act established a system by which all surveys, when made pursuant to its requirements, and advertised in a certain way, became so far final as to leave to the commissioner the simple ministerial duty of issuing a patent thereon. It provided that the surveyor-general, when he had caused, in compliance with the thirteenth section of the act of 1851, a private land claim to be surveyed, and a plat thereof to be made, should give notice that the same had been done, and that the plat and survey were approved by him, by publication once a week for four weeks in two newspapers, one of which was to be in a paper "where the place of publication was nearest to the land," and the other in a paper published in San Francisco, if the land was situated in the Northern district of California, and in Los Angeles, if situated in the Southern district. The act also provided that, until the expiration of the publication, the survey and plat should be retained in the surveyor-general's office subject to inspection; that upon the application of any party whom the district court or a judge thereof, should deem to have such an interest in the survey and location of a land claim, as to make it just and proper that he should be allowed to intervene for its protection, or on motion of the United States the district court should order the survey and plat to be returned into court for examination and adjudication; that when thus returned notice should be given by public advertisement, or in some other form prescribed by rule, to all parties interested, that objection had been made to the survey and location and admonishing them to intervene for the protection of their interests; that such parties having intervened might take testimony and contest the survey and location, and that on hearing the allegations and proofs, the court should render its judgment approving the survey, if found to be accurate, or correcting or modifying it, or annulling it and ordering a new survey, if found to be erroneous, and generally to exercise control over the survey until it was made to conform to the decree of confirmation.

And the act then declared that when after publication, as thus required, no application was made for an order to return the survey into court, or the application was refused, or if granted the court had approved the survey and location, or reformed or modified it and determined the true location of the claim, it should be the duty of the surveyor-general to transmit, without delay, the plat or survey of the claim to the general land office; and that the patent for the land, as surveyed, should forthwith be issued therefor; and that "the plat and survey so finally determined by publication, order or decree," as the same might be, should "have the same effect and validity in law, as if a patent for said land so surveyed had been issued by the United States." It is plain, from this language, that it was the intention of congress to withdraw from the commissioner the supervision and control of surveys subsequently made of private land claims under Mexican grants in California.

But there was still a duty resting upon that officer. To render the survey final, when not subjected to the judgment of the district court (which acquired jurisdiction by a return to it of the survey), it was necessary under the act, as already seen, that the publication required should be made. This was an essential prerequisite to its finality; nothing else could be substituted for it. And though in issuing a patent upon a survey when final, the commissioner had a mere ministerial duty to perform, there was this preliminary duty cast upon him to see that the necessary publication had been made. The certificate of the surveyor-general was evidence of this fact, but it was only prima facie evidence; un-

questioned, it might be taken as conclusive; when questioned, the commissioner could go behind it. The documents presented to him disclosed the fact that no publication of notice of the Terrell survey had been made in a paper published nearest the land. They allege that the Santa Barbara Gazette was, in January and February, 1861, published in the city of San Francisco, and not in the county of Santa Barbara, which is distant several hundred miles from that city. Of these documents one was an affidavit made by a person employed upon the Gazette, and the other by a subscriber to the paper. Both of them were made upon personal knowledge, and were positive in their character. And yet an affidavit of the widow of one of the publishers of the paper, made four years afterwards, that the Santa Barbara Gazette, though printed in San Francisco between January and October, 1861, was sent as soon as printed to Santa Barbara for distribution, was considered by Commissioner Drummond six years afterwards, sufficient to overthrow these allegations. This distribution constituted, according to his judgment in reversing the action of his predecessor, the publication of the paper in that county within the meaning of the act of congress.

Assuming for the present that Commissioner Drummond possessed at the time authority to annul the action of his predecessor, if deemed erroneous, we do not agree with him in his conclusion as to the sufficiency of the publication. It was not alleged in the affidavit of the widow, and it could not be presumed from the mere heading of the paper, admitted to be printed elsewhere, that the entire issue was sent to Santa Barbara, though intended principally for circulation there. Certainly, a presumption of the kind was very slight ground upon which one public officer could undertake to set aside the deliberate act of his predecessor, had years before, upon which rights of property rested. The statute says that the notice must be published in a paper where the place of its publication is nearest the land, not where the place of its distribution is nearest. In one sense, a paper is published in every place where it is circulated, or its contents are made known. But it is not in that general sense that the language, "place of publication," in the statute is used. That language refers to the particular place where the paper is first issued, that is, given to the public for circulation. Nearly all the great dailies published in the city of New York are distributed in different parts of the country. Large packages of these papers are daily made up and immediately transmitted to California, where the packages are opened and the papers distributed. A large number of them in this mode, no doubt, find their way to the county of Santa Barbara; yet it would do violence to our apprehension of the term to say that these papers are published in Santa Barbara, in the sense of the statute. No one so understands the term in ordinary parlance, and it is not used in the statute in any technical sense.

But there is disclosed in the opinion of Commissioner Drummond, another fact, which makes it clear that no sufficient or legal publication was made, and that is, that the notice published omits the material statement required by the statute, that a survey and plat of the claim confirmed had been made and approved by the surveyor-general. All that is stated in the notice is that the surveyor-general had examined and approved of the Rancho Guadalupe, confirmed to Olivera and others, and that the plats would be retained in his office, subject to inspection, for four weeks from the date of the publication. A party might perhaps reasonably infer that reference was thus intended to some survey of the land, but he would not be obliged to take notice from the statement that the surveyor-general had caused a survey and plat to be made, or had approved of one made by others under his directions.

The commissioner appears to have given controlling weight, in overruling the action of his predecessor, to the certificates of Surveyors-General Mandeville and Beale, and of a clerk of the United States district court. The certificates were only prima facie evidence, and before the patent was issued, and afterwards, if the patent was properly recalled, the commissioner was at liberty to go behind them, and inquire whether notices had been in fact published, as there stated. The certificate of Surveyor-General Beale, as to the publication, was of matters not within his personal knowledge. And the same may be said of the certificate of the clerk, so far as the acts of the surveyor-general and his publications were concerned; as to them it was without any value whatever. The clerk can certify to copies of papers and orders in his office; also, perhaps, to the absence of papers and orders in particular cases, but that is the extent of his authority. His certificate would have been just as valuable as evidence had it related to the acts of the commissioner himself, and yet the commissioner twice refers to it as having some potentiality in the matter.

But aside from all considerations of this kind, the case cannot be disposed of by any judgment we may form of the evidence which controlled Commissioner Wilson. We have commented upon that evidence because, upon its supposed insufficiency, Commissioner Drummond justified his attempted annulment of the action of his predecessor and the cancellation of the second patent. If the patent of 1866 could be recalled at all, the sufficiency of that evidence is not a subject for consideration in this form of action, any more than the sufficiency of the evidence upon which any other step in the progress of the proceeding for a patent was taken. As we have already stated, it was the duty of the commissioner, upon receiving a survey transmitted to him as published, under the act of 1860, to

examine into the regularity and sufficiency of the alleged publication. That was a matter submitted by the law to his determination; and that determination, whether correctly or erroneously made, was conclusive, unless reviewed and corrected on appeal by his superior, the secretary of the interior. The commissioner has undoubtedly a right within a reasonable period, upon proper application, to reconsider any matter previously determined by him, but such right must be exercised before proceedings upon the original ruling have been taken and concluded. It would be a dangerous doctrine, creating great insecurity in titles, if the correctness of his action upon a matter over which he has jurisdiction could years afterwards be annulled by his successor, because of supposed errors of judgment, upon the sufficiency of evidence presented to him. And it would be without precedent and against principle for a court of law, in an action of ejectment upon a patent, to inquire collaterally into the sufficiency of such evidence to justify the action of the commissioner, and to submit that question to the determination of a jury. The patentee, if such a proceeding were permissible, would find his title established in one case and rejected in another, according to the varying judgment of different juries.

It becomes important, therefore, to determine when a patent of the United States for land takes effect, that is, when it becomes operative as a conveyance and binding upon both parties; and under what circumstances it may be recalled after it has passed under the seal of the United States, and been recorded. Some confusion has arisen in the consideration of this subject from not distinguishing between acts which bind the government, and acts which bind the patentee. It has been assumed, rather than stated, both in judicial decisions and in the argument of counsel, that when the government is bound, the patentee is bound also, without reference to his assent on the subject; but nothing is farther from the fact. No one can be compelled by the government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally, or nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the government or the deed of an individual, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance. There is in this respect no difference between the patent of the government and the deed of a private individual.

The question then, in all cases is, when is the conveyance in a condition for acceptance by the grantee? What act of the grantor is necessary to place the instrument in a condition for acceptance? When in that condition its operation is no longer subject to the control of the grantor; that then depends upon the grantee. The answer to the question is not difficult. If the instrument be the deed of a private individual it is in a condition for acceptance when it is offered for delivery, that is, when the grantor has parted with its possession or the right to retain it, in order that it may be given to the grantee. Jackson v. Dunlap, 1 Johns. Cas. 116; Jackson v. Phipps, 12 Johns. 418; Jackson v. Bodle, 20 Johns. 184; Church v. Gilman, 15 Wend. 656; Hulick v. Scovil, 4 Gilman, 159; Bullitt v. Taylor, 34 Miss. 741. If the instrument be the deed of the government, that is its patent, it is in that condition when the last formalities required by law of the officers of the government are complied with. Those formalities consist in passing the instrument under the seal of the United States, and in recording it in the records of the land office. By these acts, open and public declaration is made that so far as the general government is concerned, the title of the premises has been transferred to the grantee. The record stands in the place of the offer for delivery in the case of a private deed; the instrument is then in a condition for acceptance, and is thenceforth held for the grantee. And so the authorities are, that the grantee in such case takes by matter of record, the law deeming, as says Mr. Justice Story, speaking for the supreme court, "the grant of record of equal notoriety with an actual tradition of the land in view of the vicinage." Green v. Liter, 8 Cranch [12 U. S.] 247.

In case of a private deed, it is essential that the grantor should part with its possession or the right to retain it, for until then he may alter or destroy it. But not so with the government deed; with the close of the record the power of the officers of the government over the instrument is gone. Whether it thereafter remain in the land office or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected. Its acceptance by the grantee will then be conclusively presumed, unless immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land office.

But assuming the correctness of this doctrine in cases of ordinary transfers by the government of property by sale or gift, it is argued by counsel that it has no application to patents issued upon a confirmation of Mexican grants in California. The argument is, that the government, in dealing with claims to land under these grants, acts

as a sovereign over a subject within its exclusive jurisdiction; and, that in the discharge of its treaty obligations, it has declared in what manner such claims shall be presented; by what officers their validity shall be tested and location determined, and by what document the result of the proceedings, when favorable to the claimant, shall be authenticated. The patent, it has declared, shall be issued by the commissioner when its tribunals have adjudged that the claim is valid, and its officers have correctly surveyed it. The claimant, say the counsel, cannot prevent the agents of the government from performing the duties which the law has imposed upon them. He is as powerless to prevent the issue of the patent as he was to annul the survey or control the decree. The law commands the commissioner to issue the patent, and with the discharge of that duty the confirmee cannot interfere. No act of the latter can enlarge or abridge the commissioner's powers. And hence the efficacy of the patent in these cases does not depend upon the acceptance of the patentee.

The argument is plausible, but not sound; it proceeds upon the assumption that an acceptance of the patent must be by assent subsequent to its issue. But subsequent assent is not essential. A previous application for a patent is as persuasive evidence of its acceptance as any subsequent assent; that is, if the patent conforms to the application. Patents issued upon confirmation of Mexican grants in California are of this character. To obtain them is the object of the proceedings instituted under the act of 1851. The claimant asks in effect that his claim may be recognized and confirmed by an appropriate decree; that then a survey conforming to such decree may be made in the mode prescribed by law, and that a patent thereupon be issued to him. When a patent is thus issued it will take effect without reference to any subsequent action of the patentee. He has in advance, by his proceedings, signified his acceptance. But on the other hand, if the patent in such case be issued without a final survey, that is, one determined in the prescribed mode to be conformable to the decree, its acceptance cannot be conclusively presumed, from the fact that the patentee instituted the proceedings for the confirmation of his claim. He asked what the law authorized him to have, and so far as the law is disregarded in the survey he stands free as to his acceptance of the result. He can in such case, by prompt expression of dissent, communicated to the proper department, prevent the patent becoming so far binding upon him as to preclude a re-examination of the survey as to the errors alleged.

Such was the case with the patent of 1866; it was issued upon the supposition that the survey had become final by proper publication. The owner of the claim insisted that no such publication had been made, and that the survey was not therefore final and binding upon him, and was in fact erroneous, and on that ground refused at once to accept the patent, and asked for a new survey. The commissioner of the general land office was, upon this refusal and petition, at liberty to look again into the alleged finality of the survey, that is, into the sufficiency of the publication, for on no other ground than its insufficiency could he depart from the survey returned. The proceeding was one between the patentees and the government, and if the patentees, before accepting the patent, consented that the regular officer of the government might go behind the record and re-examine the matter which had been by law intrusted to him, and correct an error which had been committed, by accident, inadvertence, or otherwise, we do not perceive how any third party can object, and assail the second patent on that ground. If the defendants, or other third parties, have superior rights to those of the patentees, they are no more affected by the correction of the error in the survey than they would have been had the error never been committed. And if they have no such superior rights they cannot, upon any just principle of law or morals, contend that the error committed to the injury of the patentees or their successor in interest, shall be for ever irreversible. This is not a case where any doctrine of estoppel for alleged acts or conduct of the parties applies.

The proceeding is not in principle essentially different from the correction of a deed of a private person. If the deed is accepted when tendered, the transaction is closed; the title has passed, and any subsequent alteration of the instrument, or its destruction, cannot affect the grantee's title. But if not accepted when tendered, the deed may be corrected by the grantor, until it meets the views of the grantee. The only difference between the two cases arises from the fact that whilst the individual grantor is not restricted in his alterations, the officers of the government, acting under the law, can only, even by consent of the patentee, go behind the record to correct an error committed to his injury in disregard of rights secured to him by the law. The Terrell survey not having become final, and the commissioner being satisfied that it was erroneous, a new survey was properly ordered, under the act of 1864, which was then alone applicable. It is conceded that the subsequent proceedings, including the issue of the patent of 1870, were in accordance with its provisions. Our conclusion is, that the patent of 1866 was lawfully recalled, and that the patent of 1870 was properly issued, and is a valid instrument, binding both upon the government and the patentees and their successor in interest. After it was recorded, the officers of the government were powerless to change it or cancel it, without the

consent of its owner. It was then his muniment of title, and he was entitled to its possession whenever demanded.

The grant, upon which the patent held by the defendants is founded, was of a rancho known as "La Punta de la Laguna," adjoining the Rancho Guadalupe. It was presented to the board of land commissioners in 1852, was confirmed by that tribunal in 1854, and by the decree of the district court of the United States in 1857. This decree, like that in the Guadalupe case, became final by stipulation of the attorney-general, abandoning an appeal taken from it to the supreme court of the United States. In September, 1860, the claim confirmed was surveyed, under instructions of the surveyor-general for California, by the same deputy who surveyed the Guadalupe rancho, and the survey and plat were approved, as in that case, on the twenty-ninth of January, 1861, and a similar certificate of publication of notices of the survey and plat, in the same papers, and for the same period, was filed by the surveyor-general, on the thirty-first of May, 1861. From some unexplained cause, the survey and plat do not appear to have been forwarded to the general land office, for a patent, until 1873, for the certificate of the original by the surveyor-general, incorporated into the patent, is dated in July of that year. The patent, as already stated, was issued in October, 1873. Whatever defect existed in the publication of notices of the survey and plat, in the Santa Barbara Gazette, in the Guadalupe case, existed in this case. No objection, however, appears to have been taken before the general land office on that ground, and objections to the survey of that character were obviated by the acceptance of the patent. The demanded premises are covered by this patent. We have, then, the case of two patents regularly issued, each embracing the land in controversy. We must, therefore, look behind them, to the original grants, to ascertain which of them carried the better right to the premises. As already said, they adjoin each other; the eastern line of one is the western line of the other. If we can find this line, the difficulty is, of course, solved. The grant of the Guadalupe rancho only designates generally the location of the land, without giving any specific boundaries, but in April, 1840, which was the month following its issue, possession was officially delivered to the grantee by the magistrate of the vicinage, a proceeding necessary, under the law of Mexico, to a complete investiture of title, and called, in the language of the country, juridical possession. This proceeding involved a measurement of the land, and its segregation from the public domain. A record of the proceeding, showing the measurement and the boundaries established, was made, and a copy is produced in evidence.

The grant of the Rancho La Punta de la Laguna describes the land granted as bounded by various designated ranchos. In January, 1845, juridical possession of these premises was also given to the grantees by a magistrate of the vicinage. A record of this proceeding was also preserved, and a copy is in evidence. These records were before the land commission, and the United States district court when the grants were confirmed, and in the decrees of confirmation the boundaries there given are followed.

If, now, we look at the decree in the case of the Rancho of La Punta de la Laguna, we find the dividing line between it and the Rancho Guadalupe thus described: "Commencing on the top of the Lomas de la Larga, and running northerly over the plain, crossing the middle of the laguna, the distance of ten thousand two hundred varas to the Cuchillo de Nipomi, where two roads ascend, and where a stake was driven as a boundary." The different objects here stated have all been identified. The position of the top of the Lomas de la Larga is admitted to be at a live oak marked on the survey; the laguna, of course, lies where it always did; and the point where the stake mentioned was driven has been shown. The line thus given is the one laid down in the new survey of the Guadalupe rancho upon which the patent of 1870 was issued. We are satisfied that it is the true line. It would serve no useful purpose to go minutely into an examination of the evidence presented against this view. It is sufficient to observe that it has not created any serious doubt in our minds as to the correctness of this line. This conclusion disposes of the question of conflict of boundaries.

It is admitted that the defendants, except such as disclaimed, were in the possession of the premises in controversy at the commencement of the action; but there is no evidence of their possession at any previous period. There is, therefore, no basis laid for the recovery of any other than mere nominal damages for the alleged previous possession; and none, accordingly, will be awarded.

The plaintiff must have judgment for the possession of that portion of the demanded premises which is covered by the patent of 1870, with one dollar damages. Counsel for the plaintiff will, within ten days, prepare special findings in the case, and submit them to the court for settlement, upon notice to the counsel of the defendants; otherwise, a general finding will be filed.

[For another case by the same plaintiff in the same court, decided by Circuit Judge Sawyer, in which he sustains the patent of March 1, 1870, against defendants claiming under preemption, see Case No. 8,268.]

Case No. 8,272.

LE ROY v. REEVES.

[5 Sawy. 102.] [1]

Circuit Court, D. California. March 4, 1878.

VOID TAX DEED—TAX SALE TO PARTY IN POSSESSION INEFFECTUAL—STATUTE OF LIMITATIONS—DISABILITY.

1. A tax deed of a sheriff made in pursuance of a sale under a judgment for taxes reciting a sale of real property to the highest bidder, where the statute only authorized a sale of the smallest portion of the property which any one would take and pay the judgment and costs, is void upon its face.

[Cited in Mora v. Munez, 10 Fed. 637.]

2. Where a party is in possession of and claiming title at the time when a tax levy is perfected, and the tax becomes delinquent, and when judgment for the tax is rendered, it is his duty to pay the tax. He cannot under such circumstances acquire an outstanding title by neglecting to pay the tax or judgment, and purchasing at the sale for taxes under the judgment.

3. Where a right of action to recover land accrues during the minority of the owner, the statute of limitations of California does not begin to run against the action till the owner attains majority.

4. In such case the owner upon attaining majority may convey the land, and the grantee may maintain an action against the disseisor entering during the minority of the owner, at any time within five years after the disability terminates.

This is an action to recover possession of the east half of lot seven, in the block bounded by L and M and Fourth and Fifth streets, in the city of Sacramento. On April 23, 1862, Mary A. Wallace acquired the title to the locus in quo, through sundry mesne conveyances from John A. Sutter, the original grantee, under a Mexican grant. Said Mary A. Wallace was born on May 2, 1857. She consequently attained her majority in May, 1875—eighteen being the age of majority in California for females. On May 6, 1876, she conveyed to the plaintiff, [Theodore] Le Roy. On December 23, 1864, the people of the state of California recovered a judgment for the sum of seventeen dollars and twenty-nine cents taxes for the year 1863, and twenty dollars and twenty-six cents costs against Mary A. Wallace, the premises in question, eight lots in block between X, Y, Twenty-First and Twenty-Second streets, and eight lots in block between G, H, Twenty-Eighth and Twenty-Ninth streets. The lots are wholly disconnected, and lie in different parts of the city. The judgment-roll does not show whether the assessments and taxes were levied separately, or as a single tax upon the whole as one lot. The allegations of the complaint and the judgment are for a single sum in solido. A certified copy of the judgment and order of sale having been issued to the sheriff, he sold thereunder the whole of said premises in a body to Eli Mayo for forty-eight dollars and fifteen cents, on February 6, 1865. On August 7, 1865, there having been no redemption from the sale, the sheriff executed and delivered to Mayo, the purchaser, a deed of the entire premises so sold, in which deed he states the sale to Mayo for forty-eight dollars and fifteen cents, and recites therein, "he being the highest bidder, and that being the largest sum bid for said property at such sale;" and nowhere stating any offer to sell any less amount than the whole. The deed is in the form of that adjudged void by the United States supreme court in French v. Edwards, 13 Wall. [80 U. S.] 506. On August 25, 1865, the purchaser, Mayo, procured from the court a writ of assistance under said judgment and sale, and by authority of said writ of assistance, on the next day, August 26, he was put in possession of the premises now in question by the sheriff of the county. On August 6, 1866, the people recovered another judgment against the premises now in question and John Doe and Richard Roe, being fictitious names, for the sum of twelve dollars and five cents taxes for the year 1865, and nineteen dollars and ninety-three cents costs. Upon a certified copy of this judgment and order of sale, the sheriff again sold the premises in question to said Eli Mayo for forty-three dollars and two cents; and there having been no redemption, the sheriff executed a deed to said Mayo in pursuance of the sale, on March 25, 1867, in which it is recited that he sold the premises "for the sum of forty-three dollars and two cents, that being the amount of said judgment and costs, and the best bid therefor;" and said land so sold being the smallest quantity that any purchaser offered to take and pay said judgment and costs. He does not, however, say that he offered to sell to the party who would take the smallest part of the land, or any part less than the whole. Said Mayo conveyed to the defendant [John H.] Reeves, on December 17, 1875. The defendant Reeves claims title under those tax sales. He also sets up the statute of limitations, claiming that he and his grantor, Mayo, have been in possession, claiming adversely; under those deeds for a period of more than five years prior to the commencement of his action.

P. Dunlop, for plaintiff.

L. D. Latimer and A. C. Freeman, for defendant.

SAWYER, Circuit Judge. The first tax sale and the sheriff's deed in pursuance thereof require no discussion; for it is already authoritatively settled by the supreme court of the United States in French v. Edwards, that they are void upon the face of the deed. 13 Wall. [80 U. S.] 506. The sale and deed in that case arose in the same

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

county under the same statute, and the deed was in form precisely similar to the one in question. In that case, also, the premises consisted of one continuous tract of land. In this the lots were in three different disconnected blocks, lying remote from each other in different parts of the city. The tax seems to have been levied in solido. At all events such was the judgment, and the sale appears to have been of the whole in solido as one lot. It may well be doubted whether a valid judgment could be rendered in this form charging the tax properly levied upon one lot, as a lien upon another distant and distinct lot, and enforcing it by a proceeding in rem against the latter. There was no personal service of process, so as to authorize a personal judgment against the owner; and the tax was not assessed against the owner by name. But, however this may be, the deed is void on the grounds fully stated in the case cited. It is insisted by the defendant's counsel, that the point upon the invalidity of the deed on its face cannot be insisted on, because no objection was made to the introduction of the deed in evidence. But the deed being in evidence the question arises as to its effect. The deed is a fact in the case; but it appears upon its face to be void. Hence it passes nothing to the defendant or his grantor. It might as well be claimed that a piece of blank paper put in evidence passed the title, because no objection was made to its introduction. There is nothing in this point.

Conceding for the purposes of this case, that the second tax levy, judgment, sale, and deed, are regular in form upon their face, another question arises. Immediately upon obtaining his first tax deed, Mayo obtained from the court in the case a writ of assistance, and under that writ he was put in possession under his deed. He took possession, and thenceforth continued in possession claiming title under this deed. He was in possession before the tax duplicates for that year were perfected, at the time when the suit for the taxes was commenced and the judgment obtained, and when the tax sale took place. The tax, it is true, was in form against unknown owners; and the suit and judgment against fictitious persons and the land, and not against either him, or the real owner by name. But he was enjoying the possession obtained by a writ of assistance under a judicial proceeding against the owner claiming title under his said tax deed, which took effect by relation from the date of the sale, February 6, 1865, before the lien for taxes of that year attached; and the tax under which the second sale was made, if valid at all, was as valid against his interest as against the real owner, to whose rights he claimed to have succeeded; and it was his duty to pay the taxes of that year. It is settled in this state, that a party occupying such a relation to the land cannot omit to pay the taxes duly levied upon it, allow it to go to a sale and purchase in either himself or through another an outstanding title. Such a proceeding is but an indirect mode of paying the taxes, which it is his duty to pay himself, without suit, and the law will not tolerate his acquisition of the title of another in this mode through his own wrong. Barrett v. Amerein, 36 Cal. 326; Coppinger v. Rice, 33 Cal. 424, 425; Bernal v. Lynch, 36 Cal. 146; Reily v. Lancaster, 39 Cal. 356; Moss v. Shear, 25 Cal. 45.

The next question arises under the statute of limitations. Under section 328 of the Code of Civil Procedure: "If a person entitled to commence an action for the recovery of real property * * * be at the time such title first descends, or accrues * * * within the age of majority, * * * the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action." And this has always been, substantially, the statute, with only changes in the form of expression. At the time of the entry of defendant's grantor, and of the accruing of the action, Mary A. Wallace was an infant just entering upon the ninth year of her age. She did not attain her majority until May, 1875. The complaint was filed May 15, 1876—a few days more than a year after the disability ceased. The defendant while admitting that the action would not have been barred had the title remained in Mary A. Wallace, and the action been brought by her, insists that this disability is a personal privilege which was only available to herself in person, and that her grantee is not protected. I can perceive no principle upon which such a proposition can be sustained. The bar of the statute is a creature of the statute, and is just such, and no other, as the statute makes it. An adverse possession for the period prescribed vests a title in the possessor. Arrington v. Liscom, and cases there cited, 34 Cal. 365. But until the adverse possession has continued for the full period prescribed, the title of the owner is in no way affected. It is as perfect up to the last day as on the first. Under the statute in question the time did not begin to run until Mary A. Wallace attained her majority. She had the absolute dominion of the property—a perfect title—in no way impaired or affected by the statute of limitations at the time she conveyed to plaintiff; and plaintiff took a clear title. Any other construction would materially affect the rights of Mary A. Wallace—in reality confiscate her property; for the defendant at that time had been in possession more than five years; and if she could not sell the land and convey a title, she would be deprived of the benefit of one of the most important elements of property—the jus disponendi—often the only quality which renders it available, or of any really practicable value. Her title to the land was perfect, and what-

ever title she had, she could, and did, convey to the plaintiff. He took the land subject only to such rights as the defendant had acquired by virtue of an adverse possession from the time Mary A. Wallace attained her majority. If any authority is needed for so plain a proposition it will be found in the cases of Ford v. Langel, 4 Ohio St. 466, and Huls v. Buntin, 47 Ill. 401. There must be a finding and judgment for plaintiff, and it is so ordered.

LE ROY (TATHAM v.). See Cases Nos, 13,760–13,762.

LEROY (WILSON v.). See Case No. 17,817.

Case No. 8,273.

LE ROY v. WRIGHT et al.

[4 Sawy. 530.] [1]

Circuit Court, N. D. California. Aug. 12, 1864.

APPEAL OPENS THE WHOLE ISSUE—POSSESSION OF REAL PROPERTY GIVES USE OF SAME — COURTS OF EQUITY WILL NOT INJOIN THREATENED TRESPASS.

1. An appeal to the district court of the United States from a decree of the board of land commissioners created under the act of 1851 [9 Stat. 631], confirming a claim under a Mexican grant in California, opens the whole issue for consideration. The case is to be heard in the district court de novo, upon the papers and testimony used before the board, and such further evidence as either party may produce.

[Explained in San Francisco v. U. S., Case No. 12,316. Cited in Grisar v. McDowell, Id. 5,832.]

2. Where the title to real property is in dispute between two claimants, and one of them takes possession of the property, he will not be injoined from its occupation and the erection of buildings thereon before the title is judicially determined.

3. Courts of equity will not ordinarily interfere to injoin the commission of a threatened trespass to real property, unless the trespass be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coals and the like. The jurisdiction of the court, in such cases, is asserted for the preservation of the property pending proceedings at law for the determination of the title.

[Cited in Erhardt v. Boaro, 113 U. S. 539, 5 Sup. Ct. 566.]

[Cited in Newall v. Staffordville Gravel Co. (N. J. Ch.) 13 Atl. 271; Hunt v. Steese, 75 Cal. 624, 17 Pac. 922.]

Suit in equity to restrain the defendants [George Wright and others] from entering upon certain real estate in San Francisco, alleged to be the property of the complainant [Theodore Le Roy], and appropriating it to the use of the United States.

B. S. Brooks and George E. Whitney, for complainant.

Delos Lake, U. S. Atty., for defendants.

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

FIELD, Circuit Justice. This is a suit to restrain the defendants from entering upon certain real estate situated at a place known as Black Point or Point San Jose, in the city of San Francisco, alleged to be the property of the complainant, and appropriating it to the use of the United States. The complainant, or his immediate grantor, has been in possession of the premises in question for several years, and claims to be the owner in fee of the same, deriving his title from the city of San Francisco by virtue of the ordinance of the common council for the settlement of land titles in the city, passed on the twentieth of June, 1855, commonly known as the "Van Ness Ordinance," and the act of the legislature of the state confirmatory thereof.

The defendants, who are officers of the army of the United States, and acting under the orders of the secretary of war, have taken possession of an adjoining tract of land at the same Black Point, and commenced the erection of fortifications for the general government thereon; and they declare their intention to take like possession, under the same authority, of the premises in question, and to appropriate them for the erection of barracks and other buildings required in connection with the fortifications.

The complainant, therefore, invokes the authority of the court to restrain such appropriation until compensation to him for the property is previously made.

The defendants controvert the complainant's claim of ownership; they deny that the land is private property, and insist that it is the property of the United States, upon which the complainant has intruded without color of right. The question of title is thus, at the outset, raised in the case. And the documents produced by the complainant as evidence of his title, so far from establishing the title in him, show conclusively that the title is a matter in controversy now under consideration in a judicial proceeding pending before the district court of the United States. The complainant, as we have stated, derives his title from the city of San Francisco, through the operation of the Van Ness ordinance. At the time that ordinance was passed, there was much diversity of opinion among the members of the profession as to the title of the land embraced within the limits of the charter of 1851; some of them holding the land to be public property of the United States, and others holding that the title was in the city, as successor of a Mexican pueblo established and in existence at the date of the acquisition of the country. The ordinance was passed to meet both of these views. The first section was framed upon the supposition that the land above the natural high-water mark of the bay belonged to the United States, and it provided for the entry of the same at the proper land-office. It does not appear from the evidence before us, that any entry was ever made as thus provided;

or that the price per acre required by law, was ever tendered to render the entry, if made, effectual. Besides, there is evidence in the case tending to show that if the land embraced within the city limits belonged to the United States, that portion which constitutes Black Point (sometimes called Point Jose or San Jose,) was, as early as 1850, exempted and reserved from sale for public purposes. There is on file in the office of the surveyor-general of California, a notice from the commissioner of the general land-office at Washington, bearing date on the twenty-fourth of June, 1851, informing the surveyor that such reservation had been made by President Fillmore on the sixth of November of the previous year.

The second section of the ordinance was framed upon the supposition that the city possessed the title to the lands within the corporate limits, and by its provisions she relinquished and granted all her title and claim thereto, with certain exceptions, to the parties in the actual possession thereof, by themselves, or tenants, on or before the first of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance in the common council, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process. The party through whom the complainant traces his title was in such possession of the premises in question, and hence acquired whatever title the city possessed at the passage of the ordinance. The city then asserted title as successor of the pueblo to four square leagues of land. She had presented her claim for the same to the board of land commissioners, created under the act of congress of March 3, 1851, and the board, in December, 1854, had confirmed the claim to a portion of the four square leagues, including the premises in question, and rejected her claim to the residue. From this action of the board an appeal was taken, by the filing of a transcript of the proceedings and decision of the board with the clerk of the district court. The appeal was by the statute for the benefit of the party against whom the decision was rendered—in this case, of both parties—of the city, which claimed a larger quantity of land than that confirmed; and of the United States, which denied the claim of the city altogether; and both parties gave notice of their intention to prosecute the appeal. Subsequently, in February, 1857, the attorney-general withdrew the appeal on the part of the United States, and upon the stipulation of the district attorney, the district court, in March, 1857, ordered the appeal to be dismissed, and gave leave to the city to proceed upon the decree of the commission as upon a final decree. The counsel of the complainant regards this decree as closing the controversy between the city and the United States as to the land to which the claim was confirmed. But in this view he is mistaken. Had the city also withdrawn her appeal such result would have followed. But this course the city declined to take. She continues to prosecute the appeal for the residue of her claim to the four square leagues.

This leaves open the whole issue with the United States. The proceeding in the district court, though called in the statute "an appeal," is not, in fact, such. It is essentially an original suit, in which new evidence can be given, and in which the entire case is to be tried over. This was expressly held in the case of U. S. v. Ritchie, 17 How. [58 U. S.] 533. In that case it was contended that the act of congress, in prescribing an appeal from the board of commissioners to the district court was unconstitutional, as the board was not a court under the constitution, and could not be invested with any portion of the judicial power conferred upon the general government; but the supreme court, Mr. Justice Nelson delivering the opinion, said: "That the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers and evidence into it from the board of commissioners, being a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case, as heard and decided by the board of commissioners, but hears the case de novo upon the papers and testimony which had been used before the board, they being made evidence in the district court, and also upon such further evidence as either party may see fit to produce."

The district court then, as thus held, "hears the case de novo." Every question raised before the commissioners may be raised again before the district court. No fact is concluded by the decree of the board. It follows, from this view of the case, that the title to the premises in question is far from being settled, that it is, in fact, a matter now pending for determination in a judicial proceeding between the city and the United States.

Nor is the case of the complainant aided by the recent act of congress "to expedite the settlement of titles to lands in the state of California." By that act, the right and title of the United States to the lands within the corporate limits of the city, as defined by the charter of 1851, are relinquished and granted to the city for the uses and purposes specified in the Van Ness ordinance, subject to certain exceptions and reservations, among which are all sites or other parcels of land which had been previously, or were then, "occupied by the United States for military, naval, or other public uses," or which might be designated by the president within one year after the return to the general land-office of

an approved plat of the exterior limits of the city.

The title being in dispute, there is no ground for considering the question of compensation. The case is one where, upon the complainant's own showing, a mere naked trespass is threatened—the entry by the defendants upon the premises, and the erection of buildings thereon. The ancient doctrine of equity was not to interfere in such case, even where the title was undisputed, but to leave the party to his legal remedy. And even after the doctrine had been modified in later cases, if the title to the property were disputed, that fact was regarded as sufficient to exclude the jurisdiction of the court. In Pillsworth v. Hopton, 6 Ves. 51, Lord Eldon stated that he remembered being told from the bench, in early life, "that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." And in the case of Norway v. Rowe, 19 Ves. 147, which arose several years afterward, the same distinguished chancellor observed that the court had certainly proceeded to extend injunctions to trespass, but he did not recollect that it was ever granted on that head, where the fact of the plaintiff's title to the property was disputed by the answer. The ancient doctrine in this respect has been greatly modified, and it is the common practice at this day for the court to issue injunctions where the title is in dispute. But in such instances a stronger and clearer case of irremediable mischief must be presented than where the title is indisputed. The trespass threatened must be one going to the destruction of the substance of the estate, such as the extracting of ores, the cutting down of timber, the digging of coals, and the like. The jurisdiction of the court in these cases is asserted for the preservation of the property pending proceedings at law for the determination of the title of the parties. Jerome v. Ross, 7 Johns. Ch. 332; West v. Walker, 2 Green, Ch. [3 N. J. Eq.] 282; Kerlin v. West, 3 Green, Ch. [4 N. J. Eq.] 452; U. S. v. Parrott [Case No. 15,998]; Perry v. Parker [Id. 11,010].

In the case at bar, the alleged trespass threatened will not produce irreparable mischief or tend to the destruction of the inheritance. The barracks and other buildings which the defendants propose to construct, will not impair the value of the property, at least to such an extent that an adequate remedy may not be obtained in the ordinary course of the law. The bill must be dismissed, and a decree to that effect will be entered.

[For another action by the same plaintiff against defendants who claim under the Van Ness ordinance, see Case No. 8,266.]

LE RUE (AMES v.). See Case No. 327.

Case No. 8,274.

LESASSIER et al. v. The SOUTHWESTERN.

[2 Woods, 35.] [1]

Circuit Court, D. Louisiana. April Term, 1874.

SALES—STOPPAGE IN TRANSITU—TRANSFER OF BILL OF LADING AS COLLATERAL.

A transfer of a bill of lading, as a mere collateral to previous obligations, without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage in transitu.

[Cited in The Vidette, 34 Fed. 397.]

[Cited in Loeb v. Peters, 63 Ala. 244; Skilling v. Bollman, 73 Mo. 671; Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 200, 25 N. E. 104.]

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

In admiralty.

H. T. Hays, J. H. New, and Percy Roberts, for libellants.

Wm. M. Randolph, for claimants.

BRADLEY, Circuit Justice. The libel in this case must be dismissed. The goods, for the nondelivery of which by the steamboat the libel was filed, were seized by the vendors under the right of stoppage in transitu. The objections raised against the existence of the right, in this case, do not seem to me to be sufficient.

First. It is insisted that Barnett was the shipper of the goods; in other words, that the goods had been delivered to him by the vendors in Shreveport, and that he had shipped them, though using the names of Durham, Howell & Co. It is true, that Barnett, in his testimony, speaks of his having shipped the goods. But he does not say that he shipped them in the name of Durham, Howell & Co. He gives no such explanation of the bill of lading. The bill, therefore, stands as a very strong fact against that view of the case. Prima facie, the bill shows the real transaction as against the steamer. In addition to this, it is in evidence that Durham, Howell & Co. brought the bill of lading to the office of Lesassier & Wise, and left it there for Barnett, the consignee, thus showing that they had shipped the cotton to his order. This circumstance corroborates the legal effect of the bill itself. Barnett's idea, that he shipped the cotton, is a very natural one under the circumstances. He procured it to be shipped, and, as between him and Lehman, Abrams & Co., to whom he intended to transfer it, he may be regarded as substantially the shipper. But in the eye of the law Durham, Howell & Co. were the shippers.

Second. It is contended that Barnett was not insolvent when the property was stopped by Durham, Howell & Co. His check for the cotton was not paid. That, certainly, was one pretty strong circumstance, though not

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

conclusive. But it seems that he was, in fact, insolvent at the time. He has never settled his obligations then outstanding. Cotton was falling and he was largely obligated on cotton. Lesassier & Wise seem to have thought his situation such as to justify their being considerably alarmed. I think he was insolvent.

Third. It is contended that the delivery of the bill of lading by Isaacs, at the instance of Barnett, to Lesassier & Wise, to enable the latter to protect themselves, was such a transfer of it as cut off the right of stoppage in transitu. I do not think so. Lesassier & Wise advanced nothing, and gave up nothing, in consideration of this delivery. They simply took it as an additional provision against possible loss on their outstanding obligations for Barnett. It was a plank seized hold of by them to enable them to better protect themselves against the hazard of past transactions. It can in no sense be regarded as so much received in payment of indebtedness due. It was not so regarded by them at the time. They were not then sure that Barnett would owe them in the final result of existing speculations. But they feared he would. And they naturally desired to have additional security. A transfer of a bill of lading as a mere collateral to previous obligations, without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage in transitu.

In my judgment the decree of the district court must be affirmed and the libel dismissed with costs.

LESLIE (DAVIS v.). See Case No. 3,639.

Case No. 8,275.

LESLIE v. GLASS.

LESLIE v. KEYSER.

[Taney, 422.] [1]

Circuit Court, D. Maryland. April Term, 1840.

SHIPPING — LIABILITY OF OWNER FOR DEBTS OF BUILDER — DECLARATION THAT HE WILL PAY—ASSIGNMENT BY BUILDER OF INTEREST—LIABILITY OF ASSIGNEE—PROPERTY IN SHIP BUILDING—LIEN ON VESSEL.

1. In general, the party for whom a vessel is built, under a contract with a shipwright, is not liable for the debts contracted by the shipwright on account of the vessel; in such cases, the contracts for work or for materials are usually made by the shipwright for himself and on his own account, in order to fulfil his agreement with the party for whom the ship is built.

2. Where both parties reside in Maryland, and the ship is built there, the mechanics and material men have no lien upon her.

3. Where the party for whom a vessel is built pays the money to the shipwright, according to his contract, he is entitled to the delivery of the vessel, and holds her free and discharged from any claim against the vessel, or against himself personally, on account of work done or materials furnished for the shipwright.

4. In ordinary cases of this description, general declarations made by the party for whom the vessel is built, after the work is done or the materials furnished, that he will pay all bills against the ship, will not bind him, and cannot be enforced in a court of justice.

5. Such promises made after the work is done, are without consideration, and cannot, on that account, be enforced in a court of justice.

6. But if, while the vessel is being built, the person for whom she is being built, makes advances to the shipwright beyond the sums mentioned in their contract, and takes from him an assignment of all his "right, title and interest in the vessel, as she advances in construction, together with all materials collected and to be collected for the same," and conceals the fact of such assignment, with a view to preserve the shipwright's credit, and enable him, under such false credit, to obtain work and materials for the vessel, without subjecting the assignee to responsibility for the same, this would constitute a design which a court of justice can never sanction.

7. The effect of such an assignment would be to divest the shipwright of all interest in the vessel; she would become from that moment the exclusive property of the assignee, not by way of mortgage, but absolutely; all the work already done upon her, as well as all that should be afterwards done, would be for his use and benefit; and all the materials already purchased, or afterwards to be purchased, became his property as soon as they were delivered.

8. Although the creditors, at the time the accounts were created, supposed that the shipwright still retained his interest in the vessel, and that he was dealing with them on his own account, still, all the work done, and materials furnished, after the date of the secret assignment, were for the use of the assignee alone, and justice requires that he should pay the value of them; and this constituted a sufficient and valuable consideration to support his promise to pay.

9. Since, by virtue of the transfer, the assignee obtained all the materials which had been already bought, whether worked up or not, and also the benefit of all the labor which had been already bestowed upon the vessel, there existed a sufficient consideration, in relation to the antecedent portions of the work and materials, as well as the subsequent.

10. The taking of certain bills receivable, or his own note, from the shipwright, by one of the creditors, while in ignorance of the secret transfer, would not impair his right to proceed against the assignee, in the event of the security so taken turning out to be worthless.

11. The extent of the shipwright's property in the vessel before the assignment, cannot affect the principle upon which the case is to be decided, if he had an interest to any extent; whatever that interest was, it passed out of him by the assignment, and the vessel, as she advanced in construction, and the materials were collected for her, became the exclusive property of the assignee, and the shipwright had no longer that interest in them which would have belonged to him by his original contract.

[Appeals from the district court of the United States for the district of Maryland.

[These were libels by John Glass and Samuel Keyser against Robert Leslie.]

The libels in these cases were filed, the one on the 31st of January, and the other on the 25th of February, 1839, to recover the value of labor and materials furnished the ship Scotia, between the months of April, 1838,

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

and January, 1839. The defendant, Leslie, in each case, answered the libel, and denied that he ever requested or contracted with the libellant to furnish any materials or do any work, for or upon, or in anywise concerning said ship, since he became the owner of her, or at any time before; and he stated that he entered into a contract with William F. Smith, under which, as would thereby appear, said Smith was bound to build and furnish, and deliver to him a vessel, as therein specified; and the respondent exhibited, as part of his answer, the said contract; in pursuance whereof, said Smith did build the vessel, and did receive payment for her from respondent, and had even received a larger amount from respondent than was payable for her, and was now liable for the excess to the respondent. In his answer to the libel filed by Glass, Leslie also suggested to the court, that it appeared by the contract between Smith and himself, that the libellant was surety for Smith's performance thereof, and for saving respondent harmless in the premises, and so answerable for any default of Smith by which respondent might suffer; as must be the case, if said libellant could be entitled to recover in the present cause. The contract exhibited with the answers, was between Robert Leslie, of the first part, and William F. Smith, of the second part, and after setting forth in detail the mode in which the vessel was to be built, it proceeded as follows:

"The contractor on the first part (Leslie) engaging to pay for the same, at the rate of $38 per ton, Baltimore carpenters' measurement, in the following payments, viz:—$1,000 on the 23d of May (1838), $1,500 on the 1st of June, and $2,000 on the 1st of each month till November; the balance in two notes at four and six months from the delivery of the certificate. The ship to be launched on or before the 1st day of December, 1838, and to be built under the inspection of the contractor on the first part; each party furnishing security for the faithful performance of this contract. In witness whereof, we hereunto set our hands and seals, the day and year above named. William F. Smith. [Seal.] Robert Leslie. [Seal.]

"Witness: C. W. Meyer.

"We, the undersigned, do hereby guarantee the performance of the above contract on the part of William F. Smith. Geo. A. V. Spreckelsen. Jno. Glass.

"We, the undersigned, do hereby guarantee the performance of the above contract on the part of Robert Leslie. (Not signed.)"

A decree was passed by the district court in favor of the libellant, in both cases [case unreported], and appeals were taken to this court.

Charles F. Mayer, for appellant.

Glenn and Gatchell, for appellees.

TANEY, Circuit Justice. These two cases have come before the circuit court upon appeals from the district court. They arose upon libels filed to recover money, which the respective libellants alleged to be due to them for work and labor done upon the ship Scotia, or for materials found for her construction, at the request of Leslie. The district court, in each of the cases, decreed in favor of the libellants, and from these decrees, Leslie has appealed to this court. The causes depend upon the same principles, and the decision of one must determine the other.

The case first in order is that of Leslie v. Glass, in which the appellee obtained a decree in the district court for the sum of $757 12, with interest thereon from the 25th day of February, 1839, together with the costs of suit.

It appeared from the testimony, that on the 23d of May, 1838, at the city of Baltimore, a contract in writing was made between the said Leslie and a certain W. F. Smith, master shipwright of the said city, whereby Smith, for the consideration therein mentioned, engaged to build for Leslie, a ship of the dimensions and kind particularly described in the said agreement. In consideration whereof, Leslie agreed to pay Smith $38 per ton, carpenters' measure: $1,000 on the day of the date of the contract; $1,500 on the first of June following, and $2,000 on the first of each succeeding month, till the 1st of November; and the balance in two notes at four and six months from the delivery of the certificate by Smith and Leslie; the ship to be finished on or before the 1st of December, 1838.

The evidence shows, that although Smith had built smaller vessels, yet he had never built a ship, when he undertook the Scotia; and Leslie was aware of that fact. The usual price for a vessel of the description of the Scotia, at the time of the contract was about —— dollars per ton, and the sum agreed on by Smith of $38 per ton, was below the usual price. He did not, it seems, engage in the work with an expectation of making money by it, but he hoped to be able to save himself, and his main object was, to obtain for himself the character of a first-rate ship builder, by constructing this ship of the best materials and in a superior manner. Leslie appears to have been sensible of Smith's object, and that the price mentioned in the agreement was a low one, and at the time the written contract was signed, he promised Smith, verbally, to pay him a half a dollar per ton more than the writing called for. The ship was built under the inspection of Leslie, and the work done in the best manner and of the best materials.

The libellant, Glass, was one of Smith's sureties to Leslie for the fulfilment of his contract. Upon the face of the paper, it would seem, that he signed it after Spreckelsen, the other surety; and Spreckelsen, as has been proved and admitted, signed as surety at the request of Leslie, in order that he might exercise an influence over Smith in

urging on the work, but under an express agreement on the part of Leslie, that he would in no event hold him liable as surety.

It appears also, that after the contract was signed, an alteration was made in the plan of the ship by Leslie, and assented to by Smith. She was made longer and deeper than the written contract called for, and her breadth of beam was not increased. This alteration was in some degree disadvantageous to Smith, and made the construction of the vessel somewhat more expensive in proportion to her tonnage, than the plan set forth in the written contract. The sureties do not appear to have been consulted in relation to this change of plan, nor to have assented to it.

The keel was laid soon after the contract was made; but as early as July the 3d, the confidence of Leslie in the ability of Smith to fulfil his agreement appears to have been shaken, and being, on that day, called on by Smith for an advance of money, beyond the amount he was entitled to under the contract, he took from him the following assignment: "Received, Baltimore, July 3d, 1838, from Robert Leslie, the sum of one thousand dollars, on account of new ship building by me, as per contract; and I hereby assign over to Robert Leslie, all right and title to said ship, as she advances in construction, together with all materials collected and to be collected for the same. William F. Smith."

This assignment was kept secret, and was not known to the sureties of Smith, or any one employed in working upon the ship, or in furnishing materials for her, until Smith stopped payment, as hereinafter mentioned. The work went on, after this assignment, as it did before, and Leslie continued to advance money, from time to time, in order to enable Smith to carry it on. The ship was launched about the 1st of January, which was one month later than the time stipulated in the contract; she was finished four or five weeks after the launch, and measured about five hundred and forty tons.

The difficulties of Smith continued to increase from the time of the assignment above-mentioned; but he entertained hopes of being able to complete the ship, and to pay those who had credited him, until about the time of the launch, relying, as he states, upon the verbal promise of Leslie, that he should not lose by this contract. But about the time last mentioned, a note, which he had given for materials furnished for the vessel, fell due, which he was unable to take up, and applied to Leslie for assistance; Leslie, however, refused to advance any further, and Smith thereupon was obliged to stop payment, because insolvent, and was unable to go on with the work; and much more money was, at that time, due to the mechanics and material men, than was due from Leslie under his written contract.

The ship was launched about the 1st of January, and the situation of Smith having then become public, those who had worked upon the ship, or furnished materials for her, and whose bills were yet unpaid, became uneasy and applied to Leslie upon the subject. He assured those who called on him that he would pay all just bills against the ship; and in various conversations with other persons who were not interested in their claims, he repeatedly declared that all just bills against the ship should be paid, and requested one of those persons to make the statement known, and to defend him, if he heard any report, imputing to him a contrary intention. In a conversation with a clerk of Smith, the day before the ship was launched, he said, that he had agreed to pay all the bills against the ship, but he would pay nothing more until the ship was launched. It appeared from the evidence, that Smith had applied all the money he had received from Leslie toward the construction of the ship and the purchase of materials for her.

The libellant Glass was employed by Smith to do the outside joiners' work. It was all done after the assignment hereinbefore mentioned, according to the testimony, and a small portion of it, after the ship was launched, and after the assurances above-mentioned had been given by Leslie, and had become publicly known among the persons engaged upon the ship About the month of January, after the ship had been launched, certain bills receivable were transferred to Glass by Smith; but they do not appear to have been on account of the present claim, although there is some controversy on that point; the bills could not be collected, and were returned by Glass to Smith.

Since the ship has been completed, Leslie has refused to pay these libellants and others who worked upon the ship, on the ground that the credit was given to Smith, and not to him; and the question is: Is the libellant entitled to recover the amount from Leslie? In general, the party for whom a vessel is built, under contract like the one now before the court, is certainly not liable for the debts contracted by the shipwright. In such cases, the contracts for work or for materials, are usually made by the shipwright for himself and on his own account, in order to fulfil his agreement with the party for whom the ship is built. Where both these parties reside in Maryland, and the ship is built in this district (as is the case with the parties and the vessel now before the court,) the mechanics and material men have no lien upon her; and where the party for whom she is built, pays the money to the shipwright, according to his contract, he is entitled to the delivery of the vessel, and holds her free and discharged from any claim against the vessel, or against himself personally, on account of work done or materials furnished for the shipwright. The mechanics and material men have no equity against the party for whom the ship is built, under such a contract; the credit is not given to him by the mechanics or material men, but to the ship-

wright who employs them, or with whom they deal.

In ordinary cases of this description also, general declarations, made by the party for whom the vessel is built, after the work is done, or the materials furnished, that he will pay all bills against the ship, will not bind him, and cannot be enforced in a court of justice. And this is the case, even if the vessel turns out to be worth much more money than the party paid for building her; and although the shipwright sinks money on his contract, and becomes insolvent and unable to pay the workmen and material men; for, as there is no lien on the vessel, and the work is done for the benefit of the shipwright, and the credit is given to him alone, the party who has fulfilled his contract with him, and thereby become the exclusive owner of the vessel, is under no obligation, legal or moral, to pay the mechanics or material men, whom the shipwright employed in his own work upon the ship. Consequently, any promises made by this party, after the work is done, are without consideration, and cannot, on this account, be enforced in a court of justice.

But the case before the court is a very different one from the ordinary contracts under which vessels are built. The evidence shows that, within a month after the ship was begun, Smith became involved in difficulties, and was unable to go on with the work, without advances from Leslie greater than those mentioned in the contract; when Smith's situation became known to Leslie, and he was called upon, early in July, to make those advances, it is evident, that he lost confidence in Smith's ability to comply with his engagement, and to secure himself, took from him the comprehensive assignment hereinbefore mentioned. Now, it cannot be doubted, that if this assignment had become known to the workmen employed upon the vessel, and to the persons from whom Smith was procuring materials, that they, too, would have lost confidence in the ability of Smith to comply with his contracts, and would have required something more than his mere personal responsibility, before they bestowed their labor upon or sold materials for a ship, in which Leslie had acquired the exclusive interest, and in which Smith had no longer any title.

The motive for keeping secret this assignment cannot be mistaken; it was to preserve Smith's credit, and by that means to enable him to go on with the ship. This concealment gave him a false credit, and if Leslie intended by that means to obtain, upon the credit of Smith, the labor and materials necessary to build the ship, without becoming personally responsible himself, it was a design which a court of justice can never sanction; for, in this aspect of the case, what is the result? Leslie knew Smith's difficulties, and to secure himself, had taken an assignment of the whole interest of Smith in the ship, "as she advanced in construction, together with all the materials collected, and to be collected, for the same." After this comprehensive transfer was made, the men who furnished materials, and the men who worked on the ship, were still left to suppose that Smith's property in the vessel remained unchanged, and Leslie well knew that they were dealing with him under that impression; and yet every plank that was nailed upon the ship, became immediately the property of Leslie, as well as every pound of iron or other material furnished for the ship. These things were all, in fact, procured by Smith for Leslie's use, and if Leslie did not intend to become responsible for them, and designed to avail himself, in this way, of the false credit which the concealment of the transfer above-mentioned gave to Smith, such conduct on his part would have been a fraud upon the creditors. And if he could establish by proof that he took the assignment, intending not to be responsible for the necessary expenses of building the ship, of which he had then become the exclusive owner, it would not strengthen his defence. He would be made responsible for the benefits he had received by the false credit, which his concealment of the assignment would have given to Smith.

But it would hardly be just to the appellant, to decide the case upon this ground. The court is satisfied, that at the time the contract was made, he supposed that Smith would be able to make some money by it; and when he took the assignment to secure himself, he supposed that the cost of the ship would not very far exceed the amount mentioned in the contract, and believed it would be for the advantage of Smith, as well as himself, to sustain Smith's credit, by concealing the assignment until the work was finished. The excess of the cost over the sum anticipated, appears to have been much larger than he expected; and the ship was hardly finished, when, notwithstanding his assurances that the bill should be paid, one of these libels was filed against him. I am persuaded, from a view of the whole evidence, that the present defence is owing more to the irritation occasioned by these circumstances, than to any deliberate design to break the promises he had made, or to be unjust to the creditors.

But however this may be, the legal effect of the assignment was to divest Smith of all interest in the vessel; she became, from that moment, the exclusive property of Leslie; all the work already done upon her, as well as all that should be afterwards done, was for his use and benefit; and all the materials already purchased, or afterwards to be purchased, became his property as soon as they were delivered. From the time of the transfer, therefore, Smith was nothing more than Leslie's agent, managing Leslie's property for him. The assignment was not a mere mort-

gage, as has been argued, but an absolute transfer, and Leslie had a right, under it, to select the materials to be bought for the ship, and to designate the workmen to be employed, and to agree on the prices to be paid; and whether he exercised this power in his own person, or allowed Smith to act for him, is not material to the present question. In either case, Leslie was, in substance, the principal and Smith the agent, after this assignment, and the work afterwards done, and the materials afterwards bought, were exclusively for Leslie's use.

This being the case, the promises afterwards made by Leslie, are by no means promises without consideration. It is true, that the creditors, at the time the accounts were created, supposed that Smith still retained his interest in the vessel, and believed that he was dealing with them on his own account; but it turns out that Smith had no property in the ship after the third of July, and that all of the work done and materials furnished after that time were for the use of Leslie alone; and as Leslie has received all the benefit of this labor and of these materials, justice requires that he should pay the value of them; and they are a sufficient and a valuable consideration to support the promises he afterwards made.

It has been argued, that a portion of the libellant's claim arose before the transfer of the ship and materials to Leslie, and stand upon different principles from that part of it which accrued afterwards. But assuming this to be the fact, yet, Leslie admitted the right of the libellant to the whole bill, and made no distinction in his promises and admissions between different portions of it; and since, by virtue of the transfer, he obtained all the materials which had been already brought, whether worked up or not, and also the benefit of all the labor which had been already bestowed on the ship, undoubtedly, there is a sufficient consideration, in relation to the antecedent portions of the work and materials, as well as the subsequent.

These promises appear to be nothing more than the admissions of Leslie, of the obligations imposed upon him by the original understanding between Smith and himself. When the contract was originally made, and made below the ordinary market price, Leslie assured Smith that he should lose nothing by it; he appears to have desired a first rate ship, and he relied on Smith to build him such a one, in all respects, as he desired. And while he, very naturally, wished to do this in an economical manner, yet he had determined to spare no expense necessary to accomplish his object; hence, we find him, in the early part of July, as hereinbefore mentioned, advancing money to Smith beyond the amounts stipulated in the agreement; we find these advances carried on until the vessel was completed; and instead of giving his notes at four and six months to Smith, for a large balance, which, according to the written agreement, was expected to be still in Leslie's hands when the ship was launched, we find that he had paid, by that time, very nearly the whole amount in the agreement, and we find him actually paying a bill for copper, after the ship was finished, although the bill exceeded the small amount of the balance still in his hands, and due from him according to the written terms of the contract. Why should this payment have been made, unless he felt himself bound in justice to pay it? And how could he be bound to pay, unless it was procured for his use, either by himself in person or through the agency of Smith? In either case, the claim stood upon the same footing with the other bills, and if justice required him to pay this one, the same obligation exists as to the others.

The bills receivable taken from Smith, by the libellant, if taken in part payment of this account, would in no degree affect the controversy; these bills were never paid, and were returned to Smith shortly afterwards; the character of the debt, as originally due to the libellant, remained unaltered, and if Leslie was liable before this transfer, he was equally liable after these bills receivable were returned to Smith. The act of taking them, or of taking Smith's note, would only show that the parties gave the credit to Smith when the accounts were originally created, and were not aware that they had any remedy against Leslie. The fact that the credit was so originally given, is undisputed, it applies to all the accounts, and was evidently given to Smith, under the impression that the work and materials were for his benefit; for all of the workmen and material men appear to have been ignorant of the understanding between Leslie and Smith, and unacquainted with his embarrassments, and with the assignment made by him to Leslie.

I have not thought it necessary to examine into the extent of the property which Smith held in the vessel, previously to his assignment. It has been a good deal discussed in the argument; but it is admitted on all hands, that he had a property in the ship to some extent; and it can make no difference in the principle upon which this case is decided, whether that property was greater or less; whatever it was, it passed out of him by the assignment, and the vessel, as she advanced in construction, and the materials that were collected for her, became the exclusive property of Leslie, and Smith had no longer that interest in them which would have belonged to him by his original contract.

I have entertained some doubts as to the amount charged by libellant; the testimony of Costigan is certainly strong, to show that the outside joiners' work ought not to have cost the amount charged for it; and this testimony is supported by that of Robb, who has, for a long time, been a shipwright in Baltimore, and has had much experience in that line; but it appears, that the libellant was employed by Leslie himself to do the inside

joiners' work on the ship, and that Leslie settled with him upon terms precisely the same with those claimed for the outside work; that is to say, the charges in both cases is a per diem charge at the same rate of wages. Leslie can hardly complain of the price charged for the outside joiners' work, when he employed the same person, and at the same rate of wages, to do the inside joiners' work for the same vessel. The inside joiners' work was not, under the original contract, to be done by Smith; it is not usually done by the shipwright, but by the person for whom the vessel is built, and Leslie employed the libellant to do it.

In the answer of Leslie, he insists upon the liability of Glass to him, as one of the sureties of Smith in the written contract, as a part of his defence against this claim; but this ground has not been relied on at the trial, and it is unnecessary, therefore, to remark upon it.

The case of Keyser v. Leslie must be governed by the principles upon which the case of Glass has been decided. It is for the iron used in the construction of the ship. It is true, that all of the iron had been delivered before the declarations and promises of Leslie, hereinbefore mentioned, and some of it before the assignment; but in the view taken by this court, that circumstance does not, in any material respect, distinguish it from the case of Glass; for the right of the last-mentioned party to recover, does not depend on the small portion of the outside joiners' work that was done after these promises were made. His right to recover, as will appear by reference to the aforegoing opinion, depends on principles altogether independent of that small part of the work, and which apply in all respects, with equal force, to the claim of Keyser, and apply to the materials furnished before the assignment as well as after.

These claims are, however, cases of some hardship to Leslie; the ship has cost more than such a vessel ought to have cost, built in the best manner. It is, indeed, sufficiently established by the evidence, that Smith honestly applied the money he received for building the ship; yet, from want of experience in the construction of large vessels, or from some other cause, more money per ton has been expended upon her, than was laid out upon other larger vessels built in Baltimore about the same time; and which appear to have been, perhaps, as well built as the one in question. Nor are these libellants altogether free from blame, in suffering these accounts thus to accumulate, and to remain so long unsettled, without applying to Leslie to know Smith's situation, and also to apprise him of the accounts which Smith was suffering to accumulate, and to remain so long in arrear. If Leslie is compelled to pay the principal amount of the bills, with the interest and costs recovered against him in the district court, it is all that justice can require of him, and as much as the creditors can rightly demand. I shall therefore give neither interest nor costs in the circuit court, and shall merely affirm the decrees of the district court.

LESLIE v. KEYSER. See Case No. 8,275.

Case No. 8,276.

LESLIE v. URBANA.

[8 Biss. 435.] [1]

Circuit Court, S. D. Illinois. March Term, 1879.

DECISIONS OF STATE SUPREME COURT—WHEN FOLLOWED—ESTOPPEL.

1. The supreme court of Illinois having decided that the legislature cannot by subsequent legislation, render valid a vote by a town to subscribe to railroad stock, if there was no law in force at the time of the subscription authorizing it, the federal court will follow that authority although in conflict with a prior decision of the United States supreme court.

2. Although a town has paid interest on its bonds for ten years, it is not estopped from denying their validity even in the hands of innocent purchasers.

[This was a suit by George Leslie against the town of Urbana. The cause was heard on demurrer.]

George W. Gere, for plaintiff.

Wm. D. Somers and F. M. Wright, for defendant.

DRUMMOND, Circuit Judge. In this case bonds were issued by the town of Urbana to the Danville, Pekin & Bloomington Railroad Company. At the time the town voted, on the 4th of August, 1866, by a majority of voters to take the stock and issue the bonds, there was no law which authorized the vote. An act amending the charter of the railroad, on the 28th of February, 1867, attempted to give effect and validity to this vote. An act of April 17, 1869, in some particulars, further legalized the election. The case of the Town of St. Joseph v. Rogers, 16 Wall. [83 U. S.] 646, was decided under these identical statutes, and the bonds issued in that case were declared valid, so that we have an express decision of the supreme court of the United States declaring that the statutes, under which the bonds in a case precisely similar to this were issued by the town of St. Joseph, were valid, but the supreme court of Illinois has ruled in several cases that the legislature could not constitutionally render such votes valid when there was no law in force at the time authorizing them. Marshall v. Silliman, 61 Ill. 218; Wiley v. Silliman, 62 Ill. 170; Barnes v. Town of Lacon, 84 Ill. 461.

In the case of the Township of Elmwood v. Marcy, 92 U. S. 289, the supreme court of the United States seemed to consider the law settled in this state by the decisions of

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

the supreme court, that the legislature cannot render valid a vote to subscribe to the stock of a railroad when there was no law in force at the time which authorized the vote. Undoubtedly this is in direct conflict with the decision of the supreme court of the United States in the case of the Town of St. Joseph v. Rogers, in 16 Wall. [83 U. S.], already referred to. The opinion of the majority of the court in the case of Township of Elmwood v. Marcy [supra] does not refer to the case in 16 Wall. [83 U. S.], but the opinion of the minority does, and it is therefore clear that the attention of the court was directed to the latter case, and that it was considered no insuperable obstacle in the way of following the decisions of the supreme court of this state. In the case of Alcott v. The Supervisors, 16 Wall. [83 U. S.] 678, the court refused to follow a decision of the supreme court of Wisconsin, which ruled that a statute of that state was unconstitutional. This was also in a bond case.

This places the law in a doubtful condition and leaves it very uncertain for parties who deal in bonds to know what to depend upon. There are decisions of the supreme court of this state which hold that the legislature cannot render valid a vote to subscribe to stock, unless there was a law in force at the time authorizing the subscription; on the other hand, there is a decision of the United States supreme court which declares that the legislature may do so, and for aught we know, these parties, plaintiffs in this and other cases, may have bought these bonds relying on the decision of the supreme court of the United States, in 16 Wall. [83 U. S.]. Perhaps some criticism might be made upon the rulings of the supreme court of the United States, but while it may be that the court has not been always consistent in its rulings on this question, we have to judge by the best lights before us. What is its latest deliberate decision on this point? So far as I can see, it is to follow the latest decision of the supreme court of this state, and so the issue of the bonds in this case was unauthorized by law. While it is a very hard case on the bondholders, and not a very creditable defense on the part of the town, because they have, as the declaration alleges, for ten years paid the interest on these bonds, and only woke up at the end of that time to find them invalid, and to refuse to pay them; yet we must sustain the defense. Individuals might be estopped from refusing to pay them. I suppose a town is not, because the law is that if the act was not authorized—in other words if it was a void statute—no act of the town could ratify it. It would be otherwise if voidable or merely irregular.

It is embarrassing to meet such questions of law, and in such a way as this question arises in this case, but still we have to follow the only guides there are in the case, and grope our way as best we can, however dark may be the path, and so far as I can see, the supreme court of the United States informs us that it intends to follow the decisions of the supreme court of this state. It has, therefore, substantially overruled the case of the Town of St. Joseph v. Rogers, supra.

This being a demurrer to the declaration, although it avers a ratification, payment of interest and other facts tending to the same result, still we must hold, I think, that the demurrer is well taken, and that the bonds are invalid, even in the hands of bona fide holders.

Perhaps I might refer to the case of the Town of Keithsburg v. Frick, 34 Ill. 405, which was cited and so much commented on by the counsel on both sides. In that case it is true that the court in its opinion states that the issue of the bonds would have been valid under the vote which was taken (ostensibly under the act of 1849, I think), and which was subsequently sought to be legalized by an act of the legislature. The court does say that that act gave validity to the vote, although there was no law in force at the time authorizing it. But still the court also says that the bonds were issued under a law which authorized the subscription to be made and the bonds to be issued by the authorities of the town, and that it did not require a vote at all upon the subject. So that really what the court says in relation to the act of the legislature legalizing the vote, was unnecessary to the decision of the case, and in a sense may be considered nothing more than dictum; and upon that view the supreme court of this state relies in its subsequent decisions, although the supreme court of the United States, in the Rogers Case, refers to and relies upon the decision of the supreme court of this state, in the case of the Town of Keithsburg vs. Frick, 34 Ill. 405.

The demurrer will be sustained. I presume the case will go to the supreme court, and if it goes there, the parties can see whether the view we have taken of the case of Township of Elmwood v. Marcy is correct.

On appeal to the supreme court, this case was affirmed by a divided court.

[NOTE. This case, selected from several similar cases (not reported), was taken by writ of error to the supreme court as a test case, and the judgment was affirmed (not reported) by a divided court. Subsequently the court below granted new trials in the other cases. Judgments having been rendered in favor of the plaintiffs, the defendants brought error, and the supreme court affirmed (not reported) the decision of the lower court. Thereafter the plaintiff in the present action filed a bill of review in the circuit court of the United States for the Southern district of Illinois to have the judgment therein set aside. A demurrer to the bill of complaint was sustained, and the bill dismissed (case not reported) for lack of equity. An appeal was then prosecuted by the plaintiff to the circuit court of appeals, Seventh circuit. Jenkins, Circuit Judge,

in delivering the opinion of the court, held that the affirmance of a judgment by a divided court was as effective between the parties as though it passed by the unanimous decision of the court. Sustaining the bill would be to overthrow the whole doctrine of res adjudicata, and accordingly the decree of the circuit court was affirmed. 56 Fed. 762.]

L'ESPENASSE (SCHERMEHORN v.). See Case No. 12,454.

L'ESPERANZA (BOOTH v.). See Case No. 1,647.

L'ESPERANZA (COULTER v.). See Case No. 3,277.

LESSEE OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the names of the lessors; e. g. "Lessee of Ritchie v. Woods. See Ritchie v. Woods."]

LESSFORD (KEILER v.). See Case No. 7,649.

Case No. 8,276a.

LESSER v. SKLARZ.

[Betts, Scr. Bk. 601.]

Circuit Court, S. D. New York. Nov. 5, 1859.

COPYRIGHT—TRANSLATION.

[A translation from the original Hebrew, of the Pentateuch, is subject to copyright.]

This case came up under two forms of action: One for an infringement of a copyright which the plaintiff [Isaac Lesser] claimed to have in a printed book; and, secondly, for an injunction to restrain the defendant [Samuel Sklarz] from printing, publishing, or selling or exposing for sale a piratical edition of the plaintiff's English translation from the original Hebrew of the five books of Moses and portions of the prophets. It was stated under oath that a Hebrew in the employ of the plaintiff went to the store of the defendant, and saw his wife. She said her husband was not at home, but being told the object of the visit was to procure a cheap English edition, translated, of the five books of Moses, she said her husband had such a cheap translation, and, going to a glass case where Hebrew books were for sale, said she could not find them. The purchaser saying he could not wait, she produced the books, and said her husband charged $6 and $7 for them, according to the style of binding. The witness subsequently went again, and saw the defendant, and from him made a purchase of copies of the books, being a mere fac simile of the plaintiff's translation. This was the substance of the complaint.

Mr. Cutter for complainant said his client was one of the Hebrew ministers of a large synagogue in Philadelphia, and contended that, as his client had taken out a copyright for his work, this was such an infringement as would justify the court to put a stop to the sale of the printed work of the defendant.

Mr. Joachimson, on the other side, contended that the defendant could not be made amenable for selling or printing or publishing a book which had existed beyond the memory of man. If he could, then the Messrs. Harpers could be enjoined from publishing or selling their translation of the Bible. Such books were not the subject of a copyright law.

The facts in the case were not contested by the counsel on either side; and BETTS, District Judge, after listening patiently to a long argument, granted the injunction, and gave a judgment for the plaintiff.

LESTER (NATIONAL FIRE INS. CO. v.). See Case No. 10,043.

Case No. 8,277.

LESTER v. STANLEY.

[1 Brunner, Col. Cas. 58; 3 Day, 287.] [1]

Circuit Court, D. Connecticut. Sept., 1808.

JURY—SEPARATION AFTER CASE SUBMITTED AND BEFORE VERDICT.

If the jury separate after a case is committed to them, and before they have agreed on a verdict and afterwards return a verdict, it will be set aside.

[This was a suit by Timothy Lester against Frederick Stanley.]

After this case had been committed to the jury, and they were about to retire, LIVINGSTON, Circuit Justice, remarked that he understood it had sometimes been the practice with juries in this state to separate while they had a case under consideration. The rule of the common law requires them to be kept together until they have agreed on a verdict; and on looking at the statute we do not perceive that that varies it. The statute, indeed, appears to have been made in affirmance of the common law. The words are explicit: "And when the court have committed any case to the consideration of the jury, the jury shall be confined, under the custody of an officer appointed by the court until they are agreed on a verdict." [2] If they separate

[1] [Reported by Albert Brunner, Esq., and here reprinted by permission. 3 Day, 287, contains only a partial report.]

[2] Title 6, c. 1, § 11. This clause was passed as early, at least, as 1702, for it appears in the edition of the statutes published that year, and has not since undergone the slightest variation. The courts for many years afterwards were astute to enforce a compliance with the injunction it contains. In the case of Nicols v. Whiting [1 Root, 443], before the superior court in Hartford county, September term, 1711, the parties having been heard and the issue committed to the jury, in the evening Richard Skinner, a constable and officer of the court, was charged to go out with them and attend them under this confinement, until they should have agreed on their verdict. The court then adjourned until the next morning, when the officer

before, and afterwards return a verdict, it will be set aside.

See Howard v. Cobb [Case No. 6,755]; Burrill v. Phillips [Id. 2,200].

Case No. 8,278.

In re LESZYNSKY.

[3 Ben. 487.] [1]

District Court, S. D. New York. Nov., 1869.

STAY OF PROCEEDINGS—JUDGMENT APPEALED FROM.

1. A judgment rendered against a bankrupt in a state court, from which he has appealed before the filing of his petition, is conclusive, as against him, to enable the judgment creditors to prove it as a debt in the bankruptcy proceedings.

2. Proceedings by the creditors, on such appeal from the judgment, will be stayed, on motion of the bankrupt, pending the bankruptcy proceedings.

The petition in these proceedings was filed on the 4th of May, 1869. Before that time judgment had been recovered against the bankrupt [Henry S. Leszynsky] in the supreme court of the state of New York, and he had appealed from such judgment, giving security on such appeal. On the filing of his petition he obtained an injunction restraining the creditors from proceeding in the matter of the appeal. This injunction they moved to have modified, in order to enable them to determine the amount of their claim against the bankrupt, and to enforce their rights against the sureties. The bankrupt's petition did not admit the claim of the judgment creditors against him, but stated the fact of the recovery of the judgment against him, the appeal and the giving of security on such appeal.

John A. Mapes for the motion.

P. J. Joachimssen in opposition.

BLATCHFORD, District Judge. This motion must be denied. See Metcalf's Case [Case No. 9,494], in which decision I concur. The judgment already recovered is conclusive, as against the bankrupt, to enable the creditors to prove it as a debt.

Case No. 8,279.

In re LESZYNSKY.

[16 Blatchf. 9; 25 Int. Rev. Rec. 71; 7 Reporter, 358.] [1]

Circuit Court, S. D. New York. Feb. 13, 1879.

CRIMINAL LAW — CIVIL AND CRIMINAL PROCEEDINGS FOR SAME OFFENSE—PENALTY AND IMPRISONMENT—HABEAS CORPUS.

1. Section 3318 of the Revised Statutes of the United States provides that any person who commits any one of the offences therein specified shall pay a penalty of $100, and shall, on conviction, be fined not less than $100, nor more than $5,000, and imprisoned not less than 3 months, nor more than 3 years. The United States brought a civil suit against L. to recover the penalty of $100 imposed by that section for an offence therein specified, and recovered a judgment therefor, which was paid and satisfied of record. Afterwards L. was arrested on a warrant for the same offence, and was committed for trial. On a habeas corpus: *Held*, that the criminal proceeding by the warrant was not a proceeding to punish him twice for the same offence.

2. The three punishments—the penalty, the fine and the imprisonment—are only one punishment for the same offence, although the penalty is recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution.

[Cited in U. S. v. Thompson, 45 Fed. 468.]

[Certiorari to the district court of the United States for the Southern district of New York.

[Habeas corpus upon the petition of Samuel H. Leszynsky, claiming a discharge from alleged unlawful arrest.]

Roger M. Sherman, for relator.

Stewart L. Woodford, Dist. Atty., for the United States.

BLATCHFORD, Circuit Judge. Section 3318 of the Revised Statutes is in these words: "Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the commissioner of internal revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, or adds water or anything thereto, or in any respect alters the same, enter in such book, and in the proper columns respectively prepared for the purpose, the date when, the name of the person or firm from whom, and the place whence, the spirits were received, by whom distilled, rectified or compounded,

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came into court and gave information that the jury on the preceding evening, before they had agreed on any verdict, broke loose from their confinement, or in other words went out of the room to which he had conducted them, each one where he pleased. Upon which the officer was ordered to command their attendance in court forthwith. They accordingly appeared, acknowledge the fact, and offered their several excuses. Some of them said they thought it their duty to stay until they were agreed, and were willing to do so, but their fellows left them. Others alleged the carelessness of the officer as a palliation of their offense. The result was as follows, which I choose to give in the words of the record: "The court having considered the matter, the disorder of the jury in the liberty they have taken to scatter and disperse before they had agreed on any verdict, which is directly contrary to the law, and a great prejudice to the administration of justice in many respects, are unanimously of opinion not to receive any verdict made after the separation, either while they are so separate, or whensoever they can convene again. It is, therefore, resolved that the money they received of the plaintiff be returned to the plaintiff, which was accordingly done in court. And resolved that this action be continued to the next superior court to be holden in Hartford, the third Tuesday in March next, where it shall have a trial." R.

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

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 7 Reporter, 358, contains only a partial report.]

and when and by whom inspected, and, if in the original package, the serial number of each package, the number of wine gallons and proof gallons, the kind of spirit, and the number and kind of adhesive stamps thereon. And every such rectifier and wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like manner in the said book, the day when, and the name and place of business of the person or firm to whom, such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons and fractions of a gallon at proof, and, if in the original packages in which they were received, the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public or open place on the premises of such rectifier or wholesale dealer for inspection, and any revenue officer may examine it and take an abstract therefrom; and when it has been filled up as aforesaid, it shall be preserved by such rectifier or wholesale liquor dealer for a period not less than two years; and during such time it shall be produced by him to every revenue officer demanding it. And whenever any rectifier or wholesale liquor dealer refuses or neglects to provide such book, or to make entries therein as aforesaid, or cancels, alters, obliterates, or destroys any part of such book, or any entry therein, or makes any false entry therein, or hinders or obstructs any revenue officer from examining such book, or making any entry therein, or taking any abstract therefrom, or whenever such book is not preserved or is not produced by any rectifier or wholesale liquor dealer as hereinbefore directed, he shall pay a penalty of one hundred dollars, and shall, on conviction, be fined not less than one hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years." This section is, in all material respects, a re-enactment of section 45 of the act of July 20th, 1868 (15 Stat. 143). In the first edition of the Revised Statutes, the words "on conviction," found in said § 45, were omitted from said § 3,318, but, by the act of February 27th, 1877 (19 Stat. 248) said section 3318 was amended by inserting said words "on conviction," that act stating that such amendment, with others, was made "for the purpose of correcting errors and supplying omissions" in the Revised Statutes, "so as to make the same truly express" the statutes of the United States in force on the 1st of December, 1873. Said section 3318, as above quoted, is quoted as it is printed in the second edition of the Revised Statutes, except that the word "quality" is printed "quantity," by mistake, in the second edition, the word being "quality" in the first edition and in said section 45.

The United States, on the 13th of January, 1879, brought a civil action, in the district court of the United States for this district, against Samuel H. Leszynsky and Charles A. Troup, the complaint in which set forth, "that, at the time hereinafter mentioned, the defendants were partners in business, under the firm name of Leszynsky & Troup, at No. 26 Beaver street, in the city of New York, and then and there carried on the business of wholesale liquor dealers and rectifiers; that, in and during the year 1878, the defendants, at the city of New York, received certain distilled spirits which they failed and neglected to enter in the book required by law to be kept by them as such wholesale liquor dealers and rectifiers, and, therefore, by virtue of the premises, and by force of the statute of the United States in such case provided, the defendants became liable to pay to these plaintiffs the sum of one hundred dollars ($100), which said sum remains due and unpaid; wherefore plaintiffs demand judgment against the defendants for the sum of one hundred dollars, besides the cost of this action." The defendants appeared by attorney in said action, and put in an answer, which stated, that the defendants, "for answer to the complaint, say nothing in bar or preclusion of the suit of the said plaintiffs." On the 20th of January, 1879, an order was made by said district court, "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred and fifteen dollars," and "that the clerk enter judgment for said amount." On the same day a judgment in said action was entered, "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred dollars, and that they have execution therefor." [Case unreported.] On the same day an order was made by said district court reciting that a judgment had been entered in said action for $115, and that the defendants' attorney had paid into the registry of said court the sum of $115 in satisfaction of said judgment, and ordering that said judgment be satisfied and cancelled of record. Afterwards, on the same day, a United States commissioner issued a warrant to the marshal, setting forth that complaint on oath had been made to him, "charging that Samuel H. Leszynsky and Charles A. Troup were, at the times hereinafter mentioned, rectifiers and wholesale liquor dealers, doing business at No. 26 Beaver street, New York City, did, on or about the 29th of October and 18th day of November, in the year one thousand eight hundred and seventy-eight, at the Southern district of New York, unlawfully neglect to make any entry whatever in the book kept by them, the form whereof had theretofore been prescribed by the commissioner of internal revenue, of spirits then and there sent out by them of their stock and possession, before the said spirits were removed from

their premises, and, further, they did, as such wholesale liquor dealers and rectifiers, on or about the 18th day of November, 1878, in said district, unlawfully neglect to make any entry in their said book, of spirits then and there sent out by them of their stock, before the said spirits were removed from their premises, and the spirits here mentioned are not those stated hereinbefore, and for similar offences on the 30th of October and 15th day of December, 1878," and commanding the marshal to apprehend the said Leszynsky and Troup. Under this warrant Leszynsky was arrested and brought before the commissioner, and an examination was had, and, on the 23d of January, the commissioner committed him to the custody of the marshal, for trial, in default of $1,000 bail. He has now been brought before this court on a writ of habeas corpus issued by it, and the proceedings which took place before the commissioner are before this court on a writ of certiorari. At the examination before the commissioner, the defendant put in evidence the said proceedings in said civil action, and, while admitting that there was probable cause to hold him under said warrant, but for said proceedings, contended, and here contends, that, in consequence of such proceedings, he is not liable to be again arrested, held, detained, tried, convicted or punished for the same cause, and that an arrest and detention under said warrant is for the same cause for which he was punished by the payment of said judgment.

It is contended, for the relator, that, if he shall be convicted, and fined and imprisoned for the offences alleged in the warrant, he will be punished twice for the same statutory offence; and that he was completely punished for the offences alleged in said warrant, by the payment of said judgment.

It is to be noted that section 3318 provides distinctly, that, whenever any rectifier or wholesale liquor dealer does what is specified therein he shall pay a penalty of $100 and shall, on conviction, be fined and imprisoned. No more distinct form of expression could have been adopted to indicate the intention of congress to provide cumulative penalties or punishments, three in number, each in addition to the other two —a penalty of $100 to be recovered by a civil action, and fine and imprisonment to follow conviction on a criminal prosecution. But, in the eye of the law, the three punishments are only one punishment for the same offence, although the penalty of $100 may be recovered in a civil action, and the fine and imprisonment are inflicted by a criminal prosecution. The statute book has many like provisions for punishment of offences, where a penalty to be recovered by a civil action is given, and a fine and imprisonment, or one of them, on a criminal conviction, is prescribed in addition and cumulatively, by the use of the word "and." Provisions for punishment by the forfeiture of property, which must be enforced in a civil action, and, cumulatively and in addition, by fine and imprisonment, or one of them, on a criminal conviction of the same offence for which the forfeiture of property is prescribed, are of the same character. Where the same section of the statute contains the description of the offence, and the prescription of the penalty by civil suit, and of the punishment on a criminal conviction, the two connected by the copulative "and," no other construction is proper than that the whole is one punishment, and that the whole cannot be satisfied by a part. Reference, for provisions of the above descriptions, in the same title in which section 3318 is found, may be had to sections 3257–3260, 3279, 3292, 3296, 3326, 3340, 3342, 3360, 3370, 3380, and 3401. Penalties and forfeitures given by statute are to be enforced by civil suits. Rev. St. § 563, subd. 3; Id. § 919. Fine and imprisonment are to be inflicted as the result of a conviction on a criminal prosecution. Different methods are to be resorted to to enforce the different parts of what is one and the same punishishment. But, the fact that the two methods may be progressing simultaneously and one be completed before the other, or that one may be fully completed before the other is commenced, cannot have the effect to annul the provision of law in regard to the uncompleted part. The views above expressed are in harmony with those of the supreme court in the recent case of U. S. v. Claflin, 97 U. S. 546, where the provisions of section 3082 of the Revised Statutes were under consideration, as section 4 of the act of July 18th, 1866 (14 Stat. 179). That section provides, as a punishment for the fraudulent importation of merchandise, a forfeiture of the merchandise, and a fine or imprisonment, or both. The court construe the section as having in view not only punishment of the offence described but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offence; and say that the forfeiture of the goods was designed to secure indemnity to the government for the wrong done, and that the fine and imprisonment "were superadded, as a vindication of public justice."

The case of U. S. v. Gates [Case No. 15,191], in the district court of the United States for this district, before Judge Betts, in 1845, is cited on the part of the relator. In that case Gates had been indicted and convicted, under section 19 of the act of August 30th, 1842 (5 Stat. 565), for smuggling and clandestinely introducing into the United States certain goods, with a view to defraud the revenue of the United States, and had thereon been sentenced to pay a fine of $2,000 and to be imprisoned 30 days. That specific offence was made punishable by that statute and the sentence was a lawful one. Gates had paid the fine and suffered the imprison-

ment. Afterwards a civil suit was brought by the United States against Gates, under section 50 of the act of March 2d, 1799 (1 Stat. 665), to recover the penalty thereby imposed, of $400, for landing the same goods without a permit. The defendant pleaded in bar the conviction and sentence and punishment aforesaid. The plea was demurred to, and was held good by the court, on two grounds: (1,) that, as the United States had obtained judgment and inflicted punishment on the defendant for an offence, they were prohibited, by general principles of law, from prosecuting him again for acts constituting the same offence, or, in other words, which, if proved, would call for his conviction of that offence; and, (2,) because the punishment provided by the act of 1842 was not cumulative, and to be imposed in addition to that prescribed by the act of 1799. The present is a different case. The fine and imprisonment provided by section 3318 are cumulative to the penalty of $100, and are to be imposed in addition; and the United States are not prosecuting the relator a second time for the same offence.

The case of U. S. v. McKee [Case No. 15,688], also relied on by the relator, is like the Gates Case, and different from the present one. McKee had been indicted and convicted, under section 5440 of the Revised Statutes, for taking part in a conspiracy to defraud the United States of taxes due on distilled spirits, in pursuance of which conspiracy his co-conspirators unlawfully removed such spirits. He was sentenced to pay a fine and be imprisoned. Afterwards, under section 3296, he was sued in a civil action, by the United States, to recover a penalty of double the amount of the taxes on certain distilled spirits, out of which the government alleged it was defrauded by means of a conspiracy entered into for that purpose by McKee and certain distillers, for the unlawful removal, by the distillers, of said spirits, without the payment of taxes. It was alleged that McKee aided and abetted in such removals. The defendant pleaded in bar such indictment, conviction and sentence. The overt acts charged in the indictment, were alleged to be the unlawful removal of the same distilled spirits, without the payment of taxes, for which the penalty sought to be recovered in the civil suit was denounced by section 3,296. The defendant also pleaded in bar a pardon by the president. The United States demurred to the pleas, and the pleas were held good.

There is nothing in the decision in Ex parte Lange, 18 Wall. [85 U. S.] 164, 168, considered with reference to the facts of that case, which sustains the claim of the relator in this case.

As was said by the court in People v. Stevens, 13 Wend. 341: "It is undoubtedly competent for the legislature to subject any particular offence both to a penalty and a criminal prosecution; it is not punishing the same offence twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offence. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. It might as well be contended that a man was punished twice, when he was both fined and imprisoned, which he may be in most misdemeanors."

It is urged that the word "and," after the words "penalty of one hundred dollars," in section 3318, should be read "or." As congress unquestionably had the power to prescribe the entire punishment provided by section 3318, quite as much as they have to prescribe fine and imprisonment in any case, it must be held that the word "and" has its natural and cumulative meaning.

The 5th amendment to the constitution of the United States provides that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb." It is contended, for the United States, that the judgment in the civil suit, and the payment of it, did not subject the relator to be put in jeopardy of his life or limb. But, even though the spirit of this amendment be to prevent a second punishment, under judicial proceedings, for the same crime, so far as the common law gave that protection (Ex parte Lange, 18 Wall. [85 U. S.] 163, 170), yet the criminal proceeding now instituted against the relator will not produce a second punishment for the same offence, but will only complete, on conviction, the punishment intended by congress. The 5th amendment was proposed by congress on the 25th of September, 1789, and was ratified by eleven states in that year and the following two years. But, that amendment has not been regarded by congress as preventing legislation such as that found in the statute now in question. Thus, by the act of July 31st, 1789 (1 Stat. 46), it was provided, that, if goods entitled to drawback were entered for exportation and were afterwards landed, they and the vessel from which they were landed, and the boats used in landing them, should be forfeited, and all persons concerned therein should, on conviction, be imprisoned. This same provision was re-enacted as section 60 of the act of August 4th, 1790 (1 Stat. 174), and as section 82 of the act of March 2d, 1799 (Id. 692), and is now found in section 3,049 of the Revised Statutes. It would necessarily sometimes happen that the owner of the forfeitable goods would be concerned in landing them, and thus he would be punishable both by having his goods forfeited and by being imprisoned on conviction, the forfeiture of goods being enforced in a civil suit and the conviction taking place in a criminal proceeding. So, in section 24 of the act of March 2d, 1799 (1 Stat. 646), it was provided, that, if goods should be imported in violation of the statute as to a manifest, the master in command of the vessel should forfeit and pay

a sum of money equal to the value of such goods not included in the manifest, and all such goods, not included in the manifest, belonging to him, should be forfeited. It was made the duty of the master in command to make and sign and have the manifest, and thus, in respect to goods not manifested, which belonged to him, he would be punished by losing the goods in a suit in rem, and also by paying their value again, as the result of a suit in personam. This provision is re-enacted in section 2809 of the Revised Statutes. In section 46 of the act of March 2d, 1799 (1 Stat. 662) it was provided, that, when any articles subject to duty are found in the baggage of any person arriving in the United States, which shall not, at the time of making entry for such baggage, be mentioned to the collector before whom such entry is made, by the person making the same, all such articles so found shall be forfeited, and the person in whose baggage they shall be found shall, moreover, forfeit and pay treble the value of such articles. Under this provision, if the person in whose baggage the articles were found was the owner of them, and if he made the entry, he would forfeit the articles in a suit in rem and pay treble their value in a suit in personam, as one punishment for the offence. This provision is re-enacted in section 2802 of the Revised Statutes.

Provisions are found in the statutes, where, when congress has intended that a person who would otherwise be subject to two distinct provisions of the same section should be exempt from one, if subject to the other, it has said so distinctly. Thus in section 34 of the act of September 1st, 1789 (1 Stat. 64, 65), it was provided, that, on conviction of any of certain neglects or offences against the act for registering vessels, the offender should forfeit $1,000 and be rendered incapable of serving in any office of trust or profit under the United States; and, further, that, if any person required by the act to perform any thing should wilfully neglect or refuse to do so, he should, on conviction, "if not subject to the penalty and disqualification aforesaid," forfeit $500 for the first offense, and a like sum for the second offence, and should, from thenceforward, be rendered incapable of holding any office of trust or profit under the United States. This provision was re-enacted in section 26 of the act of December 31st, 1792 (1 Stat. 298), and a like provision is found in section 29 of the act of February 18th, 1793 (Id. 315). These provisions are now found in sections 4187, 4188, 4373 and 4374 of the Revised Statutes. The restriction found in them is a recognition of the principle of the 5th amendment and of the doctrine of the case of U. S. v. McKee [supra]. But, the fact of such restriction, and the punishment of the offences named by a pecuniary forfeiture or penalty and by a disqualification to hold any office of trust or profit under the United States, shows that congress did not regard the punishment by a pecuniary forfeiture or penalty, and by a disqualification in addition, as within the inhibition of the 5th amendment. The imposition of the forfeiture or penalty is a punishment. Indeed, sections 4187 and 4188 use the words "punishable by a fine," instead of the word "forfeit," found in the act of 1792, while sections 4373 and 4374 use the words "liable to a penalty," instead of the word "forfeit," found in the act of 1793, and section 4188 refers to the punishment by a fine, prescribed by section 4187, as a "penalty." The disqualification to hold office is a punishment, under the decisions of the supreme court in Cummings v. Missouri, 4 Wall. [71 U. S.] 277, and Ex parte Garland, Id. 333.

The proper conclusion from these considerations is, that congress had power to prescribe the punishment by the penalty and the fine and the imprisonment, prescribed by section 3318, as a punishment the whole of which may be imposed; and that the language is such as to indicate an intention that the whole shall be imposed. The language of Chief Justice Marshall, in U. S. v. Wiltberger, 5 Wheat. [18 U. S.] 76, 95, is applicable to this case: "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute, to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

It follows, that the relator is not, by what took place in the civil action, exempted from criminal prosecution, under section 3318, in respect to the matter covered by the complaint in such civil action; and that he is not entitled to be discharged on habeas corpus.

Case No. 8,280.

LETCHER et al. v. WOODSON.

[1 Brock. 212.] [1]

Circuit Court, D. Virginia. Nov. Term, 1811.

COVENANT — BREACH FOR GAIN — BREACH FOR WANT OF TITLE — RULE OF DAMAGES — INTEREST UPON VALUE OF LAND AT DATE OF CONTRACT.

1. Quaere, where a man covenants to convey lands, and breaks his covenant to convey, in order to avail himself of their increased value, and an action of covenant is brought to recover damages for the breach, if the value of the lands at the time of trial should not be the standard of damages?

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

2. But it seems, that where a man contracts for the sale of lands, without fraud, and it afterwards appears that he had, in truth, no title to the lands when the contract was entered into, and, in consequence of his want of title, he refuses to convey, the standard of damages, in an action founded upon the covenant, is the value of the lands at the time of the contract entered into, and not their value at the time of trial. (But see the note of the chief justice at the end of this case.)

[Cited in Logan v. Moulder, 1 Ark. 313.]

3. Whether the jury in such a case, should allow interest upon the value of the lands at the date of the contract, must depend upon the circumstances of the case, of which they are the proper judges, and it is competent for the defendant to give in evidence to the jury, any circumstances tending to show that interest should not be allowed.

This was an action of covenant brought in 1805, by the plaintiffs, Stephen G. Letcher and Stephen Arnold, citizens of Kentucky, against Samuel Woodson, a citizen of Virginia, to recover damages for the breach of a covenant, made by the defendant with the plaintiffs, on the 30th of August, 1793, whereby the defendant bound himself, his heirs, &c., in consideration of £40, to be paid in horses, twelve days from the date of the contract, and of £160 in like manner, to be paid on the 10th day of November ensuing, by the plaintiffs to the defendant, to make to the plaintiffs a good title, in fee simple, to 666⅔ acres of land in Mercer county, Kentucky. The plaintiffs alleged in their declaration, a full performance of their covenants, and claimed damages from the defendant for failing to make a good title according to his covenant, &c. The defendant craved oyer, and pleaded covenants performed, and various special pleas, which it is unnecessary to notice. At the November term of this court, 1811, the jury found the following special verdict: "It appearing in this cause, that before, and at the time of the covenant in the declaration mentioned, the plaintiffs resided, and have ever since resided in the state of Kentucky, in the neighbourhood of the lands in the declaration mentioned, and that the defendant's testator, during that whole period, and till the time of his death, resided in Goochland county, Virginia, where the covenant was entered into: that the plaintiffs, after the first payment of two horses on the 10th of September, 1793, viz.: in the December following, went out of Virginia to Kentucky, and never had any further communication of any kind with the defendant's testator, until December, 1805, when, for the first time, he tendered the balance of the consideration, viz.: £160 in horses, at which time it was ascertained and known, both to the plaintiffs and the defendant's testator, that the title of the defendant's testator to the lands sold, was not good, the jury pray the judgment of the court on the rule by which they ought to be regulated in assessing the damages. We find for the plaintiffs: and, 1st. If in the opinion of the court, the present value of the land be the standard by which damages ought to be regulated, we assess the damages to $4,000. 2dly. If the value of the land, at the date of the covenant, or when the deed ought to have been executed, be the standard of damages, we assess the damages to $2,533. 3dly. If, in the opinion of the court, the standard of remuneration be the price contracted for, then we assess the damages to $1,266.50. 4thly. If we are at liberty to take into consideration, all the circumstances of the case in the first part of the preceding statement, so as not to be tied down to either of the foregoing standards on abstract principles, then we assess the damages to $324.67."

THE COURT took time to consider of the judgment proper to be rendered on this special verdict, and at a subsequent period of the same term, delivered the following opinion:

MARSHALL, Circuit Justice. This is a suit instituted by the plaintiffs to recover against the defendant, damages for the non-conveyance of land, lying in Kentucky, which the defendant had stipulated to convey. The jury in their verdict present to the court certain circumstances which appeared to them to be material, and then pray the advice of the court respecting the standard by which, under those circumstances, damages ought to be measured. They request the opinion of the court whether the damages ought to be regulated by: (1) The value of the land at the date of the contract, or failure to convey; (2) by its value at the time of trial; or, (3) by the price contracted for; or, (4) by their own opinion, under all its circumstances, of the justice of the case. One of these circumstances is, that the title of the vendor was defective, and this circumstance is connected with one other, to wit, that the plaintiffs resided at the time in Kentucky, where the lands lay, and the defendant in Virginia.

It has always been my individual opinion, that in a case where the lands sold are retained by the vendor, and he breaks his covenant to convey, in order to avail himself of the increased value, that he ought to be liable for the value of the lands at the time of trial. I suspect that this is not the opinion of the judges of the supreme court; of this, however, I am not confident. Had this been such a case, I am inclined to think that my opinion would have been in favour of the highest sum mentioned in the verdict.[2] But this is not such a case. The vendor appears to have sold, without fraud, lands to which he believed himself to be entitled. He was mistaken. The motives for subjecting him to the increased value of lands exist no longer. If he should be subjected to pay this increased value, it must be on principles of strict law, in opposition to the

[2] See note 3 at end of this case.

real justice of the case. I find no such principle of law, and I find maxims entitled to respect which militate against it. One of these is, that in cases of doubtful law, where the one party seeks to make a gain, and the other to avoid a loss, the law will rather favour him who seeks to avoid a loss. But I can find no principle which, in a case of plain mistake with respect to title, will permit the damages to grow after the contract has been broken. I am, therefore, of opinion, that, in this case, the value of the land at the time of trial is not the standard of damages. Is the value of the land at the date of contract, or which is the same thing in this case, at the time when the deed was demandable and to have been executed, the standard of damages?

The contest is between the value and the price actually given. Upon principle, it appears to me that the value at the time must be taken by the jury as their guide. The reason for this opinion is given in a single sentence. The value affirms the contract, and gives damages for its breach; the price annuls the contract, and replaces the parties in the same situation as if it had never been made. I therefore think myself constrained to say, that the price at the time is not to be the limit of the plaintiffs' right to recover in this action. But the jury present to the consideration of the court a fourth alternative. If the circumstances stated in the verdict will authorize them to depart from all the standards which are mentioned, then they find other damages than they would find, if bound in law by any one of those standards. That a jury may, if they choose, find a verdict against law, is admitted; and the court must either renuer judgment according to such verdict, or set it aside and award a new trial. But in this case, the jury have not chosen to find a verdict against law. They have asked the opinion of the court whether, in point of law, the circumstances stated in their verdict, warrant a departure from all the principles stated in their preceding findings. Those circumstances, therefore, are to be considered. They are, that the plaintiffs resided in the neighbourhood of the land in Kentucky, and the defendant in Virginia, where the contract was made, that the vendor had no title to the land sold, and that the whole purchase money was not paid, nor was the deed demanded until twelve years after the contract was made, when the defect of the title was known. These circumstances may have some influence in the selection of the standard, or in the estimate of damages under that standard, but they cannot justify a disregard of every rule whatever. I do not think, therefore, that judgment ought to be rendered upon the fourth finding of the jury.

The argument at the bar will, it is believed, authorize, if it does not require the court, to say something respecting the testimony admitted in this cause. The counsel for the plaintiffs seem to suppose that every species of testimony ought to be excluded, except that which would show the execution of the deed, or the value of the land. I do not think so. To me, it appears that the testimony may tend to fix the standard of damages; and that the complexion of the case may fairly have some influence on the jury, in estimating damages under that standard. The testimony, showing that the non-conveyance of the land, arose from the want of title in the vendor, has decided the opinion of the court on the question, whether the value at the day of contract, or at the day of trial, ought to have governed the verdict, and was, consequently, very material in the cause. The other circumstances stated in the verdict, might influence the jury, and, in my opinion, were proper to influence the jury on questions completely within their province. There might be contradictory and doubtful evidence respecting the value of the land, and the whole complexion of the case might have weight in deciding on that testimony. The residence of the parties especially, and their knowledge of the property, might deserve to be considered. On the question of interest too, if the value at the date of contract be the standard, the circumstances attending the case might be very material. There may be cases in which a court would instruct a jury that they ought to include interest in their computation of damages, if they took the value at the date of the contract as their standard; but there may be cases, and this is one, in which the court, on account of the very circumstances stated in this verdict, would be well satisfied with the exclusion of interest from the computation of damages.

These observations would be proper, in a court, unacquainted with the circumstances which occurred at the trial of the cause. But gentlemen engaged in the cause will recollect, that the testimony of which they complain was added by themselves. They stated the defendant's want of title; they proved the tender in 1805, which established the fact that no previous payment had been made; and they proved it in such manner as to justify the inference, that no previous demand of the deed had been made. Was it for the court to say that this testimony might avail the plaintiffs, and not the defendant? Was it for the court, after the plaintiff had introduced this testimony, and argued upon it, to check the counsel for the defendant when attempting to apply the same testimony. The jury had no right to allow the defendant, in their verdict, so much of the purchase money as remained unpaid, and to this point they were instructed by the court. But could the court inform the jury, that they were to weigh the case made out by the plaintiff, according to his testimony, but that the moment their at-

tention was directed to the defence, they were to forget that they had heard it. Without regard, however, to the particular party from whom this testimony came, I have no doubt of its admissibility, under the directions of the court respecting its application.

Judgment rendered for twenty-five hundred and thirty-three dollars, the damages assessed by the jury in the second finding of their verdict.

NOTE, by MARSHALL, Circuit Justice. Since this opinion was given, I find that the uniform course of Kentucky, is to give the purchase money with interest, and to this course I now conform, where no rents and profits have been received.—Where they have, that circumstance affects the interest.[3]

[3] In an action by the vendee for the breach of a contract of sale by the vendor, in not delivering the article, the measure of damages is the price of the article at the time of the breach of contract, and not at any subsequent period. Shepherd v. Hampton, 3 Wheat. [16 U. S.] 200; 4 Pet. Cond. R. 233. In that case the subject of the contract was a chattel. The covenantors agreed to deliver at a stipulated day, and for a stipulated price, one hundred thousand pounds of cotton. The covenantors delivered forty-nine thousand pounds, according to the contract, but refused to deliver the balance, and the suit was brought to recover damages for the breach. The price agreed on was ten cents per pound; the market price on the day stipulated, was twelve cents per pound; and when the suit was brought, it had risen to thirty cents per pound. Marshall, C. J., in delivering the opinion of the court, said: "The only question is, whether the price of the article at the time of the breach of the contract, or at any subsequent time before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article at the time it was to be delivered is the measure of damages. For myself, only, I can say, that I should not think the rule would apply to a case, where advances of money had been made by the purchaser under the contract; but I am not aware what would be the opinion of the court in such a case." The rule is settled in the supreme court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article sold, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article, subsequently to the contract, rose in value, would always have it in his power to discharge himself from his contract, and put the enhanced value into his own pocket. Nor can it make any difference on principle, whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for at the contract price, and sell it himself at the increased price. Hopkins v. Lee, 6 Wheat. [19 U. S.] 109; 5 Pet. Cond. R. 23. See, also, Gilpin v. Consequa [Case No. 5,452], where Judge Washington said, that where a party fails to comply with his contract, the value at the time of the breach was the proper standard of damages, and that the plaintiff would never be permitted to resort to a foreign market, to which he might have carried the article, to fix the standard of loss. The same principle, with regard to marine torts, viz.: that the probable profits of a voyage are not a fit mode for the ascertainment of damages, is laid down by the supreme court, in The Amiable Nancy, 3 Wheat. [16 U. S.] 546, and in La Amistad de Rues, 5 Wheat. [18 U. S.] 385. (4 Pet. Cond. R. 322, 697.) So in a late case before the circuit court of the United States, in Pennsylvania, where a lot of coffee was purchased at a stipulated price, but no day for the delivery was specified, in an action for damages by the vendees, against the vendor for a breach of his contract, Baldwin, J., instructed the jury, that no time being fixed for the delivery of the coffee, the law made it deliverable in a reasonable time, which must depend on circumstances; and, in that case, they might assume the day on which the coffee was demanded as the time of delivery, and the refusal of the defendant as the breach of the contract. As to the measure of damages, that was determined by the market value of the article when it was deliverable. On a motion for a new trial in this case, on the ground that the jury had found excessive damages, Hopkinson, J., said, that the rule of law that the market price, that is, the price actually paid for the thing at that time in the market, was founded on an hypothesis very favourable to the vendor, viz.: that he certainly would have sold the article, if he had received it, at the advance of that day, and not retained it subject to the contingency of a future depression. But on the other hand, he must be content with the price of that day, and cannot claim the benefit of a subsequent increase of value. Blydenburgh v. Welsh [Case No. 1,583].

LETHE, The (McCULLOCH v.). See Case No. 8,738.

LETHE, The (SHAW v.). See Case No. 12,721.

Case No. 8,281.

LE TIGRE.

[3 Wash. C. C. 567.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1820.

SALVAGE — EXTRAORDINARY ASSISTANCE OF OFFICER TO SAVE PROPERTY—INTENTION OF SALVOR —SMUGGLING—SEIZURE OF VESSEL.

1. If an officer, acting as such, exceeds the bounds of his official duty, by giving extraordinary assistance to save property, he is entitled to salvage.

[Cited in The Wave, Case No. 17,297; Hobart v. Drogan, 10 Pet. (35 U. S.) 121; The Centurion, Case No. 2,554; The Josephine, Id. 7,546; The Wave v. Hyer, Id. 17,300; Lea v. The Alexander, Id. 8,153; Roff v. Wass, Id. 11,999; The C. D. Bryant, 19 Fed. 605.]

2. It is no objection to a claim for salvage, that the interference or assistance of the salvor, did not arise from a desire to preserve the property, or benefit the owner.

[Cited in The B. C. Terry, 9 Fed. 926.]

3. A mere intention to smuggle goods, will not authorize the seizure of a vessel.

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

In admiralty.

WASHINGTON, Circuit Justice. Some time in the month of April, 1819, the brig Le Tigre, with a valuable cargo on board, both of them belonging to a subject of his catholic majesty, was captured on the high seas by the Constitution; an armed vessel, manned and equipped in the port of Baltimore, and

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

asserted to be commissioned by the government of Buenos Ayres, to make capture of the property of the subjects of Spain, between which countries open war was then, and still is existing. A prize-master and crew were put on board the Tigre, and she was ordered to Buenos Ayres. Being short of provisions and water, the prize-master determined to put into Margaretta, and there to have the vessel and cargo condemned; but, as he swears, the crew compelled him to steer for the United States, for the avowed purpose of smuggling the cargo on shore. On the 3d of June, she arrived in Cape May Roads, within this district; and the prize-master reported the vessel to be in distress for water and provisions, and applied to the deputy-collector, Stevens, for permission to land a part of his cargo, and to dispose of it, for the purpose of obtaining the supplies he wanted; which, after a survey and report of her situation, was granted. On the 4th of June, the deputy-collector was informed by Bedwell, the prize-master, that his crew was in a mutinous state, and intended to put to sea, and to smuggle the cargo into the United States; and he was at the same time requested to take possession of, and detain her until he could hear from the agent of the owners in Baltimore. In consequence of this communication and request, Stevens, with seven or eight men hired by him for the purpose, boarded the brig and took possession of her, without encountering the slightest resistance from the crew, in whose conduct there appeared no indications of insubordination; so far from it, they, without objections, assisted the persons thus brought on board, to navigate the brig to the mouth of Cohansey creek; to which place she was ordered by Stevens, and where she arrived on the 5th of June. On the day after, the hired hands were discharged; but Stevens obtained possession of the brig until the 9th, when the prize-master made a formal assignment, in writing, of the vessel and cargo, to the collector, Mr. Westcott, the other claimant, by whose orders she was conducted to Bridgetown. On the 11th of June, the Spanish consul filed a libel on behalf of the owners of the brig and cargo, for the purpose of obtaining restitution of the property; upon the ground of the illegal outfit within the United States. No claim having been interposed for the captors, a decree of restitution was pronounced by the district court, upon the payment of one-fifth of the appraised value to Westcott and Stevens, for salvage, for which they had filed a joint claim. It is from this part of the decree, that the appeal was prayed; and the only question to be decided by this court is, whether those claimants are entitled to any, or what compensation, by way of salvage? Whether the account which Bedwell gives of the mutinous behaviour of his crew, which he says compelled him to come to the United States, and of their threats to put to sea and smuggle the cargo into the United States, be true or not; may well be doubted; since he is flatly contradicted by most of his crew, who swear, that Bedwell came in voluntarily, and with a declared intention, after obtaining the supplies of which he stood in need, to put to sea, and to employ vessels to introduce the cargo into the United States. They positively deny the existence of a mutiny, actual or intended, either before or after the arrival of the brig in Cape May Roads. There are two facts, however, of which we entertain no doubt. The first is, that an intention illicitly to introduce the cargo into the United States, was formed either by Bedwell or his crew, or by both. 2. That whatever might have been the designs of the crew, they had not, while the vessel lay in Cape May Roads, broken out into any overt acts; and the undisputed possession of the vessel was, to all intents and purposes, retained by Bedwell at the time when Stevens went on board with the persons hired to aid him in taking possession. We are also satisfied, that the vessel and cargo would have been carried to sea, either by Bedwell or by his crew, and would have been lost to the owners, but for the interposition of Stevens. If the facts thus assumed be correct, it is undeniable, that a meritorious service has been rendered to the owners; which in ordinary cases would entitle the persons rendering it, to an adequate compensation by way of salvage. But it is contended by the counsel for the libellant, that this case is not within the general law of salvage; because, the preservation of the property was not the direct object of the acts done by the claimants, but was incidentally the effect of an act performed by public officers, in execution of a public duty enjoined upon them by law; and this constitutes the great question in the cause. When the service for which the compensation is claimed by a public officer, is required of him by the law, virtute officii; or it becomes a duty, necessarily connected with his public employment; we can perceive the most obvious reason, why a compensation beyond what the law allows, should not be claimed from the owner of the property saved. For services thus required, he is paid by the public, in the emoluments to which his office entitles him; and this the law may justly consider as a full equivalent. He deserves, and ought to receive no other reward, from the person for whose interest he acted; for, although the individual receives the benefit, the service is in reality rendered to the government, and not to the individual. The case of The Aquila, 1 C. Rob. Adm. 39, was that of a claim for salvage, made by a magistrate; who, in obedience to the requisitions of the act of Anne (section 2, c. 18), issued a warrant to a constable, to summon as many men as might be thought necessary, for the preservation of a vessel on the seacoast, from the danger of being stranded. The vessel and cargo were saved, by means of the persons so sum-

moned; and the judge was of opinion, that the claim of salvage was inadmissible, because the magistrate acted in discharge of his public duty; and not having exceeded what was required of him, in the ordinary discharge of said duty, he ought to be left to the general reward of all good magistrates —the fair estimation of his countrymen, and the consciousness of his own right conduct. In this case, it will be observed, that the law was imperative upon the magistrate, to issue the warrant for the express purpose of saving the property, and not for some other purpose, which might, nevertheless, have incidentally produced the same consequence. The magistrate had no choice, whether to perform the required act or not—his refusal would have been a breach of duty. Besides, the statute having provided a compensation by way of salvage, for the collector, and all others actually concerned in preserving the vessel, might reasonably be construed to have intended to exclude the magistrate.

The case of The Belle, Edw. Adm. 66, was that of a transport, rescued from hostile capture, by the commander of a ship of war, of the squadron to which the transport belonged. The transport having been hired to the government, to aid in taking off the British troops from Corunna, was, pro hac vice, the property of the government, and under its protection. It was the duty of the ships of war to afford that protection; and, although the owner of the rescued vessel was benefited by the performance of this duty; still, as in the former case, the service was performed for the government, in the ordinary line of the duty of the officer of the saving vessel; and was, in fact, paid for by the government, as for any other service connected with his public official duty. Of this class of cases, is that of the pilot, who safely conducts into port, a vessel in distress at sea. He acts in the performance of an ordinary duty, imposed upon him by the law and the nature of his employment; and he is therefore not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment. The Joseph Harvey, 1 C. Rob. Adm. 306. Salvage is allowed for the re-capture, by the convoying ship of one of the convoy, from the possession of the enemy; upon the principle, that the capture dissolved the connexion between the convoying vessel and the prize; and consequently, the former was under no obligation to make the re-capture. Any exertions which could have been made, to prevent the capture, could not have been a case of salvage; because the salvor acted in the line of his duty. Whether the principle, to be deduced from the cases, is strictly applicable to one, where the duty imposed upon the officer has for its object the public interest exclusively, distinct from that of the individual, may admit of some doubt. And, reasoning upon the general principles of quantum meruit, it would seem somewhat inconsistent with the nature of such a claim, that compensation should be allowed for a service professedly not intended, and should yet be withheld, when the salvor acted with a view to the interest of the person from whom the compensation is demanded. It may also be observed, that, in the above cases, Sir William Scott does not appear to have been governed in his decision by any consideration of the official duty being directed to the interest of the individual whose property has been saved. It is not, however, our intention to give any opinion upon this point; because we have the authority of Sir William Scott, and, as we think, of good sense, for saying; that, if an officer, acting as such, exceeds the limits of his official duty, by giving extraordinary assistance to save property, he is entitled to salvage. And we are of opinion, that these officers went beyond the ordinary limits of the duty which their official stations required from them.

We are aware of no law of the United States, which authorized the collector or his officers to seize and detain the Tigre, upon the asserted ground of an intention, in the master and crew, to smuggle the cargo on shore. The only section of the duty law, under colour of which they could have so acted, is the 29th; and that merely requires the collector to arrest a vessel which attempts to depart from any district into which she has arrived, unless it be to proceed on her way to some interior district, to which she may be bound, before the master has made a report or entry of her cargo. But it will be perceived, that it is the attempt to depart, and not an intention to violate the revenue laws, which will justify a seizure under this section. Yet it is contended, by the counsel for the respondent, that an authority to prevent a violation of the revenue laws, by arresting the vessel, is cause of well grounded suspicions, which must necessarily reside in the collector, upon general principles of law, although it would not be granted to him expressly by statute. We think it will be pretty difficult to maintain this position; for let us ask of those who make it, what are the ulterior measures which they would propose to be taken by the collector consequent upon the result? It is most unquestionable, that no proceeding could be instituted against the vessel, upon the mere ground of an intended breach of laws, attended by no overt act of an illegal nature. If he may seize and detain her for one hour, without being able to bring her to adjudication, he may for just as long time as his suspicions of the evil designs of the persons on board shall continue;—a power, which, in its exercise, would or might be most inconvenient and oppressive to the owners of the property. In a case arising under the 29th section, the service is made on account of an offence actually committed;—the attempt to depart before an entry or report; and by performing either of these acts it would of course be removed. The collector

might also put an officer on board to prevent smuggling; but he cannot detain her on that ground. We are, then, of opinion, that it was not the duty of the collector to take possession of this vessel, much less to carry her, out of the course of her voyage, up the river Delaware; upon the ground of a suspicion of an intended violation of the revenue laws of the United States. On the contrary, we think it perfectly clear, that the officer acted at his peril, and would be considered in the light of a trespasser, if he could not, as Stevens certainly may, justify his conduct, by pleading, that he acted as he did, at the express request of the prize-master and commander of the vessel. However the general principle of law then may be, we have no doubt, that, if a collector, or other revenue officer, intending to act in the line of his official duty, but mistaking the law, and transcending his authority, is the meritorious cause of saving property to the owner, he is not precluded, on account of the motive which actuated him, from claiming salvage; and that such was the present case. Two other objections have been made to this claim, which deserve to be noticed.—The first is, that the seizure of this property was not made with a view to save it from loss, or to benefit the owner; and that, consequently, the claimants have not the merit of salvors; nor are they entitled as such to compensation. 2. That, upon the fair construction of the 9th article of the Spanish Treaty, the property ought to be restored entire, free from every deduction. 1. As to the first of these objections, it might be a sufficient answer to say, that it is not supported in point of fact. It is expressly sworn, by Bedwell, that the seizure was made by the deputy-collector, at his request, and upon his representation of the mutinous conduct and unlawful intentions of the crew to put to sea, and to smuggle the cargo on shore; and that he stated to Stevens, that his object was to have the Tigre detained, until he could hear from the agents of the owners of the privateer. If this be so, and the evidence stands entirely uncontradicted, it is fair to conclude, that, in making the seizure, and in detaining the vessel, Stevens was influenced by the double motive of preventing a breach of the laws, and also of rescuing the property from the destruction with which it was threatened, should the crew persist in their design. But we by no means acknowledge the soundness of the objection in point of law. The owner, whose property has been preserved from destruction by the acts of a stranger, has no right to inquire into the motives which influenced his conduct, provided he acted legally. It is sufficient to entitle the salvor to a just compensation, that a beneficial service has been rendered, by which the property has been rescued from imminent danger. It is only in estimating the quantum of compensation, that considerations of this nature should be taken into account. The intention of the salvor may have been to appropriate the whole of the property to his own use; as where a vessel, captured as prize, turns out to be a mere case of salvage. "The re-captor," observes the chief justice, in the case of Talbot v. Seamen, 1 Cranch [5 U. S.] 36, "is seldom actuated by the sole view of saving the vessel. In no case has the inquiry been made." 2. The Spanish Treaty.—The 9th article declares, that "all ships and merchandise, of what nature soever, which shall be rescued out of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of, and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof."

The only question in this case is, whether the rescue was made from pirates or robbers? And this must be decided by the evidence in the cause. It is certainly a matter both of surprise and regret, that the fact of the national character of the Constitution, is left in so much doubt by the imperfect manner in which the evidence has been taken; for, it can scarcely be supposed, that if the prize-master and crew had been examined upon this point, they could not have given important information in respect to it. It is highly probable, that Bedwell knew whether she was built or owned in Buenos Ayres; and he must have known whether she had on board a commission from the government of that country or not. Yet his evidence is altogether unsatisfactory upon these points; nor is he even asked any question, by either side, calculated to throw light upon them. If, then, the evidence as to the national character of the vessel, and her authority to make captures, be defective, how ought this circumstance to affect the question under consideration? We are of opinion, that it must operate against the party who alleges the fact, that the capture was piratically made. To the claim of salvage, for a rescue of Spanish property captured at sea as prize of war, by a vessel professing, at least, to be an enemy of Spain, the owner sets up the Spanish treaty; which requires the restitution to be entire, provided the rescue be made out of the hands of pirates and robbers. He must therefore bring the case within the treaty; and to do this, it is incumbent upon him to prove that the captors were pirates and robbers. What degree of proof would be sufficient to establish that fact, would be another question; but that the onus is upon him, can hardly, we think, be doubted. The evidence ought, at least, to be such as to lay a reasonable ground for believing, that the taking was piratical, so as to shift the burthen of proof to the other side. It might not be necessary, for example, that the owner should prove, that the vessel had no commission; and yet if the fact were so, it must have been within the knowledge of the prize-master, who was examined by both parties. If the

capture were prima facie illegal, and it were proved that the Constitution was owned by a neufral, it would be sufficient to establish the fact of piracy; unless the claimants could show her to have been regularly commissioned.. For, if she were, in fact, a Buenos Ayrean bottom, the capture would be legal, although she had no commission; and the only effect of the want of one would be, that the prize would be condemned to the government of Buenos Ayres, instead of the captors. But there could be no ground for the charge of piracy against the captors. Whether the evidence in this cause would be strong enough to prove the legality of the capture, if that were now the point of inquiry, need not be decided. It is sufficient to withdraw the case from the operation of the treaty, that a piratical taking by the Constitution is not made out. The evidence, indeed, such as it is, would rather lead us to a different conclusion. Amongst the papers found on board the ship, is one which purports to be the copy of a commission for the Constitution, with the signature of Puerydon, supreme director of the united provinces of Buenos Ayres, dated at Buenos Ayres, with an endorsement by A. Micah, the original commander; authorizing Captain Broom to take command of the Buenos Ayrean brig of war Constitution, and to act as commander, conformable to the said commission of the Buenos Ayres government, and the orders of the owner or merchant of Buenos Ayres. Bedwell, in his deposition, speaks of her as a Buenos Ayrean national vessel; and he swears he sailed in her on a cruise to capture Spanish property. He also swears, that, after the capture of the Tigre, he was put on board of her as prize-master, with directions to carry her to Buenos Ayres, for condemnation; that his intention, when he left the Constitution, was to go to Buenos Ayres; and that he afterwards endeavoured to get to Margaretta, on account of his being short of water—where he intended to bring the property to adjudication; but that his crew compelled him to come to the United States. This evidence is strongly corroborated by the letter of instructions to Bedwell, found amongst the papers of the Tigre, seized by the commander of the Constitution, dated on board the Buenos Ayres brig Constitution, in which he is ordered to take the prize to Buenos Ayres, and is informed, that he will be entitled to an additional share, if he gets her in safe. Now, taking this evidence altogether, it is difficult to resist the belief, that at least the Constitution belonged to Buenos Ayres, and was there owned. The papers above mentioned speak of her as such; and if she was so, we have already stated, that it is immaterial, whether she had a commission or not, so far as the question of piracy is involved in the case. If the Constitution was not a commissioned privateer, the whole property would have been condemned to the government of Buenos Ayres; and consequently, the promise to allow any share of the property to Bedwell, would have been made without authority. And if she was not only uncommissioned, but was in truth the property of a neutral, is it credible, that the prize would have been ordered or conducted to Buenos Ayres, or to the port of any other civilized country, for the purpose of adjudication; and thus to expose the property to confiscation, and the prize-master and crew to the danger of being tried as pirates? Upon the whole, we are of opinion, that the charge of piracy not being established, the case is not within the operation of the Spanish treaty.

The only remaining inquiry respects the quantum of compensation to be allowed to the two claimants. This must depend upon the exercise of a sound discretion, after taking into view the damage from which the property was relieved, the risk run, and the labour employed in saving the property. We are fully satisfied, that, but for the interference of the claimants, this valuable property would have been lost to the owners. At the same time, we are of opinion that this is a case of very little merit. The rescue was made while the vessel was lying at anchor, within the district of the collector whose deputy made it, without the slightest personal danger, and with very little labour; for, although Bedwell's fears induced him to suspect his crew of mutinous intentions, yet it is most clear, that if even his suspicions were well founded, (and the contrary is proved by the crew;) still Stevens took possession of the vessel, not only without opposition, but without a murmur from the crew; she was, with little trouble, and no hazard, conducted to a place of safety, by persons employed by Stevens; and who appear to have been satisfied with a very moderate compensation made to them by the claimants. In making the seizure, no legal responsibility was incurred; not only because the act done to save the property was meritorious; but because it was performed at the request of the prize-master. This is a very different case from those of derelict, re-capture from the enemy at sea, rescue from mutineers, and the like. In general, those are attended with danger, either to the persons employed in the service, or to the vessel and cargo so engaged. We have looked into the cases; and find, that in some of them, though possessing a greater merit than this can boast of, a much lower rate of compensation, than is given in this case, has been allowed. The case of The Franklin, 4 C. Rob. Adm. 147, was that of a British vessel and cargo, captured whilst going into an enemy's port, whereby she was saved to the owners from inevitable destruction. The court refused to allow military salvage, because the property was not captured from the possession of the owner; but for the actual service rendered, a compensation, by way of salvage, was decreed, of about one sixtieth part of the appraised value, over and above expenses incurred. The case of

The William Beckford, 3 C. Rob. Adm. 355, was that of a rescue of a slave ship from insurgent slaves, and one tenth only was allowed. We regret that we have not an opportunity of looking into the American decisions upon this subject, to see what has been the usual rate allowed in cases resembling the present. But we are well satisfied, that these claimants will be amply rewarded for all the services which they have rendered to the owners of the Tigre, by allowing each of them 1000 dollars, over and above the sums paid by them to the persons employed to aid in seizing this vessel, and navigating her to Cohansey creek, together with any other reasonable expenses to which they have been put, in preserving the property; all which expenses, are to be ascertained by the register of the court. We shall allow the claimants their costs.

The sentence of the district court is to be reversed, so far as it allows to the claimants one fifth of the property saved for salvage; and is affirmed in all other respects, reforming it as above.

Case No. 8,282.

LETOURNO v. RINGGOLD.

[3 Cranch, C. C. 103.] [1]

Circuit Court, District of Columbia. May Term, 1827.

TRUST—EFFECT OF DEED OF TRUST AS BETWEEN PREFERRED AND GENERAL CREDITORS.

A deed conveying, in trust, to secure certain creditors, certain specified articles of personal property, does not protect from the general creditors, articles purchased to supply the place of articles sold by the trustee; unless so stipulated in the deed of trust.

Replevin, for goods taken in execution by the defendant [Tench Ringgold], as marshal of the District of Columbia, at the suit of a creditor of Joseph Letourno. Joseph, the debtor, was also indebted to his brother Clement, the plaintiff in this cause; and to secure that debt, conveyed to one Elijah White, by a deed of bargain and sale, dated on the 25th of February, 1825, all his household furniture and stock in trade, as a tavern-keeper, (a particular schedule of which was annexed to the deed,) in trust to permit Joseph to remain in possession and to use them until the execution of the trust; and providing that White should preserve the property for the purpose of securing the payment of $1363.50 due to Clement Letourno, the plaintiff, within a year from the date of the deed; after which he was, on demand, to deliver up the property to Clement, to be sold in discharge of that debt, if it should not have been before paid. And by a second deed, dated October 18, 1825, reciting that part of the goods, mentioned in the schedule, had been sold and other goods substituted, conveyed to the said White upon the same trusts, the goods, stock in trade, &c., then in the house, (other than those contained in the schedule annexed to the former deed;) and also such as might thereafter, before the extinguishment of the debt to Clement, "be purchased or procured out of the profits or proceeds of the same, or for the purpose of replacing any of the goods, wares, merchandise, stock in trade, furniture, or other articles now in the house; or for carrying on the business of the said Joseph Letourno."

The defendant's counsel prayed THE COURT to instruct the jury, that the deed did not convey the after-acquired property.

But THE COURT instructed the jury that the deed of the 18th of October, if not otherwise fraudulent, protected the goods purchased, since the date of the last deed, out of the profits or proceeds of the goods which had been acquired between the dates of the two deeds; but not such as may have been purchased since the date of the last deed, out of the proceeds or profits of the goods conveyed by the first deed, and sold since the date of the last deed. See the case of Wagner v. Watts [Case No. 17,040], at June term, 1819, in this court. Verdict for the defendant.

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

Case No. 8,283.

LETTS et al. v. HACKETT.

[6 Chi. Leg. News, 283; Brown's Adm. 480.]

District Court, E. D. Michigan. March 9, 1874.

PRINCIPAL AND AGENT—LIABILITY OF OWNER OF VESSEL FOR FAILURE OF MASTER TO NOTIFY SHIPPER.

Liability of owner of vessel for fault of master in failing to notify the agent of the shipper of his leaving, so that he could have effected an insurance on the cargo.

The libel in this case is based upon a contract of affreightment of a cargo or cargoes of coal to be transported in respondent's vessels from Cleveland to Detroit, in November, 1872. A part of one cargo, about 295 tons, was taken on board respondent's barge Ontario, and the weather being threatening and the closing of the navigation imminent, the barge put to sea, and together with the cargo was lost. The loss was clearly by a peril of the sea, and no damages are claimed on that account. The cargo was not insured, however, and it is claimed on the part of the libelants that the failure to insure was owing to the neglect and misconduct of the master of the barge, and it is to recover damages on this account the suit was brought.

Libelants [Charles E. Letts and William A. Carpenter] were coal dealers in Detroit, and, as such, purchased coal in large quantities of the Pennsylvania Coal Company, in Cleveland; and they had a standing arrangement with the agent of the company there to insure for libelants all cargoes of coal shipped to them in vessels of a certain class, and

to which class the barge Ontario belonged. On application of the master of the barge to the agent of the coal company for a cargo for libelants, he was sent up the river about a mile, to take on a part of a cargo at the "Mahoning Shoots," so called, and was then to return to the company's docks near the mouth of the river, and complete his lading, which was to be 400 tons. After taking on about 295 tons at the Mahoning shoots, the barge came down for the purpose of completing her load, but could not lay at the company's dock for that purpose on account of the weather, and so laid up to a dock further up the river to await the abating of the storm. During the following night, the storm having abated, the master of the barge was notified by the tug Torrent, upon which he depended to make the voyage, that if he went with her he must get ready and put to sea at once. Close of navigation by the setting in of winter being imminent, the master of the barge decided to go with the Torrent, that being, as he believed, his only chance to reach Detroit (his home port,) that season, and he so left early next morning. The barge so left without completing her load, without a bill of lading, and without notifying the agent of the company; and the agent testifies that he had no knowledge of her having left until he heard of the catastrophe by which she was lost; and no insurance was effected.

The question is, is the respondent [Robert J. Hackett] liable for the loss on account of the failure to insure?

H. B. Brown, for libelants.
Wm. A. Moore, for respondent.

LONGYEAR, District Judge. The alleged faults upon which this action is based are all summed up in the failure of the master of the barge to notify the agent of his leaving, so that he could at once have effected an insurance on the cargo, as it is claimed it was his duty to do. It was said it was the duty of the master to complete his lading. This is important only because in that case the agent would probably have known of his leaving, and the amount of cargo to be insured. It was also said that it was the duty of the master to sign a bill of lading before leaving; but this was important only for the same reason as the other. Let it be conceded, therefore, that the duties of the master of the barge were as claimed; that he failed to discharge those duties without legal excuse; and that the failure to obtain insurance on the cargo was wholly owing to such failure on the part of the master, (as to which latter proposition, however, I think there is doubt,) and the important question which meets us at the threshold is, are the damages sustained by libelants legally chargeable to respondent under the allegations and proofs in the case? Whatever difficulty there may be, and it is often great, in determining what damages arising out of breach of contract, are sufficiently direct and immediate, and what are too remote to be allowed against a party so in default, the rule of law is well settled that the damages must in all cases be such as must have been in the contemplation of the parties when the contract was entered into. Sedg. Dam. 63–76; 2 Greenl. Ev. § 256, and note 6; Fox v. Harding, 7 Cush. 522; Hadley v. Baxendale, 9 Exch. 341, 354; Hutchings v. Ladd, 16 Mich. 493, 505.

The arrangement between libelants and the agent of the coal company in regard to insurance was entirely separate from and independent of the contract of affreightment, and there is no allegation and no testimony even tending to prove that respondent was informed or knew of its existence when the contract of affreightment was made, or afterwards. Under these circumstances it can not be said that damages arising out of a failure to insure could have been in the contemplation of the respondent when he entered into the contract of affreightment. Under the foregoing rule of law, therefore, respondent can not be held liable for the damages complained of. But even if the facts were such as to bring the libelants' case within the rule of law above stated as to damages, I think the libelants could not recover, because it is by no means certain that the insurance would have been effected if the barge had waited to complete her lading, or the agent had been notified of her leaving when she did leave. In order to insure it was necessary, of course, that the agent should ascertain the number of tons on board. The master of the barge testifies that when he had taken on what he did take on at the Mahoning shoots, he requested of the weigher a statement of the number of tons, and was informed by the weigher that he could not give it to him there, but it would be sent down to the coal company's office. This was not done until the next day, or next but one, after the barge had left and after the catastrophe had happened, when, of course, it was too late to insure. It is true, if the barge had waited to complete her lading, the information might have been received before she left; but the court would hardly hold a party liable upon a mere probability of that sort, especially in view of the apparent urgency of the necessity of the barge leaving when she did, and without completing her lading. But it is not necessary to put the decision upon this point. The first point is clearly sufficient to dispose of the case adversely to the libelants. The libel must be dismissed with costs to the respondent.

Case No. 8,284.

Ex parte LETTY.

[1 Cranch, C. C. 328.] [1]

Circuit Court, District of Columbia. July Term, 1806.

SLAVERY—PETITION FOR FREEDOM—HABEAS CORPUS—SECURITY.

A petitioner for freedom, in custody, will not be discharged upon the request of the master, unless upon security given by him to have the petitioner forthcoming, &c., to prosecute a claim for freedom.

Habeas corpus upon the petition of a man claiming to be the master of the negro Letty, committed to jail by a magistrate, upon a complaint made that she was entitled to her freedom under the law of Virginia, December 25, 1795 (Rev. Code 1803, p. 346).

Mr. Youngs, for her master, contended that the justice had not stated that the master failed or refused to give bond. That her title to freedom must be proved, by legal evidence, before she can be detained against the will of the master. The negro had been confined in jail in Washington, and, while in jail there, was sold by B. G. Orr to Henry Dawes, of Georgetown, by him brought to Alexandria, and sold to Dozier, of South Carolina. She had petitioned for her freedom in Washington county, where the petition was still pending.

Mr. Hiort, for prisoner, filed a petition praying that she may be protected from being removed out of the district, until her petition for freedom can be heard in Washington.

THE COURT, after consideration, refused to suffer the master to take the negro away, unless upon giving security not to take her out of the District of Columbia, &c., according to the Maryland practice, and remanded her.

Case No. 8,285.

LETTY et al. v. LOWE.

[2 Cranch, C. C. 634.] [1]

Circuit Court, District of Columbia. Dec. Term, 1825.

SLAVERY—REPAYMENT OF PURCHASE MONEY—FREEDOM—DEED OF EMANCIPATION.

A female slave, purchased by the defendant at the request of the slave, to enable her to obtain her freedom by repayment of the purchase-money, is not entitled to judgment in her favor, until she has repaid the whole purchase-money; and if she had paid the whole purchase-money, quaere whether she would be entitled to judgment in her favor, either at law or in equity, without a deed of emancipation.

Petition for freedom. On the trial of this cause, Thomas Bingay, a witness for the petitioner, testified that he was present at the bargain between the defendant and Mary Greenfield, for the purchase of the petitioner, who was held by the said Mary Greenfield, as a slave for life, and was offered for sale by her mistress; that the price agreed upon to be paid by the defendant, was $250. That the witness then took the defendant aside, and inquired of him what was his purpose and object in making the said purchase; to which he replied that he was about to make the said purchase from motives only of Christian charity, and to serve the said woman, of whom he had a good opinion, and whom he thought it his duty to serve; that he had confidence in her that she would repay him what he should advance, and that she should then be free. The witness told him if that was his object in making the said purchase, he would, if he desired it, be security for Letty for $50; that she would pay up, in small sums, what he might advance; and that he would, moreover, put into his hands $40 then, to enable him to make the first payment for Letty. The defendant declined requiring the security, saying he had confidence in the woman, but agreed to receive the $40, which the witness thereupon paid him. The witness got the said $40 from a colored woman, to whom Letty told him to apply for it, saying that it had been contributed by some friends of hers, for the purpose of enabling her to buy herself of her said mistress. That he would not have given the said $40 to the defendant, but for his stating that he was making the purchase from the motives and for the purpose aforesaid. That after the said bargain, the defendant never claimed nor held the petitioner in his service; but that she lived at large, as a free woman, in the city of Washington, where the defendant also lived; and that after the said bargain, and while so living at large, the child mentioned in the petition, was born. That the defendant after receiving the $40, paid it to Mrs. Greenfield, but no information was given to her of the object of the defendant in making the said purchase. That this transaction took place some time in the year 1818, and at that time no bill of sale was executed, nor any receipt given for the money paid.

And the petitioner also produced and read in evidence the paper writings following, admitted to be signed by the defendant.

"Washington City. This is to certify that Letty Brown, the bearer of this, is my property; that I, in 1817 or 1818, purchased her from Miss Mary Greenfield, then her mistress. I further certify that I have received from her (Letty,) at sundry times, $206, and that there is now due, on the purchase-money, &c., to me, $64.94, on payment of which I hereby promise and bind myself that she (Letty) shall be free, her lifetime, from bondage to any person or persons. Given under my hand this 21st day of February, in the year 1823. John H. Lowe. Balance due and to be paid J. H. B., $64.94."

"Washington City, 8th October, 1823. Received from Letty, through the hands of Mr.

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

Bingay, $20, in part payment of the above claim. John H. Lowe."

"Received of Letty nine dollars. 5th February, 1825. J. H. Lowe."

The petition was filed on the 15th of July, 1825.

Upon this evidence, Mr. Jones, for defendant, prayed the court to instruct the jury that the petitioner was not entitled to recover; because: 1st. A slave is not competent in law to be a party to a binding contract. 2d. There can be no emancipation, but by deed, according to the provisions of the Maryland act of 1796, c. 67, or by last will and testament. 3d. The whole purchase-money has not yet been repaid to the defendant.

Mr. Lear and Mr. Key, contra.

In the case of Brown v. Wingard [Case No. 2,034], at April term, 1822, this court only decided that there could not be a contract between the master and his slave, even in equity. But this is a contract between a slave and a third person. Here Mr. Lowe was only the trustee of the slave, and bought her only for her own use. The witness, Bingay, was also a trustee, and may enforce this contract. It is not necessary, under the law of Maryland, that there should be a deed of manumission. Freedom may be obtained by implication. The defendant never had the right of property in the slave, he was only trustee, and no deed of manumission was necessary from him. Hall v. Mullin, 5 Har. & J. 190.

The jury is to decide whether the whole purchase-money has been repaid to the defendant. In the case of Crawford v. Cruse [Case No. 3,367], this court decided that there was a remedy for the slave in equity.

Mr. Jones, in reply.

In Crawford v. Cruse, this court said there was a remedy in equity, consequently not at law. If the defendant never had the legal title, then the petitioner can have no right to freedom. It is said that freedom may be gained by implication in a will; but there must be a will; and the whole question in Hall v. Mullin, was as to the true construction of the will; that is, whether the testator intended to give freedom to his slaves. But here is neither a will, nor a deed of emancipation. There was no contract between Bingay and the defendant. He merely received the $40 from Letty and gave it to the defendant. This is a suit at law, and the petitioner must show a legal, consummate, title to freedom. In Crawford v. Cruse, the suit was in equity, upon a contract between persons competent to contract.

THE COURT (MORSELL, Circuit Judge, absent) could not agree to give the instruction. The defendant then demurred to the evidence.

At the next term (May, 1826) THE COURT (THRUSTON, Circuit Judge, contra) ordered judgment to be entered for the defendant upon the demurrer, without prejudice to any equitable relief which the petitioners might thereafter have.

LETZ v. CLARK. See Case No. 9,971.

LEVEE COMMISSIONERS (BARCLAY v.). See Case No. 977.

LEVEE COMMISSIONERS (HEINE v.). See Case No. 6,325.

LEVERIDGE (EUBANKS v.). See Case No. 4,544.

Case No. 8,286.

LEVERING v. BANK OF COLUMBIA.

[1 Cranch, C. C. 152.] [1]

Circuit Court, District of Columbia. Dec. Term, 1803.

MARITIME LIENS — PROVISION AND REPAIRS—SEAMAN'S LIEN.

1. A ship lying in Baltimore, whose owners reside in Alexandria, is not liable for provisions and repairs, Baltimore and Alexandria not being foreign to each other.

2. But the ship is liable to a seaman shipped for a voyage not prosecuted.

[Cited in The Atlantic, 53 Fed. 609.]

This was an action on the case for money paid, laid out and expended, and for money had and received. The bank having a claim against one Hamilton, a part owner of the ship Alexandria, caused her to be attached at Baltimore, and obtained judgment of condemnation. At the sheriff's sale, the plaintiff became the purchaser, but under an agreement with the bank that they should exonerate him from all liens and incumbrances on the ship. The seamen libelled the ship for wages, and the plaintiff finding their claim just, paid them, and now brought this action to recover the amount of such payments from the bank. It was admitted by the defendants that the plaintiff would have a right to recover if there were any claims against the ship for which the claimants had a lien at the time of the sale; and which the plaintiff had paid. The charges paid by the plaintiff were for the mate's wages, work done for repairs on the ship, and for provisions. It appeared that the mate was engaged at Alexandria, where the former owners lived, to go to Baltimore to take charge of the ship, and prepare her for sea; that when he arrived he found Hamilton's share attached, and in the custody of the sheriff; that after remaining on board about fourteen days, he was directed by the owners at Alexandria not to proceed in preparing the ship for sea, but to remain on board to take care of her: he was to have one dollar a day until that vessel sailed, after which he was to have thirty-six dollars per month as mate. He went on board the 10th January, and remained on board till the 16th of June, when the ship was sold by the sheriff.

Mason & Key, for defendants, contended that, as to repairs and provisions, in order to make the ship liable they must be furnished

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

while the ship was on her voyage, or else that there must be an express hypothecation; that Baltimore could not be deemed a foreign country as to Alexandria; and, as to the mate's wages, they admitted that if he was employed as a mariner by the owners, in contemplation of a voyage, and to prepare the ship for such a voyage, she was liable to him for his wages while so employed in port, but contended that, by his remaining on board after the orders of countermand were given, he remained there under a new contract, and was a mere ship-keeper, for which service he had no lien on the ship, and cited Green v. Farmer, 4 Burrows, 2214; Godin v. London Assur. Co., 1 Burrows, 494; Ex parte Shank, 1 Atk. 234; Abb. Shipp. 66, 91, 108; Rich v. Coe, Cowp. 636; Westerdell v. Dale, 7 Term R. 312; Abb. Shipp. 288; Watkinson v. Bernadiston, 2 P. Wms. 367; Wells v. Osmond, 6 Mod. 238. The remedy of the plaintiff against the former owners is good for these charges.

Gantt & Morsell, for plaintiff. Whenever necessary supplies are furnished to a ship, the individual has a triple security; the master, owners and ship. In any case in which a master may hypothecate, if necessaries are furnished, the ship is liable without hypothecation. The contract was made on the credit of the ship, and not on that of the owners, who, as to Baltimore, were in a foreign country, that is, in Alexandria. Mariners may libel where the compact is made on land, and cannot libel unless their lien on the ship is perfect. The cases cited are upon questions to the jurisdiction of the court of admiralty, not upon the nature of the contracts. 4 Bac. Abr. 615; Yates v. Hall, 1 Term R. 73; 2 Term R. 73; 1 Com. Dig. 391; Wells v. Osman, 2 Ld. Raym. 1044; Cro. Car. 296; Hoare v. Clement, 2 Show. 338; 4 Bac. Abr. 620; Abb. Shipp. 102; Menetone v. Gibbons, 3 Term R. 267; Rich v. Coe, Cowp. 636; 2 Bac. Abr. 176; Ross v. Walker, 2 Wils. 264.

KILTY, Chief Judge. That there was no lien as to the repairs and provisions, Baltimore and Alexandria not being foreign ports to each other. That to make the ship liable to seamen for work done in port, it is not necessary that they should be hired for a specific voyage; that mariners may be hired by the owners themselves, and in such case they are not to be considered as relying solely upon the personal credit of the owners, and as losing their lien on the ship; that if a mariner is hired for an uncertain voyage, and not a specific one, the owners or the master may discharge such mariner; that if a seaman is hired for a voyage, and to do duty while in port in preparing for the the voyage, and the voyage is not prosecuted, the ship is liable to such mariner for his service while in port; that the claim of the mate in this case was a lien upon the ship if he remained on board under the first agreement; but if the prosecution of the voyage was abandoned, and after the revocation of the first orders, he remained on board to take care of the ship in port, a voyage not being contemplated at the time of such revocation, his claim for wages which accrued subsequently was not a lien on the ship.

The jury could not agree, and a juror was withdrawn by consent, and the cause continued. Levering v. Bank of Columbia [Case No. 8,287].

Case No. 8,287.

LEVERING v. BANK OF COLUMBIA.

[1 Cranch, C. C. 207.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

MARITIME LIENS—PROVISIONS AND REPAIRS—SEAMAN'S LIEN.

The wages of a seaman on board of a ship in port who was hired to take care of her, at a dollar a day while in port, are not a lien on the ship; nor are repairs and provisions furnished to a ship in Baltimore in Maryland, the owners residing in Alexandria, District of Columbia.

Assumpsit, for money paid and advanced for the use of the defendants. The jury not having agreed at the former trial, in December term, 1803 [Case No. 8,286], the cause now came on again, and the facts appeared to be as follows: The defendants had sold to the plaintiff half of the ship Alexandria, to be delivered to the plaintiff free of all liens and incumbrances. One Donaldson was hired by the former owners, at Alexandria (D. C.), to go to Baltimore, and to take charge of the ship, until the owners should get a freight for her, and prepare her for a voyage. In case a freight should be procured he was to go the voyage as mate, at thirty-six dollars a month. The owners then resided in Alexandria.

Mr. Morsell, for plaintiff, contended that the following claims are liens on the ship: (1) Mate's wages while the vessel lay in the port of Baltimore. (2) Repairs, particularly a figure-head, &c., made in Baltimore. (3) Provisions and necessaries furnished the ship while in Baltimore, by persons residing in Baltimore, and cited the following authorities: Wells v. Osman, 2 Ld. Raym. 1044; Rich v. Coe, Cowp. 636; 2 Bac. Abr. (Gwyll. Ed.) 108, 181; 4 Inst. 141; 1 Vent. 146, 343; 3 Mod. 244, 245; Clay v. Sudgrave and Bayly v. Grant, Salk. 133, pl. 4, 5; 1 Ld. Raym. 576, 632, Carth. 518; Wheeler v. Thompson, Strange, 707; Ragg v. King, Id. 858; Read v. Chapman, Id. 937; Alleson v. Marsh, 2 Vent. 181; Rolle Abr. 533; Cro. Car. 296. Resolution of the judges respecting the admiralty jurisdiction: Ross v. Walker, 2 Wils. 264; 1 Com. Dig. 390; Hook

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

v. Moreton, 1 Ld. Raym. 397; Opy v. Child, 1 Salk. 31; Westerdell v. Dale, 7 Term R. 306; Farmer v. Davies, 1 Term R. 108; 4 Burrows, 2220; Green v. Farmer, Id.; Farrel v. McClea, 1 Dall. [1 U. S.] 392.

Mr. Mason and Mr. P. B. Key, contra, contended that there was no lien for any of the claims. The wages claimed by Donaldson were not due upon a contract to be performed at sea; it was a contract made on land, to be performed on land; it was not in the usual form of a maritime contract. No voyage was ever agreed upon or made. There is no lien for repairs made in the country of the owner. As to the admiralty jurisdiction, all the ports of the United States are parts of one country. Alexandria and Baltimore are not foreign to each other. There was no lien for provisions furnished to the ship in Baltimore. They cited the following authorities: 1 Bac. Abr. (Old Ed.) 622, tit. "Admiralty"; Ross v. Walker, 2 Wils. 264; 6 Mod. 238; Wells v. Osmond, 6 Mod. 238; Watkinson v. Bernadiston, 2 P. Wms. 367, and note to that case; Abb. Shipp. 290, 378; Buxton v. Snee, 1 Ves. Sr. 154; Abb. Shipp. 91, 379, and the cases there cited; Hoare v. Clement, 2 Show. 338; Ex parte Shank, 1 Atk. 234; Wilkins v. Carmichael, Doug. 101; Wood v. Hamilton. Dom. Proc., June 15, 1789.

THE COURT instructed the jury as follows: That if the jury should be of opinion, from the evidence, that the contract between the owners and Ronald Donaldson was that he should go from Alexandria to Baltimore, there to take charge of the said ship as mate, and prepare her to receive a cargo as soon as the owners should be able to procure a freight for her, and that he should be paid at the rate of one dollar a day for the time he should be so employed in the port of Baltimore, the ship was never liable for the wages due to him for the time he was so employed. But if the jury should be of opinion, from the evidence, that the work done by Donaldson was done by him as mate, under a contract made by the owners with him to perform a stipulated voyage, then the ship was liable for his wages for the time he was actually employed, although the contemplated voyage was not performed, unless the non-performance was owing to the default of the said Donaldson. The ship was not liable for the repairs, nor for the provisions furnished.

The jury having been out two days, THE COURT ordered them to be brought in and gave them the following instruction, viz.: The court, in this case, further instruct the jury, that if they should find the facts to be true, as stated in the paper handed to them and admitted by the counsel on both sides, then the contract made by the owners of the said ship with the said Donaldson consisted of two separate parts, one of which was absolute, whereby he was to go to Baltimore and go on board the said ship and prepare her to receive a cargo as soon as the said owners should be able to procure a freight for her, and that he was thereby to receive for his wages one dollar a day and be found, while he continued on board the ship in port preparing her to receive a cargo. That the other part of the said contract was contingent, and was not to take effect until the said ship should take in a cargo and proceed to sea; and that by this last part of the contract, if it had been carried into effect, the said Donaldson would have been entitled to thirty-six dollars per month for his time after the vessel sailed, but no provision was in this second part of the contract made for his wages while in the port of Baltimore, as aforesaid.

Verdict for the defendants. No writ of error was ever prosecuted. See Ramsay v. Allegre, 12 Wheat. [25 U. S.] 611, Judge Johnson's opinion, and Clinton v. The Hannah [Case No. 2,898]; Shrewsbury v. The Two Friends [Id. 12,819]; Bridgeman's Case, Hob. 11; Justin v. Ballam, 2 Ld. Raym. 805.

LEVERING (CONNER v.). See Case No. 3,114.

LEVERING (JACOBS v.). See Case No. 7,162.

Case No. 8,288.

LEVERINGE v. DAYTON.

[4 Wash. C. C. 698.] [1]

Circuit Court, D. New Jersey. Oct. Term, 1827.

EVIDENCE—SUFFICIENCY—COPY OF DOCKET ENTRIES—LEDGER—ORIGINAL ENTRIES.

1. Where the judgment of another court forms a necessary part of the evidence, a mere copy of the docket entries, without even the substantial form of this judgment, is not sufficient evidence.

[Cited in Cromwell v. Bank of Pittsburg, Case No. 3,409; Young v. Martin, 8 Wall. (75 U. S.) 357; Re Coleman, Case No. 2,980.]

[Cited in Hoehne v. Trugillo, 1 Colo. 161; Rape v. Heaton, 9 Wis. 316 (Old Series, 334).]

2. The plaintiff's or defendant's ledger, proved to contain original entries, is not evidence.

This was an action of assumpsit. The principal item in the bill of particulars delivered to the defendant [Joseph Dayton] was one for about $1700 principal, interest and costs, paid by the plaintiff [Jacob Leveringe] under an execution upon a judgment rendered on a custom house bond to the United States, executed by the defendant as principal, and the plaintiff as his surety. To prove this item, the plaintiff offered in evidence a paper under the seal of the district court of Pennsylvania, certified by the clerk of that court to be a true copy of the

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

docket entries in a suit of the United States v. Dayton and Leveringe [unreported], with a certificate of judge of that court subjoined, "that the above attestation is in due form." The contents of this paper were nearly as follows: viz. "United States v. Leveringe, &c. nar. filed—on motion judgment for the United States v. Leveringe; exit capias ad satisfaciendum, $1602," to which are added the interest and costs in figures. "July 3d. Satisfaction acknowledged." This evidence being objected to by the defendant's counsel, the plaintiff's counsel proved by a witness that he applied to the clerk of the district court for the Eastern district of Pennsylvania, for a copy of the judgment and other proceedings in the above case, and that in compliance with this application, the above paper was delivered to him, and that it is the practice of that officer to deliver a similar paper in cases like the present. The court refused to admit the evidence.

Mr. Wood, for plaintiff.
Mr. Elmer, for defendant.

WASHINGTON, Circuit Justice. The plaintiff relies upon a record to prove payment of a certain sum composed of principal, interest and costs, under a judgment and execution against him. But the paper produced is no record of a judgment or execution; it is a mere minute of the proceedings of the court, taken by the clerk to enable him to make up a record. The paper contains no judgment, nor even the minute of a judgment for any sum at all, unless we are to connect the figuring with the general entry, "judgment for the United States," and then conclude that the aggregate of the sums stated is that for which the judgment was rendered; which would be going much further than any court in my opinion ought to do. In short, this paper does not inform us that the action to which it relates was on a bond in which the plaintiff was surety, or what was the nature of the demand; for what sum the judgment was entered, or the execution issued. I do not say that the record need be made out with the same precision in matter of form, as if it were to accompany a writ of error to a superior court. But the proceedings should be stated, and the judgment ought to have substantially at least the form of a judgment.

The plaintiff's counsel then offered a paper headed thus: "United States v. Dayton and Leveringe, in the district court of the United States, capias satisfaciendum," with an acknowledgment annexed, signed by the marshal, that he had received of Leveringe, one of the defendants above mentioned, the sum of $1718 in full, for debt, interest and costs in the above suit. This evidence was likewise overruled.

WASHINGTON, Circuit Justice. This paper contains a receipt of principal, interest and costs, not by the United States or their agent, but by a person styling himself marshal. Where was his authority to receive even the principal and interest of the debt due to the United States; much less the costs? A judgment and execution would have amounted to such an authority, but no sufficient evidence of either has been given.

The plaintiff's counsel then offered the plaintiff's ledger, proved by a witness to contain original entries, in which is an account raised against Dayton and Weightman, and the following debet, viz. "To duties, $1602.82 cents." The counsel admitted that this would not be good evidence at common law, but insisted that it was admissible according to the regular practice of the courts in this state. Judge Rossel stated a case in which evidence of this kind had been admitted, and the judgment of the court, in which it had been so admitted, was for that cause reversed by the supreme court.

WASHINGTON, Circuit Justice. The case mentioned by the district judge is conclusive. The evidence must be rejected.

The plaintiff then consented to be called, and a nonsuit was entered.

LEVETT (WHIPPLE v.). See Case No. 17,518.

LEVI (FOXALL v.). See Case No. 5,015.

LEVI v. HOME MUT. INS. CO. See Case No. 8,290.

Case No. 8,289.

LEVI et al. v. NATIONAL BANK OF MISSOURI.

[5 Dill. 104;[1] 7 Cent. Law J. 249; 7 Am. Law Rec. 283.]

Circuit Court, E. D. Missouri. Sept. Term, 1878.

BANK AS COLLECTING AGENT—PAYMENT BY CHECK—CERTIFICATION OF CHECK — FAILURE OF COLLECTING BANK—RIGHT TO COLLECT AND CREDIT AFTER SUSPENSION.

1. A bank, acting as the collecting agent of another bank, has, in the absence of special authority or usage, no right to receive in payment anything but money; if it receives the check of the debtor on another bank, this is conditional payment only, and it becomes the agent of the drawer of the check to receive the money thereon, and until the money is received the payment is not complete.

2. The defendant bank received from the plaintiffs, their correspondent, a bill of exchange "for collection and credit," and accepted from the drawee his check on a third bank for the amount, and surrendered the bill of exchange. On presenting the check, instead of demanding the money thereon, it accepted its certification as good, and suspended the same day, having previously credited the plaintiffs with the amount. On the day after its suspension it collected the certified

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

check. A receiver having been appointed, the amount, mingled with other moneys, came into his hands. The question was, whether the defendant bank was a general debtor to the plaintiffs for the amount, or whether the money received on the check was held by the receiver in trust for them; and judgment of the court was for the plaintiffs.

[Cited in Re Armstrong, 33 Fed. 408; First Nat. Bank v. Bank of Monroe, Id. 412; Fifth Nat. Bank v. Armstrong, 40 Fed. 48, 49; First Nat. Bank v. Armstrong, 42 Fed. 197. Cited, but not followed, in Franklin Co. Nat. Bank v. Beal, 49 Fed. 608.]

[Cited in Jones v. Kilbreth, 49 Ohio St. 411, 31 N. E. 349; Re Assignment of State Bank (Minn.) 57 N. W. 337; First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 568. Distinguished in Ayres v. Farmers' & Merchants' Bank, 79 Mo. 425. Cited in Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 558, 20 N. E. 193.]

This is a suit in equity, wherein the plaintiffs seek to recover from the defendant a certain sum of money which they allege the receiver of the defendant—the National Bank of the State of Missouri—has in his possession, which is the proceeds of a certain draft drawn by August Taussig on the firm of Taussig Brothers & Co., St. Louis, for $10,000, which said plaintiffs forwarded to the defendant on the 18th day of June, 1877, "for collection and credit." This sum of money the plaintiffs claim on the ground that the said bank did not collect it until after its suspension, on the 19th day of June, 1877, and therefore holds the money as plaintiffs' agent. The plaintiffs also seek to recover said sum of money on the ground that the directors of the defendant bank received said draft for collection after they had knowledge of the fact that the bank was insolvent, and on the very day the bank suspended payment, and that, therefore, the receipt by the defendant bank of said money was a fraud on the plaintiffs, and they are entitled to the full proceeds. To this bill the defendant filed an answer, putting in issue the averments of the plaintiffs' bill, and stating the facts of the transaction specially; to which answer the plaintiffs replied. The facts, so far as material to the ground of the court's judgment, are, shortly, these: The defendant bank was the correspondent of the plaintiff bank. On June 18th, 1877, the plaintiffs transmitted to the defendant bank, "for collection and credit," a draft or bill of exchange for $10,000, drawn by one August Taussig on the firm of Taussig Brothers & Co., St. Louis. This was received by the defendant bank on the morning of June 19th, and the amount provisionally credited on account to the plaintiffs. The defendant bank on the same day presented the bill of exchange for payment, and received from Messrs. Taussig Brothers & Co. their check for the amount on the Franklin Savings Bank, of St. Louis, and thereupon surrendered the bill of exchange. This bill of exchange was specially endorsed to the defendant bank for collection, on account of the plaintiffs. On the same day (June 19th) the defendant bank presented this check, and had it certified as "good" by the Franklin Savings Bank, and took it away; and on the same day the directors of the defendant bank resolved that "all payments shall be suspended, and all its banking business shall cease, except to collect and preserve its assets." It never again opened its doors. The next day after the suspension its officers collected the amount of the certified check, and a receiver having been appointed by the comptroller of the currency, the money thus collected, having been mingled with the other money of the bank, came into his hands. No notice to the plaintiffs of the provisional credit was given until after the check had been collected, on the 20th day of June. The defendant bank was hopelessly insolvent at the time, and had been known to be so for a considerable time by its executive officers and a majority of the creditors; but as the judgment of the court does not proceed upon the distinct ground that the collection of the draft was for this reason fraudulent, the particular facts in this regard need not be stated in detail.

Two questions were argued: 1. Whether or not the defendant, Johnson, as receiver of the said bank, holds the amount of money so collected as a trustee for the plaintiffs, or whether they are simple contract creditors for said amount, and entitled only to their dividends as other creditors. 2. Whether or not the insolvency of the bank, together with the facts in evidence in relation to the knowledge of its directors of its insolvency, rendered the collection of the money by defendant bank a fraud against plaintiffs, so as to entitle them to recover the full amount of the proceeds of said Taussig draft.

William Patrick and Nathan Frank, for complainants.

Henderson & Shields, for defendant.

DILLON, Circuit Judge. It is only necessary to decide the first of the above questions, although counsel have discussed both of them with great fulness, and referred to numerous cases. While these cases have been considered, I do not feel called on to examine them at length in this opinion, for, in my judgment, on the facts here presented, the principles of law decisive of the case are clear and well settled.

In respect of the Taussig draft, out of which the controversy arises, the defendant bank was the collecting agent of plaintiffs. This is manifest from the relations of the two banks to each other, from the letter transmitting this draft "for collection and credit," and from the plaintiffs' special endorsement thereon to the cashier of the defendant bank "for collection on account of" the plaintiffs. This relation was not only

known to the two banks, but knowledge of it—that is to say, that the defendant bank was merely the agent to collect this draft for the plaintiffs, and not the holder of it in its own right—was imparted to the drawees of the draft, the Messrs. Taussig Brothers & Co., by the above-mentioned special endorsement of the plaintiffs on the draft itself, and which was surrendered to the drawees when their check for the amount thereof on the Franklin Bank was received.

What, then, was the duty of the defendant bank, and the rights and obligations of the drawees, the Messrs. Taussig Brothers & Co.? It was the duty of the defendant bank, as the collecting agent of the plaintiffs, to present the draft for payment; and as there is no proof of any special authority to the defendant, or agreement or usage varying the legal rights of the parties, the defendant bank could receive in absolute payment thereof nothing but money, "that which the law declares to be a legal tender, or which, by common consent, is considered and treated as money." Ward v. Smith, 7 Wall. [74 U. S.] 452. This settled principle of law has not been drawn in question by the defendant's counsel.

As the defendant bank was not authorized to receive payment except in the manner above stated, and as the Messrs. Taussig Brothers & Co. knew that the defendant bank did not hold the draft as their own, but as agents to collect, they are charged with knowledge that they could only make a valid payment binding upon the plaintiffs by making such payment in money.

Their check for the amount of the draft would, at most, be but conditional payment —that is, payment when the money was actually received thereon by the agents of the plaintiffs. Even if the defendant bank had undertaken by a special agreement to receive the check in absolute payment (of which there is no pretence), such an agreement would have been void for want of authority from the plaintiffs to make it.

When the check was received in exchange for the draft, the drawers of the check must be taken to have constituted the defendant bank their agents to collect the check, in order that its proceeds might be paid to the plaintiffs. Without special authority to the defendant bank to take a check in absolute payment, or without ratification of its act in receiving a check instead of money, this act of the defendant would not bind the plaintiffs ex proprio vigore. The latter could affirm or disaffirm it, as they might elect. If the money had been received on the check by the defendant bank before its suspension, this would have presented a very different question from the one which actually arises.

The check was presented, but instead of payment being demanded and received, a certification of it was accepted. That was an act which did not bind the plaintiffs—for it was alike without their knowledge or authority. If this was done by the defendant bank without authority from the Messrs. Taussig Brothers & Co., it might, as between them and the bank, discharge them as drawers of the check, but it could not operate to pay the bill of exchange for which the check was given, or in any manner vary the rights of the plaintiffs. Their debt subsisted until payment was made by Messrs. Taussig Brothers & Co., and no payment was made until the check was actually paid, which was the day after the failure of the defendant bank and its resolution to cease business and wind up its affairs. It is, therefore, a mistake to suppose that the act of the defendant bank, in originally receiving the check of the Messrs. Taussig Brothers & Co., or in subsequently procuring it to be certified, discharged Taussig Brothers & Co. from their liability to the plaintiffs. I am, therefore, of opinion that the defendant bank remained the agent of the plaintiffs to collect the bill of exchange on Taussig Brothers & Co. until the money was actually received. When the money was received, and not before, the agency of the defendant bank to collect terminated, and its authority to credit the amount to the plaintiffs and to make itself an absolute debtor therefor would then arise, provided it was still a going concern; but inasmuch as before it received the money it had failed, its agency to constitute itself a general creditor for the amount had ceased to exist. It would hold the amount as the agent of the plaintiffs, or in trust for it, subject to any balance due it from the plaintiffs.

Against this view the defendant urges two objections. The first is thus stated in the defendant's printed argument: "The letter transmitting the draft was simply asking for 'credit'—the depositing of the Taussig draft by the plaintiffs in the defendant bank. The words 'for collection and credit' mean 'credit.' While it is reasonable to suppose that the defendant bank would not give the credit until it was satisfied that it would obtain the money on the draft, yet the ultimate object of the plaintiffs being 'credit,' if they receive the credit, it matters not to them whether the defendant bank received the money or not; and as soon as the defendant bank was satisfied to give the credit, as requested, the plaintiffs' demand was complied with, whether the collection was ever made or not."

The argument is fallacious. The words "for collection and credit" do not mean that the credit shall be given until the money is collected. And it does make a difference whether the defendant bank ever received the money or not. On this point the language of Byles, J., in Sweeting v. Pearce, 7 C. B. (N. S.) 485, is applicable. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in

cash. If the agent receives the money in cash, the probability is that he will hand it over to the principal; but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive payment in anything but cash." This language is approved in the case of Pearson v. Scott, [38 Law T. (N. S.) 747] decided in the chancery division of the high court of justice, May 4th, 1878.

The second objection of the defendant's counsel to the view above stated, is "that, even if the defendant bank was the agent of the plaintiffs for the collection of the Taussig draft, and had no right to receive payment thereof in anything but money, the acceptance of the Taussig check, and having it certified, by defendant bank was a simple breach of their duty as such agents, for which they became instantly liable, on the 19th day of June, as a simple contract debtor." I answer that it has been shown above that the act of the defendant bank in having the check certified wrought no change in the plaintiffs' rights, and that their debt still remained. This unauthorized act, if it resulted in any injury to the plaintiffs, would undoubtedly give them a right to recover any damages suffered thereby, but it did not dissolve or terminate the relationship of principal and agent between the plaintiffs and the defendant bank, nor preclude the plaintiffs from the right to elect to ratify the act of receiving the check, and to claim the money afterwards collected thereon.

The force of the argument of the defendant's counsel, that the defendant bank, on the very day of its failure, and when it was in articulo mortis, had the right, by a credit in advance of collection, or by its unauthorized act in receiving the check and in procuring its certification, to terminate, without the plaintiffs' consent, the agency, and to constitute itself the actual debtor for the amount, against the plaintiffs' will and against their interest, I must confess I have been unable to perceive.

It is not unusual for bankers to credit their correspondents or customers with the amount of paper of a certain character at the time of its receipt for collection, but such credits are provisional only, being made in anticipation that the paper will be promptly paid, and with the right to cancel the credit if the paper is dishonored. First Nat. Bank of Trinidad v. First Nat. Bank of Denver [Case No. 4,810]. Such was the nature of the credit made in this instance, and the circumstance is immaterial, as it does not vary the ultimate rights of the parties.

The conclusion, therefore, is that the defendant bank was the agent of the plaintiffs to collect the draft on Taussig Brothers & Co.; that the agency remained until the money was received on the check, and as this was after the defendant bank had ceased to do business, and had resolved to wind up its affairs, it was received in trust for plaintiffs (less the plaintiffs' indebtedness to the defendant bank); and hence the receiver has no right to hold it, to be distributed ratably among the general creditors of the bank. Let a decree be entered for the plaintiffs for $8,168.58, with interest from the date of the commencement of this suit at the rate of six per cent per annum. Decree accordingly.

Liability of bank as a collecting agent: First Nat. Bank of Trinidad v. First Nat. Bank of Denver [supra]; St. Louis v. Johnson [Case No. 12,235].

Case No. 8,290.

LEVI et al. v. NEW ORLEANS MUT. INS. ASS'N. SAME v. HOME MUT. INS. CO. SAME v. UNION INS. CO.

[2 Woods, 63.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1874.

MARINE INSURANCE—LOSS—NEGLIGENCE OF MASTER—MISCONDUCT OF MASTER AND OFFICERS—LIABILITY OF INSURANCE COMPANY—EXPRESS WARRANTY—TOTAL LOSS—PAYMENT OF FULL SUM INSURED.

1. Mere carelessness, negligence or unskillfulness of the master and officers of a boat do not relieve the insurance companies from liability to pay a loss occasioned thereby, unless it is so expressly stipulated.

2. It is otherwise when the master and officers of the boat are guilty of positive misconduct.

3. Misconduct is the transgression of some established and definite rule of action, where no discretion is left except what necessity may demand.

4. Negligence, carelessness and unskillfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor.

5. Section 3651 of the Revised Statutes of Louisiana of 1870 was intended to apply only in cases where the carelessness of the officers of a boat is so gross as to justify a criminal prosecution; in other words, to cases of misconduct.

6. A clause in a river policy of insurance, in which it was warranted and agreed by the insured that the boat should be navigated "free from any loss or damage by barratry, or by the negligence of those in charge of the boat at or before the time of any accident or disaster," relieved the insurance company from liability to pay a loss resulting from a collision occasioned by the negligence of the pilot.

[Cited in Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 26 Fed. 604.]

7. Three insurance companies insured a steamboat for $4,500 each, valued in each of the policies at $27,000. The boat was sunk by a collision. *Held*, that if she were a total loss, or if she were abandoned to the insurers, they were bound to pay the full sum insured.

The plaintiffs [James Levi and others] in these cases held policies of insurance issued by the defendant companies [the New Orleans Mutual Insurance Association, the

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

Home Mutual Insurance Company, and the Union Mutual Insurance Company] respectively, on the hull, engine, furniture and appurtenances of the steamboat Sabine, which was lost in consequence of a collision with the steamboat Richmond, near Twelve Mile Point, a short distance above New Orleans, all within the territorial limits of the state of Louisiana, on the morning of the 11th of February, 1873. The cases, by order of the court, were consolidated and tried together.

J. Ad. Rosier, E. C. Billings, and A. de B. Hughes, for plaintiffs.

M. M. Cohen, A. Voorhies, and Henry Chiapella, for defendants.

WOODS, Circuit Judge. The execution of the policies and the fact of the loss are admitted by defendants. They defend against a recovery on several grounds.

1. Because the collision and consequent loss were caused by the carelessness, negligence and improper conduct of the master of the Sabine, and of his mariners and servants, and by their gross fault and violation of law and the rules of navigation. In the case of Shirley v. The Richmond [Case No. 12,795], I have found that the loss of the Sabine was the result of a collision with the Richmond, and that the collision was occasioned by the fault of the Sabine, in not keeping the middle or thread of the river, but running close to the left bank under Twelve Mile Point, where she encountered the Richmond, who was in her proper place. It is claimed that this fact should defeat a recovery in this case on the grounds: (a) That by the general law of insurance, the fact that the loss occurred through the fault of the officers of the boat, bars a recovery upon the policy of insurance; (b) that the Code of Louisiana bars a recovery under the like circumstances; and (c) that specially the Union Mutual Insurance Company is discharged from liability on its policy by reason of the following warranty in the policy: "Warranted free from any loss or damage occasioned by barratry, or by the negligence or misconduct of those in charge of the steamboat at or before the time of any accident or disaster."

I shall notice these grounds in their order. "It is the settled rule that negligence and carelessness are insured against, while misconduct, which is a violation of definite law, a forbidden act, is never insured against." Fland. Ins. (2d Ed.) 553; Citizens' Ins. Co. v. Marsh, 5 Wright [41 Pa. St.] 386; Johnson v. Berkshire Ins. Co., 4 Allen, 388; Phoenix Ins. Co. v. Cochran, 51 Pa. St. 148; Chandler v. Worcester Ins. Co., 3 Cush. 328; Goodman v. Harvey, 4 Adol. & E. 870. In Columbian Ins. Co. v. Lawrence, 10 Pet. [35 U. S.] 507, Judge Story says: "The next question is whether a loss by fire occasioned by the fault and negligence of the assured, their servants and agents, but without fraud or design on their part, is a loss for which the underwriter is liable. In regard to marine insurance cases, this was a question much vexed in the English and American courts. But in England the point was completely settled in Busk v. Royal Exchange Assur. Co., 2 Barn. & Ald. 82, upon the general ground that 'causa proxima, et non remota spectatur'; and therefore that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. The same doctrine was afterwards affirmed in Walker v. Maitland, 5 Barn. & Ald. 171, and Bishop v. Pentland, 7 Barn. & C. 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of Patapsco Ins. Co. v. Coulter, 3 Pet. [28 U. S.] 222." See, also, St. John v. American Mut. Fire & Marine Ins. Co., 1 Duer, 371; Hynds v. Schenectady County Mut. Ins. Co., 16 Barb. 119; Gates v. Madison County Mut. Ins. Co., 1 Seld. [5 N. Y.] 469; Catlin v. Insurance Co. [Case No. 2,522]; Mathews v. Howard Ins. Co., 13 Barb. 234. These authorities establish conclusively the doctrine that mere carelessness and negligence of the master and officers of a boat do not relieve the insurance companies from liability for a loss occasioned thereby.

The question remains, were the officers of the Sabine guilty of misconduct, or of carelessness and negligence only? Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from negligence, carelessness and unskillfulness, which are trangressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386. I think no better illustration could be given of what constitutes carelessness, negligence, and unskillfulness as distinguished from misconduct, than the conduct of the pilot of the Sabine, which caused the collision by which she was lost. He failed and neglected to follow a custom of the river, well known and established, but not prescribed by any positive law. That custom was that ascending boats should run under the points near the shore, so as to avoid the current, while descending boats followed the main channel or thread of the river, so as to take advantage of the current. The neglect by the pilot of the Sabine to observe this rule resulted in the collision. But this was no misconduct; there was no willful violation of positive law. If the pilot could see along the bank of the river for a long distance, and there was no boat coming in an opposite direction, there was no positive law of the river to forbid a descending boat from running near the shore. But the fault was that he ran near shore at night, and when

rounding a point, where, if he happened to meet an ascending boat, there was danger of collision. This was negligence, carelessness, and unskillfulness, but it was not willful misconduct.

I cite two instances of misconduct taken from reported cases, which will show how far the conduct of the pilot of the Sabine falls short of misconduct. The captain of a steamer, while racing, for the purpose of making more steam, brought from the hold of the vessel a barrel of turpentine, knocked out the head and placed it so near the furnace that the fire was communicated to the wood upon which the turpentine was thrown and then to the barrel; such manner of use of turpentine being in contravention of an act of congress. This, as matter of law, was held to be misconduct, and to avoid the policy. In Chandler v. Worcester Mut. Fire Ins. Co., Shaw, C. J., puts the case of a party insured, standing by the fire, which was yet so trifling that by throwing on a cup of water which was at hand, the fire might be extinguished, and yet neglecting to do so, as a case of misconduct, which would avoid a policy. 3 Cush. 328. The case of the Sabine is not like either of the cases just mentioned. There was no willful violation of a positive law, nor was there such gross negligence as to amount to misconduct. I am of opinion, therefore, that the first ground of objection to a recovery is not well taken.

2. It is claimed that the Code of Louisiana bars a recovery against the insurance companies under the circumstances of this case. The law relied on is section 3651 of the Revised Statutes of 1870 (page 709), which declares: "Any accident except such as is impossible to be foreseen or avoided, that may happen to any steamboat from racing, carrying higher steam than may be allowed by law, running into or afoul of another boat, or that may occur whilst the captain, pilot or engineer is engaged in gambling or attending any game of chance, or hazard, or whenever an accident happens from the boat being overloaded, the owner of the boat shall be responsible for all loss or damage, and shall be barred from the recovery of freight or insurance, and the officer violating the provisions of this section shall be subject to a fine of not less than five hundred nor more than two thousand dollars, and imprisonment for not less than three months nor more than three years; and in the event of loss of life being the result of such accident, then said officers shall be adjudged guilty of manslaughter." This act was passed in 1834. Whether it is still in force has been a question raised but not decided by the supreme court of Louisiana. Caldwell v. St. Louis Perpetual Ins. Co., 1 La. Ann. 85. But considering it to be still the law, it clearly appears that it was intended only to operate in cases where the carelessness of the officers of the boat was so gross as to justify a criminal prosecution, and in cases where loss of life occurred, a prosecution for manslaughter. In other words, there must have been misconduct on the part of the officers of the boat. The whole tone and spirit of the section seems to indicate this. I have already expressed the opinion that there was no misconduct of the officers of the Sabine which resulted in the collision. I am of opinion, therefore, that this section of the Revised Statutes does not bar a recovery in these cases.

3. In the policy of the Union Mutual Insurance Company, but in neither of the others, is this stipulation: "It is also warranted and agreed by the assured, that the steamer shall be navigated in strict compliance with the provisions of any and all acts of congress regulating or pertaining to the management of vessels propelled in whole or in part by steam, and with the rules adopted by competent authority under any such act or acts, and free from any loss or damage by barratry, or by the negligence of those in charge of the steamboat at or before the time of any accident or disaster." It is claimed for the Union Mutual Insurance Company that this warranty must have been strictly complied with or there can be no recovery against it. It is not shown by the record that the Sabine was not navigated in strict compliance with the acts of congress or with the rules adopted under such act. The fault committed by the Sabine was in the nonobservance of a rule or custom of the river. It is not shown or claimed that the loss was occasioned by barratry, and we have found that there was no willful misconduct, but only negligence in the management of the boat. But the negligence of those in charge of the boat, at or before the time of any accident or disaster, which occasions the loss, is expressly warranted against in this policy, and if that warranty is binding upon the assured, it will be a bar to a recovery. The clause in this policy, upon which the Union Mutual Insurance Company relies, is an unusual one, as counsel for the company have taken pains to show. But it is printed like all other parts of the policy in large leaded type, and it is made a distinct paragraph, and the words, "it is also agreed and warranted by the assured," with which the paragraph commences, are printed in type much larger than the body of the paragraph. The remark of the supreme court of the United States in Insurance Co. v. Slaughter, 12 Wall. [79 U. S.] 409, that "in order to avoid just cause of complaint it would be better for insurance companies to employ type large enough to arrest the attention of an interested party," can have no application to this case. We find this warranty in this policy conspicuously printed, and we cannot presume that it was inserted without the knowledge of the assured. We cannot make contracts for parties or act as their guardians to supply the want of care and vigilance in the conduct of their business. If the assured did not know that such a warranty was to be found in the

policy, it was because he did not take the trouble to read it. We find it in the policy and it is as much a part of the contract as any other, and is as binding on the parties as any other. Having found that the loss to the Sabine was occasioned by the negligence, carelessness and unskillfulness of her pilot, the case of the Union Mutual Insurance Company is fully within the express warranty, and there can be no recovery against that company. De Hahn v. Hartley, 1 Term R. 343; 1 Arn. Ins. 584. As to the other companies, the defenses which they have set up have been found to be untenable.

The question remains, therefore, what ought to be the amount of the recovery against the New Orleans Mutual Insurance Association, and against the Home Mutual Insurance Company? In the policies executed by the companies, the Sabine was valued at $27,000, and each policy was for the sum of $4,500. If the Sabine were a total loss, or if she were abandoned to the insurance companies, they must pay the full sum insured. But the Sabine was not a total loss, for she was raised and repaired. Was she abandoned? The policies of both the New Orleans Mutual Insurance Association and of the Home Mutual Insurance Company contain these clauses: "And it is agreed that in case of any loss or misfortune aforesaid, it shall be the duty of the assured to use every reasonable effort for the safeguard and recovery of the said steamboat and every part thereof, and if recovered, to cause the same to be forthwith repaired, if practicable; to the charges whereof the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value herein; and in case of the neglect or refusal of the assured, or their agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, then the said company shall have the election to interpose and recover said steamboat or any part thereof, and cause the same to be repaired for the account of the assured; to the charges of which the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value in this policy. And in no case whatever shall the assured have the right to abandon until it is ascertained that the recovery and repairs of the said steamboat are impracticable, nor shall the assured have the right to sell the wreck or any part thereof without the written consent of said company." The Sabine was raised by a wrecking company, and after being so raised, she was libeled for salvage and sold, and her purchaser had her repaired at an expense of $3,100. These facts being established, it is clear that the insured had no right to abandon under the terms of these policies, for they had no right to abandon until it was ascertained that the recovery and repairs of the steamboat were impracticable. This was never ascertained, for it was not true, and the right to abandon did not exist.

I have examined the evidence to see whether there was in fact an abandonment, and an acceptance of the abandonment by the insurance companies. The evidence fails to satisfy me that there was a purpose to abandon, or that the insurance companies intended to waive their right under their policies, and accept the abandonment. There can, therefore, only be a recovery against the New Orleans Mutual Insurance Association and the Home Mutual Insurance Association as in case of no abandonment. The case will be referred to a master to ascertain and report from the evidence now on file the amount to be paid by each company under the terms of the policy.

LEVI v. UNION INS. CO. See Case No. 8,290.

LEVI DEARBORN, The (WOODRUFF v.). See Case No. 17,987.

LEVI DEARBORNE, The (WOODRUFF v.). See Case No. 17,988.

Case No. 8,291.

In re LEVIN.

[7 Biss. 231;[1] 14 N. B. R. 385.]

Circuit Court, N. D. Illinois. July 12, 1876.

CONSTRUCTION OF RULE 24.

The district court has discretion to enlarge the time for entering appearance and filing specifications in opposition to discharge as well after, as before the expiration of the time allowed by the rule.

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

On February 16, 1876, the bankrupt [Lewis Levin] filed his petition for discharge. March 25 following was assigned for the hearing of the petition, and no opposition being on file the case was referred to the register to report as to the regularity of the proceedings. On the same day the bankrupt made his final oath before the register according to the statute. On April 3, William A. Hubbard, a creditor, who had duly proved his claim, entered his appearance in opposition to the discharge of the bankrupt, and on April 6 the bankrupt moved to strike the appearance from the files. On the same day Hubbard asked leave to file his specifications in opposition to the discharge. To this the bankrupt objected on the ground that the appearance and specifications were not filed in time, under the twenty-fourth rule in bankruptcy. The district court, however, overruled the motion of the bankrupt, and allowed Hubbard to file specifications in opposition to the discharge within four days. The bankrupt thereupon filed a petition of review in the circuit court.

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

Becker & Dale, for objectors.
Shorey & Shaffner, for bankrupt.

DRUMMOND, Circuit Judge. The 24th rule in bankruptcy requires that any creditor opposing the discharge of the bankrupt shall enter his appearance in opposition thereto, on the day when the creditors are required to show cause; and shall file his specification of the ground of opposition in writing within ten days thereafter, unless the time shall be enlarged by the district court. More than ten days had elapsed from the 25th day of March before Hubbard asked leave to file specifications, and his appearance had not been entered on that day, as strictly speaking it should have been.

It was claimed on the part of the bankrupt that the rule is absolute in its terms, and that if ten days had elapsed before the filing of specifications or before application had been made for an enlargement of the time, the power of the district court to exercise the discretion therein referred to had ceased to exist; and such is claimed to be the opinion of the court in some cases cited. But this is too narrow a construction of the rule. The district court had the discretion to enlarge the time as well after the expiration of the time as before. In equity, when a discretion is given to the court, it has been uniformly exercised as well after as before the time designated, and in the present case there was no reason why this rule should not be followed.

[In this case, the bankrupt had not been discharged. It was competent for the district court, under the circumstances, to enlarge the time in which appearance and opposition to discharge by specifications might be filed. There is no complaint made against the exercise of its discretion in the decision made by the court, but the claim is that it had no authority to extend the time. For aught that appears, the district court had good reasons for enlarging the time for filing appearance and specifications.][2]

The demurrer to the petition is sustained, and the order of the district court affirmed.

LEVINESS, The JOSHUA. See Case No. 7,549.

Case No. 8,292.

LEVINSON v. OCEANIC STEAM NAV. CO.

[24 Int. Rev. Rec. 122; 17 Alb. Law J. 285.]

Circuit Court, S. D. New York. Jan. 25, 1876.

LIABILITY OF SHIP OWNERS — STATUTE OF 1851 — EXTENT—FOREIGN VESSELS—SERVICE OF PROCESS—POWER OF CONGRESS.

1. The United States statute of 1851 (9 Stat. 635), limiting the liability of ship owners to their interest in the vessel, and her freight, is applicable to foreign vessels. It is a regulation of commerce, and not a municipal regulation.

[Cited in Thomassen v. Whitwell, Case No. 13,930.]

2. Congress has power to authorize the supreme court to fix by rule the manner of serving process. A rule providing for service of process upon an attorney is valid, and jurisdiction of his client can be thus acquired.

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

In admiralty.

E. F. Shepard and E. Coffin, Jr., for plaintiff.

Everett P. Wheeler and Charles E. Souther, for defendant.

SHIPMAN, District Judge. The case now before the court stands in this position: The plaintiff, a resident of the state of New York, and of the Southern district of New York, brought his action in this court against a common carrier by sea (having its domicile in a foreign country), to recover damages for personal injuries to him while a passenger and for the loss of his baggage. The plaintiff has made out his prima facie case. The defendants pleaded in bar a decree of the district court of the Southern district of New York, and have offered in evidence the libel, the appraisement by the commissioners, the monition after the appraisement, the payment into court of the amount of the appraisement, and the final decree. The defendants then rested their case. The plaintiff thereupon moved for a direction to the jury to find for the plaintiff, on the ground that the defence is insufficient in law. The question is, whether the decree of the district court is a bar to the action of the plaintiff. That decree was based upon the statute passed by congress in 1851, the first and third sections of which are as follows:

"Sec. 1. No owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners; provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship owners."

"Sec. 3. The liability of the owner or owners of any ship or vessel for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any other person or persons, of any property, goods or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture,

[2] [From 14 N. B. R. 385.]

done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending." 9 Stat. 635.

The motion of plaintiffs for a direction to the jury notwithstanding the decree of the district court is founded substantially upon two points: First, that the district court never had jurisdiction of the subject matter of the libel; and, second, it had no jurisdiction of the person who is now plaintiff in this suit, and who was named as one of the defendants in that libel.

All the objections resolve themselves into these two questions, whether the district court had jurisdiction of the subject matter or jurisdiction of the person. This statute of 1851 has been discussed at length by the counsel. It seems to me to have been a limitation of the common law liability of common carriers by sea. It is well understood that at common law there was no limitation upon the liabilities of such common carriers, but that the amount which they were liable to pay was limited only by the judgments which might be rendered against them. Congress, in 1851, saw fit by statute to limit that liability, and the statute seems to have been a modification or alteration of the common law in regard to the extent of liability of ship owners for the negligence of their officers and crew. Congress also saw fit to adopt the same limitation which had previously existed in the several maritime countries of Europe. The statute which was passed was the adoption by legislative authority of a new principle of law so far as this country is concerned, but one which has been the rule in the admiralty courts of foreign countries.

The question, then, is whether this limitation of the liability of common carriers by sea applies only to American vessels, and was merely a municipal regulation, or whether it was the adoption of a general principle. Now, neither from the language of the statute of 1851, nor upon principle, can I see that this limitation of liability was local, or that the legislation was municipal. There was nothing local or municipal in its character. The statute was not in terms confined to American vessels. It had a wider scope and was a modification by legislative enactment of the common law, in regard to a subject over which congress had jurisdiction. If a modification of the common law liabilities of carriers by land was provided by the statute of the state, which had jurisdiction over such corporations, it would have been binding upon all courts of the state; it would have been the lex fori, the modification would have been a general one, and when an action was brought before a court of the state, the court would have been prohibited from exceeding the liabilities which the legislature of the state had limited. So, this statute being a modification of the common law of a general and universal character, it is binding upon all courts in this country, and they are limited or restrained from proceeding to give judgment beyond the limit of liability, which the legislature had prescribed in 1851. In other words, the adoption of a principle of admiralty law cannot be considered as merely local or municipal legislation.

Second. Whether the district court had jurisdiction of the person, is next to be considered. At common law personal service, or its equivalent, is in all cases to be made upon the defendant, so that he may have an opportunity to appear and make defence. The common law prescribes that " . . . personal service is in all cases necessary to enable the court to acquire jurisdiction, unless some other mode of service is authorized by the laws of the state." This action in admiralty was both a proceeding in rem., and a proceeding in personam. In so far as it is a proceeding in personam, the principles of common law in regard to actions in personam are applicable; that is, that personal service of process or that service which is authorized by statute as an equivalent, is to be made upon the party who is to be affected by the judgment that may be rendered in the suit. In this admiralty proceeding the supreme court has announced the rules which are applicable to the service, and the rule of the supreme court corresponds to and has the same effect as the rules prescribed by the statutes as to common law service. The statute of 1851 (section 4) provides that the owner "may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto." It announced no rule by which service shall be made.

The supreme court has jurisdiction of the rules which govern the proceeding. The general rule of the supreme court adopted in 1871 (13 Wall. [80 U. S.] xiii.) provides that "public notice of such monition shall be given as in other cases, and such further notice served through the post office or otherwise, as the court in its discretion may direct." They point out one method of service: through the post office. That is not, strictly speaking, personal service; it is merely constructive. One mode of constructive service then is designated, and they declare that the district court, in its discretion, may direct how such other and further notice may be given as it chooses. The rule does not say "such further notice shall be served through the post office, and otherwise;" but it is optional with the district court whether notice shall be served on the known claimants through the post office or otherwise in the exercise of its judgment. The supreme court provides an equivalent for personal service, and has in effect declared that constructive service shall be sufficient. In other words,

they direct that the district court may elect, in its discretion, whether one or another mode of constructive service may be adopted, and have not limited them to personal service. The district court, in its discretion, selected one mode of constructive notice, and that was by service upon the attorneys for the claimants, and it was not necessary that service upon them should be made otherwise than by delivering a copy of the monition to their attorneys. It is not material, in my judgment, whether the attorneys admitted or did not admit service, for the important question is whether the service which the court directed to be made on the defendant was sufficient service or not. If the rule had provided that "such other notice shall be served through the post office, or actually served upon the defendants," and the monition has not been served, either by mail or personally, the district court would have had no jurisdiction. But the rule having left the method of service to the discretion of the court, which had the jurisdiction of the libel, and the court, having exercised its discretion, and determined what, in its judgment, should be a valid constructive service to bring the defendant into court, and service having been made accordingly, no valid objection can be taken to the jurisdiction of the court over the action in personam. The motion to direct a verdict for the plaintiff is denied. The court, at the conclusion of the evidence, directed a verdict for the defendant. Judgment was entered on the verdict. No writ of error has been brought to review this judgment.

Case No. 8,293.

The LEVI ROWE.

[Blatchf. Pr. Cas. 323.] [1]

District Court, S. D. New York. Jan. Term, 1863.

JUDICIAL DISCRETION—LEAVE TO PUT IN FURTHER EVIDENCE.

There being probable cause, on all the evidence, to believe that the vessel was engaged in an attempt to violate the blockade, the court suspended a final decision, with leave to the libellants to put in further proofs as to the place at which the capture was made, and as to the purpose of the voyage, at any time within one year.

In admiralty.

BETTS, District Judge. The libel alleges the capture as prize of this schooner at sea, six miles from the coast of North Carolina, by the United States gunboat Mount Vernon, November 29, 1862, and that she was thereupon brought into this port for adjudication. The suit was instituted December 17, 1862. Process of attachment and a monition was issued from the court on the same day, and were duly returned by the marshal January 6, 1863, and after proclamation made in open court, no appearance being given thereupon, a decree by default was, on motion of the district attorney, regularly entered against all persons having any interest in the aforesaid prize, and the vessel's papers and the preparatory proofs were submitted to the court by the district attorney, who moved the consideration and judgment of the court upon the same. The vessel's documents are a certificate of British registry issued to Joseph Eneas, of New York, as owner, dated at Nassau, New Providence, September 21, 1861; a shipping agreement made at the same place November 10, 1862, for a voyage to Beaufort, North Carolina, and back to Nassau; a clearance at the same place the same day for Beaufort aforesaid, with a cargo of ten barrels of oranges and two thousand four hundred bushels of salt; also a log-book. The president's proclamation of May 12, 1862, and the circular of the secretary of the treasury thereunder of the same date, and a license granted to the vessel at Nassau November 11, 1862, legalized the above-mentioned voyage, and exempted the vessel from liability to seizure for trading with or entering the port of Beaufort, North Carolina. A charter-party, executed by Sawyer & Manendez, as owners of the vessel, to James M. Taylor, was found on board of her, dated at Nassau November 11, 1862, for a voyage to Beaufort, North Carolina, thence to New York and back to Nassau. The master of the vessel and all persons concerned in the voyage knew that the ports of North Carolina, except Beaufort, were under blockade. The master testifies that the vessel was thirty-five miles south of Beaufort and ten miles from land on the North Carolina coast, when captured. Taylor, the supercargo, the only other witness, gives about the same testimony as to the time and place of the capture. Both of them fix the distance to be about thirty-five miles from Beaufort, but neither of them names the place nearest which she was captured. They both assert she was steering for Beaufort, and was sailing towards the land and away from Mount Vernon. The prize master testifies, in his deposition verifying the arrest and the papers taken from the prize, that the vessel was, when captured, standing directly into Topsail Inlet, about six miles off shore. The log-book makes no mention of the capture or of the position of the vessel at the time of her arrest, nor does it enter the proceedings of the vessel on the 28th of November, the day of her seizure. The master testifies that the arrest was made about noon of that day.

The testimony of both of the witnesses shows that the vessel and the lading were considered by them to be the property of Sawyer & Manendez. No proof exists on the papers that the title to the vessel ever passed to them from her American owner; but whether she was owned by them or by

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

Eneas, the American proprietor, any attempt to evade the blockade at Topsail Inlet would be illegal, and would subject her to condemnation. There is a palpable reserve in the log and in the statements of the witnesses examined in preparatorio, which, connected with the circumstances surrounding the voyage, affords probable cause for the belief that the vessel was engaged in an illicit adventure, and this is so strongly made out that I shall suspend a final decision in the case, with leave to the libellants to put in further proofs as to the point or place at which the capture was made, and also as to the purpose of the voyage, at any time within one year after the entry of the decree on this decision.

[The libellants having presented further evidence in pursuance of the order of the court, a decree of condemnation was pronounced against the schooner. Case No. 8,294.]

Case No. 8,294.

The LEVI ROWE.

[Blatchf. Pr. Cas. 373; 20 Leg. Int. 229.] [1]

District Court, S. D. New York. June 29, 1863.

PRIZE—VIOLATION OF BLOCKADE.

On further proofs, vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This suit was brought to hearing in January term last [Case No. 8,293] upon the preparatory proofs theretofore taken therein, and on the ship's papers and the documents captured with her at the time of her seizure as prize, no claimant having intervened in her defence. It was then considered by the court that the evidence presented against the prize, on the part of the libellants, was inadequate in law to authorize the condemnation prayed for. The court, being thereupon moved by them, made an order that they have one year from that time within which further evidence might be presented by them to the court "as to the point or place of the capture, and also as to the purpose of the voyage, and such other or further proof as they may be able to produce." The libellants, in pursuance of said order, took, before one of the prize commissioners of this court, on the 10th day of June instant, the deposition of Samuel B. Hoppin, an assistant surgeon in the United States navy. He testifies that he was on board of the United States gunboat Mount Vernon, being attached to her, about the 29th of November, 1862, and witnessed, at that time, the capture of the above prize by said gunboat; that the capture was made off New Topsail inlet, off the coast of North Carolina; that, when taken, the prize was heading or running directly into Old Topsail inlet, which then bore west about four miles; that New Topsail inlet, at the time of boarding and seizing the schooner, bore northwest by north, from three to three and one-half miles; that the prize was, when discovered, heading, with a fair wind, directly into New Topsail inlet; that, as soon as she saw the Mount Vernon, she went about, and headed out from the shore; and that, after the capture, he had several conversations with the supercargo of the vessel, captured in her, who told him that he was aware of the blockade, and had run the blockade of Charleston and Wilmington several times, and that the schooner intended to run the blockade into Wilmington. The further proofs so furnished in the case show conclusively the illicit character of the voyage upon which the schooner was engaged at the time of her capture. A decree of condemnation and forfeiture must, accordingly, be entered against the vessel and her cargo.

[1] [Reported by Samuel Blatchford, Esq. 20 Leg. Int. 229, contains only a condensed report.]

LEVITT (UNITED STATES v.). See Case No. 15,594.

Case No. 8,295.

In re LEVY et al.

[1 Ben. 454;[1] 1 N. B. R. 107; Bankr. Reg. Supp. 24; 6 Int. Rev. Rec. 134.]

District Court, S. D. New York. Oct. 3, 1867.

EXAMINATION OF WITNESSES IN BANKRUPTCY—NOTICE.

1. No notice need be given to the bankrupt of the examination of a witness called by the assignee in bankruptcy.

2. Such examination may be proceeded with, without reference to an examination of the bankrupt, which is being had on the part of creditors.

[This was a proceeding in bankruptcy against Samuel M. Levy and Mark Levy. For hearing upon the practice of the register as to the manner of receiving and certifying objections, see Case No. 8,298.]

In this case, an examination of the bankrupts on the part of creditors was pending, and was adjourned to a day. The assignee applied for and obtained a summons to a witness to appear on a previous day and answer as to the bankrupt's property. On the return of the summons, the bankrupts also appeared, and objected to the examination of the witness, because no notice had been given to the bankrupts of the time and place of the examination, and because an examination of the bankrupts was pending, and the proceedings on it stood adjourned to a subsequent day, until which day no proceedings could, as the bankrupts claimed, take place except on consent of the bankrupts or reasonable notice to them. The register directed the examination of the witness to proceed and certified the ques-

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

tions, raised by the bankrupts' objections, to the judge.

By ISAIAH T. WILLIAMS, Register:

[2] [That in the proceedings in said cause before him, the following questions arose pertinent to said proceedings, and was stated by the counsel for the opposing party, to wit: Mr. Samuel Boardman, who appeared for the bankrupt, Mr. C. H. Smith appearing for the assignee.

[The assignee, Mr. Sedgwick, by Mr. C. H. Smith, his solicitor, applied to the register for a summons (form 48), directed to William Secor, requiring him to appear before the said register and answer concerning the bankrupt's property at a time therein specified. At the time so specified the said witness appeared pursuant to said summons, Mr. Smith and Mr. Boardman also appeared for the parties aforesaid. Whereupon Mr. Boardman objected to the examination of the witness, and filed his objections in the words following, to wit: "In re Samuel Levy and Mark Levy, Bankrupts. The petitioners herein by their solicitors, Benedict & Boardman, object to the examination of the witness, William Secor, at the present time, upon the following grounds: 1st. That no notice of the time and place of the proposed examination has been given to the petitioners or their solicitors. 2d. That an examination of the petitioners under section 26 of the act being now pending, and the proceedings on said examination before the register having been regularly adjourned to the 26th day of September, 1867, at 1 p. m., no examination of the bankrupts or witnesses can take place except upon such adjourned day without the consent of, or reasonable notice given to the bankrupts or their solicitors. 3d. That the examination of witnesses under section 26 of the act being a proceeding in the matter, the bankrupts or their solicitors are entitled to reasonable notice of the time and place of such examination so as to enable them to be present and to have an opportunity to cross-examine the witnesses produced. 4th. That to allow the examination of witnesses to proceed except upon the regular adjourned days or times agreed upon, or of which due notice has been given, would lead to confusion, and might and would result in great injustice to the petitioners. (Signed) Benedict & Boardman, Solicitors for Petitioners. September 20, 1867."

[After hearing the parties, the register decided to certify the points made by Mr. Boardman to the courts for decision, but did not consider it a proper course to adjourn the examination until the coming in of the decision, as he thought no harm could come to the bankrupt from proceeding, and was given to understand that a loss might ensue if the testimony were not at once taken. The examination proceeded accordingly. As to the objections made by Mr. Boardman, the register says he thinks that when put as questions to the court they amount to the following: First. When an assignee desires to examine a witness for the purpose of discovering property (an assignee can have no other object in examining a witness or a bankrupt, and probably would not be allowed to use his office to get testimony to defeat the bankrupt's application for a discharge), is it necessary to give notice to the bankrupt of the time of such examination? Second. When the creditors have commenced an examination of parties and witnesses before a register, and the further examination stands adjourned over to a future day, may the assignee, in the mean time, and before the adjourned day, come in and examine a witness, or must he wait until the adjourned day and then proceed? As to the first question, it is not without difficulty. On the one hand it would seem to be of no just concern to the bankrupt to oppose an assignee in finding and obtaining his assets, and clearly he cannot complain if the assignee does not require his aid. On the other hand, as the examination taken by an assignee on such an occasion must be returned to the court with the other papers in the case, and will comprise a part of the record in such case (see act, section 26 [14 Stat. 529]; also general order 7), it is clear that it may be read and referred to on an argument before the court by a creditor opposing the discharge of the bankrupt, and thus made testimony against the bankrupt, although he should have had no opportunity to cross-examine the witness. This would seem to be unjust; yet neither the act nor the general order in terms require a notice to be served upon the bankrupt or his solicitor, even in case the examination is by a creditor for the purpose of defeating the application for a discharge. The words "in like manner" in section 26, referring to the preceding words "upon reasonable notice," in the same section, refer to the witness and not to the bankrupt or his solicitors. It can hardly have been the intention of congress to allow a creditor to proceed and take testimony before a register for the purpose of defeating the bankrupt without giving notice and thus enable him to cross-examine the witness. It was probably left to the court to regulate the practice by an order, and has been overlooked by the court. It might be inconvenient for the assignee to give notice to the bankrupt or his solicitor in all cases; and in a case where he had reason to fear collusion between the witness whom he desired to examine, and the bankrupt, it might not be expedient to give such notice to the bankrupt. If he is at all times entitled to notice from the assignee, then it would be competent and perhaps just to adjourn the examination to suit the convenience or pretended convenience of the bankrupt or his solicitor, and thus, in case of collusion, the

[2] [From 1 N. B. R. 107.]

whole purpose of the examination might be defeated. Judging from my own experience, I think the injury likely to be done to the bankrupt by the omission to give him notice of an examination by the assignee, and the loss of an opportunity to cross-examine the witness, would not be so great as that which would be likely to flow from an opposite course. In case testimony injurious to the bankrupt were so taken, it would be competent for the court on the trial to allow him to recall the witness for cross-examination. Besides, the register would be careful that the assignee's name should not be used by creditors for the purpose of getting in testimony clandestinely to defeat the bankrupt's discharge. As to the second question, it will be observed that the proceedings pending were proceedings by creditors; this is a different proceeding by the assignee. I don't see that one proceeding should be affected by the other.] [3]

BLATCHFORD, District Judge. It was not necessary to give notice to the bankrupts of the time and place of the examination of the witness on the summons applied for by the assignee. The examination of such witness was an independent proceeding, and could be proceeded with without reference to the examination on the part of the creditors. The clerk will certify this decision to the register Isaiah T. Williams, Esq.

[NOTE. This case was subsequently heard upon the right to examine one of the bankrupts as to property acquired since filing petition, and upon the right of his counsel to cross-examine him. Case No. 8,296. It was again heard upon the question as to whether attorney for creditors could act as counsel for assignee. Case No. 8,299. And, finally, upon whether or not a creditor who has not filed his claim may file objections to the bankrupt's discharge. Case No. 8,297.]

Case No. 8,296.

In re LEVY et al.

[1 Ben. 496; [1] 1 Bankr. Reg. Supp. 30; 1 N. B. R. 136; 6 Int. Rev. Rec. 163.]

District Court, S. D. New York. Oct. 30, 1867.

EXAMINATION OF BANKRUPT—ISSUES OF LAW AND REGISTER'S CERTIFICATES.

1. Under section twenty-six of the bankruptcy act [of 1867 (14 Stat. 529)], and general order No. 10, a bankrupt is to be examined and cross-examined like any other witness.

2. The exclusion by a register of a question in an examination before him, which is objected to, is not raising an issue of law within section four of the bankruptcy act, nor does objecting to the question raise such an issue of law.

3. A register has no right to pass upon the competency, materiality, or relevancy of a question.

[Followed in Re Bond, Case No. 1,618. Cited in Re Graves, 24 Fed. 552.]

4. The practice in taking depositions before a register is the established practice in examinations before an examiner in chancery.

5. When a register adjourns a question into court under section four of the act, it is not necessary to adjourn further proceedings in the matter until the question shall be decided by the judge.

[Cited in Re Heller, Case No. 6,339; Re Blaisdell, Id. 1,488.]

6. As to the interpretation of the provision in section six of the act with reference to certificates —quere.

7. A certificate by a register stating a question objected to, and that he excluded the question, is not a "special case" under section six.

[This was a proceeding in bankruptcy against Samuel M. Levy and Mark Levy. It was formerly heard upon the certificate of the register as to his practice in receiving and certifying objections. Case No. 8,298. Again upon the question whether or not notice of time and place of examination of witnesses as to bankrupt's property should be given bankrupt. Case No. 8,295.]

In this case, on the examination of one of the bankrupts, the creditors and the assignee put the following question to him: "Have you acquired any property since you filed your petition, or since you were declared a bankrupt?" This question was objected to by the bankrupts, and the register sustained the objection, and excluded the question. Thereupon the creditors and the assignee excepted to the decision, and desired that it should be certified to the court for decision. The register stated his reason for excluding the question to be, that he is of opinion that, under the bankruptcy act, the assignee takes all the property acquired by a voluntary bankrupt up to the day on which the register signs the order, form No. 5, declaring and adjudging him to be a bankrupt.

When the creditors and the assignee had concluded the examination of the bankrupt, the counsel for the bankrupt proposed to cross-examine the bankrupt, and asked for an adjournment. The creditors and the assignee objected to such cross-examination, on the ground that the counsel for the bankrupt had no right to cross-examine him; that the right of the bankrupt was limited to explaining by affidavit, under general order No. 33, any answers given by him; that his attention might be called by his counsel to any answer given by him, and he might be asked if he had any explanation to make; that his petition and schedules were his direct examination, and his examination by creditors was a cross-examination; and that he was his own witness and not a witness called by the creditors. The reply on the part of the bankrupt to these views was, that the most proper and convenient mode of calling the bankrupt's attention to any erroneous statement he might have made during his examination was by questions put by his counsel in the way of cross-examination; that in this way he was afforded an opportunity of correcting or explaining statements made by him; that, under

[3] [From 1 N. B. R. 107.]

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

general order No. 33, he might correct his statements under oath, but was not confined to doing so in the form of an affidavit; that the particular way of doing so was in the discretion of the court; and that the examination of the bankrupt by a creditor, was not a cross-examination, especially as to any new matter inquired of, not contained in the petition and schedules, and particularly as regarded his copetitioner, the defeating of whose discharge, as well as that of the bankrupt examined, was alleged to be aimed at by questions propounded on the examination. The register certified both of the questions to the court, for its decision.

BLATCHFORD, District Judge. I shall consider the last question first. Under section twenty-six of the bankruptcy act and general order No. 10, I think that the bankrupt is to be examined and cross-examined like any other witness. Section twenty-six, after providing that the bankrupt may be required to attend and submit to an examination on oath, says, that "the court may, in like manner, require the attendance of any other person as a witness," and that, "for good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness." Form No. 45 is prescribed as a form to be used indifferently as an order for the examination either of the bankrupt or of his wife. Form No. 46 is prescribed as a form to be used as a caption to the examination of the bankrupt or of any witness. Form No. 47 is prescribed as a form of oath to be taken, on such examination, by the bankrupt or his wife. General order No. 10 provides for the manner of conducting the examination of witnesses before a register, and says, that "the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode adopted in courts of law." It then prescribes that the depositions shall be taken in narrative form, except in special cases, and shall be read over to the witness and signed in the presence of the register. It then provides, that "any question or questions which shall be objected to shall be noted by the register upon the depositions, but he shall not have the power to decide on the competency, materiality, or relevancy of the question, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just." Now, if general order No. 10 does not apply to the examination of the bankrupt, then there is no general order that does apply to his examination, and it is left to be regulated merely by the statute. If the bankrupt is to be regarded as a witness, then general order No. 10 does apply to him, and expressly provides that he shall be subject to examination and cross-examination. That general order speaks of the testimony given on the examination of witnesses as "depositions." Section 47 of the act, in its list of fees to registers, says: "For taking depositions, the fees now allowed by law." The only fees allowed by law for taking depositions are those prescribed by the act of February 26, 1853 (10 Stat. 167), as fees to commissioners for taking and certifying the depositions of witnesses. So that, unless the bankrupt is to be regarded as a witness, and unless his deposition is the deposition of a witness, no fee is given for taking his deposition. Everything in the act and in the general orders tends to the conclusion, that congress and the framers of the general orders intended that, at least so far as the manner of examining the bankrupt and taking his deposition is concerned, the proceeding should be conducted like the examination of any other witness, and the bankrupt be examined by direct and cross-examination. Whether, so far as the effect of his testimony is concerned, the bankrupt is to be considered as a witness called by the creditor or the assignee, or as a witness for himself under cross-examination by the creditor or the assignee, or not at all as a witness, but as a bankrupt under examination under the special authority of section twenty-six of the act, is another and a different question, and one which will be disposed of when it is properly raised.

There is nothing in general order No. 33 that conflicts with this view. When the examination and cross-examination of the bankrupt before the register are completed, and the deposition is signed by him and filed as required by section twenty-six, the whole document is "his examination;" and general order No. 33, in saying that, "in like manner, he may correct any statement made during the course of his examination," means, that he shall have, in regard to statements made by him during the course of his examination, the same opportunity of correcting those statements that he has of supplying omissions in the schedules to his petition. This latter right is expressly given to him by section 26, which says, that he shall "be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts." The facts and the truth are what the law aims at, and the bankrupt is not to suffer because he has made an honest mistake in his schedules. Therefore, general order No. 7 provides, that "the court may allow amendments to be made in the petition and schedules, upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt;" and general order No. 33 provides that, "in making any application for amendment to the schedules, the debtor shall state, under oath, the substance of the matters proposed to be included in the amendment, and the reasons why the same had not been incorporated in his schedules as originally filed or as previously amended." So, also, by general order No. 33, with a view to the ascertainment of the truth, and in order that the bankrupt

may relieve himself from the imputation of having willfully sworn falsely in his examination in relation to any material fact, which charge is made a ground, by section twenty-nine, for withholding his discharge, he is permitted, on stating under oath the substance of the correction he desires to make, and the reason why it was not stated during his examination, to correct any statement made during the course of his examination, on making a proper application to the court for leave to make such correction. That is the meaning of the words "in like manner," in general order No. 33, and that, and nothing else, is the purport and scope of that order, so far as it relates to the bankrupt's examination.

The question thus decided was properly certified as an issue of law, under section four of the act. But the other question certified is not an issue of fact or of law which can be certified under section four. The question certified is, whether the question put to the bankrupt—"Have you acquired any property since you filed your petition, or since you were declared a bankrupt?"—was a proper question. The question certified is certainly not an issue of fact, and there are several reasons why it is not an issue of law.

(1) The certificate of the register merely states that the question was objected to by the bankrupt, and that the register sustained the objection, and excluded the question. This is not raising an issue of law, within section four. The ground of objection to every question objected to should be stated, otherwise, no point, or question, or issue in regard to it, is presented or raised.

(2) By general order No. 10, the register had no right to decide on the competency, materiality, or relevancy of the question. He is required, by that order, to note the objection upon the deposition—that is, not merely the fact of objection, but the ground of objection; and, if no ground of objection is assigned, he is not bound to note the fact of objection; and the ground of objection must be directed to the competency, materiality or relevancy of the question. But he is not allowed to make any decision thereon. Therefore, no issue of law can be raised on his decision, nor can the propriety of such decision be certified as an issue of law, under section four. The question, therefore, whether the register was right in sustaining the objection to the question, and in excluding it, is not properly certified as an issue of law, under section four.

(3) Under general order No. 10, a question put to a bankrupt or other witness, on an examination before a register, and objected to in proper form, does not raise a question or issue of law which can be adjourned into court, under section four, for decision by the judge. The manifest intention of that order is, that, when a question is objected to, the question and the fact and grounds of objection shall be taken down by the register, and that the question, although incompetent, immaterial or irrelevant, shall be answered, and that, when the deposition is closed, the court shall deal with it as a whole, and then pass upon the question as to what parts of it are incompetent, immaterial or irrelevant, and impose costs, in its discretion, upon the party who caused the taking of the parts which ought not to have been taken. The language of the order is: "Any question or questions which may be objected to, shall be noted by the register upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the question; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions as may be just." Now, inasmuch as, by section four, it is made the duty of the register to adjourn into court, for decision by the judge, any question or issue of fact or of law that is raised and contested by any party in the course of the proceedings, if the making of an objection to a question put to a witness, in the course of his examination, raises an issue of law, which the register is obliged to adjourn into court, under section four, so that it may be decided by the judge, there will be left on the record of the examination no questions objected to and undisposed of, and no objections noted and undecided by the court, and there can be no incompetent, immaterial or irrelevant depositions or parts of depositions to be dealt with in regard to costs; every objection will be adjourned into court as an issue of law, and disposed of as it arises, and no incompetent, immaterial or irrelevant answer or testimony will be found in the record, for, the court will already either have excluded the answer to the question objected to, by deciding the question to be incompetent, immaterial or irrelevant, or else have admitted the testimony as competent, material and relevant. For the good sense of general order No. 10 is, that it extends not only to objections to questions, but also to objections to answers and testimony, on the grounds of competency, materiality and relevancy, and that neither question, nor answer, nor testimony, is to be ultimately held to be incompetent, immaterial or irrelevant, unless objected to on the record for some ground of incompetency, immateriality or irrelevancy stated on the record. The practice thus prescribed for taking depositions, where the officer taking them notes the objections made to questions and answers, but has no power to decide on the competency, materiality or relevancy of any question or answer, is the established practice in examinations before an examiner in chancery, and in some other examinations; and no practical difficulty or embarrassment is experienced in the working of such a system. Although the meaning of the provision of section four of the act, that the register shall adjourn the question or issue into court for decision by the judge, is not that he shall necessarily adjourn the further proceedings in the matter until the question or issue raised and contested shall be decided by the

judge (general order No. 11, providing that the pendency of an issue undecided before a judge shall not necessarily suspend or delay other proceedings before the register in the case, and the word adjourn in the section having the signification merely of the word certify, or transmit) yet I am satisfied that, to hold that every objection to a question put on an examination of the bankrupt, or of any other witness, before a register, raises a question or issue of law, which, under section four of the act, must be certified to the court for decision as soon as it arises, would soon break down, not only the system, but the court. For, although the pendency of the issue undecided before the judge would not, under general order No. 11, necessarily suspend or delay other proceedings before the register in the case, and although the examination of the bankrupt or other witness might proceed in respect to questions or answers not objected to, yet it could hardly be pretended that, under such a system, it would be proper to close the examination until the decision of the court had been had upon all the questions and issues thus raised. This would open the door to a protraction of the examination and of the case until human patience would be wearied out, and the bankruptcy system would be valueless alike to creditor and debtor, to say nothing of the increased expense caused to both. In regard to the hardship urged, of obliging the bankrupt or other witness to disclose, under irrelevant, immaterial, incompetent, inquisitorial, and other questions, the offspring of a mere itching and prurient curiosity, things which he ought to be protected from being compelled to answer, the same hardship exists in regard to the examinations before an examiner in chancery, and the other kindred examinations before referred to. And the bankrupt or other witness always has it in his power, in a clear case of abuse, to refuse, under the advice and responsibility of his counsel, to answer a question. Then, on an application to punish the party for a contempt, which must come before the court, and which the register has, under section four of the act, no power to entertain, the whole question as to the competency, relevancy and materiality of the question will come before the court, in a proper way, for adjudication. Responsible counsel will not advise a party to refuse to answer a question, except in a reasonably clear case of abuse, and a party will not be likely to run the hazard of a contempt of court, in refusing to answer a question, unless advised by counsel to refuse. In this way, real and substantial questions alone will come before the court for adjudication, whereas, under the facility with which an objection can be made to a question or answer, and the irresponsibility for making it, except as regards the mere penalty of costs, the court would probably find itself able to do little other business than to dispose of objections to single questions and answers, one at a time, certified by registers, on examinations before them.

For these reasons, I am satisfied that a question put to a bankrupt or other witness, on an examination before a register, or an answer given by him, even though objected to in proper form, does not raise a question or issue of law which can be adjourned into court, under section four of the act, for decision by the judge. Inasmuch as the first question certified in this case by the register is not properly adjournable into court for decision by the judge, under section four, it remains to be considered whether it is properly before the court under section six of the act.

Section six provides for two modes of bringing a question before the court. The first mode provided is, that "any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof, and such certificate so signed shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge, at chambers or in open court." This provision is very difficult of satisfactory interpretation, and of practical execution. It is not stated what the judge shall do if he does not approve "thereof," and it is only the certificate to be signed by the judge, if he does approve "thereof," which is made binding on all the parties to the proceeding. The opinion of the judge, so to be taken, is not declared to be binding on the parties, unless the judge approves of and signs the certificate. In the present case, in regard to the first question so certified, I am of opinion that the question put to the witness, and excluded by the register, was not a proper question to be put, but I am also of opinion that the register had no power to decide on the competency, materiality or relevancy of the question, and was, therefore, wrong in excluding it; and I am also of opinion that the view of the register, that, under the bankruptcy act, the assignee takes all the property acquired by a voluntary bankrupt up to the day on which the register signs the order, form No. 5, declaring and adjudging him to be a bankrupt, is not a correct view; and I am also of opinion that the reasons given by the register, in his certificate, for holding that the objection to the question put was a good objection, are not sound. I, therefore, cannot say that I approve the certificate, within the language of section six. My opinion upon the point or matter on which my opinion is desired by the certificate, has been given, but of what avail it is, or how far it is binding on the parties, under section six of the act, is something I am not now called on to decide.

Judge Hall, of the Northern district of New York, has made a rule of his court (rule 24)

in regard to this certificate under section six, as follows: "In every certificate made by a register, stating any case, point or matter for the opinion of the district judge, under the fourth or sixth section of the bankrupt act, according to form No. 50, established by the general orders in bankruptcy, the fact, agreed upon by the parties to the controversy, shall be clearly and fully stated, with reasonable certainty of time and place; and this shall be followed by a brief statement of the claim made, or position assumed, by each of the parties to the controversy. The register shall then add thereto such proposed order, adjudication or decision as in his judgment ought to be made, and which shall be in such form that the district judge may signify his approval thereof by his signature. The register shall then afford to each of the opposing parties, or their attorneys, a reasonable opportunity to consent, in writing, to the register's decision thereon. The court will, on the approval and confirmation of such decision by the register, make such order for costs, against any party declining to assent thereto, as may be deemed proper. In case all parties to such controversy shall assent to such adjudication or decision of the register, he shall file the same, and proceed with the case upon the basis thereof, as though such controversy had not arisen." This rule seems to imply that Judge Hall regards the opinion of the district judge, in respect to any case, point or matter stated in the certificate of a register, under either the fourth or the sixth section of the act, as to be given solely by his approving or disapproving the proposed order, adjudication or decision, which is to be added by the register to the certificate, his approval being signified by his signing the proposed order, adjudication or decision, and his disapproval being signified by his withholding the signature.

The second form, under section six, in which the opinion of the court can be obtained upon a question arising in the course of the proceedings, is, by a special case, stated by the parties by consent, and signed by them or their attorneys, and, when it presents an issue raised before the register in any proceedings, certified by the register, under general order No. 11. The present certificate is not one of such a special case.

The question intended to be raised by the certificate, in this case, and which is discussed by the register, as to the time when the line is to be drawn between property which does and property which does not pass to the assignee in bankruptcy, is one of paramount importance, and is fully considered and disposed of by me in my decision in Re Patterson [Case No. 10,814], made herewith.

[This case was subsequently heard upon the question as to whether the attorney for creditors could act as counsel for assignee. Case No. 8,299. It was again heard upon the question whether a creditor who has not filed his claim may file objections against the bankrupt's discharge. Case No. 8,297.]

Case No. 8,297.

In re LEVY et al.

[2 Ben. 169;[1] 1 N. B. R. 327 (Quarto, 66); 1 Am. Law T. Rep. Bankr. 122.]

District Court, E. D. New York. Feb. 28, 1868.

WHO MAY OPPOSE A DISCHARGE—SURETY.

1. Creditors who desire to oppose a bankrupt's discharge must prove their claims.

[Cited, but not followed, in Re Murdock, Case No. 9,939.]

2. Neither the discharge of the bankrupt, nor any step taken by the creditor in the course of the proceedings in bankruptcy in regard to his debt against the bankrupt, can release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

[This was a proceeding in bankruptcy against Samuel Levy and Mark Levy. It was formerly heard upon the certificate of the register as to his practice in receiving and certifying objections. Case No. 8,298. Then again upon the question whether or not notice of time and place of examination of witnesses as to bankrupts' property should be given bankrupts. Case No. 8,295. It was again heard upon the right to examine one of the bankrupts upon property acquired since filing petition, and upon the right of his counsel to cross-examine him. Case No. 8,296. And again heard upon whether or not attorney for creditors might appear and act as counsel for assignee. Case No. 8,299. It is now heard upon objections filed to bankrupts' discharge.]

In this case, on the return of the order to show cause why the bankrupts should not be discharged, certain creditors, who had not proved their claims, appeared and desired to file objections. They presented an affidavit showing that they held obligations signed by sureties, in actions commenced before the proceedings in bankruptcy, to the effect that the bankrupts should perform the judgments recovered in the suits, which judgments were also recovered before the commencement of the bankruptcy proceedings, and that they were apprehensive lest, by proving their debt, they might imperil their rights as against the sureties. The register held that they could not file objections without proving their claims, and, on their request, certified the question to the court.

[By I. T. WILLIAMS, Register:

[On the return of the order to show cause in the above matter, Mr. Charles H. Smith presented notice of appearance and intention to file objections on the part of Messrs. H. B. Claflin & Co., John M. Davis & Co., H. Duhring & Co., Hoyt, Sprague & Co., Albert C. Lamson, and Jacob Stettheimer, Jr., creditors of the bankrupts. Messrs. Benedict & Boardman, on the part of the bankrupts, objected to the receipt thereof by the register, on the ground that the said cred-

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

itors had not proved their claims, and therefore were not entitled to appear in the case to oppose the discharge of the bankrupt. Whereupon Mr. Smith read an affidavit which is hereunto annexed. The register decided that the said creditors were not entitled to appear in the proceedings and file their objections, until they should first have duly proved their claims respectively. Whereupon the parties desired the question to be certified to the court, and Mr. Smith handed up his points, which are hereunto annexed. Pursuant to the requirement of the nineteenth rule of this court, the register respectfully submits that his decision aforesaid is based upon the language of the twenty-ninth section of the act [of 1867 (14 Stat. 53)], which provides that the court shall order notice to be given to all creditors who have proved their debts to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. Section 31 does not provide that any creditors may oppose, but speaks of "any creditor opposing," referring to those who may oppose, i. e. those who are called to the meeting under the provisions of section 29. It is true that section 24 provides that a creditor who may not have proved his demand in the proceedings may attack the discharge within two years, but this attachment is a substantive proceeding, not in, but independent of the proceeding taken by the bankrupt to procure his discharge.] [2]

C. H. Smith, for creditors.

Benedict & Boardman, for bankrupts.

BLATCHFORD, District Judge. The register was correct in his decision. If a creditor proves his debt against a bankrupt, the only effect, under section twenty-one of the act, is, that he cannot afterward maintain a suit against the bankrupt on the debt, and that proceedings pending thereon against the bankrupt, and unsatisfied judgments already obtained thereon against the bankrupt, are discharged and surrendered by the proving of the debt. But the creditor may still sue any one else liable on the same debt, and proceedings pending against others thereon, and unsatisfied judgments already obtained against others thereon, are not affected, discharged, or surrendered by the proving of the debt. In this respect, the twenty-first section must be construed in connection with the thirty-third section, which provides that "no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Neither the discharge of the bankrupt, nor any step taken by the creditor, in the course of the proceedings in bankruptcy, in regard to his debt against the bankrupt, can have the effect to release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. [Such of a bankrupt's creditors as have not duly proved their claims against his estate cannot appear in opposition to his discharge.] [3]

[2] [From 1 N. B. R. 327 (Quarto, 66).]

Case No. 8,298.

In re LEVY et al.

[1 N. B. R. 105; [1] Bankr. Reg. Supp. 23; 6 Int. Rev. Rec. 134.]

District Court, S. D. New York. Oct. 1, 1867.

BANKRUPTCY — EXAMINATION OF BANKRUPT — OBJECTIONS AND EXCEPTIONS TO REGISTER'S RULINGS.

In an examination of bankrupts by creditors under section 26 of the act [of 1867 (14 Stat. 529)], where questions are objected to, the register will pass upon the same, and permit the parties to take formal exceptions to his rulings. At the close, motion to strike out specified points, or to have excluded questions answered, will be entertained, and the questions be certified for decision by the judge, and proceedings thereafter be had in accordance with such decision.

[Cited in Re Lyon, Case No. 8,643.]

The creditors of the above bankrupts [Samuel M. Levy and Mark Levy] being before the register examining the bankrupts under the provisions of section 26 of the act, the counsel of the bankrupts interposes various objections to questions put by the counsel for creditors, such as, that they were immaterial, &c. The question at once arises whether the register has the right to pass upon these questions. The counsel for the creditors insists he has the right to put any questions he sees fit, and that the register must take the answers, as in the case of an examiner in chancery. The counsel for the bankrupt insists that the objections must be passed upon by the register, with the right of either counsel if he sees fit to demand that the questions be certified to the judge.

By ISAIAH T. WILLIAMS, Register:

The matter presents many difficulties and embarrassments. It is true, as appears by reference to English adjudications, that the largest liberty of examinations should be allowed, and a question will, perhaps, rarely be ruled out. Yet it would seem that there should be some discretion exercised by the register to prevent abuses. The case is quite different, so far as the rights and interests of the parties are concerned, from that of testimony taken before an examiner in a suit in chancery; it is open to greater abuses, and the field of inquiry is larger. The matters to be inquired about are often of a more delicate and private nature, affecting household expenses and family matters of every character. The state of feeling be-

[3] [From 1 Am. Law T. Rep. Bankr. 122.]

[1] [Reprinted from 1 N. B. R. 105, by permission.]

tween the parties is apt to be more rancorous. A creditor who feels that the bankrupt has squandered in luxuriant living property that ought to have been applied to the payment of his claim, is not likely to spare the feelings of the family, or to omit to drag to light those thousand little family secrets which the good of society as well as of order and good breeding require rather to be suppressed. It is impossible for a register to sit and give free run to inquiries of this nature, and those of a similar character, without a sense that public decorum is being violated, and sometimes that a bankrupt is imposed upon and wronged, and his own as well as the time of others, uselessly and more than uselessly wasted. On the other hand, the bankrupt is often evasive in his answers, vague and unsatisfactory in his statements. The creditor claims a categorical answer; the bankrupt insists that he has given it, and questions of a similar character are constantly arising. Between these two opposing parties, the examination would often come to stand still, on the pretence, or otherwise, that the opinion of the court was desired, and thus great delay, waste of time, and vexation would seem to be almost inevitable.

After some consideration, I adopted the following course: I directed the parties to proceed with the examination, and I would pass upon every objection, and the parties might take formal objections; then at the close of the testimony, upon a motion to strike out specified points so objected to, or that excluded questions may be answered, I would certify the questions to the court, and upon the coming in of the judge's decision I would proceed to strike out or allow the questions to be answered as the opinion should indicate. This course was readily accepted by the respective counsel, and I have pleasure in certifying that it seems to work well. I am sure it shortens the examination. It makes the counsel more exact and circumspect, and I think has the effect to bring out facts with more exactness, and with more method. If, upon reflection, the court should deem this practice allowable, and will so signify its opinion, the practice will easily become uniform among the registers. That it is allowable under the act, the court is referred to the 4th section, where it is provided that the register may "sit at chambers, and dispatch there such parts of the administrative business of the court and such uncontested matters as shall be defined by general rules and orders, or as the district judge shall in any particular matter direct." The decision of the court upon this certificate may be regarded as such general rule or order in this matter.

BLATCHFORD, District Judge. The views and practice of the register as above set forth, are approved, and this decision will be regarded as a general rule or order that such practice be followed by the registers.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

[NOTE. This case was subsequently heard upon the question whether it is necessary to give notice to bankrupts of time and place of examination of witness as to bankrupts' property. Case No. 8,295. It was again heard upon the right to examine one of the bankrupts upon property acquired since filing petition, and upon the right of his counsel to cross-examine him. Case No. 8,296. The court considered the question as to whether attorney for creditors could act as counsel for assignee in Case No. 8,299. Finally, the point is decided as to whether or not a creditor who has not filed his claim may file objections to the bankrupts' discharge. Case No. 8,297.]

Case No. 8,299.

In re LEVY et al.

[1 N. B. R. 184; [1] Bankr. Reg. Supp. 40.]

District Court, S. D. New York. Dec. 7, 1867.

BANKRUPTCY — CREDITORS' ATTORNEY ACTING AS ASSIGNEEE'S COUNSEL.

The counsellor of the assignee may act as attorney for creditors in bankruptcy proceedings.

[This was a proceeding in bankruptcy against Samuel M. Levy and Mark Levy. It was formerly heard upon the certificate of the register as to his practice in receiving and certifying objections (Case No. 8,298), and upon the question whether or not notice of time and place of examination of witnesses as to bankrupts' property should be given the bankrupts (Case No. 8,295). It was again heard upon the right to examine one of the bankrupts upon property acquired since filing petition, and upon the right of his counsel to cross-examine him. Case No. 8,-296. It is now heard upon the following certificate of the register:]

By the Register:

I, Isaiah T. Williams, one of the registers in said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr. Samuel Boardman, who appeared for the bankrupt, and Mr. Charles H. Smith, who appeared for the assignee and divers creditors of said bankrupt. The respective parties this day appearing before me to proceed with the examination of Mark Levy, one of the said bankrupts, Mr. Boardman, solicitor for the bankrupts, objected that Mr. Smith who had hitherto been and was acting on said examination for and on behalf both of the creditors, and also on behalf of John Sedgwick, the assignee of the bankrupts, ought not to be allowed further to act in said capacity for said assignee on the ground that the 27th rule of this court prohibited the same. It was claimed on the part of Mr. Smith that he did not assume to act as solicitor or attor-

[1] [Reprinted from 1 N. B. R. 184, by permission.]

ney for said assignee, but only in the capacity of counsel, and that in such capacity he did not contravene the provisions of said rule.

After hearing the respective parties, I decided that it was not competent, under the provisions of said rule, for Mr. Smith to act for the assignee on said examination, as he was, and from the first had been, the attorney and solicitor for divers of the creditors of said bankrupts, in taking testimony for the purpose of opposing the discharge of the bankrupts. And I further certify and report to this honorable court, that the grounds for said decision were as follows: First. Although the word "counsel" is not used in said rule, yet, as the proceedings before me were in the nature of chamber business rather than proceedings in open court, the distinction between attorney and counsel could not be regarded. Second. That if the distinction between the office of attorney and counsel, now contended for, were to prevail, it would render the said rule wholly inoperative. Whereupon Mr. Smith requested that the question should be certified to the judge for his opinion thereon.

BLATCHFORD, District Judge. In consequence of embarrassments similar to that certified in this case, the 27th rule has been vacated, leaving any case in which any ground of complaint exists against an assignee on account of any matter connected with his employment of an attorney or solicitor, to be brought before the court for its action.

The clerk will certify this decision to the register, Isaiah T. Williams, Esq.

[This case was subsequently heard upon the question as to whether a creditor who has not filed his claim may object to the bankrupt's discharge. Case No. 8,297.]

Case No. 8,300.

LEVY v. BURLEY.

[2 Sumn. 355.] [1]

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

EVIDENCE — COMPETENCY — CERTIFICATES OF PUBLIC OFFICERS — CONSUL'S CERTIFICATE — COMPETENCY OF WITNESS — SUIT FOR BENEFIT OF GOVERNMENT — LIABILITY FOR COSTS.

1. Where public officers are authorized by law to certify to certain facts, their certificates to these facts are competent evidence thereof.

2. A consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly made so by statute.

3. Quaere, if a consul's certificate is evidence, that a ship's register was deposited with him, agreeably to the act of congress of 1803, c. 62, § 2 [2 Story's Laws, 883; 1 Stat. 203, c. 9].

4. An information was brought in the name of the consul of the United States, for the island of St. Thomas, suing for the benefit of the United States, against the defendant, to recover a penalty for not depositing with the consul the ship's register on her arrival at the port of St. Thomas, agreeably to the act of congress of 1803, c. 62, § 2. *Held*, that the certificate of the consul was not admissible evidence, to prove the arrival or departure of the vessel.

5. Quaere, if a consul, who sues for a penalty, in his own name and person, but for the benefit of the United States, is liable for costs.

6. Quaere, if a party plaintiff of record, who has no interest in the suit, is a competent witness.

7. Quaere, if an information is the proper proceeding in the present case, where the suit is not brought in the name of the government.

This was a writ of error, to the judgment of the district court of the United States, for the district of Massachusetts. The original suit was an information brought by the district attorney, in the name of Nathan Levy, consul of the United States, for the island of St. Thomas, suing for the benefit of the United States, against David Burley (the defendant in error), master of the ship Redwing, to recover the penalty of 500 dollars, for not depositing with the said consul, the ship's register on her arrival at the port of St. Thomas, according to the requirement of the supplementary act, respecting consuls and vice-consuls, of the 28th of February, 1803 (chapter 62). The defendant pleaded not guilty, upon which issue was joined and a verdict passed upon the trial, in his favor. A bill of exceptions was taken at the trial; from which it appeared, that a certificate of the said consul (the plaintiff), under the seal of his consulate, was offered in evidence, on behalf of the plaintiff, stating the fact, of the arrival and departure of the ship, at the said port of St. Thomas; and that the defendant, Burley, neglected and refused to deposit the register of the ship in the hands of the consul. The certificate being objected to, as evidence, the learned judge of the district court ruled, that the certificate was evidence, that the defendant Burley, did neglect to refuse to register with the consul, but that the same was not admissible to prove the arrival and departure of the ship from the port of St. Thomas. To this opinion, the plaintiff filed his bill of exceptions; and the question now presented to the court, was whether the certificate was admissible, for the purpose of proving such arrival and departure.

Mr. Mills, Dist. Atty., for plaintiff, argued, that the plaintiff in the present case, not being liable for costs, was a competent witness, though a party to the record. No objection can be taken, because the certificate is not sworn to, as the consul is a public officer, acting under his oath of office. The district judge admitted it as evidence, that the register was deposited; but not of the arrival of the vessel. It would seem to be prima facie evidence of the arrival of the vessel, as consuls are ex officio bound to take notice of the arrival and departure of American vessels. He cited Act Cong. 1803, c. 62, § 2.

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

Mr. Shipley, contra, for defendant, contended, that the plaintiff, being a party to the suit, was an incompetent witness, though not liable to costs. The statute makes it the duty of the consul, to prosecute in an alleged case like the present, but does not make him a competent witness. His certificate is not evidence of any fact, except what is within the consular functions. Church v. Hubbard, 2 Cranch [6 U. S.] 237; U. S. v. Mitchell [Case No. 15,791]; Catlett v. Pacific Ins. Co. [Id. 2,517]. The consular functions are enumerated in the statute. According to this, the consul is not bound to keep a record of arrivals. The ninth section of this statute, expressly makes his certificate evidence in certain cases. This express provision excludes the conclusion that it is competent evidence, in cases not provided for. The statute, moreover, is a penal statute, and to be construed strictly.

STORY, Circuit Justice. The act of 1803, c. 62, § 2, provides, that it shall be the duty of every master of a ship belonging to the United States, on his arrival at a foreign port, to deposit his register, &c., with the consul or other commercial agent of the United States at such port; and in case of his refusal or neglect, he is to forfeit and pay 500 dollars, to be recovered by the consul or other commercial agent; "in his own name, for the benefit of the United States, in any court of competent jurisdiction." No provision is made, as to his certificate of the fact being evidence of such refusal or neglect, or of the arrival, or of the departure of the vessel. But in another section of the act (section 4,) it is expressly provided, that the certificate of the consul under his hand and seal shall be prima facie evidence of the refusal of the master of an American ship to receive destitute seamen on board, according to the requirements of that section. The maxim of law might, therefore, very properly be here brought into view: "Expressio unius est exclusio alterius;" and, certainly, an express provision, in such a case, would not be without its weight in giving a construction to such an omission, in a statute of this sort.

There is no doubt, that certificates and other documents made by a public officer, entrusted with authority for that purpose, are to be treated as public documents, and as such, are evidence against all persons (to the extent of the officer's authority), of the facts, which he is directed to certify. But the difficulty in the application of this doctrine to the circumstances of the present case is, that neither this statute, nor any other statute of the United States, has made it the duty of the consul to certify any such facts; and, therefore, the reason fails. On the other hand, the general rule of law is, that all evidence must be given under oath, and in the very case in controversy. The exceptions to this rule are well known; and, here again, the difficulty is to bring the present case within the reach of any of these exceptions. I do not find, indeed, that any act of congress has required consuls to take an oath for the faithful performance of the duties of their office, although, in common with all other officers, they are required to take an oath to support the constitution of the United States. So, that here, there is a certificate offered, not only not under oath, and not provided for by any statute, but open to the grave objection, that it is not even by an officer, sworn to the faithful discharge of duty.

In addition to these suggestions, it is proper to state, that it is not shown to be any part of the official duty of a consul to keep a memorandum of the arrival or departure of American vessels at or from the port, for which he is appointed. If it were a part of his duty to do so, it would by no means follow, that his certificate of the fact would be evidence in a court of justice; for there would be better evidence behind, that is to say, his own deposition on oath, giving the opposite party a right of cross-examination. The case of Waldron v. Coombe, 3 Taunt. 162,[2] shows, that the certificate of a consul on a matter of fact, clearly within the line of his duty, is not evidence. The case of Church v. Hubbard, 2 Cranch [6 U. S.] 237, shows with what strictness the law acts in relation to a consular certificate. It was there rejected, as proof of the existence of a foreign written law annexed thereto. On that occasion, Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "There appears no reason for assigning to their (consuls') certificates respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact." This language seems to me to justify the conclusion, that a consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly so made by statute; for it is in derogation of the rules of evidence of the common law. In the case of U. S. v. Mitchell [Case No. 15,791], my late brother, Mr. Justice Washington (a truly able and cautious judge,) admitted a consul's certificate to be evidence, that the ship's register was deposited with him; but he rejected it as to all other facts. I do not now meddle with this point; because it is not necessary to the decision of the case before the court; and there may be good reason to hold, that the certificate, in relation to an official fact, of which the consul may have exclusive knowledge, may be properly admissible, when, as to all other facts, it would be inadmissible; because they might admit of proof aliunde, or even of proof of a higher nature. If the certificate in this case had been of the positive deposit of the register, and were admis-

[2] See, also, Roberts v. Eddington, 4 Esp. 88; Drake v. Marryat, 1 Barn. & C. 473, 476.

sible as evidence of that fact (as Mr. Justice Washington held it was,) then I should have no doubt, that it was prima facie evidence of the arrival of the vessel; for it would be a natural presumption, that it was deposited by the master in the ordinary discharge of his duty. But where the certificate is merely negative of the non-deposit, of the register, it would seem at most to establish only its own verity. It would afford no presumption of the arrival and departure of the vessel; for it would be quite consistent with the fact, that the vessel had never arrived at the port. Indeed, the presumption from such non-deposit would be, that the vessel had never arrived at the port; for the law will not presume a violation of his duty by the master. It must be established by competent proofs.

Now, I do not well see, upon any established principles of evidence, how the certificate of the consul of the fact of the arrival or of the departure of the vessel was admissible as proof of the fact. It is not proof under oath. It is not authorized by any statute. It is not made any part of his official duty to keep a memorandum or record of such facts. They are not facts peculiarly or officially within his knowledge. They are susceptible of perfect proof from a great variety of other sources. It does not appear to me, that it is a case, which, upon principles of public policy, or otherwise, calls upon the court to relax the rules of evidence, which are the great security of the rights and interests of all persons. In the case of Dunbar v. Harvie, 2 Bligh, 351, the house of lords held a certificate of an officer of excise, as to matters within the scope of his official knowledge and duty, not admissible evidence. And I do not find, that upon that occasion, any authorities were adduced, having the slightest tendency to shake the rule as to the non-admissibility of the certificates of public officers generally. My judgment is, that the decision of the district judge was, upon general principles, correct; and that the judgment ought to be affirmed.

It is unnecessary to decide the other point raised in the case; and that is, whether the certificate, if otherwise admissible, is not incompetent evidence, because it is the certificate of the plaintiff on the record. The argument is, that though he is a plaintiff upon the record, he has no interest, as he sues under the authority of a statute for the sole benefit of the United States, and he is not liable for costs. As to the non-liability for costs, I am not aware, that that point has ever been directly decided. The plaintiff here sues in his own proper name and person, and not merely by his official name, as the postmaster general does, under the act of 1810, c. 54, § 29 [2 Story's Laws, 1165; 2 Stat. 602, c. 37], or the act of 1825, c. 275, § 31 [3 Story's Laws, 1995, 4 Stat. 112, c. 64]. And there may be a distinction in the cases. Suppose a bond given to a person "for the use of the United States," and the obligee sues, is he of course to be exempted from the payment of costs? That has never yet, to my knowledge, been decided; and I give no opinion upon it. But the more enlarged question is, whether a party plaintiff of record, although he has no interest in the suit, can be admitted as a competent witness. I am aware, that my late brother, Mr. Justice Washington, in Willing v. Consequa [Case No. 17,767], held that he may. But I also know, that that decision has not been thought entirely satisfactory; because, it has been suggested, he is disabled by law, from the mere circumstance of his being a party, without any reference to his ultimate interest, as a party, to give testimony in his own cause. Upon this also I give no opinion.

There is another question arising out of the record, which has not been argued; but upon which, nevertheless, I wish to suggest my own doubt, and that is, whether an information by the district attorney will lie in this case. The result, to which I have come, renders it unnecessary to decide the point. But I ought not to disguise, that I think it difficult to maintain an information, upon the terms of the statute, or for the penal objects, which it is designed to enforce. I do not remember a single case, in which an information for a penalty has been maintained, except where the suit has been brought in the name of the government itself. Judgment affirmed.

Case No. 8,301.

LEVY v. THE CAROLINE.

[Cited in Case No. 88. Nowhere reported; opinion not now accessible.]

Case No. 8,302.

LEVY v. The GREAT REPUBLIC.

[2 Woods, 33.][1]

Circuit Court, D. Louisiana. April Term, 1874.

CARRIERS — GROUNDING OF BOAT — REASONABLE CARE AND SKILL.

Where everything was done by the officers of a boat which reasonable care and skill required in the navigation, neither the boat nor her owners will be liable for damage to freighters which may result from her grounding.

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

[This was a libel by Jacques Levy against the Great Republic for damages for delay and loss caused by the grounding of the steamer, due to alleged careless pilotage.]

R. H. Marr, for libellant.

H. J. Grover, for claimant.

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

BRADLEY, Circuit Justice. According to the testimony of the master and pilots of the Great Republic, the grounding of the steamboat which caused the delay and loss complained of in this case occurred in this way: The steamer was drawing about seven and a half feet of water. The place where the accident occurred was near a bar called "Perry's Towhead," and was known to be a dangerous and an uncertain place, where the channel, in times of floating ice, frequently changed. As they neared it, the master said to the pilot: "If you don't think that you can run this place with safety, I would rather you would round the boat and let her go into the bank." The latter stated, in answer, that the reports were that they had nine and a half feet of water there; that it was a very loggy and rough place. The master then said that they would have to float over it; telling the pilot to go into it, and go as easy as possible, so that if they did hit anything it would not hurt the boat. The steamer soon commenced rubbing the ground, and then they began to back her, and would have got clear again but for a small steamboat following them in the rear. She was so close that they were in imminent danger of collision. To prevent this catastrophe, they stopped backing, and then the Great Republic again grounded at the stem, and her stern was swung around by the current, and she became stranded and frozen up for several days. The weather was extremely cold, several degrees below zero. Ice was forming as well as floating in the river. The boat was soon enveloped in such a pack of it as to endanger her safety. The subsequent efforts to get clear from their position, to relieve the vessel by unloading the cargo, and to get started again on the voyage, seem to have been dictated by the ordinary skill and care due to such a combination of circumstances. The pilot's knowledge of the place in question depended on his examination of the river by passing up in a steamboat two nights previously. When passing this place, however, they took no soundings on account of the ice, the cold, and darkness of the night; but they had learned from another pilot coming down the river that there was nine and a half feet of water at this point, and that the depth of water or channel was where the Great Republic attempted to pass through.

The question is, whether everything was done in this case which reasonable care and skill required in navigating such a channel at such a time. It was shown that the pilots on the Mississippi are in the habit of getting their knowledge of the channel and its changes from each other; that they have formed themselves into an association for this purpose, and that it is the duty of the members to communicate this information, and that all of them rely on it. Sounding, of course, is constantly resorted to in doubtful and dangerous places when sounding is practicable. But the master and pilots of the Great Republic state that it was impracticable to make soundings with the yawls, or sounding boat, on account of the ice, which was rolling very thick.

Under these circumstances, the question is reduced to this: Whether at that time, and under those circumstances, they ought to have ventured into the place in question at all; whether, in other words, they had sufficient knowledge of the channel to authorize them to proceed; or whether they should have run to shore and laid by. In my judgment, according to the custom of the river, they were justified in acting upon the intelligence which they had. The libel must be dismissed.

Case No. 8,303.

LEVY v. JAMISON et al.

[The case reported under above title in 1 Law & Eq. Rep. 52, is the same as Case No. 8,271.]

LEVY (MAXFIELD v.). See Case No. 9,321.

Case No. 8,304.

LEVY v. VIRGINIA FIRE & MARINE INS. CO.

[9 Ins. Law. J. 113.]

Circuit Court, D. Louisiana. Dec. 23, 1879.

FIRE INSURANCE—LIMITATION IN POLICY.

[In a policy which provides for proofs of loss, and arbitration of differences as to amount of damage, and forbids the bringing of suit until an award is made, a limitation requiring suit to be brought within six months after the "loss or damage shall occur" means six months after the amount of the loss is thus ascertained, and not six months from the date of the fire.]

[This was an action on a policy of fire insurance.]

BILLINGS, District Judge. The plaintiff was insured against loss by fire by defendants. There was fire and loss. To a suit brought by plaintiff upon the policy of insurance, the defendants, among other defenses, plead, by way of exception, that according to the provisions of the policy the action is barred by the lapse of time. The submission to the court of the cause at the present time is simply as to the question: "Was this suit instituted within the time fixed within the terms of the policy of insurance, excluding from consideration all facts tending to show any waiver by the defendants of the limitation, and confining the inquiry to an interpretation of the policy itself?" The policy stipulates that the "loss or damage shall be paid sixty days after the proofs required by this company shall have been received at their office in Richmond, and the loss shall have been satisfactorily ascertained and proved as re-

quired by the provisions of this policy; that the damage to property not totally destroyed shall, unless the amount is agreed upon, be appraised by disinterested persons mutually agreed upon by the parties; that it shall be optional with the company to replace the articles lost or destroyed with others of the same kind and quality, or take the goods or any part thereof at their value appraised as aforesaid, and to rebuild and repair the buildings within a reasonable time, giving notice of their intention to do so within sixty days after having received the proofs herein required; that until sixty days after such proofs and certificates are produced, and such examination and appraisal permitted, no suit shall be instituted, nor the loss be deemed proved or payable." It is further provided that "in case difference shall arise concerning the amount of any loss or damage by fire, after proof thereof has been received in due form by the company, the matter shall, at the instance of the company, be submitted to the judgment of arbitrators mutually agreed upon, whose award in writing as to the amount of such loss or damage, shall be binding upon the parties; * * * but such award or appraisal of damage shall only determine the amount of loss sustained, but in no wise the liability of the company." The policy proceeds: "It is furthermore expressly agreed that no suit or action of any kind against the company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within the term of six months next after the loss or damage shall occur; and in case any such suit or action shall be commenced against this company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitation to the contrary notwithstanding."

The petition alleges that the loss occurred by fire on August 1, A. D. 1878; that there was an award by arbitrators made on January 4, A. D. 1879. This suit was instituted February 10, A. D. 1879. All questions of waiver being excluded, the question which the court is now called upon to decide is: "When did the six months' limitation commence to run? From the time of the fire and loss or from the time of award?" If the former, then the exception is good in law, and the question of waiver must hereafter either be submitted to a jury or determined by a court; if the latter, then the exception must be overruled, and judgment rendered for plaintiff.

It is to be seen from the provisions of the policy above quoted that the loss is, so far as relates to the right, on the part of the insurers, to substitute new for old, and to repair and to rebuild, to be decided within sixty days after the proper preliminary proofs are furnished, and that if they do not elect and signify their election to replace and rebuild, the loss then becomes payable; that so far as relates to the amount of loss an award is indispensable; no suit can be sustained unless there shall have been an award; and that the suit must be brought "within the term of six months next after the loss or damage shall occur;" that unless so brought "the lapse of time shall be deemed conclusive evidence against the validity of the claim for indemnity." That this limitation is valid and binding upon the parties is held in Fullam v. New York Union Ins. Co., 7 Gray 61. The same thing is declared with reference to a similar limitation of one year in Carraway v. Merchants' Mut. Ins. Co., 26 La. Ann. 298. But in neither of these cases was the point decided which is here submitted. The question has been directly passed upon by the court of appeals in the state of New York. It seems to be the settled doctrine of that court that this limitation should be construed to commence at the time when the loss by the terms of the policy became due and payable, and not at the time of the physical burning of the property. See the opinion of the court, as given by Chief Justice Church,—Hay v. Star Fire Ins. Co. [13 Hun. 496],—and the New York cases there cited. The doctrine has been reached in that court in cases involving the matter of waiver of the limitation. But it seems now to be settled as a proposition with reference to the construction of this clause. The same principle is stated in Wood's work on Insurance, as a rule of construction. Page 762, § 443.

But this case has a feature which strengthens the argument upon which the cases in the books are placed. In those cases the controlling provision was held to be that the loss should become payable upon the lapse of sixty or ninety days after the satisfactory completion and filing of the proofs, and it was there held to be the meaning that the commencement of the limitation was from the time the right of action existed; because, according to any other construction, the policy would allow the insurers, by objecting to the proofs or refusing or neglecting to file them, to postpone the time when the action might be brought to a time when, by the six months' limitation, the right to sue at all would be extinguished. But in this case we have to deal not only with the claim postponing the rights of action till sixty days after the complete proofs have been furnished, but with an additional claim which interposes a new ground of delaying the plaintiff's right to sue, viz. till arbitrators mutually chosen have made an award. Now, the control on the part of the insured over the matter of satisfactory proofs

was but partial and imperfect, but, in the nature of things, a control on his part over the time when arbitrators shall make an award is clearly impossible. So that, if the defendant's construction of this clause in the policy were to obtain, an insured party, who had been doing his utmost to secure a seasonable award, might fail in obtaining it until after the lapse of six months from the date of the fire or loss. To maintain this construction would be to maintain that the contract of insurance provided that any suit to enforce it might be premature until it became prescribed, and that the insured, without fault or omission, could be told by the insurer that the fact that he had not brought an action upon an instrument before his right of action, by its very provisions, could be brought, was, by the very terms of that instrument, "conclusive evidence that his claim under it was invalid." Such a construction cannot be maintained, if any other can reasonably be adopted. A construction should be sought which will harmonize all the provisions of the policy, and effectuate the intent of the parties to a contract of indemnity. The weight of authority and reason is in favor of making this limitation commence, as do all limitations upon the time of actions under statutes, at the time when the party whose right to sue is to be extinguished could have instituted an action, and not at the time when the loss physically occurred; such date being that point of time at which both the sixty days after furnishing the proofs have elapsed, and the award has been made. Let the exception be overruled, and let there be judgment for plaintiff.

Case No. 8,305.

LEVY COURT OF WASHINGTON COUNTY v. RINGGOLD.

[2 Cranch, C. C. 659.][1]

Circuit Court, District of Columbia. May 13, 1826.[2]

MUNICIPAL CORPORATIONS—RIGHT OF COUNTY TO FINES AND PENALTIES OF CITY OF WASHINGTON—RIGHT OF DISTRICT ATTORNEY AND MARSHAL TO ORDER WRITS OF CAPIAS AD SATISFACIENDUM—LIABILITY OF MARSHAL FOR FINES COLLECTED.

1. The levy court of Washington county, D. C., are only entitled to a moiety of the fixed fines, penalties, and forfeitures accruing under the adopted statutes of Maryland; not of the common-law discretionary fines, nor of those imposed under original acts of congress.

2. The attorney of the United States for the District of Columbia is not bound, by the 2d section of the Maryland act of 1795, c. 74, to order writs of ca. sa. for fines, &c., on the application of the marshal; nor can the marshal order them without the authority of the district attorney, who has a discretion in that respect, which the marshal has no right to control.

3. The marshal, D. C., is not liable for fines which he has no means of collecting.

4. There is no act of congress which imposes upon the attorney of the United States for the District of Columbia the special duties imposed upon the attorney-general of Maryland and his deputies by the statutes of Maryland.

5. The levy court of Washington county is not bound to repair the gaol erected by the United States in that county.

6. The marshal had no right to expend the funds of the levy court of Washington county in the repairs of the gaol without their order.

At May term, 1825, Mr. Marbury, having given previous notice, obtained a rule in behalf of the levy court of Washington county, D. C., upon Tench Ringgold, marshal of the District of Columbia, to show cause "why judgment should not be rendered against him in favor of the said levy court for the sum of $2,266.51, which said sum of money" they claim against him for their proportion of the fines, penalties, and forfeitures, "collected, or which ought to have been collected" by him and paid to the said levy court under the provisions of the 2d section of the act of congress, supplementary to the act concerning the District of Columbia. Upon the appearance of the marshal, THE COURT ordered the auditor of the court to ascertain and report what moneys, on account of fines imposed by this court, have been collected by the marshal since the month of December, 1819; what fines since that period remain uncollected, and whether the persons from whom the same were to have been collected, were insolvent, and which of them; and whether the marshal has applied any of the moneys collected by him, as aforesaid, towards the repairs of the gaol, or towards any other public uses, and to what amount; and to state any other matters specially which either party may request. On the 5th of January, 1826, the auditor reported,

That half of the whole amount of fines imposed, was.....		$2,267 66
That half of the amount to be deducted for pardons and fines not collected, was		1,660 17
That the amount received by the marshal, was		$ 607 49
That the marshal should be credited for repairs of the gaol	$814 95	
And for money paid to the judge of the orphans' court, &c.....	157 00	
		971 95
Leaving a balance due to the marshal of.....		$364 46

To this report Mr. Marbury, for the levy court, excepted. "1st, Because the auditor has allowed credit to the defendant in cases where no execution issued against the party fined. 2d, Because the auditor has allowed credit to the defendant for money expended by him on the gaol of Washington county and for money paid to the judge of the orphans' court for the same county, without

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

[2] [Affirmed in 5 Pet. (30 U. S.) 451.]

proof of any authority from the levy court to make such expenditures and payments." The 2d section of the act of congress of the 3d of March, 1801 (2 Stat. 115), supplementary to the act concerning the District of Columbia, provides, that "all fines, penalties, and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and the informer; one half of which fine shall accrue to the United States, and the other half to the informer; and the said fines shall be collected by, or paid to the marshal; and one half thereof shall be by him paid over to the board of commissioners hereinafter established," (that is, the levy court,) "and the other half to the informer; and the marshal shall have the same power regarding their collection, and be subject to the same rules and regulations as to the payment thereof, as the sheriffs of the respective states of Maryland and Virginia are subject to in relation to the same."

Mr. Marbury, in support of his first exception to the auditor's report, contended that the 2d section of the act of the 3d of March, 1801 (2 Stat. 115), made the marshal liable to all the obligations of the sheriffs in Maryland, in regard to the collection of fines; and liable to the same summary process which is provided by the Maryland act of November, 1797, c. 43. By the Maryland act of November, 1795, c. 74, § 7, the sheriffs of that state were "answerable for all fines, penalties, and forfeitures imposed on the inhabitants of their respective counties by the judgment of any court" within that state, "where no execution shall issue for recovery of such fine, penalty, or forfeiture, unless the said sheriffs shall respectively make it appear, to the satisfaction of the treasurer, that the party on whom such fine, penalty, or forfeiture was imposed was insolvent, and unable to pay the same." Under this act, Mr. Marbury contended that the marshal was liable for the fines in all cases where no execution for them had issued, unless he proved the insolvency of the parties fined. By the second section of the same act it was made the duty of the attorney-general of Maryland to order an execution to issue for a fine, penalty, or forfeiture, on the application of the sheriff. Under this section Mr. Marbury contended that the marshal was bound to apply to the district attorney to order an execution, in every case where the fine was not paid, and the party not insolvent; and that it was the duty of the district attorney to order it. As to the second exception, Mr. Marbury contended that the levy court was not bound to repair the gaol, and had no right to apply the money of the levy court to that object without their order.

Mr. Lear, contra.

The marshal had no authority to order an execution, nor to require the district attorney to order it, and therefore ought not to be liable in cases where no execution issued. The levy court have a right only to one half of the fines, penalties, and forfeitures accruing under the adopted statutes of Maryland, not of the common-law fines, nor fines under acts of congress. The repairs of the gaol were made by the order of this court. The county is as much bound to repair the gaol as to repair the roads, or to pay the judge of the orphans' court, which it has always done; and the half of the fines was given to the levy court for that purpose. The marshal cannot be liable where he is in no default.

Mr. Key, in reply.

The marshal is bound to use due diligence, and is prima facie liable for all the fines, but may discharge himself by showing the parties to be insolvent, and perhaps by showing that he applied to the district attorney for executions, but did not get them.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, contra). Under the act of congress of the 3d of March, 1801, § 2 (2 Stat. 115), the levy court of Washington county, who represent, or, in fact, are, the commissioners therein named, claim, of the marshal, one half of all fines, penalties, and forfeitures imposed, assessed, or recovered in this court, from the beginning of December term, 1819, to October term, 1821, inclusive, amounting, as they say, to $2,266.51. This amount is understood as including one half of the fines imposed by the court for common-law offences, the amount of which is discretionary, and of those discretionary fines which are imposed by the court, under acts of congress, (as in the cases of larceny, manslaughter, &c.,) and of fines, penalties, and forfeitures fixed by acts of congress for certain offences, as well as the fixed fines, penalties, and forfeitures accruing under the adopted statutes of Maryland. But we think that the levy court are entitled only to the latter.

The laws of Maryland and Virginia, which were adopted by the act of congress of the 27th of February, 1801 (2 Stat. 103), included many penal laws, and the modes of recovering the fines, penalties, and forfeitures accruing thereon, were various. In some cases they were to be recovered by indictment; in some, by information; in some, by action of debt; in some, by seizure; in some, by conviction before a justice of the peace; in some, before the county courts; in some, before the general courts, &c. In some cases, the fine, penalty, or forfeiture was recovered for the use of the state; in some, for the use of the county; in some, for the use of particular literary institutions; and in some for

the use of the poor, &c. It was evident that much perplexity and embarrassment would arise in the execution of those laws, unless some precise mode of recovery and appropriation of those fines, &c., should be provided. To effect this purpose, and to designate the person who should receive or collect the fines, the second section of the act of the 3d of March, 1801, was enacted. As it regards the fines, penalties, and forfeitures accruing under the laws of Maryland, we think it refers only to those fines, penalties, and forfeitures which are alluded to in the act of Maryland, 1795, c. 74, entitled, "An act for the more speedy and effectual recovery of fines, penalties, and forfeitures," and those, we think, were such as were imposed and fixed by statute, and not those discretionary fines which the courts of law imposed for misdemeanors and other common-law offences. We are induced to think so for the following reasons: The preamble of that act (1795, c. 74) declared that doubts were entertained, whether, under the existing laws of the state, a writ of ca. sa. could be issued "for the recovery of any fine, penalty, or forfeiture;" whereas, the act of February, 1777, c. 13, entitled "An act for the more speedy and effectual recovery of common-law fines and forfeited recognizances," § 2, expressly gives a writ of ca. sa. for fines imposed by any court of record for any common-law offences, which, in the preamble of the same statute, are described as "the common-law fines imposed on public delinquents." And, by another statute of the same session (chapter 6), and passed on the same day (20th April, 1777), entitled "An act to direct in what manner fines, forfeitures, penalties, and amerciaments shall be applied," it is enacted, that "all fines, penalties, and forfeitures directed and imposed by any of the laws now in force, and all fines, penalties, and forfeitures which shall hereafter be inflicted or imposed, and no mode of recovery or application shall be directed, shall and may be recovered in manner following," namely: where the sum did not exceed £5, the same might be recovered with costs, in the name of the state and the informer, before any one justice of the peace in the county; and where the sum exceeded £5, by indictment, in the name of the state; or by action of debt, in the name of the state and of the informer, in which it shall be sufficient to allege "that the defendant is indebted to the state and the informer, in the fine, penalty, or forfeiture, by the act directed and imposed, whereby action accrued, without setting out the special matter." When the recovery should be before a justice of the peace, he might either commit the offender, or, by warrant, direct the constable to levy the fine on the offender's goods and chattels; and was required to pay one half to the informer and the other to the sheriff, who was to pay it into the treasury. If recovered by indictment, the court might commit the offender till payment should be made to the sheriff; or might order execution, to levy the fine and costs on the offender's lands, goods, or chattels. If recovered by action of debt, the sheriff was to pay one half to the informer and the other to the treasurer. By the same act, no prosecution or suit should be commenced for any fine, penalty, or forfeiture unless within one year from the time of the offence committed.

Thus, it appears, that, in the same session, the legislature gave a writ of ca. sa. for common-law fines, but refused it in all cases of fines, penalties, and forfeitures; clearly discriminating, as we think, between common-law fines and those fines, penalties, and forfeitures which accrued under, or were imposed by, law, and which could be recovered by indictment or action; and the prosecution for the recovery of which could be limited by statute, and evidently showing, that, by fines, penalties, and forfeitures, they meant only those fines, penalties, and forfeitures which were prescribed by statute, and which could, in the language of the act of congress of the 3d of March, 1801 (2 Stat. 115), be correctly said to be "accruing under the laws of Maryland," and which could be recovered either by indictment or action of debt. The act of 1795, c. 74, uses the same terms, namely: "fines, penalties, and forfeitures," and provides, that, for all such, a ca. sa. may be issued, thereby placing them, in that respect, on the same ground as common-law fines, which are not named in that act. When, therefore, the act of congress uses the same terms, "fines, penalties, and forfeitures" accruing under the laws of Maryland, they must be understood as used in the same sense in which they are used in the laws of Maryland, where, we think it is evident, they mean only those fines, penalties, and forfeitures which are prescribed by the statutes of Maryland. To the half of such only do we think the levy court entitled.

The next inquiry is, how far is the marshal chargeable to the levy court for fines, penalties, and forfeitures, of that description, which have never, in fact, been received by him. Common-law fines, and fines imposed originally by acts of congress, are out of the question. By the act of Maryland, 1795, c. 74, § 2, it is made the duty of the attorney-general of Maryland, upon application of the sheriff, to order writs of ca. sa. for such fines, penalties, or forfeitures. By the 3d section, such fines, &c., are to be paid to the sheriff to whom the ca. sa. shall be directed, to wit, it authorizes the sheriff to receive the money on the ca. sa. By the 4th section, the sheriff is to have the body, on the return of the ca. sa. or pay the money. By the 5th section, the clerk of the court is to transmit to the treasurer, a list of the ca. sa.'s issued under that act, and of the sums of money which the sheriff shall have acknowledged to have received for such fines, &c. The 6th section di-

rects the sheriff to pay over the costs upon the executions, to the persons entitled to them. And the 7th enacts, "That the respective sheriffs of this state shall be answerable for all fines, penalties, and forfeitures, imposed on the inhabitants of their respective counties, by the judgment of any court within this state, where no writ of execution shall issue for the recovery of such fine, penalty, or forfeiture, unless the said sheriffs shall respectively make it appear to the satisfaction of the treasurer, that the party on whom such fine, penalty, or forfeiture was imposed, was insolvent, and unable to pay the same." The questions, arising under this act, are, 1. Whether the attorney of the United States for this district, is bound by the 2d section of the act of 1795, c. 74, which requires the attorney-general of Maryland, or his deputies, on the application of the sheriff, to order writs of ca. sa. for such fines, &c. 2. Whether the marshal can order such writs without the authority of the attorney for the district. 3. Whether the marshal can collect the fine without a writ of execution. 4. Whether he is liable for a fine which he had not the legal means of collecting, unless he shall show the offender to be insolvent; and, 5. Whether, if he be so liable, there be any person substituted for the treasurer of Maryland, to decide the fact of such insolvency.

1. The attorney of the United States, for the district, holds his office under the 9th section of the act of congress of the 27th of February, 1801 (2 Stat. 103), and is to take the oath and perform the duties required of the district attorneys of the United States. By the act of congress of 1789, c. 19, § 35 (the Judiciary Act; 1 Stat. 73), the district attorneys of the United States are to be sworn or affirmed to the faithful execution of their office; and it is made their duty "to prosecute in such district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States may be concerned." There is no act of congress which imposes upon the attorney for this district, the special duties imposed upon the attorney-general of Maryland, and his deputies, by the statutes of that state. The power to prosecute all delinquents for crimes and offences, seems to include the power of ordering execution against them upon conviction. This has been the constant practice in this district; and we think that the district attorney has a discretion in that respect, which the marshal has not a right to control.

2. If the attorney has the control of the prosecution, we think the marshal has no right to order the ca. sa. without the authority of the attorney.

3. It is evident that the marshal has no power to enforce payment of the fine, &c., without execution, unless the offender be committed by the court.

4. It seems to follow, from the natural dictates of justice, that as that part of the act of Maryland which authorizes the sheriff to compel the attorney-general to order an execution, is not applicable to the marshal, the correspondent obligation of the sheriff to collect the fines, &c., at all events, (insolvency excepted,) in a case where no execution shall have issued, cannot devolve on the marshal.

5. It it were possible to think that the marshal would be liable in such a case, there is no person substituted for the treasurer of Maryland, to decide the fact of insolvency, so as to discharge the marshal, even in that case.

The next questions arising in this case are, —1. Whether the levy court is bound to repair the jail erected by the United States in this county. 2. If they are, then whether the marshal had a right to apply, to that object, the funds of the levy court in his hands, without the order or assent of that court.

The levy court was constituted by the 4th section of the act of congress of the 3d of March, 1801 (2 Stat. 115), which declares that they shall possess and exercise the same powers, and perform the same duties as the levy courts, or commissioners of counties possess and perform. By the 10th section of the act of congress of the 3d of May, 1802 (2 Stat. 193), the marshal of the District of Columbia was authorized and directed, with the approbation of the president of the United States, to cause a good and sufficient jail to be built within the city of Washington, and a sum not exceeding $8,000 was appropriated to that purpose. The act of congress of the 1st of July, 1812 (2 Stat. 771), authorized the levy court to erect and maintain a penitentiary; to straighten and repair certain roads, and to make new roads; to impose a tax on the county, (excepting the city of Washington,) not exceeding 25 cents on $100 of the real and personal property, for the aforesaid and all other general county purposes; and repeals all the then existing laws so far as they vested in the levy court a power to lay taxes; and they were exempted from all obligation to support the poor of the city of Washington; and were authorized to lay a special tax upon the other part of the county for the support of the poor of such other part. By the same act, the levy court is organized anew. The general county expenses and charges, other than for certain roads and bridges out of Georgetown and Washington City, were to be divided equally between that city and the residue of the county, and one half thereof to be paid by the city to the treasurer of the levy court; which general expenses were to be ascertained annually by that court and the city. These are all the provisions of the several acts of congress, giving powers to the levy court of Washington county. By the act of Maryland, November, 1794, c. 53, entitled "An act for the establishment and regulation of the levy court in the several counties in this state," the justices of the county are to meet and adjust the ordinary and necessary expenses of the

county, including an allowance for the poor, and roads; and may impose an assessment or rate for necessary repairs of the court-house, not exceeding £150 a year, and for necessary repairs of the county jail, not exceeding £150 a year. We do not see, in these laws, any positive obligation on the part of the levy court to repair the jail; and we think that no such obligation can be inferred, when we consider that the jail was built by the United States on their land, for the safe-keeping of their prisoners; in the execution of their laws, and of the judgments of their courts; and that it is their property, and may, by them, be converted to any other use than that of a jail. Being of opinion, therefore, that the levy court is not bound to repair the jail, we think the marshal was not authorized to expend their funds, without their authority, upon that object. The report of the auditor must be reformed according to the principles contained in this opinion, and for that purpose the cause must be referred to him, with power to take any further evidence which each party may offer, (subject to the exception of the other party,) and report to this court, so that a final order may be made in the cause.

At a subsequent term, to wit, 29th May, 1829, the auditor reported again, in conformity with the opinion of the court, and found a balance of $613.33, due from the marshal to the levy court.

Mr. Marbury, on the same day, filed exceptions to the report, 1. Because it rejected the common-law fines, and fines imposed under acts of congress. 2. Because the auditor refused to allow interest on the balance, on the ground that the marshal had, by mistake of the officers of the treasury, applied the money to the use of the United States in repairing the gaol.

These exceptions were overruled by the court, January 9th, 1830, and judgment rendered for the balance reported. Affirmed by the supreme court. 5 Pet. [30 U. S.] 451.

[NOTE. Mr. Justice Thompson, who delivered the opinion of the supreme court, in construing the act of March 3, 1801 as to fines, penalties, and forfeitures, held that the provisions of the act as to the collection of such fines, penalties, and forfeitures show that, as to common-law fines, the contention of the plaintiff above is not tenable: "These provisions are entirely inapplicable to cases where there is no informer who is to take one-half. Those discretionary fines imposed by the court by way of punishment of common-law offenses cannot fall within the class designated in the statute, for in such cases there is no informer. In case of a fine imposed for an assault and battery, for instance, who is the informer? The law knows of no such character, and no distribution of the fine could be made as required by the statute." Upon the question of the interest charged to the marshal, the learned justice held that this would be unreasonable, since the money did not remain in his hands, and its appropriation was made under the sanction of the treasury department. A third exception to the rulings of the circuit court, and raised in the case, was considered in the supreme court: "Does not the law require the marshal to apply to the district attorney for executions in all cases of fines levied by the circuit court, and make him liable for neglecting to do so, if no execution be issued?" Upon this point says the learned justice: "The marshal of this district is put on the same footing, with respect to his duties and powers, as other marshals of the United States. They are considered as mere ministerial officers, to execute process when put into their hands, and not made the judges whether such process shall be issued. And it would require the most clear and explicit provision to clothe them with such power, so much out of the ordinary and appropriate powers and duties of the office."]

Case No. 8,306.

LEVY COURT OF WASHINGTON v. WASHINGTON.

[2 Cranch, C. C. 175.] [1]

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

MUNICIPAL CORPORATIONS—LIABILITY TO COUNTY EXPENSES.

The following are items of general county expenses and charges to be borne and defrayed by the city of Washington and the other parts of the county equally, viz.: The charge for the attendance of the members of the levy court; the rent of the rooms; salary of the clerk; removing records; advertising notices of the times of meeting; summoning a member to attend; expense of assessment; commission for collecting county taxes.

This was an application, made to this court, on behalf of the levy court of the county of Washington, stating that a difference of opinion existed between the corporation of Washington and the levy court upon the question whether certain items charged by the levy court, in their account against the corporation of Washington, were, or might be properly called general expenses, and applicable to the whole county, and praying this court, under the authority of the act of congress of the 1st of July, 1812, § 11 (2 Stat. 773), "to inquire, determine, and settle, in a summary way, the matter in difference." The disputed items were:

For the attendance of the members of the levy court	$ 362 00
" the use of Davis & Crawford's rooms	58 00
" salary of the clerk of the levy court at $250 per annum	958 33
" removing the records in 1814	19 00
" advertising	21 75
" express to William M'Murray	2 50
" discounts	92 40
" expense of assessment	490 00
" commission on collection of taxes	1,267 64

It was admitted by the parties, that the amount charged for the attendance of the members of the levy court, was the amount to which they were entitled for compensation while engaged in the discharge of their duties, and that there was no evidence how long they were engaged in the general business of the county. That the sum charged for the salary of the clerk was the whole

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

salary to which he was entitled, and that there was no evidence how long he was occupied in transacting the general business of the county. That the advertisements charged were for calling meetings of the levy court. That the express charged, was to summon a member of the court to attend a meeting. That the rooms charged, were for the general use of the levy court. That the charge for assessment, was for assessment of property out of the city of Washington preparatory to laying a tax on the said property; and that the charge for commissions on collection, was on the collection of taxes laid by the levy court on real estate in the said county, out of the limits of the city of Washington, by a collector of taxes appointed by the levy court.

By the act of congress of the 24th of February, 1804, § 4 (2 Stat. 254), it was enacted, "that the levy court of the county of Washington shall not hereafter possess the power of imposing any tax on the inhabitants of the city of Washington."

THE COURT (nem. con.) was of opinion that all the items were properly general expenses, and ought to be allowed, except the charge for discounts.

The judgment of the court, as entered on the minutes of the court, was as follows:—"This case coming on at the application of the levy court, upon notice admitted to the defendants, and on their appearance by counsel, and consenting to the settlement of this account according to the 11th section of the act of congress of July 1, 1812; the court is of opinion that all the items charged in this account are of general expenses except the item charged for discounts, $92.40, and do determine and settle the within account accordingly, and adjudge the balance there stated of $2,291.78 to be due from the said corporation of the city of Washington, and that they pay the same with costs."

LEVY, The EDMUND. See Cases Nos. 4,287 and 4,288.

Case No. 8,307.

The LEWELLEN.

[4 Biss. 156.] [1]

District Court, D. Indiana. May, 1868.

ADMIRALTY JURISDICTION—OHIO RIVER—POWER OF CONGRESS OVER NAVIGATION—PENALTY—PRACTICE—SEIZURE—DUTY OF STEAMER AS TO POSTING SYNOPSES OF LAWS.

1. The admiralty jurisdiction of the national courts extends over the river Ohio.

2. The power granted by the constitution to congress "to regulate commerce with foreign nations and among the several states," includes the authority, not only to pass laws regulating trade, but also navigation and intercourse.

3. The United States district courts have exclusive original jurisdiction of all civil causes of admiralty and maritime cognizance.

4. The act of July 4, 1864 [13 Stat. 390], must be regarded as a navigation law.

5. A proceeding in rem is the proper mode of prosecution for the violation of the 8th section of the act of July 4, 1864, charging a neglect to post up in conspicuous places in a steamer, synopses of the laws relating to the carriage of passengers, as required by that section.

[Cited in Hatch v. The Boston, 3 Fed. 809.]

6. In proceedings in rem against vessels for penalties and forfeitures under acts of congress, it is a general rule that a seizure of the vessels must precede the filing of the libels, in order to give jurisdiction to the court; and that consequently such precedent seizure must be averred in the libel. But, if under the act of congress, the owners execute delivery bonds, they thereby waive the objection of the want of a prior seizure.

[Followed in The Lewellen, Case No. 8,308. Cited in Hatch v. The Boston, 3 Fed. 811.]

7. The act of July 4, 1864, requiring that two copies of the synopsis of the laws relating to passengers on steamers, shall be posted up in every licensed and enrolled vessel carrying passengers, one copy thus posted up is no defense against a prosecution for a violation of the act.

8. *Held*, also, that if the owners of the steamer could not procure copies of the synopsis elsewhere, they were bound, at their peril, to apply for them to the secretary of the treasury; and that if they failed to do so, and proceeded on a voyage without the copies, the penalty was thereby incurred.

In admiralty.

A. Kilgore, U. S. Dist. Atty., and C. E. Marsh, for the United States.

Hanna & Knefler, for respondents.

McDONALD, District Judge. The libel in this case charges, that, on the 3d of September, 1867, at Evansville, Indiana, a port of delivery, the steamer Lewellen, being engaged in navigating the Ohio river along the coast of Indiana, carrying cabin and steerage passengers for hire, and being then and there temporarily landed and moored to the shore at Evansville in the regular course of passage on said river, and being wholly propelled by steam and subject to enrolment and license under the laws of the United States, the master and owners of said boat then and there wrongfully and unlawfully failed, neglected and refused to place and keep in conspicuous places on the boat two copies of a synopsis of such of the laws of the United States relating to the carriage of passengers and their safety on board of vessels propelled in whole or in part by steam, as had been theretofore prepared and published by the secretary of the treasury. The libel avers that said synopsis had been published and printed, and that copies of it might readily have been obtained by said master and owners. The libel alleges that, by reason of said negligence, a penalty of one hundred dollars has been forfeited to the government; and it prays the proper process, the seizure of the steamer, and judgment, &c.

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

On the filing of this libel, a warrant was issued, by virtue of which the marshal seized the boat and detained her until the owner, by executing a bond under the provisions of the act of March 3, 1847 [9 Stat. 181], procured a re-delivery of the boat to him.

The owners appear to the action, make claim, and demur to the libel; and the point to be decided is, whether the demurrer should be sustained.

This prosecution is founded on the 8th section of the act of July 4, 1864 (13 Stat. 390). That section provides: "That the secretary of the treasury shall cause to be prepared a synopsis of such of the laws relating to the carriage of passengers and their safety on vessels propelled in whole or in part by steam, as he shall think expedient, and have the same printed in convenient form to be framed under glass, and give to any such vessel two copies, on application of its owner or master, who shall, without unnecessary delay, have the same framed under glass, and place and keep them in conspicuous places in such vessel in the same manner as is provided by law in regard to certificates of inspectors; and no clearance shall be issued to such vessel, until the collector or other chief (officer) of the customs, shall be satisfied that the provisions of this section shall have been complied with by such owner or master; and in case such owners or master shall neglect or refuse to comply with (the) provisions of this section, he or they shall furthermore forfeit and pay for each offense one hundred dollars, and such fine shall be a lien upon the vessel until paid."

In support of the demurrer, three objections are urged,—first, that the remedy in this case is an action of debt, not a libel in rem; second, that the libel does not sufficiently allege that the secretary of the treasury prepared the synopsis in question, or that there is alleged a willful neglect to apply to him for it; third, that the libel is bad, as not averring a seizure of the vessel before the libel was filed. We will examine these objections in the order here stated.

I. It is insisted that the action in this case should have been debt, and not a libel in rem. It is observable that the section on which the action is founded says nothing about the form of the remedy. It only declares the penalty, and makes it a lien on the steamer. It may be that, on common law principles, an action of debt would lie to recover the penalty in question. But in that case, I rather think the government would abandon the lien given on the steamer by the statute. Indeed I know of no method by which that lien could be asserted at common law. But the objection under consideration does not directly present the question whether an action at common law would lie for this penalty, but whether the offense charged is within the admiralty jurisdiction of this court. That the admiralty jurisdiction of the national courts extends over the river Ohio, is too well settled to admit the least doubt. The Genesee Chief v. Fitzhugh, 12 How. [53 U. S.] 443.

Along with the power on the part of congress "to regulate commerce with foreign nations, and among the several states,"—which includes not only trade, but navigation and intercourse—the constitution extends the judicial power of the national courts "to all cases of admiralty and maritime jurisdiction." Story, Const. § 1663. The power to regulate commerce among the several states undoubtedly authorized congress to pass the law under which this penalty is claimed; and the constitutional provision, extending the judicial power over "all cases of admiralty and maritime jurisdiction," as certainly empowered congress to give the remedy, in cases of the kind under consideration, to the admiralty courts.

The 9th section of the judiciary act gives to the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade." 1 Stat. 77. The act of July 4, 1864, on which this suit is founded must be classed with our "navigation laws;" and if so, it would seem that the 9th section of the judiciary act expressly gives to this court, as a court of admiralty, jurisdiction of the present case. Unquestionably, the seizure in this case was a seizure under a navigation law.

Parsons says: "In general, and as a definition, there seems to be no other rule than that our admiralty jurisdiction embraces all maritime contracts, torts, injuries or offenses." 2 Pars. Mar. Law, 508. If so, it would seem that it embraces the present case; for the offense charged is a maritime offense.

In the case of U. S. v. The Betsey, 4 Cranch [8 U. S.] 443, it was held that all seizures under the laws of impost, navigation, or trade of the United States, made on waters navigable from the sea, by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction. The present is a case of seizure under our "navigation" laws made on waters navigable from the sea by vessels of more than ten tons burden.

In Cutler v. Rae, 7 How. [48 U. S.] 729, Chief Justice Taney remarked that "the court of admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by maritime law." If admiralty jurisdiction exists by reason of a lien created by maritime law, it would seem strange that it should not equally exist by reason of a lien created by an act of congress legislating on a subject properly belonging to the admiralty powers of the national government. For the protection of its commerce, for the collection of its revenues, and for the enforcement of all the regulations of its police in navigable waters, the

United States, like all other commercial nations, find it necessary to impose penalties and forfeitures on goods afloat and on vessels, in relation to which, the laws of trade, navigation, and revenue have been violated. * * * Whenever, therefore, a penalty or forfeiture is attached to a ship or vessel, or goods on board of her, it is enforced by a seizure of the thing, and the proceeding to condemn is a suit in the district court." Ben. Adm. § 301. "All seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burthen, are civil cases of admiralty and maritime jurisdiction." Id. § 302.

It appears to me, therefore, that in the present case, a proceeding in rem before this court, as a court of admiralty is entirely proper. Indeed, I think it is the only proceeding that could have been adopted, which would secure to the government the benefit of the lien created by the statute.

II. The second objection made to the libel is, that it does not sufficiently allege that the secretary of the treasury had prepared the synopsis in question, or that the master and owner willfully neglected to apply to him for it.

The libel alleges that the master and owner "willfully, wrongfully, and unlawfully failed, neglected and refused, and unnecessarily delayed to place and keep in conspicuous places two copies of a synopsis of such of the laws of the United States, relating to the carriage of passengers and their safety on board of vessels propelled in whole or in part by steam, as had been theretofore caused to be prepared and published by the secretary of the treasury of the United States, for the purpose of supplying to the owners or masters of such vessels two copies of the same for every such vessel, and had been caused to be printed by said secretary, in such convenient form that the same might have been framed under glass by said master and owner, and kept in conspicuous places in said vessel; that such printed copies of said synopsis were then and there, and long before had been for many months next previous thereto, accessible to the owners and master of said vessel Lewellen, but the said owners, and master willfully, wrongly, and unlawfully, wholly failed, neglected, and refused, during said months, and on the day and year aforesaid, to apply to said secretary for two of said copies," &c.

The libel, as to this objection, is faultless.

III. It is insisted that the libel is defective for not averring a seizure of the steamer before the libel was filed. As a fact, it seems that the vessel was not seized till after the filing of the libel; and it is certain that the libel contains no allegation of such a prior seizure. It is doubtless a general rule that in order to give the court jurisdiction in cases of penalties against vessels, a seizure must precede the filing of the libel; and that consequently such seizure must be averred in it. Conk. Prac. 592; Ben. Adm. 1301. But whether this general rule is applicable to the case at bar, it is not important to decide; because the owners of the vessel have waived the objection by the execution of a delivery bond under the act of congress.

The act of March 3, 1847, provides: "That in any case brought in the courts of the United States, exercising jurisdiction in admiralty, where a warrant of arrest or other process in rem shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to discharge the property arrested if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety to be approved by the judge of said court, or, in his absence, by the collector of the port, conditioned to abide and answer the decree of the court in such cause; and such bond or stipulation shall be returned to the said court, and judgment on the same, both against the principal and sureties, may be recovered at the time of rendering the decree in the original case." 9 Stat. 181.

In pursuance of said act, the claimants executed a bond on the 6th of December, 1867; and the same was filed in this court on the 9th of January following. By the filing of the bond here, it undoubtedly became a part of the record in this cause. Some doubt, indeed, may exist whether in deciding this demurrer, I can look to the bond at all. It is a general rule that "a demurrer searches the whole record;" but it is not very clear that this rule in general, goes any further than to embrace the whole pleading in the case. I am inclined, however, to extend it to the bond in question, for by the provision of the act just cited, if the government should succeed in this action, judgment would be rendered in this very bond, as the foundation of the adjudication. The bond, I think, must, therefore, in some sort, stand as in the nature of a pleading—at least so far as a demurrer and final judgment are concerned.

The objection to the libel relating to the omission of an averment of a prior seizure, is an objection to the jurisdiction of the court. And the question is, has not the claimant, by the execution of this bond, acknowledged the jurisdiction of the court, and estopped himself now to insist on any objection to it? I am inclined to think he has. And in this view I am strongly supported by the decision of Mr. Justice Story in the case of The Abby [Case No. 14]. In that case, a bond had been executed, as in the present, and an objection was made to the jurisdiction for the want of a proper seizure before the libel was filed. And the judge said "if the party meant to except to the jurisdiction, he should have filed a declinatory

allegation in the nature of a plea to the jurisdiction. But here he has applied to the court for, and obtained a delivery of, the property on bail; and the very stipulation of bail admits the jurisdiction of the court. * * * Nor is this a mere matter of form, but a substantial and important doctrine, regulating the essential rights of the parties. If a plea to the jurisdiction had been taken in the court below, no delivery on bail would have taken place until the jurisdiction had been affirmatively settled. If the court below felt itself ousted of jurisdiction, it would have remitted the cause and the property to the district court of Maine. But after a delivery on bail, how is that possible? The party gets possession of the property, without a trial, from the possession of a tribunal whose jurisdiction he admits as competent to bail the property; and, as soon as it is withdrawn from the grasp of the court, denies its power to institute an inquiry into the question of forfeiture. It cannot be admitted that any party can first affirm the jurisdiction, by taking the property on bail, and then turn around and deny the same jurisdiction, when the court can no longer administer effectual relief to the interests of other persons. The party is estopped by his own acts from such a proceeding." This decision is cited with approbation in Conk. Prac. (5th Ed.) 577, 578. Its reasoning seems to me to be just; and, though that case and the present are not in all respects alike, yet I think that the reasoning applies in full force to the case at bar.

I hold, therefore, that the third objection made to the libel can not be sustained. And it seems to me that no objection urged against this libel is valid.

The demurrer is overruled at the cost of the claimant.

Afterwards, June 2, 1868, the owners of the boat, Benjamin P. Brazelton and John L. Downey, having filed a bond, their claim, and an answer by way of denial, the cause was tried on its merits. The following is the decision:

McDONALD, District Judge. I consider that the evidence for the prosecution in this case proves, prima facie, all the allegations in the libel. Indeed, it is admitted on the part of the defense that in point of fact, the steamer Lewellen, at the time and place mentioned in the libel, did not have on board two copies of the synopsis in question. It is, however, insisted in defense—and I think it is proved—that she constantly kept in a conspicuous place in her cabin one of those copies.

The evidence in defense is, that for some months prior to the first of September, 1867, this steamer was laid up for repair at Paducah, Kentucky; that immediately preceding that day her master applied to the surveyor of the port of Paducah, where she had been duly licensed and enrolled, for all proper papers and documents required by law to be used on steamers; that the surveyor thereupon furnished him with all such documents, except the copies of the synopsis of the laws mentioned in the libel; that the surveyor did not furnish him two copies of that synopsis, for the reason that he had not two such copies on hand; that thereupon the steamer, on the first day of September, 1867, set out from Paducah on a voyage to Cincinnati without two of said copies; and that on the second day thereafter, she reached the port of Evansville, having on board only one of said copies.

The counsel for the owners insist that these facts amount to a defense to this action. They argue that the acts of congress require that the secretary of the treasury shall keep all the surveyors of ports supplied with copies of the synopsis in question; that the master or owner of a steamer is only bound to apply to the surveyor of the port where his steamer is enrolled and licensed for such copies; and that when he has applied to such surveyor for them and has failed to procure them, he has done his whole duty, and may proceed on his voyage without them.

I am not aware of any act of congress that requires the secretary of the treasury to furnish the surveyors of ports with any copies of the synopsis under consideration. The only act on this subject of which I have any knowledge is that on which this libel is founded. The 8th section of that act provides: "That the secretary of the treasury shall cause to be prepared a synopsis of such of the laws relating to the carriage of passengers, and their safety on vessels propelled in whole or in part by steam, as he shall think expedient, and have the same printed in convenient form, to be framed under glass, and give to any such vessel two copies, on application of its owners or master." 13 Stat. 391.

I suppose it is unimportant how the master or owner of a steamer obtains these copies, so that he actually procures them and keeps them in the proper places in his vessel. But I think it is too plain for argument, that the act above cited contemplates that on application of the master or owner to the secretary of the treasury, the latter shall furnish the copies. And I think it equally plain that if the master or owner cannot procure them elsewhere, he must apply for them to the secretary of the treasury.

I conclude, therefore, that the defense set up fails. Consequently, I find for the libellant, and assess the penalty at one hundred dollars.

Judgment for the penalty and costs.

NOTE. For numerous authorities on the various questions of admiralty jurisdiction, con-

sult The Flora [Case No. 4,878]; The Celestine [Id. 2,541]; The Selt [Id. 12,649]. And in the following cases it is held that the admiralty jurisdiction of the federal courts extends over the Ohio river; The Dick Keys [Id. 3,898]; Seven Coal Barges [Id. 12,677].

[Another libel was filed on behalf of the United States for the penalty under Act May 5, 1864 (13 Stat. 63), for failure to paint name on wheel-house. A demurrer to this libel was overruled at the same term of the court as above. Case No. 8,308.]

Case No. 8,308.

The LEWELLEN.

[4 Biss. 167.] [1]

District Court, D. Indiana. May, 1868.

NAME ON STEAMER—PENALTY—PRACTICE—DELIVERY BOND.

1. For a violation of the act of congress of May 5, 1864 [13 Stat. 63] requiring steamers to have their names painted conspicuously on their wheel and pilot-houses, the proper remedy is a proceeding in rem.

2. This act should not be interpreted as giving the same form of remedy as that of December 31, 1792, but only as giving the same amount of penalty.

3. The execution of a delivery bond under the act of March 3, 1847 [9 Stat. 181], is a waiver of the objection that a seizure of the vessel should precede the filing of the libel, and that no seizure had been made.

In admiralty.

Alfred Kilgore, U. S. Dist. Atty., and C. E. Marsh, for the United States.

Hanna & Knefler, for respondent.

McDONALD, District Judge. This is a libel in rem on behalf of the United States, under the act of May 5, 1864 (13 Stat. 63), to recover a penalty arising from a failure by the master, owner, and agents of the steamboat Lewellen to paint her name on her wheel-house. The libel was filed September 27, 1867. A warrant of arrest was issued on it, by virtue of which the marshal seized the vessel, which was afterwards redelivered to the owner on his execution of a bond under the provisions of the act of March 3, 1847 (9 Stat. 181).

The owner appears to the suit, makes claim, and demurs to the libel on the ground that this court, as a court of admiralty, has no jurisdiction of the cause. Whether the demurrer should be sustained must depend on the act of congress relating to the offense charged. The act on which the libel is founded, provides: "That every steamboat of the United States shall, in addition to having her name painted on her stern, as now required by law, also have the same conspicuously placed in distinct, plain letters of not less than six inches in length on each outerside of the pilot-house, if it has one, and (in case said boat has side-wheels) also on the outerside of each wheel-house. And if any such steamboat shall be found without having her name placed as herein required, she shall be subject to the same penalty and forfeiture as is now provided by law in the case of a vessel of the United States found without having her name and the name of the port to which she belongs painted on her stern, as required by law." 13 Stat. 63, 64.

This statute obviously refers us for the penalty which it creates to a prior act of congress—the act of December 31, 1792, "concerning the registering and recording of ships or vessels." 1 Stat. 287. The 3rd section of the latter act requires that the names of all registered vessels and of the port to which they belong shall be painted on their sterns; and it provides that "If any ship or vessel of the United States shall be found without having her name and the name of the port to which she belongs painted in the manner aforesaid, the owner or owners shall forfeit fifty dollars, one-half to the person giving the information thereof, and the other half to the use of the United States." If we consider this provision of the act last named by itself, it would seem that a proceeding in rem would not lie on it. For it declares no lien or forfeiture against the vessel, but only provides that "the owner or owners shall forfeit fifty dollars." And yet when we compare the above cited provision of the act with the language of the 29th section of the same statute (1 Stat. 298, 299), and with the language of the revenue act (Id. 176), to which the 29th section refers, it is not so clear that a proceeding in rem will not lie on the 3rd section of the act of December 31, 1792.

The act of May 5, 1864, first above cited, gives "the same penalty and forfeiture" as is provided by the 3rd section of the act of December 31, 1792. Yet, in one respect, the language of the two acts differs widely. The former expressly says that "the owner or owners shall forfeit fifty dollars"; and it denounces no forfeiture against the vessel. On the contrary, the latter act (on which this suit is based) provides for no penalty against the owner or owners; but it provides that "if any such steamboat" shall violate its requirements, "she shall be subject to the same penalty and forfeiture" declared in the 3rd section of the act of December 31, 1792. In construing these two statutes together, as we must, this remarkable difference, I think, requires that we should not interpret the act of 1864 as giving the same form of remedy as that of 1792, but only as giving the same amount of penalty. And I suppose that the reference in the act of 1864 to the act of 1792, was merely in-

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

tended to fix the sum that should be forfeited, and not the person or thing that should incur the forfeiture, nor the mode of enforcing it.

We have seen that the act under which this prosecution was instituted, subjects no person directly to the penalty which it denounces. On the contrary, it primarily creates a penalty against the vessel itself. "She shall be subject," &c. Under this language, it may well be doubted whether either a personal action at common law, or a proceeding in personam in admiralty, would lie against the owner of this steamer. But be this as it may, it seems to me clear that the act of 1864 meant to authorize a proceeding against the vessel itself. The act in question being a navigation law, congress had the undoubted power to pass it. The vessel found voyaging on water navigable from the sea by vessels of more than ten tons burden, was, as to locality, within the admiralty jurisdiction. The offense charged being unquestionably an offense against the laws of commerce, is a proper subject for admiralty adjudication. The 9th section of the judiciary act having vested in the district courts exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, and trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, the present action would seem appropriate to the powers and functions of this court as a court of admiralty. And, in view of all this, I am not only satisfied that the present suit is a proper one of admiralty jurisdiction, but that no common law court of the country could entertain jurisdiction of it.

In support of the demurrer, it has been urged that the court has no jurisdiction of this cause, for the reason that no seizure of the vessel preceded the filing of the libel. In many cases under the revenue and navigation laws of the United States, it seems that a seizure prior to the commencement of the action is necessary to the jurisdiction of the court. But whether the present is such a case, it is not important to inquire; for the claimant has waived this objection by executing a delivery bond under the act of March 3, 1847. At the present term of the court, in another case,—The Lewellen [Case No. 8,307],—we discussed this question at large. We shall, therefore, not enter into the discussion here.

It must not be understood that, in this decision, we recognize a demurrer as being the proper mode of raising objections to a libel in admiralty. The demurrer is overruled at the cost of the claimant.

[NOTE. Another libel was filed on behalf of the United States for the penalty under Act July 4, 1864 (13 Stat. 390), for failure to post synopsis of laws. A demurrer to this libel was overruled at the same term of the court as above. Case No. 8,307.]

Case No. 8,309.

LEWEY v. UNITED STATES.

[15 Blatchf. 1.] [1]

Circuit Court, S. D. New York. July 1, 1878.

CUSTOMS DUTIES — PACKED WITH PERSONAL LUGGAGE—NOT ON MANIFEST—ISSUE FOR JURY OF FRAUDULENT KNOWLEDGE.

L. bought kid gloves in Europe, and had them packed as merchandise, in tin boxes, and the boxes put into trunks, which also contained a small amount of his personal baggage. The trunks, and their contents, were put on board of a steamer, at Liverpool, for New York, as his baggage, he going in the steamer as a passenger. The gloves did not appear on the manifest of the vessel. On arrival, L. did not claim the trunks as his baggage. They came off the vessel with the personal baggage of the passengers. The goods were seized as forfeited, because knowingly brought into the United States contrary to law, in violation of section 3082 of the Revised Statutes, not having been entered on the manifest of the vessel, as required by section 2806 of the Revised Statutes. At the trial in the district court, which took place after the passage of the act of June 22, 1874 (18 Stat. 189), that court, under section 16 of that act, submitted it to the jury to determine, whether L. fraudulently and knowingly, with an actual intention to defraud the United States, did so import and bring the goods into the United States, as to cause or procure them to be withheld from entry upon the manifest of the vessel. *Held*, that the charge was correct, and that the form of submitting such question to the jury was a proper compliance with section 16 of the said act of 1874.

[Cited in U. S. v. Two Hundred and Eight Bags of Kainit, 37 Fed. 327.]

[In error to the district court of the United States for the Southern district of New York.]

[This was a proceeding by the United States against Sampson Lewey for the forfeiture of certain goods alleged to have been fraudulently imported. In the district court, a verdict and judgment were rendered for the plaintiff, and the defendant brings error.]

Stephen G. Clarke and William Stanley, for plaintiff in error.

Sutherland Tenney, Asst. Dist. Atty., for defendants in error.

WAITE, Circuit Justice. Section 3082 of the Revised Statutes provides, that, "if any person shall fraudulently or knowingly import or bring into the United States * * * any merchandise, contrary to law, * * * such merchandise shall be forfeited." Another statute, passed June 22, 1874 (18 Stat. 189), and which was in force when the trial in this case was had, provides, (section 16,) that, upon a trial to enforce or declare the forfeiture of any goods by reason of any violation of the provisions of the customs laws, or of any of such provisions, "in which action, suit or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to de-

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

fraud the United States, and to require upon such proposition a special finding by such jury."

The information in this case charges, among other things, that the goods in question were fraudulently and knowingly imported and brought into the United States, contrary to law, by some person or persons unknown. Section 2806 of the Revised Statutes provides, that "no merchandise shall be brought into the United States from any foreign port, in any vessel, unless the master has on board manifests in writing of the cargo, signed by such master." It is conceded by the claimant, that the goods complained of were merchandise, and that they were imported into the United States, as such, from a foreign port, in a vessel which did not have them on her manifest. They were, therefore, actually imported into the United States contrary to law; that is to say, they were imported without a compliance with the forms of the law. If this was fraudulently or knowingly done by any person, the goods were forfeitable. No one contends that the ship was in fault. The only question, therefore, is, whether the importer was equally innocent. The claimant concedes that he was the importer, and the court, in accordance with the requirement of the act of 1874, submitted it to the jury to determine, whether he, "fraudulently and knowingly, with an actual intention to defraud the United States, did so import and bring these goods into the United States, as to cause or procure them to be withheld from entry in the manifest of the vessel;" and the jury found that he did. Upon this state of facts, neither the verdict nor the judgment should now be disturbed, unless there was something in the rulings of the court upon this branch of the case that was wrong. As the proceeding was one to enforce a forfeiture of goods under the customs revenue laws, if there is enough in the case that is unimpeachable, to sustain the judgment of condemnation, errors not affecting the particular issue upon which the judgment rests need not be examined. The simple question to be considered here is, whether, upon the record as a whole, the judgment can be maintained.

So far as this point in the case is concerned, there is no complaint of the court below, except that it refused to instruct the jury to bring in a verdict against the United States. Everything else on the record, upon which error can be assigned, relates to the other causes of forfeiture set forth in the information, except, perhaps, the form of the submission to the jury, under the act of 1874, which I will consider further on. This requires a consideration of the undisputed facts. The claimant was an importer of kid gloves from Europe. That, so far as appears, was his sole business in New York. He went to Europe to buy goods and to make arrangements in respect to his business. He purchased the principal part of the goods for sale here upon their importation. They were packed as merchandise, in tin boxes, specially intended for their preservation from the effects of dampness while crossing the Atlantic, and these boxes were put into trunks, which also contained a small amount of the personal baggage of the claimant. While he went abroad to buy goods, it does not actually appear that he bought any other than these. He shipped them from Hamburg to Grimsby, as freight, but in such a form that they actually, without any intervention of his, as he insists, went on board the steamer on which he sailed from Liverpool, as his baggage. This was not unlawful, so far as the United States were concerned. Whether, being a passenger, he should pay for the transportation upon the steamer as baggage or freight, was a question of money and good faith between him and the steamer, with which the United States had nothing to do. If that was all, he incurred no risk of probable forfeiture. The steamer was excused from responsibility, if the facts were as he claims them to have been. But still, as between him and the United States, his goods, being merchandise, could not lawfully be brought into the United States on board the steamer, except they appeared upon her manifest. This, as an importer, he knew or ought to have known. They actually came in without a compliance with the requirement of the law. Upon his arrival, when asked about his baggage, he did not claim these trunks as part. He knew they could not appear upon the manifest of the vessel, as merchandise. He also knew, or ought to have known, that they would come off the ship with the personal baggage of her passengers. He had in his pocket, at the time, the invoice duly certified by the consul at Hamburg, but in another name than his own. The triplicate of that invoice was in the custom house at New York, when he arrived, but with nothing whatever to connect him or his trunks with it. It would show that one Rosenstirn, at Hamburg, had made oath to his ownership of an invoice of certain kid gloves, and that the consul was satisfied that it was the intention of the owner to enter them at the custom house in New York; but there was nothing whatever to indicate that the trunks seized were to contain the goods, or that the claimant was their owner. An agent had been employed to make the purchases in his own name. This bill of purchase was exhibited to the consul as the invoice upon which the importation into New York was to be made. The packages contained no marks whatever to connect their contents with the invoice, or the claimant with their ownership. The claimant appeared upon the books of the steamer, accidentally or otherwise, by a name not his own, and, when he arrived in New York, while waiting long enough at the dock to

see his trunks come off, he took no pains then to bring them specially to the attention of the customs officers, although it is conceded that his brother, who evidently had some knowledge of custom house forms, remained to watch developments. The next day, after the customs officers had made the seizure, he himself appeared, proffered his invoice and gave up his keys. Such action came too late. It could not explain away the effect of his previous acts of omission. The court properly refused to instruct the jury to bring in a verdict for the claimant, and the jury with equal propriety, under the law, found that the claimant "fraudulently and knowingly, and with an actual intention to defraud the United States, did so import and bring said goods into the United States, as to cause or procure them to be withheld from entry on the manifest of the vessel in which they were imported and brought into the United States." Upon such a verdict the sentence of condemnation was clearly right. The allegation in the second count of the information is clear and distinct, that "a person, or persons, unknown to the collector and said attorney of the United States, did fraudulently and knowingly import and bring into the United States, and assist in so doing, the said goods, wares and merchandise, contrary to law." That allegation is sufficient to support the judgment. If the claimant had desired to have it made more definite and certain, he should have made an application for that purpose before the trial.

But, it is further contended, that the question of "actual intention to defraud the United States" was not properly submitted to the jury, under the act of 1874. That act makes it the duty of the court "to require, upon such proposition, a special finding by such jury." The precise form in which the requirement shall be made is not given. All that is required is, that there shall be a special finding upon that proposition. In this case, the main proposition to be considered was, whether this claimant had fraudulently or knowingly imported or brought the goods in question into the United States, in such a manner as to cause or procure them to be kept from entry on the manifest of the vessel. That is all that would have been required for the jury to find, previous to the law of 1874. The proposition, as put to the jury, was: "Did Sampson Lewey fraudulently and knowingly, with an actual intention to defraud the United States, so import and bring these goods into the United States, as to cause or procure them to be withheld from entry upon the manifest of the vessel?" It is difficult to see how the precise proposition to be decided could be more distinctly put, to obtain a special finding, and it is certainly in the most explicit manner separated from every other question in the case. It matters not how many errors may have been committed in respect to the other aspects of the case. Upon the claimant's own testimony, taken in connection with the conceded facts, the judgment is right and is consequently affirmed.

Case No. 8,310.

Ex parte LEWIS.

[2 Gall. 483.] [1]

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

WHARVES—LIEN ON FOREIGN VESSEL.

1. A wharfinger has a lien on a foreign ship for wharfage by the law of the admiralty.

[Cited in Johnson v. The M'Donough, Case No. 7,395; Leland v. The Medora, Id. 8,237; United States v. New Bedford Bridge, Id. 15,867; The Kate Tremaine, Id. 7,622; Delaware River Storage Co. v. The Thomas, Id. 3,769; Ex parte Easton, 95 U. S. 76; Hubbard v. Roach, 2 Fed. 394.]

[Cited in City of Jeffersonville v. The John Shallcross, 35 Ind. 23; Brookman v. Hamill, 43 N. Y. 563.]

2. But if the wharfinger has made an express personal contract with the ship owner, the court will not give the wharfinger a priority of claim over a bottomry interest, which previously attached on the ship.

[Cited in Zane v. The President, Case No. 18,201; Wescot v. Bradford, Id. 17,429; The Amstel, Id. 339; The Panama, Id. 10,703; Remnants in Court, Id. 11,697; Harris v. The Kensington, Id. 6,122.]

3. Quaere, if such personal contract be a waiver of the lien?

[Cited in Russel v. The Asa R. Swift, Case No. 12,144.]

This was an application on petition for the payment of the dockage due on the ship Jerusalem, which had been libelled on a bottomry bond, and sold under an interlocutory order of this court, and the proceeds of the sale brought into the registry. The ship was still lying at the plaintiff's wharf when she was arrested upon the admiralty process pending in this court. The Jerusalem [Case No. 7,293].

[After the sale, a petition for payment out of the proceeds to a tradesman, for repairs, was heard and allowed. Case No. 7,294.]

Mr. Fales, for petitioners.

Mr. Hubbard, for bottomry creditor.

STORY, Circuit Justice. The first question is, whether this charge, being against a foreign ship, constitutes a lien upon the ship itself. No case in point has been cited. In Gardner v. The New Jersey [Case No. 5,233], Mr. Justice Peters stated, that he had allowed wharfage out of remnants and surpluses, as the wharfinger might detain the ship until payment. His opinion is therefore very clearly in favor of the lien. And it seems to me fully supported in principle by the doctrines, as well of the common law (Vaylor v. Mangles, 1 Esp. 109; Spears v. Hartly, 3 Esp. 81; Savill v. Barchard, 4 Esp. 53), as of the civil law (1 Domat. lib. 3, tit. 1, § 5, p. 9), and by the analogous cases of ma-

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

terials furnished and repairs made upon the ship. See Roccus de Nav. notes 92, 93; 2 Brown, Adm. 142, 198; Abb. Shipp. pt. 2, c. 3, § 9. To be sure, the case of Justin v. Ballam (2 Ld. Raym. 805) looks strongly the other way, as to a lien for repairs; but, after much consideration, I have, in a former case in this court, felt myself bound to decide against its authority. The Jerusalem [Case No. 7,294.] Vide 9 East, 426; 13 Ves. Jr. 594; 3 Ves. & B. 135; Franklin v. Hosier, 4 Barn. & Ald. 341. If the dockage be a lien, is it a privileged lien, having a priority over the bottomry interest? It being indispensable for the preservation of the vessel, it seems to me that it must necessarily be so considered. If it had been due for a former voyage, or the wharfinger had parted with the possession, the case would have been entirely altered.

The remaining question is, whether the plaintiffs have parted with their lien in the present case. Here is a personal contract, between them and the ship owner, for the payment of a specific rate of dockage, and an order drawn on the ship's agents for the payment thereof quarterly. It did not strike me, that upon principle such a contract could amount to a waiver of the lien; because it was in effect only ascertaining the rate of dockage, instead of leaving it in uncertainty, and upon the footing of a quantum meruit, or the usual rate of dockage. But there is a series of authorities directly in point, which decide, that where the parties enter into a personal contract for a specific sum, it is a discharge of the implied lien resulting by operation of law. And I cannot find that these authorities have ever been doubted or denied.[2] I am free to confess, that I am better satisfied with authorities, when I can perceive the reason of them; but sitting in a court of admiralty, and exercising an equitable relief against highly meritorious parties, I should not choose collaterally to overrule such explicit decisions. I must therefore dismiss the present petition, reserving however the right to reconsider these doctrines, when they shall come directly in judgment upon an original libel in rem. It is proper to add, that the admiralty jurisdiction in this class of cases is altogether independent of the doctrine of liens. Petition dismissed.

[2] Anon., Yel. 166; 2 Rolle, Abr. 92, "M," 1, 2; Brenan v. Currint, Sayer, 224; more fully Selw. N. P. 1163; Collins v. Ongley, cited Selw. N. P. 1163; Francis v. Wyatt, 3 Burrows, 1498; Cowell v. Simpson, 16 Ves. 275. But see Hutton v. Bragg, 2 Marsh, 339, 345, per Gibbs, C. J. See, also, Brennan v. Currant, Bull. N. P. 45; Phillips v. Rodie, 15 East, 547; Birley v. Gladstone, 3 Maule & S. 205; Id., 2 Mer. 401; Hutton v. Bragg, 7 Taunt. 14, per Gibbs, C. J. See, also, Stevenson v. Blakelock, 1 Maule & S. 535. In Chase v. Westmore, 5 Maule & S. 180, the whole doctrine is reviewed by Lord Ellenborough, and Brennan v. Currant is overruled, and the same doctrine is established, as Story, J., would seem to contend for on principle. S. P. Crawshay v. Homfray, 4 Barn. & Ald. 50; Christie v. Lewis, 2 Brod. & B. 410.

Case No. 8,311.

In re LEWIS.

[2 Ben. 96; [1] 1 N. B. R. 239 (Quarto, 19).]

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

PARTNERSHIP — PETITION IN BANKRUPTCY BY ONE PARTNER — RATIFICATION.

1. Where one member of a firm alone filed his petition in bankruptcy, individually and as a member of the firm, and the register adjudged him a bankrupt individually and as a member of the firm, and also adjudged the firm a bankrupt: *Held*, that this latter action of the register was erroneous. In such a case, notice of the filing of the petition must be given to those members of the firm who have not joined in it, or assented to it, as if the proceedings were involuntary against the firm.

2. Where afterwards the other member of the firm presented a petition praying that both of them might be adjudged bankrupts, and that he might have leave to join in the first petition: *Held*, that this petition might be taken as expressing the assent of the petitioner to the petition of the other partner, and to validate the adjudication of bankruptcy against the firm.

[Cited in Re Griffith, Case No. 5,820.]

3. It was not necessary for him to otherwise join in the first petition. The proceedings as to his individual creditors would be had under his petition, and the proceedings as to the individual creditors of the other partner, and as to the creditors of the firm, would take place under the first petition.

In bankruptcy.

Benedict & Boardman, for petitioner.

BLATCHFORD, District Judge. In this case, the register, on the 18th of November, 1867 (on a petition filed by Henry Lewis individually, and as a copartner of the firm of P. & H. Lewis, on the 13th of November, 1867), adjudged Henry Lewis individually and as a copartner of the firm of P. & H. Lewis, and also the said firm of P. & H. Lewis, bankrupt. The petition was not joined in by Philip Lewis, who with Henry Lewis composed the firm, nor did Philip Lewis assent to having the firm declared bankrupt. This action of the register was erroneous. General order No. 18 prescribes the proper practice in such a case. Where a petition is filed to have a firm declared bankrupt, if all the members of the firm do not join in, or assent to the petition, notice of its filing must be given to such of the members as do not join in it or assent to it, in like manner as if the proceeding were one in involuntary bankruptcy against the members of the firm. Until this is done the register has no authority to make an adjudication in regard to the bankruptcy of the firm. Philip Lewis now presents to the court a voluntary petition, under the bankruptcy act [of 1867 (14 Stat. 517)], which prays that he and Henry Lewis may be adjudged bankrupts, and be discharged from their debts. The petition sets forth the copartnership, and the fact of the filing of a petition in bankruptcy by Henry Lewis, and is, in other respects, in form, a

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

copartnership petition according to form No. 2. The petition refers to schedules annexed to it as being schedules of the debts and assets of the copartnership, and of the debts and assets of Philip Lewis individually. Philip Lewis asks, on filing this petition, for an order that he have leave to join in the proceedings so heretofore taken by Henry Lewis, and his petition states that he is desirous of uniting in the petition of Henry Lewis, and of being made a party to the proceedings thereunder. So far as this petition of Philip Lewis expresses his assent to have the firm declared bankrupt, and his desire to join in the petition of Henry Lewis, Philip Lewis may properly be regarded as joining in the petition of Henry Lewis to have the firm declared bankrupt, so as to effect a compliance with general order No. 18, and thus validate the adjudication of bankruptcy in respect to the firm. But it is not in any other respect necessary for Philip Lewis to join in the proceedings taken by Henry Lewis, or to be made a party to them. The proceedings in respect to the creditors of the firm, and the creditors of Henry Lewis individually, will take place under the petition of Henry Lewis. The proceedings in regard to the creditors of Philip Lewis individually will take place under his petition. Philip Lewis will be adjudged a bankrupt, and receive a discharge under his own petition. Henry Lewis will receive a discharge under his own petition. So far as the petition of Philip Lewis is a petition for an adjudication of the bankruptcy of the firm, it may be disregarded, except as indicating the assent of Philip Lewis to join in the petition of Henry Lewis for an adjudication of the bankruptcy of the firm. Under such circumstances, general order No. 16 will not apply to the case, as there will be but one petition for an adjudication of the bankruptcy of the firm. The petition of Philip Lewis will be referred to the same register who has charge of the case of Henry Lewis.

[NOTE. The case was subsequently heard upon certificate of the register of the refusal by a witness upon examination before him to answer certain questions as tending to degrade the witness. Case No. 8,312.]

Case No. 8,312.

In re LEWIS.

[4 Ben. 67; [1] 3 N. B. R. 621 (Quarto, 153); 39 How. Pr. 155.]

District Court, S. D. New York. Feb. 24, 1870.

EXAMINATION OF WITNESS — QUESTIONS TENDING TO DEGRADE.

A witness under examination in a bankruptcy proceeding is not bound to answer, on cross-examination, a question not relating to any matter of fact in issue, or to any matter contained in his direct examination, if he says that the answer to it would tend to degrade him.

[In the matter of Henry Lewis, a bankrupt. The case has been previously heard by the court upon a decision of the register declaring the firm of P. & H. Lewis bankrupt upon the petition of Henry Lewis, one of the members of the firm. This decision was reversed as to the firm. Case No. 8,311.]

In this case a witness was called by one of the creditors of the bankrupt, to show destruction of books by the bankrupts. On cross-examination he was asked, if he had ever been employed by any firm in Manchester, England, and answered that he had. He was then asked: "By whom, and what was the nature of your employment?" He refused to answer, stating that the answer would tend to degrade him. The register held, that the witness was not bound to answer the question, and, on request, certified the question to the court.

By JOHN FITCH, Register:

[2] [This cause is now pending before me. A witness is under examination on the part of the creditors of the bankrupt's estate, for the purpose of showing that the petitioner has either destroyed, altered, mutilated, or falsified, or caused to be destroyed, altered, mutilated, or falsified, some of their books of accounts, book, document or writing relating thereunto, contrary to the provisions of section 44 of the act [of 1867 (14 Stat. 539)]. The direct examination has been closed, and the witness is on his cross-examination. Counsel for petitioner asks the following questions: Extract from minutes: "Q. Have you at any time been employed by any person or firm in Manchester, England? A. I have, but not in the capacity of book-keeper. Q. By whom? what was the nature of your employment? and how long did you remain in it? (Objected to as irrelevant and immaterial—the witness can only be examined as to the times during which he was a book-keeper, he being called as an expert. Overruled—excepted.) A. I cannot answer that question without making admissions which would be more or less humiliating to me. Q. Question repeated. A. I decline to answer the question, and ask the register's protection. (Counsel for bankrupt insists upon the question being answered, and asks that the register direct the witness to answer the question.) The Register—I decide that as the question stands the witness must answer the question, unless he say, under oath, that he cannot truthfully answer it without stating facts or circumstances which would bring upon him some moral turpitude or the commission of some offense prohibited by law. Witness—I say the answer to that question would tend to degrade me." The register decides that degradation is moral turpitude, and comes within the rule as laid down by the courts, and the witness is not obliged to answer the question, and will certify the question to the district court. Counsel for

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

[2] [From 3 N. B. R. 621 (Quarto, 153).]

bankrupt requests the register to certify the question to the court.

[The witness declines answering the questions, and claims the personal privilege of declining to answer the questions on the ground that a truthful answer to said questions would tend to degrade him, etc., and applies to the court for protection. The court as in duty bound, informed him of his legal rights. Vice Ch. Ct. 1833; Taylor v. Wood, 2 Edw. ch. 94. The witness again pleaded his privilege, and the court decided as above stated. It will be observed that the witness is a foreigner, and whatever offenses he may have committed in England, he cannot be punished for them here; but his admissions, or confessions of the commission of any crime or misdemeanor, or of any act which exposes him to any penalty or forfeiture in any country, or if by answering these questions the answer would tend to such a result, he is excused from answering the questions. Ct. App. 1847; Henry v. Bank of Salina, 1 N. Y. (1 Comst.) 83, affirming 2 Denio, 155; 24 Wend. 360.

[The right of a witness to answer is a personal privilege; his right to exercise it rests in his own discretion; he uses it at his peril. N. Y. Super. Ct. Sp. Term, 1834. Heerdt v. Wetmore, 2 Rob. [N. Y.] 697; Southard v. Rexford, 6 Cow. 255; People v. Bodine (1845) 1 Denio, 281; People v. Lohman (alias Mdme. Restell), 2 Barb. 216. The courts of this state have for years held that a witness was not compelled to answer any question, the truthful answer to which would have a tendency to implicate the witness in a criminal charge, or expose him to a penalty. 24 Wend. 360. The court is to determine whether the answers he may give could directly or indirectly criminate him by furnishing evidence of his guilt by his own admissions; even if it only established one fact out of many, which, taken together, would be sufficient to warrant his conviction, his privilege should be allowed. If the court holds that the answer might in any way criminate the witness, the witness is not to be compelled to explain how he would be criminated by such answer. In re Tappan, 9 How. Pr. 394; Ct. Err. 1845. Curtis v. Knox, 2 Denio, 341; Ct. App. 1848. And also where answers to a question would have disgraced the witness, the privilege may be pleaded, and must be allowed by the court. 4 Wend. 250; Cow. & H. Notes, note 521; 1 Burr's Tr. 244; 1 Greenl. § 454. Ct. App. 1843, Lohman v. People, 1 N. Y. (1 Comst.) 383, affirming 2 Barb. 216.

[In People v. Lohman (alias Mdme. Restell), 2 Barb. 216, (Marie Bodine Case) the court held that where a party intends to coerce an answer from a witness tending to degrade him, such party is bound to show affirmatively that the question is relevant. In the case of People v. Mather, 4 Wend. 229, the court says: If the witness was obliged to show how the testimony would affect him, the protection would at once be annihilated. In this case, it would be observed, the witness is not asked any question in regard to which he has testified in his direct examination, or anything applicable to this case, and in no way relating to the correctness, accuracy, or the way or manner in which the petitioner's books of account were kept. The answers, if given, will not be in any way inconsistent with his testimony already given on this trial, and cannot implicate him in perjury. Mitchell v. Hinman, 8 Wend. 667; People v. Bodine, 1 Denio, 281, and the authorities cited in these two cases respectively.

[Courts should exercise great care in compelling witnesses to answer questions where the witness claims the privilege, as is claimed by this witness, and has brought himself within the rule, as it is a matter exclusively between the court and the witness. The opposite party cannot object. He has no right to insist upon the privilege and require the court to exclude it on that ground, as the witness has the right to waive his privilege, and, if ordered to testify, he may refuse and be committed. 3 Hill, 564; Thomas v. Newton, 1 Moody & M. 48, note b; Treat v. Browning, 4 Conn. 408; Southard v. Rexford, 6 Cow. 259; Cow. & H. Notes to Phil. Ev. 784b; Forbes v. Willard, 54 Barb. 520.

[In the case of Mordaunt v. Mordaunt [26 Law T. (N. S.) 812], in England, a suit for a divorce on the part of the husband, the Prince of Wales was examined as a witness on the part of the defendant. The court, Lord Penzance, in advance of any question being asked the prince, of his own accord stated (witness did not plead his privilege), "That no witness was bound to make to any question an answer which would admit that he had been guilty of adultery." It will be observed that the court did not confine the answer to any question as to adultery with the defendant, but held that "no witness was bound to answer any question that would admit he had been guilty of adultery." This was in conformity to the provisions of an act of parliament recently enacted, in relation to the privileges of witnesses.

[Judges should exercise a sound discretion, and be governed, in a great measure, by the circumstances of the case. If it is apparent from the questions asked that the witness may have committed some indiscretion, or been guilty of some act of moral turpitude in times gone by, which act, if proven, cannot in any manner become relevant to the questions at issue, I hold it to be the duty of the court to shield a witness from proclaiming his own infamy, derelictions of duty, or of any act involving moral turpitude, tending to degrade or disgrace him in the esteem of his fellow-men. That whenever it is apparent that a witness shows signs of a reformation, or any desire to lead a correct or virtuous life, that the judiciary should take the first step to encourage such laudable

endeavors on the part of any person, and especially should not, unless the law definitely requires it, allow its records to contain the evidence of its witnesses' moral degradation —particularly so in this country, where the waves of moral depravity and pollution are so rapidly ingulfing our young men. It may well be asked, if the judiciary cannot or will not stem the tide or breast these waves —who can or will?

[The courts enforce the attendance of witnesses by compulsory process; disobedience to such mandate of the court is a crime punishable by the court, whose mandate has been disobeyed, by fine, imprisonment, or both.

[The judgment of the court committing a party for contempt becomes, by operation of law, a conviction. The president alone, by article 2, § 2, subd. 1, of the constitution of the United States, can pardon or reprieve the person convicted of the contempt, when the proceedings were in the United States courts. In re Adams [Case No. 39], and the cases there cited. And by the Revised Statutes of this state, whenever a party has been guilty of a contempt, and if actual injury has been sustained by such misconduct, a fine shall be imposed sufficient to indemnify the party injured thereby.

[Witnesses do not volunteer their testimony. They are to testify to the truth. They are supposed to be disinterested persons, unless parties to the action. They are entitled to the protection of the court both in person and in character. It cannot further the ends of justice to destroy the character of a witness, especially when no question of veracity is raised. Neither should witnesses be placed in fear of having their character impugned or defamed, in cases where no question at issue before the court could warrant such a proceeding.

[The witness is being examined as an expert. He has given testimony in his direct examination in relation to the books of the petitioner, the manner in which they were kept, of inaccuracies, erasures, interlineations, and defects therein, etc., as is above stated. The questions asked in his cross-examination, to which he pleads his privilege, do not in any manner affect his testimony in relation to the books. They speak for themselves. He has only testified to their present condition, as he finds them, and has given his opinion as an expert in bookkeeping, as an accountant, etc.; also his conclusions founded upon facts derived from such examinations.

[After a careful examination of the rules of law applicable to this case of the national and state courts, and of various authorities both in this country and in Europe, I am of the opinion: 1st. That the greatest latitude should be allowed on a cross-examination, and such latitude rests in the sound discretion of the court; and that the witness must answer all questions pertinent to the issues being tried, unless such questions come within the rule of privileged questions, of which the witness may avail himself. 2d. That these questions do come within said rule, that the witness has properly pleaded his privilege under oath, has brought himself within the rule, and should not be compelled to answer them, as he swears that the truthful answer thereunto would tend to degrade him, etc. 3d. That the answer to the questions, though they should tend to the utter ruin of the moral character of the witness, and showed the commission of offenses involving acts of the greatest moral turpitude, could not in any manner benefit the petitioner, as the testimony of the witness relates only to the present condition of the books of the commissioner, and his opinion based upon their present condition, as by section 44 of the bankrupt act, the court has to pass upon all the facts as they appear from said books. 4th. That the questions are privileged, and I hold that the witness need not answer the questions.] [3]

BLATCHFORD, District Judge. As the question did not relate to any matter of fact in issue, or to any matter contained in his direct testimony, and as a truthful answer to it would tend to degrade him, he was not bound to answer it.

Case No. 8,313.

In re LEWIS.

[2 Hughes, 320; 8 N. B. R. 546; 21 Pittsb. Leg. J. 77.] [1]

District Court, W. D. Virginia. 1873.[2]

BANKRUPTCY—PARTNERSHIP—PARTNERSHIP CREDITORS—INDIVIDUAL ASSETS AND CREDITORS —EQUITABLE RULE.

Section 36 of the bankrupt act [of 1867 (14 Stat. 534)] only applies to distribution of partnership and individual assets remaining after the satisfaction of liens thereon. And a creditor of a partnership having a lien on both the partnership and individual assets of the members may resort to either fund for payment, at his option, unless there are creditors having liens only on the individual fund, when the equitable rule as to two funds will apply, and the partnership creditor must first exhaust the partnership fund.

[Cited in Re Sandusky, Case No. 12,308.]

The land owned by the bankrupt individually, and deeded to him individually, having been sold by the assignee, the proceeds of that land are now claimed under a judgment first in order, obtained by Lanier & Co. against Lewis & Adams (in which partnership the bankrupt was a member) on a partnership debt; also by an individual credit-

[3] [From 3 N. B. R. 621 (Quarto, 153).]

[1] [Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission. 21 Pittsb. Leg. J. 77, contains only a partial report.]

[2] [Affirmed by the circuit court; case unreported.]

or of Lewis, whose judgment is subsequent in time to the first.

The counsel for the partnership creditor contended: First. A debt against a partnership was joint and several, was the debt of each partner, and could be made out of the property of either. 3 Leigh, 548; 7 Leigh, 594; Colly. Partn. Second. That the judgment of the partnership creditor was a lien on all the lands of L. & A. from its date. Code Va. 1860, p. 77, § 6, and cases referred to in note. Third. That the 36th section of the bankrupt law provides for the distribution of the assets of the bankrupt arising from the sale of unincumbered property, and does not impair the lien of a judgment, as in a court of equity such distribution would be made preferring partnership and individual creditors where the proceeds arise from unincumbered property, yet when liens have been acquired before distribution is asked, those liens must be respected and discharged in full before distribution can be made. 4 Johns. Ch. 692, 620; 2 Hare & W. Lead. Cas. p. 312; 6 Barb. 470; 13 Grat. 615; 22 Pick. 450; 16 Pick. 572. Particularly, Straus v. Kerngood, 21 Grat. 584.

The counsel for the individual creditor insists that the 36th section did away with the liens; that the individual property must go to the payment of this individual debt, though that property was incumbered by a prior judgment.

E. E. Bouldin and I. H. Guy, for partnership creditors.

Messrs. Barksdale, Dabney, and others, for individual creditors.

RIVES, District Judge. On consideration whereof, the court is of the opinion that although in the distribution of the general assets of a bankrupt the partnership assets are to be first applied to the partnership debts, and the individual assets of any separate partner first applied to his individual debts according to the terms of the bankrupt law, yet when a judgment has been obtained by a partnership creditor against the members of a concern, such judgment operates as a several lien against the real estate of each partner, and if prior in point of time to a judgment obtained against an individual partner by an individual creditor of such partner, is to be preferred to such subsequent judgment; but the court is further of the opinion that when such partnership creditor can get satisfaction of any part of said judgment out of the partnership assets, the pro rata distribution to which such partnership creditor is entitled out of the partnership fund shall be first applied as a credit on said judgment against the separate partner in relief of the fund of such separate partner for the benfit of the separate creditor.

Upon appeal the foregoing decision was affirmed by Bond, Circuit Judge. [Case unreported.]

Case No. 8,314.

In re LEWIS.

[14 N. B. R. 144.] [1]

District Court, S. D. New York. Oct., 1874.

BANKRUPTCY—COMPOSITION—SATISFACTORY BOND.

A resolution of composition, which provides that the payment shall be guaranteed by a satisfactory bond to certain persons, as a committee of creditors, may be confirmed.

[In the matter of Solomon Lewis and others.]

James Dunn, for debtors.

BLATCHFORD, District Judge. The resolution of composition in this case, after providing for a composition of thirty-seven and a half cents on the dollar, to be paid in cash, as follows: one-half in sixty days after the filing of the statement and the recording of the composition, goes on to provide that such payment shall be guaranteed, by the giving of a satisfactory bond in the penal sum of twenty thousand dollars, to three persons who are named in the resolution, and are stated therein to be the committee appointed by the creditors in the investigation of the affairs of the debtors, within five days after the filing of the statement, and the recording of the resolution. This is a sufficient provision. It must be understood from it that the bond is not only to be given to the three persons named, but is to be satisfactory to them, and that they and they alone are to decide upon its satisfactory character. This obviates the objection in the case of In re Reiman [Case No. 11,673], to the confirmation of the resolution of composition in that case.

LEWIS, In re. See Cases Nos. 8,527 and 8,528.

Case No. 8,315.

—— v. LEWIS.

[1 Brunner, Col. Cas. 27; [2] 2 Hayw. (N. C.) 346.]

Circuit Court, D. North Carolina. June Term, 1805.

LIMITATIONS—RUNNING OF STATUTE DURING WAR.

The statute of limitations was suspended during the continuance of the war as to alien enemies disqualified to sue in our courts.

PER CURIAM. The act of 1715, whilst it was unrepealed, was suspended from its usual operation by the acts disqualifying British adherents to sue in our courts. It did not begin to operate as to such persons till the end of the war, and then if the seven years were not completed before it was repealed by the act of 1789 [1 Stat. 73], no bar could ever be operated under it. Lewis, the testator,

[1] [Reprinted by permission.]

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

died in 1780; between the end of the war and 1789 were not seven years. The demurrer to the plea, stating these facts, and relying upon the act of 1715, must be allowed. Plea held good.

LEWIS (ADAMS v.). See Case No. 60.

Case No. 8,316.

LEWIS et al. v. BAIRD et al.

[3 McLean, 56.] [1]

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

PLEADING IN EQUITY — ANSWER IN SUPPORT OF PLEA — DIFFERENT DEFENCES — ASSIGNMENT OF EQUITY — RECORDATION — LOST DEED — COPY OF DEED — CAPACITY TO CONVEY — PRESUMPTION AS TO OLD ASSIGNMENT — STATUTE OF LIMITATIONS — STATE CLAIM.

1. There must be an answer denying the fraud charged in the bill, in support of the plea.

2. The answer being broader than the plea, overrules it.

3. Fraud must be denied in the plea as well as in the answer.

4. Where one defence is made by the plea, and another by the answer, the plea will be ordered to stand for an answer.

5. The ordinance of 1787 regulates the form of conveyance of real estate.

[Cited in Reed v. Kemp, 16 Ill. 451; Churchill v. Little, 23 Ohio St. 308; Tarbell v. West, 86 N. Y. 288.]

6. An equity may be assigned or transferred in any form not prohibited by law.

7. Though an equity be conveyed, under the forms of a legal right, it does not change the title.

8. The recordation of a deed, conveying an equity only, would not be noticed under the law.

[Cited in Peterson v. Mississippi Valley Ins. Co. 24 Iowa, 498.]

9. A record of a deed in Kentucky, for lands in Ohio, is no notice to a subsequent purchaser.

10. A copy of such record is not evidence.

11. The contents of a deed, destroyed by accident, may be proved by parol.

12. Where there has been a great lapse of time, strict proof of a destroyed deed, under which parties have claimed, may be dispensed with.

13. The recording of a copy of a deed in this state, can have no effect.

14. Where any act has been done by the trustees, under a trust deed, it is evidence of an acceptance of the trust.

15. An agency must be proved to bind the parties interested.

16. A trustee is presumed to act for the benefit of his cestui que trust.

17. Under certain circumstances he may convey to an innocent purchaser for a valuable consideration.

18. No greater interest can be conveyed by the grantor than is vested in him.

19. It is said that a deed is to be construed most strongly against the grantor. The reason for this rule is not perfectly satisfactory.

20. In explaining an instrument all the parts of it must be taken together.

21. Less strictness in the description of the property is required in a contract to convey, than in a deed of conveyance.

22. There being no proof of indebtedness by the grantor, the trust deed cannot be held fraudulent.

23. Occasional insanity arising from intemperance, not sufficient to set aside a contract.

[Cited in McMechen v. McMechen, 17 W. Va. 683.]

24. An assignment of a military warrant, under which a claim has been asserted for many years, may be presumed to be genuine, and to have been made for a valuable consideration. After the lapse of nearly half a century, the consideration for such a contract cannot be expected to be clearly established.

25. A deed executed by an executor under a will before the emanation of the patent, can convey no legal title. But if the patent issue in the name of the executor, it operates in favor of the prior conveyance by way of estoppel. And this effect follows, whether the will authorises the executor to convey or not.

26. A warranty is limited by the nature of the estate conveyed. It must have an estate upon which to operate.

27. A deed must have upon its face all the requisites of a valid instrument.

28. Where a deed conveys title, a warranty can never operate by way of estoppel.

29. Where an interest passes under the deed there can be no estoppel.

30. The statute of limitations, under the decision of the supreme court of Ohio, bars the heirs of a non-resident, by an adverse possession of twenty years, during the life of the ancestor. But lapse of time will operate as a bar, against a non-resident, under certain circumstances, although the statute does not run against him.

31. Chancery will always refuse its aid against conscience where the demand is stale and there has been great negligence.

[Cited in Connecticut Mut. Ins. Co. v. Athon, 78 Ind. 17.]

[See Baird v. Byrne, Case No. 757.]

In equity.

OPINION OF THE COURT. In their bill the complainants set up a claim to a certain tract of land, in possession of the defendants, and to which they claim title; and a decree for the title and possession is prayed. It seems that General Robert Lawson, the ancestor of the complainants, having served in the Virginia continental line in the revolutionary war, received for his services a military warrant No. 1721, for ten thousand acres of land; which, before the 4th June, 1794, was located in the Virginia military district, in this state, in tracts of one thousand acres each; under the following numbers of entries. 1704, 1705, 1706, 1707, 1714, 1715, 1716, 1717, 1718, 1719. On the 4th June, 1794, as the bill states, an indenture of three parts was entered into between Robert Lawson of Fayette county, Kentucky, of the first part, Sarah his wife of the second part, and James Speed, George Thompson, Joseph Crockett, and George Nicholas of the third part, which was duly signed and delivered; and which for the considerations therein expressed, conveyed to the

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

said parties of the third part, and to their heirs, executors, administrators and assigns of them, their survivors and survivor, one hundred and fifty acres of land on which Lawson then lived; "also two thousand acres of military land situated on White Oak Creek, on the north west side of the Ohio, being the land mentioned in the first entry made for the said Lawson on the surveyor's books;" and also among other real and personal estate, "five thousand acres of land on the north west side of the Ohio, being part of the land obtained by the said Lawson for his military services, and part of ten thousand acres which have been laid off in lots of one thousand acres each, and being the last entries made in the name of said Lawson." To have and to hold the lands, &c. to them the said James Speed, George Thompson, Joseph Crockett and George Nicholas, their heirs and assigns forever; and to the survivors and survivor of them, their heirs and assigns forever; upon the special trust that they will permit the said Lawson and his wife, and the survivor; and the said Sarah, if she should again separate from her husband, to use, occupy, possess and enjoy during their natural lives, and the life of the survivor, under the exceptions above stated, the one hundred and fifty acres of land in Fayette county, &c.; and that they will convey the same to whom she may appoint, by any instrument of writing under her hand, and attested by one witness, subject, &c., and also that they will "convey the two thousand acres of land on White Oak Creek, to either of the sons of the marriage to whom the said Sarah shall direct; unless the trustees shall judge it proper to dispose of any part or parts of the said tract for the use of the family," &c., and the trustees were authorised to convey, as specified, to the children of the said Lawson, in different parcels, the five thousand acres. And the said Lawson covenanted with the trustees that he would at no future time, "offer any personal violence or injury to his wife, and that he would abstain from the intemperate use of every kind of spirituous liquors, and that if he should any time thereafter again offer any personal violence or injury to his wife, the trustees were authorised to dispossess him of the hundred and fifty acres of land," &c. Entries 1707 and 1714, the complainants aver, covered the two thousand acres conveyed by the above deed; and that the five thousand acres conveyed were covered by entries 1718, 1719, 1704, 1705 and 1706.

On the 16th August, 1796, Lawson made an assignment to one John O'Bannon, of three thousand three hundred and thirty-three and one-third acres, of the part of his warrant which had not been surveyed, for value received. This assignment is charged to have been without consideration, and when the mind of Lawson, by intemperance, was rendered unfit to make a contract, and notice of the trust deed by O'Bannon is averred. That on the 25th August, 1796, O'Bannon, well knowing that the aforesaid entry of 1707, had been conveyed by the trust deed, fraudulently withdrew it, and re-entered, in his own name, 965 acres, under the same number, on the waters of Straight creek. This is the tract in controversy in this suit. O'Bannon having obtained the plat and certificate, deposited them, before the 12th February, 1799, in the department of state, and applied for a patent. That the trustees, by their agent, Joshua Lewis, entered, on the above day, a caveat against the issuing of a patent on this fraudulent proceeding. And afterwards, on the 9th May, 1811, the department of state suspended the further issuing of patents on the warrant of Lawson. Lawson and wife remained together but a short time after the execution of the trust deed. Mrs. Lawson went to Virginia, where she died, in 1809, never having appointed, as provided by the trust deed, to whom conveyances should be made. Lawson, in 1800, was taken to Virginia, and remained in Richmond, supported by charity; his mind and body being in a most deplorable condition, until his death, which took place four years before the death of his wife. In 1800, George Nicholas, one of the trustees, died; and some time afterwards James Speed and Joseph Crockett, also, died; by which the trust estate vested in George Thompson, the survivor, and his heirs. On the 22d March, 1834, George Thompson died, and left George C. Thompson, one of the complainants, his son and only heir at law, in whom the trust estate became vested. Various disabilities, and non-residence, are alleged in the bill, as an excuse under the statute of limitations and the lapse of time. John O'Bannon died in January, 1812, having made a will, and appointed Robert Alexander, Esquire, and George T. Cotten, his son-in-law, executors. And on the 21st of December, 1816, Cotten fraudulently and with full notice of the trust deed, the bill alleges, obtained a patent, from the general land office, in his own name, "as executor of the last will and testament of the said John O'Bannon, in trust, for the uses and purposes mentioned in his will, for the tract of 965 acres." O'Bannon left several devisees, who are not within the jurisdiction of this court.

Some years before the emanation of the patent, Cotten, as executor, conveyed the land to William Lytle, who had purchased it from O'Bannon, in his life time. Cotten died, testate, some time after he obtained the patent. The defendants plead in bar, that they are purchasers from Lytle, and those claiming under him, for a valuable consideration, without notice, and they exhibit their deeds, &c. They also file an answer in support of their plea, in which the fraud alleged in the bill, and all facts going to show equity in the claim of the complainants, are denied. And in an amended answer they set up in bar the statute of limitations and lapse of time. The complainants took issue on the plea, and filed a general replication.

The first question arises on the state of the pleadings. The answer is not only full to the whole merits of the bill, but it sets up new and substantive defences: the statute of limitations and lapse of time. The bar alleged in the plea is a bona fide purchase for a valuable consideration without notice. There is some confusion in the authorities and in the elementary treatises, as to the extent and effect of an answer in support of a plea. In a note in Mitf. 240, it is said, "that in the cases in the court of exchequer, it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only overrule a plea, where it applies to matter, which the defendant, by his plea, declines to answer, demanding the judgment of the court, whether by reason of the matter stated in the plea, he ought to be compelled to answer so much of the bill." In such a case, the answer being broader than the plea, overrules it. Story, Eq. Pl. 532. Where fraud is alleged in the bill, it should be denied in the plea, and also in an answer in support of the plea. The complainant is entitled to the oath of the defendant, and if the answer do not deny the fraud, the plea may be overruled absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. Story, Eq. Pl. 536, 537. But the objection here is, that the answer sets up a different defence from that made in the plea. In Story, Eq. Pl. 537, 538, it is said, "if one defence is made by the answer, and another by the plea, the plea will be ordered to stand for an answer." In such case, the plea is considered as a part of the answer, and, with leave of the court, may be excepted to. Story, Eq. Pl. 543. As the answer in this case brings the plea clearly within the rule stated, it must be considered merely as a part of the answer.

The complainants rest their right mainly on the trust deed; and it is necessary to inquire into the execution and effect of that deed. The ordinance of 1787 for the government of the Northwestern Territory, provides, that "real estate may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person being of full age in whom the estate may be, and attested by two witnesses, provided such conveyance be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose." Under this law, the deed of trust is alleged to have been executed. The provision in the ordinance refers to the legal and not the equitable conveyance of real estate. An equity like the one in question could be conveyed by an assignment on the warrant, or on a separate paper, as well as by a deed containing all the solemnities required by the ordinance. Lawson had only an equitable title arising from entry, to the Ohio lands named in the trust deed. That deed, if duly executed, conveyed to the trustees the title which Lawson had in these lands; but the character of the instrument could convey no higher or better title than he possessed. The lands in Kentucky and in Virginia, which the deed purported to convey, may have been conveyed in fee; the fee at the time being vested in the grantor. But this can have no effect, either as regards the proof of the instrument in this case, or the interest assigned to the Ohio lands. An individual having merely an equitable interest in land, may convey that interest by a deed duly acknowledged; but such an instrument, not purporting to convey the land in fee, but an equity, is not within the statute or ordinance, and consequently is not proved by an acknowledgment, as a conveyance in fee. Such a deed, if duly recorded, would not be constructive notice under the statute. If a deed on its face purport to convey land in fee, or for a term of years, perhaps, though the grantor has no interest in the land, yet the execution of the instrument may be proved by its acknowledgment. It is within the law, and its signing and delivery are proved in the same mode as an operative instrument.

The land in controversy, it is alleged, is covered by the description in the trust deed of "two thousand acres of military land situate on White Oak creek, on the northwest side of the Ohio, being the land mentioned in the first entry made for the said Lawson, on the surveyor's books." This land the trust deed purports to convey. But how is it conveyed. In fact and in form the equity only is conveyed. It was "all the interest the grantor possessed," and he describes it by a reference to the "entry on the surveyor's books." There is no covenant of seisin, nor any expression in the deed which shows an intention to convey any other interest in the land, except that which resulted from an entry. But if the deed were a conveyance in fee of these military lands, a record of it in Kentucky, though duly certified, would not make the copy evidence in this state. The deed is required to be recorded in this state, after it has been duly acknowledged, and a certified copy of the record thus made is evidence under the statute. The recording of the deed, therefore, in Kentucky, if clearly shown, would not make either a certified or sworn copy from the record evidence. The original being lost, a sworn copy of it is the next best proof.

From the depositions of Fielding L. Turner, and others, there is reasonable proof of the loss of the original trust deed. The recorder's office where it was deposited for record was burnt before 1806, and it is highly probable that that deed, with many others, was destroyed. The above witness was deputy clerk in the office where the deed was deposited, and he states that he saw the original deed, which was in the hand writing of George Nicholas. He says the parties to

that deed, and the witnesses, are now dead. A copy of the deed in the hand writing of Colonel Nicholas is in evidence, and it agrees substantially with the deed which has been copied from the Fayette records. That deed, from the records of the Fayette county court, appears to have been acknowledged and proved by the subscribing witnesses, before it was recorded. Lawson's letters refer to the deed, and also the letters of George Nicholas, one of the trustees. These and other references are not only to the existence of the deed, but to an important part of its contents. A copy of the deed was filed in the department of state, at the time the caveat was entered. It has now been nearly half a century since the deed purports to have been executed. The evidence does not come strictly within any of the defined rules, as to the proof of lost instruments; but we think the facts and circumstances adduced create a strong probability that the deed was executed; and that its contents are truly stated in the copies certified. No effect can be given to the record of the deed in Hamilton county, of this state. That record was made, not from the original deed but a copy, and consequently the record is invalid for any purpose. It does not appear at whose instance this copy was recorded. Did the trustees accept the trust. As their signatures were affixed to the trust deed, the presumption is that they did. At least they co-operated in the execution of the deed from which their powers were derived. And in a letter to Gen. Lawson, dated nearly two months after the trust deed was executed, George Nicholas, one of the trustees says, in reference to a proposition to sell two thousand acres of the Ohio lands, in the trust deed, "if I had it in my power and was ever so well disposed to do it, I should only have one voice in four as to the disposal of the 2000 acres of land, which is all that the trustees have any power over." "It is my opinion that it ought by no means to be applied to answer current expenses, because if it is, it must necessarily soon be exhausted; but that when the title is completed, and the value of the land increased, that it may be sold," &c. And he says "I will show your letter to the other gentlemen." From this it would seem that the writer not only recognised the trust, but so far as his advice would go, acted under it. And he promises to show the letter to the other trustees. But beyond this, there is believed to be no evidence that the trustees acted under the deed. Lewis represented himself as the agent of the trustees, in entering the caveat in the department of state. But there is no evidence of this agency. James Speed, one of the trustees, states that "the caveat entered in his name and others, as trustees of Gen. Lawson, against issuing of grants, &c., had been entered without his knowledge or consent. That he never did act or intended to act as trustee." The consideration named in the trust deed was, that the wife of Lawson consented again to live with him, and also that she and George Nicholas consented to release him from his covenants in a certain deed previously executed, and in consideration of five shillings," &c.

The principal object of the trust deed was, to procure a reconciliation between Lawson and his wife, and preserve harmony in the family. But it seems that this effort, like the previous ones, proved abortive. In a short time the parties again separated, and Mrs. Lawson went to Virginia. From the time of this separation it does not appear that either the trustees, General or Mrs. Lawson, took any action under the trust deed. The great object of the deed having failed, it seems to have been lost sight of by all the parties to it. As the act of Lewis, in entering the caveat, has been disavowed by one of the trustees, their authority to do the act cannot be presumed. But it is insisted that the trust having vested, the neglect or unfaithfulness of the trustees shall not prejudice the cestui que trusts. The estate having passed by the trust deed, cannot be divested, except by an instrument of equal solemnity. Except where the trustee conveys the estate to an innocent purchaser for a valuable consideration, without notice of the trust, it is a well settled principle, that he can do no act to the injury of his cestui que trust. If he sell the estate the cestui que trust may set aside the sale, demand the purchase money or claim the property, to the purchase of which, the money may have been applied. And the principle is also clear, that where an estate is conveyed in fee, the destruction of the deed or any other act, short of a reconveyance, cannot revest the title in the grantor. But how does this doctrine apply to the case under consideration. No fee was conveyed by the deed of trust, as regards the Ohio lands. A mere equity was all that Lawson possessed, and, consequently, all that the deed could pass. Its mode of transfer was not regulated by statute. It could be assigned by the trustees, or reassigned by them to Lawson, by writing, in any form which the parties might choose; or, there being no statute of frauds, by a parol contract. This equitable title, then, which vested in the trustees, under the deed, is not governed by the principle of law adverted to. That principle applies exclusively to a conveyance of the legal title. The deed of trust describes the land as "two thousand acres of military land, situate on White Oak creek, on the north-west side of the Ohio, being the land covered by the first entry on the surveyor's books," &c. Now, it does not appear that Lawson had any lands situated on "White Oak creek," as here described. At least, it very clearly appears, that the land claimed by the defendants, is not on or near "White Oak creek;" nor is there an entry of Lawson for two thousand acres. And on this

ground, the defendants contend, that the land described in the deed, is not the land claimed by them.

There is no rule, in favor of which a greater number of authorities may be cited, than that a deed is to be construed most strongly against the grantor. The reason is, that the person who makes the conveyance, is presumed to weigh and fully comprehend the words used in it. This rule has always appeared to me, to be better sustained by authority, than by sound reason. I cannot see why a deed of conveyance should receive a different construction, from any other instrument under seal. In England, the deed is prepared by the grantee. In this country, the practice is, generally, different. The intention of the parties, both as to the interest conveyed, and the property, is to be ascertained by the language of the instrument. It must be looked at in all its parts, as one part may explain another. If there be a latent ambiguity, it may, in most cases, be explained by parol; but if the uncertainty arise upon the face of the deed, it cannot be explained. It would be difficult to sustain the trust deed, as a conveyance of the Ohio lands, in fee simple. To do this, proof must be made that Lawson had no other military lands north-west of the Ohio, except those located under his warrant for ten thousand acres. And as the entries under that warrant were made for separate tracts, of a thousand acres each, and the deed is for two thousand acres, "being the land mentioned in the first entry made for the said Lawson, on the surveyor's books," it must be proved that by the word, entry, entries were meant. This would be to introduce parol proof, as regards the situation of the land and the description of the title, in contradiction of the deed. It is believed that no case can be found to sustain this proof. But, it is unnecessary to decide this particular question. As regards the land in controversy, the trust deed cannot be considered as conveying any thing more than a simple equity. And in the relation it bears to the present suit, it may be regarded as a contract to convey, rather than a conveyance in fact. In the bill the complainants set out the description of the title, and the situation of the two thousand acres of land, as given in the deed, and aver that it is the same land as covered by entries, Nos. 1707 and 1714. And other circumstances are referred to in the bill, which conduce to sustain this averment. At the time this equity was assigned to the trustees, the situation of the land must have been imperfectly known by Lawson. The country where it was located, was new, and but little explored except by surveyors; and it is not probable that Lawson had been on the ground. The books of the principal surveyor afford evidence of no entries made in the name of Lawson, except by virtue of the warrant for ten thousand acres. And the same instrument conveys to the trustees "five thousand acres of land on the north-west side of the Ohio," "being part of the land obtained by the said Lawson for his military services, being part of ten thousand acres, which have been laid off in lots of one thousand acres each," &c.; from which there would seem to be little doubt, that the tract of two thousand acres intended to be assigned, was located under the above warrant. Indeed, it is probable that the word entry, instead of entries, was an error of the draftsman of the deed. It is the province of a court of equity to relieve from accident or mistake, and give effect to the intention of the parties. Upon the whole, without going into a detailed consideration of the facts and circumstances relied on by the complainants, we are brought to the conclusion, that the averments in the bill, as to the location of the two thousand acres, are sustained; and that on principle, viewing the bill as setting up an equity against the defendants, the evidence is admissible. From the foregoing considerations, the trustees must be held as vested with the equitable title to the land in controversy, for the purposes specified, the 4th June, 1794, when the trust deed was executed. There is no proof of indebtment by Lawson, which can make the trust deed void, as against creditors.

The title set up by the defendants, will be now examined. The defendants' title originated by an assignment of 3,333⅓ acres of his warrant, the 16th August, 1796, from Lawson to O'Bannon. This assignment is charged to have been made fraudulently, and without consideration.

A great number of witnesses have testified as to the habits of Gen. Lawson. It seems he was intemperate before he left Virginia, and that this habit became much worse in Kentucky. Indeed some of the witnesses say that his indulgences in this way were so excessive, as to render him unfit to transact any kind of business. That after the last separation from his wife, he seemed to lose all respect for himself, his family and society. That he became utterly degraded, the associate of slaves; and was seen in the streets of Lexington imploring money from every person he met with to purchase spirits. Other witnesses speak of him as always intoxicated when he had the means of becoming so, but that when sober, which was sometimes the case, he was capable of transacting business. He was a lawyer by profession, and occasionally, as well after his removal to Kentucky as before it, was engaged in the practice of law. Daniel Feagins was an attesting witness to the assignment to O'Bannon. He has since died, but his hand writing is proved by his sons, Fielding Feagins and Edward. They both state that General Lawson was at their father's near Germantown, Mason county, Kentucky, a part of the summer of 1796. And the former, who is the elder, says that General Lawson, at that time, when sober,

was of a sound mind and capable of doing business of any kind. James McKinney, a witness, who in 1796 lived on the farm of Daniel Feagins, and in the summer of that year saw General Lawson at his house, says that when Lawson was sober he appeared to be a sensible, intelligent man, of good education. That he never saw or heard of any thing to induce him to believe that Lawson was not as capable of transacting business, as any other man. The attempt to prove his insanity, about the time of taking the deposition of the witness, was the first intimation he ever had on the subject. Fielding Feagins also states that about forty years ago or upwards, he made a trip with General Lawson and his father to Louisville. They embarked in a small family boat at the place now called Maysville, putting their horses on board, and landed at the falls on the fourth morning after their departure. Their business, he says, to Louisville, was, to get a title to a piece of land purchased of Lawson, situated, now, in Brown county, Ohio. During their trip they had no spirits on board—General Lawson was perfectly sober; in good health and capable of doing any business. It is probable the assignment to O'Bannon was made at Louisville, as an assignment was made on the same day by Lawson to Daniel Feagins, of two thousand acres of the same warrant, to which Richard C. Anderson, the surveyor, who resided near Louisville, was an attesting witness. This fact is presumptive evidence that on the 16th August, 1796, Lawson was not deemed, by the surveyor, unfit to do business. Philemon Thomas, a witness, states, that Lawson came to his house in 1795, 1796 or 1797, and offered to sell his military lands in Ohio; but the witness "refused to buy them, or to make any bargain with him, as he appeared to be insane." A short time afterwards the witness states there was a report in the neighborhood, that Daniel Feagins had purchased the lands.

On looking into the whole evidence, and weighing it maturely, the fact of Lawson's insanity, at the time of the assignment, seems not to be established. When intoxicated he was undoubtedly incapable of transacting any business; and it is probable that he was intoxicated the greater part of the time in the summer of 1796. But when sober he was capable of business, and it appears from the statement of Fielding Feagins, that he was not intoxicated, and had not been for several days preceding the assignment of the two thousand acres to his father, which was witnessed by Anderson. As before remarked, the assignment to O'Bannon was made on the same day. Fraud will not be presumed, though it may be proved by circumstances. But the circumstances in this case do not authorise an inference of incompetency on the part of Lawson to make the contract of assignment. Indeed the weight of evidence, as also the presumption of law, is against the position of the complainants. The attempt to discredit the Feagins's by proving their conversations about the time their depositions were taken, and to show that Lawson was not at the house of Daniel Feagins, in the summer of 1796, as sworn by them, cannot, materially, affect their credibility.

Was the assignment to O'Bannon made without consideration. In his letter to the Honorable Thomas Todd, filed in the general land office, O'Bannon alleged that he made the original entries under Lawson's warrant, and that that was the consideration on which he obtained the assignment for 3,333⅓ acres. The books of the principal surveyor do not show by whom these entries were made. But from an old file of orders for locations found in the surveyor's office, it appears that O'Bannon gave orders for the entry of numbers 1704, 1706, and 1707, as originally made. On the books, however, his name was not entered as the locator. It seems not to have been the practice at that time to state by whom the entry was, in fact made. In a letter from General Lawson, dated Richmond, 27th June, 1788, to the principal surveyor, he says, "I have waited with anxious expectation to hear from you on the subject of my land warrant put into your hands by Col. Ed. Corrington." "Gen. Stevens tells me he has lately received a letter from you, whereby you inform him, that you must receive either so much cash, or a third of the land for surveying," &c. "I think a third very high, but under the scarcity of money at this day, I must prefer it to the demand in cash."

A certificate is offered in evidence which purports to have been signed by Lawson, and dated at Richmond, 27th November, 1802, which states that Major John O'Bannon was the locator of his military land, and that, "by prior contract he was to have one third of ten thousand acres for his services," &c. To this certificate the names of two witnesses were signed. Bootwright, one of the witnesses, swears that he never subscribed the paper as a witness, and the other witness is dead, but there is no attempt to prove his hand writing. This certificate is not proved to be genuine, and, consequently, it cannot be considered as in evidence. On the 30th of July, 1794, in a letter to Colonel Nicholas, General Lawson says, "by the enclosed letter from Colonel Anderson, I am informed that the expenses attendant on the two surveys of one thousand acres each, amount to eight pounds fourteen shillings and sixpence, which he also informs me it is necessary should be paid previous to the delivery of the plats." And he further remarks, "as I have it not at present in my power to advance that sum in money, I should esteem it as a singular favor if you could accommodate the matter with him, and take out the plats," &c. "From what Mr. Massie informed me, I have much reason to

believe that more land of my ten thousand acres north-west of the Ohio, hath been surveyed than has been returned and recorded in the surveyor's office, owing to Mr. Fox's death shortly after his return from his last surveys in that quarter. But of this I expect to receive particular information shortly," &c. He proposed to authorise Col. Nicholas to sell some of his lands to indemnify himself, should he advance the money. In his answer, Col. Nicholas declines making an advance, but promises to write to Col. Anderson, the surveyor, that if he will forward the plats, he would become ultimately responsible for the money. There is no evidence of the payment of the above sum to the principal surveyor. The letter of Lawson has undoubtedly a strong bearing against the truth of the certificate overruled, and also against the assertion of O'Bannon to the general land office, that he was the original locator of the warrant. But the letter states no fact incompatible with the assertion of O'Bannon. It refutes by inference the allegation that the entries and surveys were made by him under a prior contract, for one-third of the land. For if such a contract had been made, Lawson would have referred to it; as it can scarcely be supposed that he would have forgotten it. The reference to the return of Fox, and his decease, would seem to create some doubt whether he might not have made some of the surveys. There is nothing, however, specifically stated on the subject. In the absence of positive proof, our conclusion on this point must rest on circumstances. Lawson, in his letter to Col. Anderson, proposed to give one-third of the land called for by his warrant, for locating and surveying it, rather than a money compensation. It is proved, positively, that O'Bannon made three of the original entries in 1788. And it is a strong fact that one-third of the warrant was assigned by Lawson to O'Bannon. In all probability, this assignment was made at the land office, in the presence of the principal surveyor. The assignment made to Feagins on the same day, as before remarked, was witnessed by Col. Anderson. In his official capacity he recognized the right of O'Bannon, under the assignment, a few days after it was made. That Lawson was competent to make the assignment, we have already decided.

Now, in view of these facts, where does the probability lie? From the circumstances of Lawson, it is not probable that he advanced the money. There is no evidence that any one else advanced it for him. He preferred giving one-third of the land to a payment in money; and so stated in his letter to the principal surveyor. And he did transfer to O'Bannon one-third of his warrant. On the same day, Lawson receipted to Col. Anderson for a plat and certificate of two thousand acres of his Ohio military land. Since the assignment, nearly half a century has elapsed. The actors are all dead. Under such circumstances, can positive evidence of the payment of a consideration be reasonably expected. The assignment upon its face is fair, and it purports to have been made for value received. Since it was made, O'Bannon, and those who claim under him, have continually asserted their claim. In an ordinary case, the assignment alone would be satisfactory. But in this case there is more than a presumption resting on the assignment itself. Its validity is sustained by several leading circumstances. The answer which, in this respect, is responsive to the bill, declares that the assignment was made on a good and valuable consideration. The complainants impeach it on this ground, and to set it aside they must impeach it by evidence. That this point is not clear of doubt is readily admitted; but looking at the case as shown by the evidence, connected with the lapse of time, we are brought to the conclusion that this assignment is not void for want of a consideration. That a consideration was paid is shown in a clearer point of view than could ordinarily be expected, in so remote a transaction.

But it is contended that if the assignment were bona fide and for a valuable consideration, that it did not cover the land in controversy. And that it was a fraud in O'Bannon to withdraw the entry 1707, made in the name of Lawson, and re-enter it in his own name. The assignment to O'Bannon purports to be of that part of the warrant to be surveyed. All the entries had been made long before the assignment, but what part of them had been surveyed is not shown. By the assignment, O'Bannon had a right to one-third of the entries made, and might, in the exercise of his discretion, withdraw any of them, not exceeding his claim, and re-enter them in his own name. He was limited to the entries not surveyed; but it does not appear that entry 1707 had been surveyed. It appears that on the 25th August, 1796, nine days after the assignment, O'Bannon having withdrawn that entry, he re-entered nine hundred and sixty-five acres under the same number in his own name, on the waters of Straight creek. If entry 1707 had been surveyed, it is not perceived, from the evidence in the case, how that fact could affect the defendants. On the 4th January, 1812, O'Bannon sold the entry 1707 and survey of nine hundred and sixty-five acres, as the answer alleges, for a valuable consideration, to William Lytle, and gave him a bond for a general warranty deed. In the early part of 1813, O'Bannon died; having made a will and appointed Robert Alexander and George T. Cotten his executors. The will was proved before the county court, of Woodford, Kentucky, at April term, 1813; and bond having been given by Cotten, he was duly qualified as executor. The other executor did not qualify. Cotten, as executor, on the 16th of July, 1813, conveyed to Lytle, by a deed of general warranty, the above land, and on the 21st of

the same month and year, Lytle sold the land to Samuel McConaughy, and executed to him a deed of general warranty. From McConaughy deeds were executed to the other defendants, or to those through whom they claim, at different times, for parts of the same tract. On the 21st of December, 1816, Cotten obtained from the general land office the patent for the nine hundred and sixty-five acres in his own name, as "executor of the last will and testament of O'Bannon, deceased, and to his heirs in trust for the uses and purposes mentioned in the will, &c."

It is contended that the patent was fraudulently obtained by Cotten. But fraud is not proved. The caveat had been entered by Lewis, as the agent of the trustees, but as it now seems, without any authority on their part; and on investigation the patent was issued after it had been suspended for many years. No step seems to have been taken by the trustees to procure the patent in their own names in trust, or to prevent its being issued to Cotten.

The deed from Cotten to Lytle, it is contended, as a conveyance, was wholly inoperative and void. At the time that deed was executed the fee of the land was in the government; and of course it could not be conveyed by the deed. But the year before its execution McConaughy took possession of the land as purchaser from Lytle, so that there was not only no adverse possession at the time the deed was executed, but the possession was under the right intended to be perfected by the deed. It must be admitted that the will of O'Bannon does not specially authorise his executors to convey land, which he had previously sold. The words of the will are, "all other property as above mentioned, (including lands) to be sold and settled by my executors, with power to collect, sue, &c." O'Bannon's will was not proved and recorded in this state, as required by the 12th and 13th sections of the act of the 10th February, 1810, which gives effect to wills made out of the state, relating to real property within it.

The other objection to this deed, that the conveyance was by one executor, when two were appointed, it is unnecessary to examine; as the will gave no authority to convey the land in question. Although the deed of Cotten, when executed, did not operate as a conveyance of the land, yet it is contended that as the patent was subsequently issued, effect by way of estoppel was thereby given to the general warranty in the deed.

On the part of the complainants it is contended, that the deed being void and inoperative, as a conveyance, the covenant of general warranty annexed to it, is also void. Co. Litt. 365a. That a warranty must have an estate whereupon it may work in the beginning. Co. Litt. 378a. 4 Cruise, Dig. 294, § 16, pt. 3. That a warranty doth not give a right, but bindeth only a right so long as the same continueth. Co. Litt. 272a. That a warranty itself cannot enlarge an estate. Co. Litt. 385b. That a warranty ceases on the expiration of the estate to which the warranty is annexed. Co. Litt. 378a, note 1. That the estate being avoided, the warranty annexed to it is also avoided. Co. Litt. 366b, 367, 368a, 389a. From the view which the court have taken of this case, it is not essential that the doctrine of estoppel should be examined. But as much research and learning have been shown in the argument of the complainants' counsel, it may not be improper to consider the points above stated. That a warranty is limited by the nature of the estate conveyed, is unquestionable. And also that a warranty in a deed, void upon its face, is void. The warranty must have an estate upon which it is to operate, and a deed which does not purport to convey such an estate, though it contain a warranty, can never operate by way of estoppel. What is warranted? The title set out in the deed. And the deed must have upon its face all the requisites which the law requires. To make a valid conveyance under our law, the deed must be sealed, and have two subscribing witnesses, &c.

The argument of the complainants is, that unless the deed operate as the transfer of some title or interest when executed to feed the warranty, it is no estoppel. Now the converse of this position is the true one. Where a deed does convey title, the warranty can never operate as an estoppel. In 4 Cruise, Dig. 270, §§ 58, 59, it is said, "When an interest actually passes by a lien, there is no estoppel." "For the reason why estoppels were at any time allowed was, because otherwise, when the party had nothing in the lands, the deed must be absolutely void." 2 Co. Litt. 293, it is said, "that upon every conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts, &c., releases and confirmations made to the tenant of the land, a warranty may be made, albeit he that makes the release or confirmation, hath no right to the land, &c.; but some do hold, that by release or confirmation, where there is no estate created or transmutation of possession, a warranty cannot be made to the assignee." In note E, it is observed, "but the law is otherwise; for if A be seised of lands in fee, and B release to him, or confirm his estate in fee with warranty to him, his heirs and assigns, this warranty is good, and both the party and his assignee shall vouch." In the same book (page 486) it is said, "If the lease be made by deed indented, then are both parties concluded; but if it be by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made." And under note L, "leases by estoppel are such as are made by persons who have no interest at the time, or at least no vested estate, but are to operate on their ownership, when they shall acquire the same." "And wheresoever any interest passeth from the party, there can be no estoppel against him."

Co. Litt. 505. This doctrine is found in 4 Kent, Comm. 98. "Leases may operate by estoppel when they are not supplied from the ownership of the lessor, but are made by persons who had no vested interest at the time." "But if the lease takes effect, by passing an interest, it cannot operate by way of estoppel." "The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of the conveyance, passes an interest or title to the prior grantee, or his assignee, by way of estoppel, from the moment the estate comes to the grantor." "The estoppel works an interest in the land." "An ejectment is maintainable on a mere estoppel." And again, in the same volume, 448, Sir William Blackstone says, "that it prevails, (viz. that land cannot be conveyed while possessed adversely) in the code of all well governed nations;" for possession is an essential part of title and dominion over property. "As the conveyance in such a case is a mere nullity, and has no operation, the title continues in the grantor, so as to enable him to maintain an ejectment upon it; and the void deed cannot be set up by a third person to the prejudice of his title. But as between the parties to the deed, it might operate by way of estoppel and bar the grantor. This is the language of the old authorities, even as to a deed founded on champerty or maintenance." Co. Litt. 369. Lord Hardwicke says (1 Ves. Sr. 230), "a fine though it pass no estate estops the heir."

Lytle having purchased the land from O'Bannon, in his life time, and Cotten having obtained the patent, in his own name, as executor of O'Bannon, "in trust for the uses and purposes mentioned in the will," &c. there would seem to be no doubt that Cotten held the land in trust for Lytle, or those to whom he may have transferred it. There was no mention in the will, of this land, nor any trust created respecting it; nor, as before remarked, was there any general authority given to the executors to convey it. But by the act of the government, in issuing the patent, the trust became vested in Cotten, and his obligations arose, not from the will of O'Bannon, but from the patent. His being named as executor, and the reference to the will in the patent, may be rejected as surplusage or considered terms of description. He held the land in trust for those who were entitled to it. Of this there can be no doubt. And as a conveyance had been made by Cotten to Lytle, before the emanation of the patent, no reason is perceived why the warranty in such deed should not operate as an estoppel against Cotten and his heirs, and the heirs of O'Bannon. If Cotten were now living, and refused to convey the title to Lytle, or his assignees, a court of chancery would compel him to do so. In making the conveyance, then, he only did what equity would have required him to do, after the emanation of the patent.

The defendants rely upon the statute of limitations and lapse of time. In the case of Whitney v. Webb, 10 Ohio, 513, also in the case of Ridley v. Hettman, Id., 524, the supreme court held, that accumulative disabilities could not be set up under the statute. The court say, "the death of a person while laboring under disability, is entirely unprovided for." "The only alternative then, to which we can cling, is to say that such person stands upon the same footing as residents of the state, and that the lapse of twenty years from the time the cause of action accrued will be a bar to the assertion of the right. To say that it shall be twenty years from the death, will be going even beyond the statute of James, in which express provision is made for extending the period, not however to twenty, but only to ten years; and without which provision this advantage could not by construction have been given to the heir." Had these decisions not been made, I should have inclined to the opinion, that as the statute had not run or begun to run in the life-time of the ancestor, though the cause of action had arisen, the land descended to the heir unaffected by the statute; and that accumulative disabilities would be guarded against by holding, that the heir, though laboring under disability, was bound to bring his suit within twenty years. But it is not for this court to say whether the construction of the statute conforms to their views or not; it has been settled by the proper tribunal, and has become a most important rule of property; and as such we must regard it. Now the land in controversy has been held adversely by McConaughy and those who claim under him, since July, 1813, the date of Lytle's deed. All the defendants hold under deeds duly executed; and whether we date their adverse possession on the land in controversy, from Lytle's deed, or the emanation of the patent to Cotten, it is equally clear that they are protected under the above construction of the statute. That statute bars the complainants, whether their right is represented, by the heir of Thompson, the last survivor of the trustees; or by themselves under the trust deed; or as heirs of General Lawson. Had the statute of limitations remained open for our construction, and we construed it as above intimated, which would not bar the complainants' right; still I should have been clearly of the opinion that they were barred by the lapse of time.

The counsel for the complainants have argued that a court of equity can never give effect to the lapse of time, except in a case where the statute would bar an action at law. That time must always be applied by analogy to the statute; and that this analogy would be destroyed, if equity should give a greater effect to time, than could be given to it under the statute. And the case of Larrow v. Beam, 10 Ohio, 498, is relied on as sustaining this position. The court in that case say, "We do not know that there is any

case in which the defence has been distinctly placed upon this ground, (lapse of time) where there was a statute of limitations in force applicable to the case." "If the party be guilty of such laches in prosecuting his title as would bar him, if his title were solely at law, he shall be barred in equity. But farther than this the courts have not ventured to go." That statutes of limitations are binding on a court of equity, as they are on a court of law, is undoubted. In these cases equity may be said to follow the law. But there are many cases in which lapse of time will constitute a bar in equity, though at law the statute would not bar. The statute does not apply to the peculiar facts and circumstances of these cases. In 2 Story, Eq. Jur. 735, it is said, "a defence peculiar to courts of equity, is that founded upon the mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases courts of equity act sometimes by analogy to the law; and sometimes upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere, where there has been gross laches in prescribing rights, or long and unreasonable acquiescence in the assertion of adverse rights." In Smith v. Clay, 3 Brown, Ch. 640 [note], Lord Camden said, "A court of equity which is never active in relief against conscience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence." In Cholmondeley v. Lord Clinton, 2 Jac. & W. 141, Sir Thomas Plumer said, "In courts of equity of this country the principle has been always, as I shall hereafter show, strongly enforced. They have refused relief to stale demands, even in cases where no statutable limitation existed; and wherever any statute has fixed the period of limitations, by which the claim, if it had been made in a court of law, would have been barred, the claim has been by analogy confined to the same period in a court of equity." And again he says, "courts of equity have at all times, upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands," &c. Where the statute applies, it is binding on a court of equity, but in cases where the statute does not apply, the court acts upon its own principles. In Piatt v. Vattier, 9 Pet. [34 U. S.] 413, the statute of limitations was insisted on in the argument, but was not set up as a defence in the answer as was lapse of time. And the court held that as the statute was not pleaded they could not notice it, and decided the case against the complainant on lapse of time. In that case the evidence did not show that Bartle, the assignor of the complainant, had been within the state, so as to bring him within the statute; and if the statute had been pleaded, there can be no doubt that the decision would have been the same as was given. It was a case in which the court was asked to decree a conveyance on a doubtful equity, where there had been an adverse possession of more than thirty years. And yet the person through whom that equity was desired, was not proved to have been within the state during the adverse possession. The statute did not apply in such a case, and yet can any one doubt that the right asserted had become stale, and that relief was properly withheld? It does by no means follow that the court must decree a title, where the statute of limitations does not bar. And yet this would seem to follow, from the argument of the counsel. The case under consideration may strongly illustrate the principle. In June, 1794, Gen. Lawson, with the view of procuring a re-union with his wife, conveyed the equitable title to the land in controversy, and other real and personal estate to trustees, for the benefit of his wife, and under certain conditions, subject to her final disposition. The deed was executed, with the assent of the trustees, and some advice was given by one of them as to the disposition of a part of the land named in the deed; and there is no other positive evidence of any further action of the trustees.

On the strength of the above deed, Mrs. Lawson and her daughter returned to live with her husband; but in a few months, of choice or of necessity, again abandoned him. Some two years after the execution of the trust deed, Lawson assigned the land in controversy to O'Bannon, which he afterwards sold to Lytle. In 1797, Lewis, as agent of the trustees, though as appears without their authority, entered a caveat in the department of state against issuing a patent on Lawson's assignment, for any of the lands included in the trust deed. O'Bannon died, and his executor executed a deed to Lytle for the land, and he conveyed to McConaughy. In 1816, Cotten, as executor, obtained the patent. Since, and indeed before eighteen hundred and thirteen, possession was taken of the land under Lytle. It has been made valuable by numerous farms having been opened on it, dwelling houses erected, and by orchards and other improvements; and now this trust deed is set up against the title of the occupants. The object of the deed having failed, it seems to have been abandoned by all the parties to it. They have all gone to their account. No action under the deed—except what has been stated, and recording a copy in Hamilton county, of this state, at whose instance does not appear—has been had, until the institution of this suit. And is this an equity to be enforced against the title of the defendants—an equity which has been permitted to lie dormant for nearly half a century—an equity which was founded upon the consideration named, and which, in a few months, entirely failed? There is no evidence that the defendants had notice of this claim

until long after their titles were perfected. Possession has been held of the land twenty-nine years, twenty-seven of which elapsed before this suit was commenced. I am aware that circumstances may prevent the effect of time on an equity asserted; and the court should always regard the excuses for a want of diligence. But in the present case no sufficient excuse has been alleged. Some doubt may well be entertained whether the trust deed, having failed in its object, and no appointment under it having been made by Mrs. Lawson, could be carried into effect, if no adverse title could be set up against it. Under the facts and circumstances of the case, the court think the complainants are barred by the lapse of time. And I should be clearly of this opinion, if the statute interposed no legal bar. The bill must be dismissed.

Case No. 8,317.

LEWIS et al. v. BARKSDALE.

[2 Brock. 436.] [1]

Circuit Court, W. D. Virginia. May Term, 1831.

LIMITATION OF ACTIONS—DISABILITY—COHEIRS—PROVISIONS OF ACT PERSONAL.

1. In the construction of the proviso of the act of limitations, exempting persons under certain enumerated disabilities, from the operation of the act, who laboured under the disability "at the time of such right or title accrued," a subsequent disability cannot be tacked to one existing at the time, though both occurring in the same person, to prevent the statute from attaching.

[Followed in Parsons v. M'Cracken, 9 Leigh, 502.]

2. Where there are several co-heirs, lessors of the plaintiff, in an action of ejectment, and joint and several demises laid in the declaration, and one of the co-heirs, who labours under no disability, fails to bring his action within the time limited by law, though his right of recovery will be barred by the act, it will not affect his co-heirs who were under disability. The proviso of the act is personal, and applies to all those who labour under any of the enumerated disabilities.

[Cited in Moore v. Armstrong, 10 Ohio, 14; De Mill v. Moffat, 49 Mich. 130, 13 N. W. 387.]

This was an action of ejectment brought in 1828, by the heirs at law of Mary Lewis, deceased, and others, claiming under them, against Rice Barksdale, to recover possession of a tract of land lying in the county of Albemarle, and state of Virginia. Joint and several demises from the heirs and their vendees, lessors of the plaintiff, were laid in the declaration. The defendant pleaded the general issue, confessed the lease, entry, and ouster, in the declaration supposed, and agreed to insist on the title, only at the trial. The case is fully stated in the following special verdict, rendered at the November term, 1830: "We, the jury, find that the land in the plaintiff's declaration mentioned, was the fee-simple estate of Mary Lewis, the wife of Hopkins Lewis, late of Albemarle county, in Virginia; that the said Mary Lewis died intestate, in the year 1797, her husband, the said Hopkins Lewis, being then seized in right of his wife of the said lands; that the said Hopkins Lewis, as tenant by the courtesy, remained seised thereof, until he departed this life before the year 1801. That at his death, the heirs of the said Mary Lewis, lessors of the plaintiff, became entitled by inheritance to the fee-simple estate, and possession of the land, which heirs were as follows, to wit: Nancy Lewis, born the 5th of August, 1782; John Lewis, born the 8th of November, 1783; Edward Lewis, born the 20th of September, 1785; Henderson Lewis, born the 10th of July, 1787; Granville Lewis, born January 10th, 1791; Polly D. Lewis, now Mary Russell, born January 8th, 1793; and Matthew Lewis, born February 13th, 1795, all of whom then resided in the commonwealth of Virginia. That on the 3d of November, 1801, four of the aforesaid heirs, to wit: Nancy, John, Edward, and Henderson, made choice of a certain Matthew Henderson as their guardian, who was thereupon appointed as such by the county court of Albemarle, &c. That in the month of February, 1806, two other of the said heirs, to wit, Granville and Matthew Lewis, made choice of a certain Micajah Clarke as their guardian, who was accordingly appointed such by the county court of Campbell, in the commonwealth of Virginia, &c. That from the time of the death of the said Hopkins Lewis, till possession was taken of the land aforesaid, by Samuel Barksdale, in manner hereinafter stated, the actual possession thereof, was in tenants for years, which tenants acknowledged the title of the said heirs, it not appearing to the jury that the guardians aforesaid, ever took actual possession of the said land, or did any act in relation to it, except to sell the same as is hereinafter mentioned. That the aforesaid Polly D. Lewis, had no guardian shown to this jury. That some time in the year 1806, the aforesaid Matthew Henderson, and Micajah Clarke, sold the said land, in fee-simple, to the aforesaid Samuel Barksdale, and bound themselves personally, giving a certain John Clarke as their surety, to make to the said Samuel, a good title to the land aforesaid, but no deed or instrument in writing, from the said Micajah Clarke, Matthew Henderson, and John Clarke, or either of them, to the said Samuel Barksdale, was produced, or proved to the jury to have been executed. That in pursuance of the said sale, the said Samuel Barksdale took possession of the land aforesaid, at Christmas, in the year 1806, and not before. That from the time the said Samuel Barksdale took possession, up to the present time, he, by himself, and his son, the present tenant, and the defendant in this action, has held the actual possession thereof, claiming it as his own property, under the sale aforesaid, and quietly enjoying it as his own. That from the time the said Barksdale took pos-

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

session as aforesaid, until the institution of this suit, no demand for the delivery of the possession of the said land was made by any of the lessors of the plaintiff, and no ouster was proved to have been made, previous to the institution of this suit. That at the time when the said Samuel Barksdale took possession of the land as aforesaid, the said heirs of Mary Lewis were all absent from this commonwealth, and living in the state of Kentucky, except Polly D. Lewis, now Mary Russell, who was then in this commonwealth, and did not leave it until some time in the year 1807. That at the time of the taking possession aforesaid, all the heirs of Mary Lewis were of full age, except the four younger of them, to wit: Henderson, Granville, Polly, and Matthew, who were then under twenty-one years of age, and minors. That the said heirs have all constantly resided in the state of Kentucky, and been absent from this commonwealth from the periods of their respective removals as aforesaid. That all the minors aforesaid, attained their full age of twenty-one, more than ten years before the commencement of this action. That while the said Samuel Barksdale was in the actual possession of the land aforesaid, claiming it as his own, under the aforesaid contract with Micajah Clarke and Matthew Henderson, three of the aforesaid heirs, to wit: Henderson Lewis, Edward Lewis, and Matthew Lewis, executed their several deeds of bargain and sale, for the purpose of conveying their respective interests in the land, to James R. Russell and Bennett Henderson respectively, two of the lessors of the plaintiff. That the said Matthew Lewis after the execution of his deed, and before the institution of this suit, departed this life, intestate, leaving his aforesaid brothers and sisters his heirs. We further find the several leases, entries, and ousters in the declaration alleged, and the possession of the defendant Rice Barksdale. And, if, upon the foregoing facts, the plaintiff hath title to recover, in this action, upon any or all of the demises in the declaration, the whole, or any part of the land in the declaration mentioned, then, upon such of the said demises as the plaintiff is entitled to recover on, and as to the whole of the land, or so much thereof as he, upon the facts aforesaid is entitled to recover, we find the defendant guilty in manner and form as the plaintiff has declared against him, and assess the plaintiff's damages by occasion thereof, at one cent. But if the plaintiff be not entitled to recover upon any of the said demises, then we find for the defendant."

THE COURT (MARSHALL, Circuit Justice, and BARBOUR, District Judge) took time until the next term, to consider the questions of law arising on this special verdict, and at the May term, 1831, the opinion of the court (consisting of the same judges) was delivered as follows, by

MARSHALL, Circuit Justice. This is an ejectment brought by seven co-parceners, to obtain possession of a tract of land, of which their ancestor died seised. The original title of the lessors of the plaintiff, is not controverted. The defendant resists the claim under an adversary possession of more than twenty years. Mary Lewis died, seised in fee of the premises, in the year 1797, intestate, leaving seven children, the lessors of the plaintiff, her heirs at law. The premises remained in the possession of her husband, as tenant by the curtesy, until his death, which happened previous to the year 1801. Matthew Henderson was appointed guardian to four of the heirs, and in the year 1806, Micajah Clarke was appointed guardian to two others of them. In the year 1806, Matthew Henderson sold the land to the defendant, who took possession thereof on the 25th of December, 1806, and has held quiet possession until the institution of this suit, claiming to hold the premises as his own property, in fee simple, under the said sale. No deed of conveyance was exhibited, but a bond, in which the said Henderson and Clarke bound themselves with a surety, to make a good title, was relied on by the defendant.

On the 25th of December, 1806, six of the infant heirs, for whom guardians had been appointed, were in the state of Kentucky, where they remained until the institution of this suit. Mary Lewis, now Mary Russell, one of the lessors of the plaintiff, who was also an infant, was at that time in Virginia, but removed to the state of Kentucky some time in the year 1807.[2] The plaintiffs, each of them, attained their age of twenty-one years, more than ten years before the institution of this suit. A joint demise, and also several demises from each of the heirs, are laid in the declaration. Had the lessors of the plaintiff been seised in severalty of the same property, and been placed under precisely the same circumstances in every

[2] The proviso of our act, limiting the right of entry into lands, tenements, or hereditaments, to twenty years after such right shall have accrued, declares, "that if any person or persons entitled, &c., shall be, or were, under the age of twenty-one years, feme covert, non compos mentis, imprisoned, or not within this commonwealth at the time of such right or title accrued, or coming to them, every such person, and his or their heirs, shall, and may, notwithstanding the said twenty years are, or shall be expired, bring, and maintain his action, or make his entry within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards." 1 R. Code, 1819, pp. 487, 488, §§ 1, 2; Tate, Dig. 407. But the act of March 8, 1826 (Sess. Acts, 1825–26, p. 25, § 3), repealed the saving, as to persons not within the commonwealth at the time when their right, or title to any action, or entry accrued; and the act of February 5th, 1831, changed the limitation of the right of entry, from twenty to fifteen years, and the saving in favour of persons under disability from ten years to five; and the same act repealed so much of the act of March 8, 1826, as applies to real, or mixed actions (Sess. Acts, 1830–31, p. 98, §§ 1, 2, 3).

other respect, no doubt could exist in the case. On the 25th of December, 1806, when the cause of action accrued, Mary Lewis, now Mary Russell, was an infant, residing within the commonwealth of Virginia, and came within that exception of the statute only, which saves the rights of infants. Pending this disability, she removed out of the country, and has continued out of it until the institution of this suit. But it is admitted that one disability cannot be tacked to another, and, consequently, the right of this party is the same as if she had remained within the state.[3] The statute preserves her right of action, for ten years after she has attained her age of twenty-one years. That time having expired, she would be no longer within its saving. The other six plaintiffs were out of the commonwealth, when the cause of action accrued, and have continued out of it until the institution of this suit. Consequently, they are not barred by the act. If, then, the plaintiffs claimed in severalty, it would be clear that six of them would be entitled to recover, and that the defendant would retain the seventh part of Mary Russell.

If this were an original question, I should feel much difficulty in so construing the first and second sections of our act of limitations, as to exclude one co-heir from the exception in his favour, in consequence of the omission of another to assert his right within the time, to which it is limited. The proviso of the act, appears to me, to be in favour of each individual who comes within it. It is personal. It applies to him who labors under the disability. It is made in consequence of that disability; and, it seems to me, that the intention of the act would be defeated by a construction, which denies the benefit of the saving, to an individual coming within its words, or would give that benefit to an individual not coming within them. Both the plaintiffs and defendant, however, insist, that this rule does not apply to the case at bar.

The counsel for the plaintiffs contends, that the guardians of those infants, to whom guardians had been assigned, had a right to lease the lands during the infancy of their wards; that Barksdale must be considered as coming into possession under the title which the guardians had a right to make, and as being tenant in common with Mary, the coparcener, who had no guardian, and whose right, the guardians of the other infants could not pass, and, that an adversary possession against Mary, cannot be presumed. The law respecting the possession of one coparcener, or tenant in common, as against co-tenants, is certainly as it has been

[3] It is worthy of remark, that Mr. Blanshard, in his treatise on the Statutes of Limitation, pp. 18, 19, 1 Law Library, lays down this doctrine of tacking disabilities, somewhat differently. He says, that if there are successive disabilities in the same person, on whom the right first descended, the statute "will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue to him a protection against being barred by non-claim; but any cessation of disability, will call the statute into operative force, and no subsequent disability will arrest the bar produced by the statute": citing 2 Preston, Ab. Tit. 340. "But it has been said," he continues, "that if, before one disability cease, another commences in a different person; as if a right of entry accrue to a feme covert, and she die, leaving her heir within age, or the like, the statute does not begin to run until after the latter disability ceases." In support of this latter proposition, he cites Cotterell v. Dutton, 4 Taunt. 826, and Arch. Pl. 27. It will be observed, that the opinion of Chief Justice Marshall, is directly opposed to the doctrine laid down by Mr. Blanshard, even where the successive disabilities occur in the same person. In the above case, there were successive disabilities in the same person, yet the party was held to be barred by the statute, the disability of infancy, which alone existed at the time of the right of entry accrued, having ceased more than ten years before action brought, though pending the first disability, another attached, and continued up to the institution of the suit. Mr. Blanshard does not adduce the authority of any adjudged case, in support of his doctrine in the case first put, and the opinion of the chief justice is certainly more consonant with the phraseology of both the English, and American statutes. Our statute declares—and St. 21 Jac. 1, c. 16, § 2, uses equivalent terms—that if the persons entitled to such right of entry, &c., shall be, or were, under any of the enumerated disabilities, "at the time of such right, or title accrued, or coming to them, &c." Now, the sound construction of this language would seem to require, that the statute should be considered as beginning to run from the time that the right of entry, &c., accrued, as to all disabilities commencing at a posterior time. A subsequent disability, though succeeding "without intermission," and in the same person, one existing at the time, is without the pale of the letter of the act, and to tack them, would seem to go far to contravene the policy and spirit of the law, in creating statutes which were designed, in the language of Mr. Brougham, to "repair the ravages committed by time upon the evidence of human rights," and which have been aptly and emphatically termed, "statutes of repose."

Since the preceding part of this note was prepared, the editor has examined a case decided by the supreme court of Pennsylvania in 1821, which entirely sustains the view, which he has ventured to advance above. In that case, ejectment was brought by two female heirs. Both were infants when their title accrued, both were married before they attained their majority, and so continued when the action was brought, and more than ten years had elapsed since they came of age. The Pennsylvania statute, like that of Virginia, is taken almost verbatim, from the English statute of 21 Jac. 1, c. 16. Tilghman, C. J., said: "The ten years are to be counted from the time of the ceasing or removing of the disability which existed when the title first accrued. If other disabilities, accruing afterwards, were to be regarded, the right of action might be saved for centuries. The descent of the title upon infant females, and the marriage of those females under the age of twenty-one, might succeed each other, ad infinitum." The court held, that the plaintiffs were barred by the act. Thompson v. Smith, 7 Serg. & R. 209. In conformity with this decision, are the cases of Eager v. Commonwealth, 4 Mass. 182; Demarest v. Wynkoop, 3 Johns. Ch. 129; Jackson v. Wheat, 18 Johns. 40. The case of Eaton v. Sandford, 2 Day, 523, is contra, but the law does not seem to be settled in Connecticut. Opinion of Smith, J., in Bush v. Bradley, 4 Day, 298.

laid down. But Mr. Barksdale did not enter under a lease, nor did he, so far as we are informed by the verdict, acquire the possession under Henderson and Clarke, as guardians. He purchased from them an absolute title, in fee simple, entered on the premises in virtue of that title, and held the same as his property. It is admitted, that this is evidence, on which the jury might have found an adversary possession, and on which the court might have instructed the jury so to find; but, as the jury has not found the adversary possession, the court, it is said, cannot presume it. But the jury have not found the tenancy in common, and Mr. Barksdale certainly did not enter as a tenant in common. The argument, too, is founded on the idea, that adversary possession was a technical phrase, which it was necessary to find in terms. The act does not use the term, and I am not satisfied that such is the law. Equivalent terms may bring the possession within the act; and this verdict does find a possession, which must be adversary. It finds that the vendee took possession under the sale, and has continued in possession ever since, claiming the land as his own property. The verdict does not inform us that Henderson and Clarke acted in the character of guardians, and the sale was certainly one which, as guardians, they could not make rightfully.[4] I do not, then, consider the general law, which is applicable between coparceners, or tenants in common, as applying in this case.

The counsel for the defendant contends, that the lessors of the plaintiff constitute but one heir, and that as one of them is barred by the act of limitations, all are barred. As one of them cannot be brought within the savings of the act, those who do come within it, cannot avail themselves of the exception in their favour. It has already been said, that this construction would defeat the obvious intention of the act. A person, whose right is expressly saved for his own benefit, would be deprived of that right by the negligence of another, over whom he had no control. One of the coparceners might have been of full age when the cause of action accrued, so that as to him, the time would run from the entry of the defendant. The exception, then, in favour of the parties, in whose favour the exceptions are made, would be of no avail. According to the principles maintained by the defendant, as they are understood, no partition could be made by the coparceners while out of possession. Their deeds are mere nullities, under the act prohibiting conveyances of pretended titles. This construction would certainly defeat the intention of the law. If it could be sustained, the separate demises laid in the ejectment would be erroneous, for one joint demise only could be sustained. But, although the title be joint, the interest is, to every intent and purpose, several, and does not survive. In reason, then, it would seem, that each coparcener might recover his separate interest. The case of Roe v. Rowlston, 2 Taunt. 441, is the very case, and must be declared not to be law, on the principles for which the defendant contends.

The cases cited from 4 Term Rep.[5] and [Fitzsimmons v. Ogden], 7 Cranch [11 U. S.][6] are not applicable to this. They were decided, not upon the rights of the parties, but the form of the pleading. The parties pleaded jointly, and their plea was good or bad in the whole. The court must either have determined that a party, not within the exception, was brought within it by being joined with a person entitled to its benefits, or, that a person really within it, must lose its benefits, by having joined in the plea with a person not entitled to the protection of the bar. The plea was not good as to the person who could not bring himself within the exception, and being bad in part, was, on technical legal principles, declared to be bad in the whole. But this technical rule does not apply to this case. The lessors of the plaintiff, claim distinct rights, under separate demises. Nothing, in the form of the pleading, restrains the court from deciding according to the rights of the parties. The judgment, then, should be according to the legal rights of the parties; that the plaintiff recover six-sevenths of the land in the declaration mentioned; and that judgment, as to the other seventh, be entered for the defendant.

Judgment: This day came the parties, &c., and the matters of law arising upon the

[4] To constitute an adversary possession, the possession must be coupled with a claim of title. Without such claim of title, no naked possession, however long continued, will be considered adversary, and it will constitute no bar to those having the real title. Smith v. Burtis, 9 Johns. 180.

[5] Perry v. Jackson, 4 Durn. & E. [Term R.] 516.

[6] Marsteller v. McClean, 7 Cranch [11 U. S.] 156. Action for mesne profits by several plaintiffs against the defendant, after a recovery in ejectment. Defendant pleaded statute of limitations, and plaintiffs replied, that two of the plaintiffs "were femes covert, when the cause of action accrued, and have ever since continued femes covert,"—that another of the plaintiffs "was a feme covert,"—and that all the other plaintiffs were infants at the accrual of the action, and were still so at the commencement of the action. General demurrer and joinder to this replication. Per the supreme court. A replication should, of itself, contain a full and complete answer to the bar, and a joint plea, which is bad, affects, with its consequences, all the parties joining in it. Here, it might be true, that the third plaintiff "was a feme covert"; and yet, five years might have elapsed since the disability ceased. The rule was settled, that all the plaintiffs in a joint action must be competent to sue, citing and approving, Perry v. Jackson, 4 Durn. & E. [4 Term R.] 516, where it was held that a plea of the statute of limitations, which was good as to one partner, barred them both in a joint action. Demurrer to the replication sustained.

special verdict in this cause, having been argued, it seems to the court here, that the plaintiff is entitled to recover his term, yet to come of, and in, six-sevenths of the messuage and land in the declaration mentioned; and that he is not entitled to recover his term in the remaining seventh. Therefore, it is considered, &c., that the plaintiff recover against the defendant his term yet to come of, and in, six-sevenths of the messuage and land in the declaration mentioned, together with one cent, the damages by the jury assessed, and his costs, &c. And a writ is awarded the plaintiff, to the marshal of this district to be directed, to cause him to have possession of his term yet to come of, and to six-sevenths of the messuage and lands aforesaid.

Case No. 8,318.

LEWIS v. BREWSTER.

[2 McLean, 21.] [1]

Circuit Court, D. Michigan. Oct. Term, 1839.

NOTES — GUARANTOR — NOTICE OF DISHONOR — PLEADING AT LAW—AVERMENT OF NOTICE—PAYEE INSOLVENT.

1. A guarantor is entitled to notice of the dishonor of certain notes, the payment of which he had guarantied. The undertaking is collateral, and in all such cases, a notice is indispensable.

2. And as a notice is necessary to give the right of action against the guarantor, the declaration must aver that it was given.

[Cited in Dwight v. Williams, Case No. 4,218.]

3. An averment that notice was given to the guarantor, more than seven months after the last note became due, and nearly a year after the first one was payable, *held* to be bad on demurrer.

4. When there is an excuse for the want of notice, it should be stated in the declaration.

5. If the payee be insolvent at the time the note became payable, a notice to the guarantor need not be given.

[Cited in Donley v. Camp, 22 Ala. 659; Harris v. Pierce, 6 Ind. 164; Van Doren v. Tjader, 1 Nev. 380; Wright v. Dyer, 48 Mo. 526.]

At law.

Mr. Frazer, for plaintiff.

Bates, Talbott & Romeyn, for defendant.

OPINION OF THE COURT. To the four special counts in the declaration, the defendant demurs, and takes issue on the common counts. The questions in the case arise on the demurrer, and there are some objections as to the manner in which the instrument is set out; but as the main point appears in the declaration, it is proper to advert to the obligation on which the action is founded. It is as follows: "July 27, 1838. I do hereby guaranty the eventual payment to George W. Lewis, of Boston, Mass., of the following named notes or obligations, given by Mead, Kellogg & Co., to the order of said Lewis, and payable at the Commercial Bank in the city of New York; viz.: One note for $1,666 55, due two months from date; one note for $1,666 39, due three months from date; one note for $1,686 34, due four months from date; one note for $1,689 37, due five months after date; one note for $1,722 30, due six months from date, which said notes are given by said Mead, Kellogg & Co., to said Lewis, in payment for his account against them, which account is this day settled in full, as above. The above is done for a valuable consideration." Signed "William Brewster."

It is objected to the first count, that it does not set forth a consideration for the undertaking of the defendant. But this objection seems not to be well founded. In the first count, it is alleged that, in consideration, the plaintiff, at the special request of the defendant, would sell and deliver to Mead, Kellogg & Co., merchandize to the amount of eight thousand and forty dollars and ninety five cents; the defendant promised, whether in writing or not, does not appear, to guaranty the payment of certain notes to be given by the purchasers, for the same. And the plaintiff avers, that the merchandize was sold, the notes taken on the 27th July, 1838, and that on the same day the defendant, in writing, guarantied the eventual payment of the same. Now it sufficiently appears in the declaration, that the merchandize was sold on the promise to guaranty the payment of the notes to be given, and that the guaranty was executed, in pursuance of this promise. Here was a confidence and trust reposed in the defendant, which induced the plaintiff to sell the goods, and this constitutes a consideration for the guaranty. But it is alleged that the promise to guaranty the notes, not being in writing, was void, and that the declaration does not show that the defendant had notice of the acceptance of his guaranty. And the cases [Douglass v. Reynolds] 7 Pet. [32 U. S.] 113, and [Reynolds v. Douglass] 12 Pet. [37 U. S.] 497, are referred to. These cases, however, as it regards the notice of the acceptance of the guaranty, are not analogous to the present one. This is a guaranty of the payment of certain notes specified, and, of course, is a recognition of the obligation of the original promise. It admits every legal requisite necessary to give effect to the obligation. Under the written guaranty now before us, there could be no notice of acceptance, for the execution of the instrument shows an acceptance. That there must be a consideration to make a guaranty obligatory, is admitted. But this consideration is generally found in the credit given to the guarantor, which induced the vendor to part with his property. If it be admitted that the guarantor was not discharged from his promise, it is contended the count is de-

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

fective in not averring that the guaranty was in consideration of this liability. 4 Johns. 280. That the guaranty was given in consideration of the sale of the goods on the promise of the guarantor to be responsible, though not in terms averred, sufficiently appears from the facts stated in the first count. A special averment of this fact would have been more technical, and more, perhaps, in conformity to the correct rules of pleading; but it would not have given greater point or certainty to the count. That the holder of the notes was bound to use diligence, is a doctrine well established; but it is not necessary to consider this point in reference to the commencement of suits on the notes, and the proper averments in relation to the same, which it is contended are not to be found, either in the first or the second, third and fourth counts. We will come at once to the great question in the case, which is—whether the holder of the notes was bound to give notice to the guarantor of their dishonor; and if this shall be resolved in the affirmative, whether the declaration should contain an averment that notice was given. This description of obligation is common in commercial transactions; and the principles which govern it, have often come under judicial cognizance.

On the part of the plaintiff, it is contended that no notice was necessary, and that it is matter of defence for the defendant to show the damages he has sustained for want of notice. And, to sustain this position, 2 Hall, 199; 9 East, 348; 1 Holt, N. P. 153; 3 Moore, 15; 6 Moore, 521; 3 Brod. & B. 211; 1 Bing. 216; 2 Camp. 436; [Lee v. Dick] 10 Pet. [35 U. S.] 482, are cited. These are cases in which a notice to the guarantor need not be given, as where the drawer of the note guarantied, is insolvent when it becomes payable; and in such a case it is matter of defence for the defendant to show that he has suffered damage for want of notice. It is a well established rule, that the same degree of strictness in regard to giving notice to a guarantor is not necessary to charge him, as to charge an indorser; and there are English authorities which favor the position taken by the plaintiff, that the inquiry is, whether the guarantor has been injured by want of notice. But the weight of authority in the English books is against the position assumed; and in this view the American authorities are still stronger. The undertaking of the guarantor is collateral, as much so as that of the indorser of a bill; and the reason for a notice to him, is as strong as to an indorser. And if commercial convenience has dispensed with the same strictness in the former, as in the latter, it still requires a reasonable notice. It is as necessary that the guarantor should endeavor to obtain an indemnity from his principal as an indorser; and it is on this ground that a notice is as indispensable in the one case as the other. In the case of Reynolds v. Douglass, 12 Pet. [37 U. S.] 498, the court say: "In this part of the record, the question is fairly raised, whether the insolvency of Haring, prior to, or at the time of payment, will excuse the plaintiffs from making a demand on him, and giving notice to the guarantors." And after referring to 9 Serg. & R. 198; 1 Barn. & C. 10; 8 East, 242; 3 Kent, Comm. 123; 2 Taunt. 206; 5 Maule & S. 62; 3 Barn. & C. 439,—the court remark, "The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity." And again, in their opinion, the court say, in reference to the charge of the circuit court to the jury, "in their fifth and last instruction, the court charge the jury, that, to enable the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment, notice should have been given in a reasonable time, to the defendants; and on failure of such proof, the defendants are in law discharged." "This instruction, the court remark, rests upon the necessity of a personal demand of Haring, by the plaintiffs. It has been already shown, that this demand was unnecessary, in case of Haring's insolvency." From this opinion, it is clear that the court considered a notice to the guarantor, of the dishonor of the note guarantied, indispensable, except in case of insolvency. But that where an insolvency at the maturity of the note, is established, neither a demand nor notice is necessary. The same doctrine is laid down in the cases of Oxford Bank v. Haynes, 8 Pick. 423; Gibbs v. Cannon, 9 Serg. & R. 202; Greene v. Dodge, 2 Ohio, 438; Grice v. Ricks, 3 Dev. 62; Douglass v. Reynolds, 7 Pet. [32 U. S.] 113. There are some apparently contradictory decisions to those in the New York and other reports; but on a strict examination, they will be found, in general, to affirm the same principle. Where the guarantor has been held liable, without notice, it has been where the maker of the note guarantied was insolvent, when it became payable, or on account of a liability growing out of the original transaction. The undertaking of the guarantor in the present case, was, not to pay absolutely or unconditionally, but to pay eventually; that is, if payment could not be obtained of the drawers. His undertaking was then conditional, and a notice of the happening of the condition which was to make his obligation absolute, was necessary; and this we consider is the well established doctrine, sanctioned by the supreme court. If the parties who ought primarily to have paid the bill or note, were solvent at the time the same became due. and for some time afterwards, and only subsequently became insolvent, before notice or inference of actual damage from the

want of notice to the party guaranteeing, or otherwise collaterally liable, will prevail, until rebutted by actual proof, that if notice had been given, payment would not have been obtained. Chit. Bills (Ed. 1839) 474; Philips v. Astling, 2 Taunt. 206; Holbrow v. Wilkins, 1 Barn. & C. 10; Bridges v. Berry, 3 Taunt. 130; Bishop v. Rowe, 3 Maule & S. 362; Cory v. Scott, 3 Barn. & Ald. 619. If this notice was essential to fix the responsibility of the guarantor, was it necessary to aver it in the declaration specially; or, is the general averment in the counts demurred to sufficient? Every thing necessary to give the plaintiff a right of action, must appear in the declaration; and a notice being indispensable to this right, must, of course, be averred. The omission of an averment of notice, when necessary, will be fatal on demurrer, or judgment by default. Cro. Jac. 432. This defect may be avoided by a verdict, except against the drawer of a bill. 1 Strange, 214; 1 Saund. 228a; 4 Bin. 108; 7 Serg. & R. 310. But a general averment in a declaration on a bill of exchange, "of all which the said promises the defendants had afterwards, &c., had notice," is sufficient. 3 Johns. 207.

The general averment in this case, is the same in all the counts, and is, "of all which the said defendant, on the second September, 1839, at Detroit, had notice." This notice, as averred, was more than seven months after the last note became payable, and was, in fact about the time this suit was commenced. Had the averment been, "of which premises, the defendant had due notice," it might have been held sufficient, as, under such an averment, the fact of the notice, and the circumstances under which it was given, would be matter of evidence. But the notice averred is special, as to the time it was given, which was nearer a year after the first note became due; and, as before remarked, more than seven months after the last one was payable; and no excuse is alleged why it was not given before. There are circumstances which will excuse the want of notice, and these should always be stated in the declaration. Chit. Bills, 212, 319; 1 Salk. 214; Vin. Abr. tit. "Notice," A. 2. If a notice be necessary it must appear in the declaration to have been given in due time, or the excuse for not giving it must be stated. The averment of a notice after the lapse of so long a period, unaccompanied by an excuse for the delay, does not show the diligence which the law requires. It is, in fact, nothing more than the general averment of notice, which refers to the commencement of the suit, and is used in some cases more as a matter of form than substance. In this respect we think the declaration is defective; and without examining the other points made in the argument, in support of the demurrer, we sustain it, on this ground. Leave given to amend declaration.

Case No. 8,319.

LEWIS v. BROADWELL.

[3 McLean, 568.] [1]

Circuit Court, D. Illinois. June Term, 1847.

LIMITATION OF ACTIONS — EXCEPTION AS TO NON-RESIDENTS — REPEAL OF EXCEPTION — NO ADMINISTRATOR — ADMINISTRATION BY CREDITOR.

1. The act of limitations of Illinois of 1827 bars certain claims not prosecuted in sixteen years, but did not operate against non residents; but this exemption was repealed by the act of 1837. *Held* that, on a claim which had six years to run, the statute would operate.

[Cited in McElvain v. Mudd, 44 Ala. 48.]

2. To bar any claim, there must be a reasonable time for the statute to run after it is enacted.

3. Until administration granted, it is doubtful whether the statute can operate, as there is no one against whom suit could be brought.

[Cited in Doty v. Johnson, 6 Fed. 483.]

4. A creditor may administer, but is he bound to do so?

[Action by William Lewis against the administrators of Broadwell.]

Mr. Robbins, for plaintiff.

Logan & Lincoln, for defendant.

OPINION OF THE COURT. This is an action of covenant. The defendant pleads the statute of limitation of the 10th of February, 1827, which limits the action, brought by the plaintiff, to sixteen years. The plaintiff replies, that they are citizens of Ohio, and within the proviso of the seventh section, which declares, that non residents shall have sixteen years, within which to bring their action after coming within the state. To this replication, the defendants demur. By the act of the 11th of February, 1837, the above proviso, in favor of non residents, was repealed. And it is contended, that, until the proviso was repealed by this act, the statute did not begin to run, and that, consequently, until the lapse of sixteen years from that time, there can be no bar to the demand of the plaintiff. That the removal of the disability must, in effect, be the same as where a non resident against whom the statute does not run, comes within the state, from which time the statute begins to operate. There is plausibility in this argument, but we suppose the repealing clause must place the demand of the plaintiff on the same ground as if the act of 1837 had contained the provision, in regard to limitations, that is contained in the act of 1827, omitting the proviso as to non residents. On this hypothesis, ten years of the statute had run, from the time the right of action accrued to the plaintiff, and the question would arise, whether the statute would bar at the end of sixteen years from the time the action accrued, or from the enactment of the statute, in 1837. We suppose the statute, from its passage, would operate upon the right of the

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

plaintiff, and would constitute a bar in six years, as that would be the time the statute had to run. This is the effect given to statutes of limitations on rights of action which had accrued before their passage. No court would give effect to a statute so as to bar claims for time elapsed before its passage; but where a reasonable time must elapse after the enactment, before the bar is complete, effect must be given to the statute. The demurrer to the replication is sustained.

With the leave of the court, the plaintiff filed another replication, which alleged that, in 1836, the first administrator on the estate of Lewis died, in Illinois, and no other administration was granted until 1843, and that during that time there was no one against whom suit could be brought, &c. To which the defendant demurred. In the case of Murray v. East India Co., 5 Barn. & Ald. 204, "In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing." In Cary v. Stephenson, 2 Salk. 421, "An action of assumpsit. for money had and received, was brought against one who had received money belonging to the estate of the intestate, after his death, and before administration granted—the receipt being more than six years before the action, but the grant of the administration was within six years. The court held that the time of limitation did not begin to run until the grant of the administration." And, in the above case of Murray, Chief Justice Abbott said, "Now, independently of authority, we think it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing." When administration was granted, in 1836, the act of 1827 did not operate against the plaintiff, he being a non resident; and, from the repeal of that exemption by the act of 1837, up to the time of granting letters the second time, in 1843, there was no person against whom the action could be brought. It is not shown that the deceased had any heirs in Illinois. The statute of Illinois authorises a creditor to administer, but is he bound to do so? A failure to sue infants, it is admitted, is no excuse under the statute. On this point, Judge McLEAN suggested doubts whether the excuse of the plaintiff for not suing was not sufficient, and the district judge being of a different opinion, the question was certified to the supreme court, under the act of congress [5 Stat. 518].

[NOTE. This cause was taken, on a certificate of division in opinion, to the supreme court, where it was held by Mr. Justice Taney that "upon the first point in the certificate of division, that the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, and not before; and will direct it to be so certified to the circuit court." 7 How. (48 U. S.) 780.]

Case No. 8,320.

LEWIS v. CLARENDON.

[5 Dill. 329;[1] 7 Cent. Law J. 287; 6 Reporter, 609; 1 Md. Law Rec. 107.]

Circuit Court, E. D. Arkansas. April Term, 1878.

RAILWAY AID BONDS—CONSOLIDATION OF COMPANIES—ULTRA VIRES.

1. A municipal corporation cannot subscribe to the capital stock of a railroad company, and issue its bonds in payment of such subscription, unless the power so to do has been expressly conferred by law.

2. When two or more railroad companies are consolidated, the consolidated company succeeds to and possesses all the franchises, rights, privileges, and immunities of the several companies of which it was formed.

3. The right granted to a railroad company by its charter to receive municipal subscriptions to its capital stock, payable in bonds, is a right and privilege that, upon its consolidation with another company, passes to the consolidated company.

4. Where a city subscribes to the capital stock of a railroad company formed by the consolidation of two or more companies, and issues its bonds to such company in payment of the subscription, in a suit upon the bonds the city is estopped to deny the corporate existence of the company so formed, or the validity of the proceedings for the consolidation.

5. If, in the exercise of its undoubted powers, a corporation makes a contract, some stipulation of which is in excess of its powers, this does not avoid the whole contract, if, after rejecting such stipulation, there remains a good execution of the powers granted; and if a corporation having authority to issue bonds "bearing interest at the rate of six per cent." issue them bearing ten per cent, they are valid obligations for the principal and six per cent interest.

6. Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess.

7. Where authority is given "to any incorporated town or city" in a county to subscribe to the capital stock of a railroad company, such authority is not limited to towns and cities incorporated at the date of the passage of the act.

[Cited in De Voss v. City of Richmond, 18 Grat. 338.]

This action is brought to recover on overdue interest coupons cut from negotiable bonds issued by the city of Clarendon to the Arkansas Central Railway Company, in payment of a $15,000 subscription made by the city to the capital stock of said company. The following is a copy of one of the bonds: "State of Arkansas, City of Clarendon. No. 17. $15,000 Subscription to the Arkansas Central Railway. $500. Know all men by these presents, that the city of Clarendon, in the state of Arkansas, in conformity to the will of a majority of the legal voters of the said corporation, as expressed at an election held

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

in accordance with the laws of the said state of Arkansas, on the 25th day of July, A. D. 1871, authorizing said city to subscribe fifteen thousand dollars to the capital stock of the Arkansas Central Railway Company, for value received, hereby promises to pay to the Arkansas Central Railway Company, or bearer, the sum of five hundred dollars, lawful money of the United States of America, on the 1st day of January, A. D. 1882, at the National Park Bank, in the city of New York, with interest thereon at the rate of ten per cent per annum, payable semi-annually, on the first days of April and October in each year, at the National Park Bank, New York, on the presentation and surrender of the annexed coupons as they severally become due and payable. In witness whereof, the said city of Clarendon has caused this bond to be signed by the mayor and attested by the recorder, and the seal of said city to be hereunto affixed, on this 1st day of January, A. D. 1872. B. N. D. Tannehill, Mayor. Parker C. Ewen, Recorder."

By act of the general assembly of this state, approved January 20, 1855, the Arkansas Midland Railroad Company was incorporated, and authorized to construct a railroad from Helena to Little Rock; and any "incorporated town or city in the counties of Pulaski and Monroe" was authorized to subscribe to the capital stock of said company, upon a majority vote of the legal voters of such town or city, and to issue its bonds in payment of such subscription, "bearing interest at the rate of six per cent per annum." The charter authorized the company to "make any lawful contract for uniting said road with any other road having the same terminus, or which may at any intermediate point approach the said railroad." On the 8th day of March, 1869, there was filed in the office of the secretary of state of this state articles of association, under the general railroad incorporation law of this state, incorporating the Little Rock & Helena Railroad Company. The purpose of this company was declared to be to construct a railroad from Little Rock to Helena.

The general act for the incorporation of railroads, approved July 28th, 1868, authorized any railroad company then or thereafter incorporated "to purchase and hold any connecting railroad and operate the same, or to consolidate their companies and make one company, under the name of one or both, or any other name." Gantt, Dig. § 4969. On the 31st day of August, 1870, at a meeting of the board of directors of the Arkansas Midland Railroad Company, a resolution was adopted declaring "that the said company be, and the same is hereby, consolidated with the Helena & Little Rock Railroad Company, * * * and that said consolidated company be hereafter known as the Arkansas Central Railway Company."

At a meeting of the stockholders of the Arkansas Midland Railroad Company, September 21, 1870, it was unanimously resolved, "that the action of the board of directors of the company in changing the name of the road from the Arkansas Midland Railroad Company to the Arkansas Central Railway Company be, and the same is hereby, ratified and confirmed." At a meeting of the directors of the Little Rock & Helena Railroad Company, held on the 20th of January, 1871, it was resolved, "by the president and directors of the Little Rock & Helena Railroad Company, that we hereby agree to consolidate with said company, under the name and style of the Arkansas Central Railway Company, and do hereby authorize and empower W. H. Rogers, the president of this company, to convey unto the Arkansas Central Railway Company all the rights and privileges and immunities that we have or may have had, or by any means may hereafter become entitled to, under or by virtue of said organization, and after said conveyance is made this company shall utterly cease as a separate organization."

Mr. Taylor testifies that he was president of the Arkansas Midland Railroad Company at the time that corporation was consolidated with the Helena & Little Rock Railroad Company, and continued to be president of the consolidated company under the name of the Arkansas Central Railway Company; that the latter company built and operated about fifty miles of its road, running from Helena to Clarendon; that the business of the Arkansas Central Railway Company was conducted exclusively under the charter of the Arkansas Midland Railroad Company; that the object and purposes of the Arkansas Midland Railroad Company, and Little Rock & Helena Railroad Company, and Arkansas Central Railway Company, were identical, viz., the construction of a railroad from Helena to Little Rock, and that the proposed line of road of each of said corporations was the same.

The defences are: (1) That the defendant was not authorized or empowered to issue its bonds bearing interest at the rate of ten per cent., and that the bonds are, therefore, void. (2) Denies that there ever was such a corporation as the Little Rock & Helena Railroad Company. (3) Denies that the Arkansas Midland Railroad Company ever was legally consolidated with the Little Rock & Helena Railroad Company. (4) Denies that the Arkansas Central Railway Company was formed by the consolidation of the Arkansas Midland Railroad Company and the Little Rock & Helena Railroad Company, but alleges it was organized on the 1st day of May, 1871, as an independent corporation. (5) Denies that section 16 of the act incorporating the Arkansas Midland Railroad Company is applicable to the defendant city, which, it is alleged, "was not in existence at the date of the passage of said act, not having been founded until the year 1857, and

not having been incorporated before February 8th, 1859."

E. W. Kimball, for plaintiff.
William W. Smith, for defendant.

CALDWELL, District Judge. The defendant city could not subscribe to the capital stock of a railroad company, and issue its bonds in payment of such subscription, unless it was authorized so to do by law. Authority for the defendant to subscribe to the capital stock of the Arkansas Midland Railroad company, and issue its bonds in payment therefor, is found in sections 16 and 15 of the charter of said company; and if the bonds in suit are void obligations, it is because they were issued under the authority of those sections.

It is a settled principle that where two or more railroad companies amalgamate or consolidate their respective roads under authority of law, the new or consolidated company succeeds to and possesses all the franchises, rights, privileges, and immunities of the several companies of which it was formed. Zimmer v. State, 30 Ark. 677; Robertson v. City of Rockford, 21 Ill. 451; Nugent v. Supervisors, 19 Wall. [86 U. S.] 241, 242. And that the right granted to a company by its charter to receive municipal subscriptions to its capital stock is a right and privilege that, upon its consolidation with another company, passes with its other rights and privileges to the consolidated company, has been expressly decided. County of Scotland v. Thomas, 94 U. S. 682; reaffirmed in County of Henry v. Nicolay, 95 U. S. 619.

If, therefore, the Arkansas Midland Railroad Company and the Little Rock & Helena Railroad Company were legally consolidated under the name of the Arkansas Central Railway Company, the latter company succeeded to all the chartered rights of the Midland company, and the defendant could rightfully subscribe to the capital stock of the consolidated company, and issue its bonds in payment therefor.

Acting under the authority of section 5 of the amended charter of the Arkansas Midland Railroad Company, and section 4969 of Gantt's Digest, proceedings were had by the last-named company and the Little Rock & Helena Railroad Company to consolidate their respective companies, under the name of the Arkansas Central Railway Company. These two roads had the same termini, and their object and purpose were identical, viz., the construction of a railroad from Helena to Little Rock.

It is objected that the consolidation of these companies under the new name was not regular and legal; that the charter of the Arkansas Midland Railroad Company only authorized that company to consolidate with "any other road having the same terminus;" that this did not authorize consolidation with a road running parallel, and having the same termini; that the authority to consolidate given by the general act for the incorporation of railroads, passed in 1868 (section 4969 of Gantt's Digest), is limited to "connecting railroads," and does not extend to parallel roads having the same termini. It is not disputed that the consolidation took place in fact, and that the new or consolidated company, under the name of the Arkansas Central Railway Company, assumed to exercise and possess, and did exercise in fact, all the functions and franchises of a railroad corporation, under the charter of the Arkansas Midland Railroad Company; that it built and operated fifty miles of railroad, made contracts, received subscriptions to its capital stock, and exercised and performed every function pertaining to such corporation from the date of the consolidation. Its right to do so was never challenged by the state, nor questioned in any mode by any person. No director or stockholder of either of the two companies complained of the consolidation or change of name, but, on the contrary, appear to have ratified it.

If this was a suit to collect a stock subscription from a subscriber to one of the original companies, a different question might be presented. But the city of Clarendon subscribed to the capital stock of the consolidated company. The subscription was made in conformity to the authority given and the requirements contained in the charter of the Arkansas Midland Railroad Company; and the action of the city in subscribing for stock and issuing bonds must, under the evidence and pleadings, be referred to the authority given it so to do in the charter of the Arkansas Midland Railroad Company, which latter company had, by change of name or consolidation, or both, become the Arkansas Central Railway Company. By subscribing for stock and issuing its bonds, under these circumstances, to the consolidated company, the city is estopped, in a suit upon such bonds, to show that the Arkansas Central Railway Company was not a corporation de jure, or that the proceedings to change the name of the Arkansas Midland Railroad Company, or to consolidate that company with the Little Rock & Helena Railroad Company, under the name of the Arkansas Central Railway Company, were not in conformity to law.

In principle, this case cannot be distinguished from the case of County of Leavenworth v. Barnes, 94 U. S. 70. In that case it was objected that the bonds were issued to a company that had no legal existence in January, 1865, when the election was held, and on the 1st of July, 1865, when the bonds were issued. Answering this objection, the supreme court say: "This company was organized in 1860, under the name of the Missouri River Railroad Company, and on the 18th of April, 1866, it consolidated with another company, increasing its capital and changing its name to that of the Leavenworth & Missouri Pacific Railroad Company. We suppose this to have been authorized by

the statutes of Kansas. Laws 1862, p. 768. We are certainly of the opinion that when the parties interested in the two companies are content; when the newly-named company has been in operation for ten years; when the county has received and held its stock until 1869, when the same was sold by the county, by authority of the legislature, it is not competent for such a contracting party to say that there was an irregularity in the organization of the company."

In Commissioners of Douglass County v. Bolles, 94 U. S. 104, the suit was upon bonds issued by the county to the St. Louis, Lawrence & Denver Railroad Company, and the court say: "Whether the St. Louis, Lawrence & Denver Railroad Company was lawfully a corporation capable of contracting with the defendants below, is a question that cannot be raised in this case. * * * The company has built and operated a railroad from Lawrence to the Missouri state line, and has exercised the usual functions of a railroad corporation. It has been a corporation de facto, at least, if not de jure, from the date of its organization. Its corporate existence, therefore, and its ability to contract, cannot be called in question in a suit brought upon evidence of a debt given to it."

And in a still later case the court say: "Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." Casey v. Galli, 94 U. S. 680. And the court cite in support of this doctrine: Eaton v. Aspinwall, 19 N. Y. 119, 6 Duer, 176; Cooper v. Shaver, 41 Barb. 151; Camp v. Byrne, 41 Mo. 525; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Ellis v. Schmoeck, 5 Bing. 521; McFarlan v. Triton Ins. Co., 4 Denio, 392; All Saints Church of New York v. Lovett, 1 Hall, 191; Topping v. Bickford, 4 Allen, 121; Dooley v. Wolcott, Id. 407; Eppes v. Mississippi, G. & T. R. Co., 35 Ala. 33; Hamtramck v. Bank of Edwardsville, 2 Mo. 169; Jones v. Cincinnati Type Foundry Co., 14 Ind. 89; Worcester, etc., Inst. v. Harding, 11 Cush. 285; Hughes v. Bank of Somerset, 5 Litt. (Ky.) 47; Tar River Nav. Co. v. Neal, 3 Hawks, 520. And the following additional cases may be cited in support of this doctrine: Bigelow, Estop. (2d Ed. 423, 424) 464; Zabriskie v. Cleveland, 23 How. [64 U. S.] 400; John v. Farmers', etc., Bank, 2 Blackf. 367; Brookville, etc., Turnpike Co. v. McCarty, 8 Ind. 392; Ensey v. Cleveland, etc., R. Co., 10 Ind. 178; Anderson v. Newcastle, etc., R. Co., 12 Ind. 376; Palmer v. Lawrence, 3 Sandf. 161; Fisher v. Evansville & C. R. Co., 7 Ind. 407.

The charter authorizes the issue of bonds "bearing interest at the rate of six per cent per annum." There are no negative words; a higher rate is not in terms prohibited, and no penalty is prescribed for issuing or receiving bonds drawing a higher rate. At the time the bonds were issued, the constitution of 1868 was in force, which declared "no law limiting the rate of interest for which individuals may contract in this state, shall ever be passed." And the act of July 13th, 1868, was also in force, which declared it should be lawful for parties to stipulate for any rate of interest for "money loaned, or in any manner due and owing from any other person or corporation to any other person or corporation in this state." Gantt, Dig. § 4278.

The city and the railroad company seemed to have supposed this legislation had removed the restriction in the charter as to the rate of interest. Whether this is a sound view it is not necessary to determine, because the plaintiff having waived all claim for interest beyond six per cent, there are other satisfactory grounds upon which to rest the decision of the question. The power to issue the bonds is conceded; the rate of interest they should draw is a mere incident to the exercise of the power to issue, and not vital to the validity of the bonds otherwise lawfully issued. The city and the company might have agreed on a less rate than six per cent, and the insertion of a larger rate is at most a stipulation in excess of the power relating to a mere incident of the main power and contract, and the bonds are valid to the extent of the principal and lawful interest, and invalid as to the excess of interest only.

If, in the exercise of its undoubted powers, a corporation makes a contract, some stipulation of which is in excess of its powers, this does not avoid the whole contract, if, after rejecting such stipulation, there remains a good execution of the powers granted. Johnson v. County of Stark, 24 Ill. 91, 92; U. S. v. Bradley, 10 Pet. [35 U. S.] 343; City of Quincy v. Warfield, 25 Ill. 317. In the last case cited, under authority to issue bonds bearing eight per cent interest, bonds stipulating for twelve per cent were issued, and it was held they were valid and bore interest at the statutory rate.

If tested by the rule applicable to laws regulating the rate of interest (which, as usury laws are based on public policy, is a view too favorable to the defendant), the same result is reached. "Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess." Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 35; and see, to the same

effect, Darby v. Boatman's Sav. Inst. [Case No. 3,571]; and cases cited; Burnhisel v. Firman, 22 Wall. [89 U. S.] 170. The case of Bank of U. S. v. Owens, 2 Pet. [27 U. S.] 557, and what is said by the court in Tiffany v. Boatman's Inst., 18 Wall. [85 U. S.] 375, 384, has not been overlooked. In reference to them, it may be remarked that what is there said on the point is difficult to reconcile with what is said by the court in the later cases of Burnhisel v. Firman, supra, and Farmers', etc., Nat. Bank v. Dearing, supra.

In the last-named cases the question was fairly raised by the record, and proper to be decided. In the last case (Farmers', etc., Nat. Bank v. Dearing) the rule is stated with force and perspicuity, and supported by citations that show it to have been a deliberate opinion; and as this is the latest utterance of that court on the question, it must be regarded by this court as an authoritative exposition of the law, and it certainly is in harmony with the general, "though not quite uniform, doctrine of the authorities." Dillon, Circuit Judge, in Darby v. Boatman's Sav. Inst., supra.

There seems to have been filed in the office of the secretary of state, on the 5th day of May, 1871, articles of association incorporating a railroad company to be known as the "Arkansas Central Railway Company." The articles of association of that road were not filed until after the consolidation of the Little Rock & Helena Railroad Company and the Arkansas Midland Railroad Company, under the name of the Arkansas Central Railway Company. Under the provisions of section 4942 of Gantt's Digest, the articles of association of that road were a nullity, and it is not shown that it exercised, or attempted to exercise, a simple corporate function. But it is enough to say that the pleadings and proofs show that the defendant subscribed to the capital stock of the Arkansas Central Railway Company formed by the consolidation of the Little Rock & Helena Railroad Company and the Arkansas Midland Railroad Company, and that the bonds were issued to the company thus formed.

The authority to subscribe is given "to any incorporated town or city." This language embraces towns and cities then or thereafter incorporated. All that is required is that they shall be "incorporated" at the time the subscription is made. The construction of the branch to Pine Bluff was authorized by section 5 of the charter. The plaintiff is entitled to judgment for six-tenths of the face value of the coupons, and interest on the same at six per cent from the date of the maturity of the same. Judgment accordingly.

LEWIS (CROCKER v.). See Case No. 3,399.

LEWIS (DAVIDSON v.). See Case No. 3,606.

Case No. 8,321.

LEWIS et al. v. The ELIZABETH AND JANE.

[1 Ware (41), 33;[1] 7 Am. Jur. 30.]

District Court, D. Maine. Sept. Term, 1823.

SEAMEN'S WAGES — WRECK — ABANDONING THE WRECK—WHEN DERELICT—SALVAGE.

1. The wreck of a ship is pledged by the maritime law for the payment of wages, and the seamen's privilege is preferred to all other claims.

[Cited in Packard v. The Louisa, Case No. 10,652; Davis v. Leslie, Id. 3,639.]

2. But if they abandon the wreck, the contract between them and the owners is dissolved; they lose their privilege against the ship and their claim for wages, and they are not restored, by the jus postliminii, on the salvage of the property by other persons.

[Cited in Pitman v. Hooper, Case No. 11,185. Distinguished in The Massasoit, Case No. 9,260; Hanson v. Rowell, Id. 6,043. Cited in The Niphon's Crew, Case No. 10,277.]

3. The policy of the law is to connect the right to wages with the safety of the ship.

4. Property is derelict, in the maritime sense of the word, when it is abandoned without hope of recovery, or the intention of returning to save it.

5. The rights of the owner are not divested by abandonment, but the finder becomes the legal possessor, and acquires a privilege against the property for his salvage, which takes precedence of all other liens.

[Cited in Packard v. The Louisa, Case No. 10,652; The John Wurts, Id. 7,434.]

[Cited in Eads v. Brazelton, 22 Ark. 499.]

In admiralty.

C. S. Daveis, for petitioners.

Mr. Whitman, for owners.

WARE, District Judge. This is a petition for wages against the proceeds of the wreck of the brig Elizabeth and Jane, which was ordered at a former term to be sold for the payment of salvage, and the proceeds of the sale to be brought into the registry. One half of the gross amount has been decreed to the salvors, and the seamen now claim their wages out of the surplus remaining in court. If wages are due, the claim may be well enforced in this proceeding. By the marine law, the ship, and even the wreck, as the old ordinances express it, is, to the last nail, pledged to the seamen for their wages. Their lien is preferred to all others, and the reason given is, because it is their labor that has saved all. Consulat de la Mer, cc. 58, 63, 258, 193; Cleirac, Jurisdiction de la Marine, p. 351, art. 18; Abb. Shipp. 538; [Blaine v. The Charles Carter] 4 Cranch [8 U. S.] 328; Relf v. The Maria [Case No. 11,692]; 1 Valin, Comm. 703; Laws of Oleron, p. 751, art. 3.

The facts in the case are these:—The seamen shipped in St. Domingo, for a voyage to the United States, and the brig sailed with a cargo of mahogany about the first of January, 1823. Meeting with bad weather on the

[1] [Reported by Hon. Ashur Ware, District Judge.]

coast, she was driven about without being able to make a port, until about eighty or ninety days after leaving St. Domingo, when she struck on a reef of rocks, was wrecked, and abandoned by the crew. The men suffered, not only from the severity of the weather, but from want of provisions, having been for a considerable part of the time on short allowance. The wreck was afterwards picked up and brought in by the schooner Merit, Capt. Sylvester. The seamen now claim wages out of the savings of the wreck, and an additional sum, under the statute, for the time they were on short allowance. No evidence was offered as to the latter claim, and I understood at the argument that it was abandoned. The question presented by the case, is, whether, after shipwreck, and abandonment by the crew, wages are due, provided the wreck is saved by other persons, independent of any agency on their part. On the general principles of the contract of hire, wages may, without doubt, be claimed. A mechanic, who is hired by the day or month to build a house, does not lose his wages because the building is accidentally destroyed before it is completed. But the contract of hire for marine service stands on reasons peculiar to itself. It is a principle of every maritime code that wages are dependent on the safe delivery of the thing. If ship and cargo are lost, wages are lost. It is the policy of the law to connect, by the strongest ties, the interest of the crew with the safety of property exposed to peculiar risks. In the event of shipwreck, so long as they remain attached to the ship, they keep alive their claim to wages; and if part is saved by their labor, though the authorities are not uniform, on principle, it can hardly be denied that either full wages are due, or, at least, in proportion to what is saved, and according to the circumstances of the case, the seamen may claim an additional compensation, in the nature of salvage.

But when they abandon the wreck, and leave it derelict, a very different case is presented. It may aid in coming to a correct decision of the question, to consider the situation and incidents of property thus abandoned. Property is derelict, in the maritime sense of the word, when it is abandoned without hope of recovery, without an intention of returning. A temporary abandonment, for the purpose of providing more effectual means of saving it, does not constitute a derelict. For this purpose the abandonment must be final, without the intention of returning and resuming the possession. The property of the owner in the thing is not in this case divested. The law still considers him as the proprietor, and protects his interest. By the civil law, the purloining of goods shipwrecked or thrown overboard in a tempest, subjects the intermeddler to the action of theft. But any person who finds the goods may take possession of them; and it results from the marine law that he acquires the legal possession, and a legal interest in the property, that is, a title to a reward for saving it, which he may enforce against the thing itself; or he may deliver it to the owner, and proceed in the admiralty by a libel in personam. The Hope, 3 C. Rob. Adm. 215; The Trelawney, 4 C. Rob. Adm. 223. The thing itself becomes bound to him for the salvage, and he may retain it until he obtains a satisfaction. This right of possession is necessarily exclusive of that of all other persons, because his interest in the thing takes priority of all other interests.

The finder is bound to keep the goods with ordinary care, at least, and without fraud. The legal effect of plunderage or embezzlement on the part of the salvor, and on principle also, it would seem, of that gross negligence, negligentia proxima dolo, which the law holds as constructive fraud, is, that the salvor forfeits his claim to salvage, and the owner recovers his goods, discharged of the lien. Mason v. The Blaireau, 2 Cranch [6 U. S.] 240. But it is from the salvor only that the owner can receive his goods, and to the owner only is the salvor accountable. The master and the mariners, having lost the possession, cannot resume it. These are familiar and well-established principles of the marine law. It remains to be seen how they affect the claim of wages. The general rule, founded on principles of policy, is, that wages are dependent on the successful termination of the voyage. Seamen have then their threefold remedy, against the master, the owners, and the ship. Until that time their right to wages, and consequently their lien on the ship, are but inchoate and contingent. They become perfect on her safe arrival at the port of destination. Any misfortune that destroys the voyage, puts an end to the claim for wages, or rather prevents its ever coming to maturity. Shipwreck, followed by abandonment, seems necessarily to involve this consequence. The contract is dissolved. The connection of the crew with the ship is at an end. The property is derelict, and the finder acquires a possession and an interest, which the master and mariners cannot legally disturb. They have no longer a right to intermeddle with the goods. The rights of the owner continue, but if he does not appear and make his claim within a year and a day, the title, subject to the salvor's lien, by the law of nations, as now understood, accrues to the sovereign. The Aquila, 1 C. Rob. Adm. 37; Valin, Comm. L. 4, tit. 9, art. 27; Jac. Sea Laws, bk. 4, c. 4. I know of no principle of law which authorizes the carrier, master, or mariners, to intercept the goods between the salvor and the owner. On the contrary, it seems to be the uniform language of jurists, that the goods come to the owner burdened only with salvage. It appears to be a necessary result, from these principles, that the

claim for wages is extinguished by shipwreck and abandonment, and that the benefit of the jus postliminii does not arise on the salvage of the goods by other persons.

The question of freight was collaterally introduced into the argument in support of the claim for wages. It does not arise indeed in this case, the owner of the ship and cargo being the same. But it is contended that, on the principles of the marine law, the ship being preserved in specie, and the lading brought into port in her, and received by the owner or insurer, freight must be considered as earned; and if so, that wages follow of course. In answer to this argument it may be said that the principles before stated apply with as much force to the question of freight as wages. The merchant receives his goods, but with the deduction of salvage, and they are delivered, not by the ship-owner, but by the salvor. The possession of the salvor deprives the carrier of the capacity of performing this essential part of the contract. On the whole, it seems a fair deduction from these premises, that, by shipwreck with abandonment by the crew, the contract is totally dissolved. Such seems to me to be the legitimate inference from the acknowledged principles of the marine law; and so the law is stated by the learned editor of Abb. Shipp. p. 512. The authorities are not, however, so explicit on the subject as might have been expected, and perhaps not wholly reconcilable. In the case of Frothingham v. Prince, 3 Mass. 563, (and see Abb. 498, note,) the cargo and freight were wholly lost, and the wreck only of the vessel saved. The court decided that full wages were due to the time of the shipwreck, though the amount was nearly equal to the whole value of the wreck saved. The report is short and confused, and it does not appear certain whether the salvage was effected by the crew or not. But from the circumstances stated, it is rather to be presumed that it was. Taking the facts to be so, this case is supported in principle by the case of Weeks v. The Catharine Maria [Case No. 17,351], decided by Judge Hopkinson, and Taylor v. The Cato [Id. 13,786], decided by Judge Peters. In both these cases the court lays stress on the services of the seamen in effecting the salvage; and in both a doubt seems to have existed whether full wages should be allowed, or only in proportion to what was saved. "So long," says Judge Hopkinson, "as the duty of the mariners calls for their attention and services in the preservation of the ship and cargo, or any part thereof, so long does their lien for wages enure, at least in proportion to the value of the property saved." In the case of Luthridge v. Gray, Abb. 340, which was originally brought in the court of admiralty in Scotland, and, after going through the Scottish courts, was finally decided by the house of lords, it was settled that freight is due on goods saved from shipwreck, though some of them may have been so much injured as to be of no value. See, also, the case of Luke v. Lyde, 2 Burrows, 883, and Baillie v. Mogdiliani, Marsh. Ins. It does not clearly appear whether in this case the crew aided in saving the goods, though it seems probable that they did. If freight was earned, and the seamen staid by the vessel and assisted in saving the ship and cargo, it would be difficult to maintain, consistently with the marine law, that wages were not due. In Post v. Robertson, 1 Johns. 24, the court seems to be of the opinion that freight was due in a case nearly resembling the present. The ship was abandoned by the crew, who were taken off the wreck by another vessel, part of whose crew brought the wreck in. The court decided that freight could not be recovered in an action on the charter-party, but a nonsuit was entered against the plaintiff, on the ground that he might prevail in a different form of action. This case would carry greater authority, if it did not appear to be very much qualified, at least, if not reversed in substance, by a subsequent decision of the same court. In Dunnett v. Tomhagen, 3 Johns. 154, where the vessel was abandoned, and part of the merchandise taken into the long-boat by the crew, who were taken up and brought in by another vessel, the court decided that no wages were due, and the reason given is that no freight was earned. The salvor, says Chief Justice Kent, in giving the opinion of the court, and not the ship-owner, was the deliverer.

It was admitted in the argument for the petitioners, that the cases in the books are at best equivocal; but it is contended that this is a question to be decided by the marine law, which, according to Lord Mansfield, is not the law of any particular state, non alia lex Romae, alia Athenis; but it is founded on principles received in common by the whole commercial world. The courts of this country apparently admit the correctness of this observation, and foreign jurists and ordinances are familiarly quoted, not as binding of their own authority on the judicial conscience of the court, but as credible witnesses to prove what the marine law is. I have looked into the foreign authorities referred to, but without finding the satisfaction in this case, which our domestic authors have failed to afford. By the civil law, the principles of which form the substratum of the marine law, what any one saved from shipwreck he saved for himself, tanquam ex incendio. By the Consolato del Mare, 492, goods saved from shipwreck shall pay freight in proportion to the part of the voyage performed. Though wages are not named in this article, the fair inference from the general tenor of that code, which studiously connects freight and wages, is, that they would be holden to be due in a like proportion. This inference is strengthened by the provisions of the other ancient ordinances.

The Laws of Oleron, art. 3, and of Wisbuy, art. 15, allow wages in case of shipwreck unless all is lost; but both ordinances make wages to depend on the services of the crew in saving the wreck. In the revised edition of the Ordinances of the Hanseatic Towns, of 1614, tit. 9, it is expressly enacted that full wages shall be paid without deduction, if enough is saved from the wreck of the vessel to pay them. The terms of the law are large enough to comprehend the present case, but in practice they were probably restrained to cases where the crew were the salvors. The rule established by the Ordinances of the Marine of Louis XIV., bk. 3, tit. 4, arts. 3-9, is, that in cases of a total loss of the ship and merchandise, the seamen lose their wages. But if any part of the wreck is saved, they shall be paid their wages, says the ordinance, from the wreck which they have saved, and an additional compensation for their labor in saving it, evidently restricting the rule to cases where the crew are the salvors. If the value of the wreck is sufficient, wages shall be paid without deduction, but if merchandise only is saved, they shall be paid in proportion to the freight received by the master. The Code de Commerce, 258-261, is substantially a transcript of the ordinance.

The language of the ordinance, that the crew shall be paid their wages, sur les debris qu'ils ont sauvé, naturally suggests the conclusion that the payment is to be made only in those cases in which they are the salvors, or at least have aided in the salvage. But Valin has expressed a different opinion. He says that in case of shipwreck the crew are at liberty to abandon the vessel, although he admits Laws of Oleron, art. 3, and the Ordinance of the Hanse Towns, art. 44, decide the contrary. His reasoning is, that by shipwreck the contract is dissolved, having been rendered impossible to be performed, by an accident of major force. The owners are under no personal obligation to pay the crew either their wages or their expenses home, and consequently they have no just cause of complaint if the seamen refuse to exert themselves in saving the wreck. The seamen are not bound to render any further service, because the contract, and with it all the obligations resulting from it, has been dissolved by an accident which renders the performance of it impossible. But though the seamen are discharged from the obligation of rendering any further service, their lien or privilege continues in force against the vessel or wreck; by whatever means it may be saved. The reason is, that the ship being specially pledged for their wages, by a general hypothecation, the lien adheres to the thing as long as it exists. His language is: "It may perhaps be said that it would be just, with regard to the seamen who refuse to labor in the salvage, to withhold from them the payment of their wages from the savings of the wreck and freight. But this would require a law which should expressly decide it, because their wages are due from the objects which are specially pledged for them, whether they have concurred in saving them or not. When saved, they are saved for their benefit, as well as for the benefit of all others who are interested in them, whether present or absent." Volume 2, p. 704. I have not the presumption to question the authority of Valin in the interpretation of the ordinance. His commentary, by the common consent of the learned, is allowed an authority nearly if not quite equal to that of the text of the law itself. But his reasoning on this point has not been received as wholly satisfactory by all the learned among his own countrymen. Boulay Paty, one of the best commentators on the maritime part of Code de Commerce, is of the opinion that, neither under the ordinance nor the code, which here adopts the words of the ordinance, can the seamen claim wages from the savings from the wreck, unless they have contributed to the salvage; and he quotes Boucher and Delvincourt as holding the same doctrine in opposition to the authority of Valin. 2 Cours de Droit Maritime, p. 228, tit. 5, § 4.

But however it may be under the positive text of the French law, I take it to be clear by the law as it is held in this country, that the seamen are not discharged from the obligation of their contract by the happening of any fatal disaster to the vessel, but that it is their duty, while they can do it with safety, to remain by the wreck and exert themselves to the utmost of their ability to save as much as possible, both of the ship and cargo. Abb. Shipp. pt. 4, c. 2, § 6. Whatever they save, both the fragments of the vessel and the freight, constitutes a fund pledged for payment of their wages, and the foreign ordinances also allow them a further reward in the nature of salvage. Laws of Oleron, art. 3; Ordinance of Philip II. of 1563, tit. 4, § 12; Laws Hanse Towns 1591, art. 44; Ordinance 1614, tit. 4, art. 29; Jus Navale Rhodiorum, 45. Their right to wages and lien on the vessel remains as long as they remain by the wreck. But when they abandon the vessel, they at the same time abandon their claim to wages. This is the legitimate inference from that rule of policy of the marine law which connects the interest of the crew with the safety of the ship.

There is not that precision and exactness in the language of the authorities which could be desired, and in some of them, taking the terms in their ordinary import, they are comprehensive enough to include this case. But the general current of the authorities which allow wages from the savings of a wreck, is confined to cases where the crew are the salvors, or at least aided in the salvage. Where the language is general and indefinite, as that, for instance, of Judge Winchester in note to Relf v. The

Maria [Case No. 11,692], it is to be taken, I think, with this restriction. I do not find a single case that can be considered as a clear authority to sustain a claim for wages after a shipwreck and abandonment, and a salvage by others than the crew, unless that in 1 Johns. 24, be so considered, and the authority of that is much impaired by the subsequent case in the third volume of the same reporter. The silence of the books alone may be considered as an argument against the validity of the claim; for if, in any instance, it had been allowed to prevail, it probably would not have escaped the vigilance of the reporters. The result of this opinion is, that the petition must be dismissed, but it is dismissed without costs.

Case No. 8,322.

LEWIS v. ESTHER.

[2 Cranch, C. C. 423.][1]

Circuit Court, District of Columbia. Oct. Term, 1823.

CONTRACTS—FAILURE TO COMPLETE—RIGHT TO RECOVER FOR WORK DONE.

If a man contract to do certain work at a certain price, and quits it before it is finished, he cannot recover, upon a quantum meruit, the value of his labor.

The plaintiff [Samuel Lewis] agreed to do certain work for the defendant [Robert Esther] for the sum of $125. He began, but abandoned it before it was finished, and now sued for quantum meruit, and offered to prove the value of his work.

Mr. Jones, for defendant, objected that there was an express, specific agreement at a certain price, and therefore the plaintiff could not recover upon an implied assumpsit.

Mr. Ashton, contra, contended that, by usage, money is due as the work progresses, otherwise a poor mechanic cannot go on.

But THE COURT (nem. con.) rejected the evidence, and instructed the jury that the plaintiff is not entitled to recover in this action.

Case No. 8,323.

LEWIS v. FIRE INS. CO.

[2 Cranch, C. C. 500.] [1]

Circuit Court, District of Columbia. Nov. Term, 1824.

VENUE IN CIVIL CASE—CHANGE — DISCRETION OF COURT—AFFIDAVIT.

The court has a discretion, upon a motion to change the venue, and will not, in general, change it, unless the suggestion be accompanied by an affidavit stating the grounds of belief, that an impartial trial cannot be had in the county in which the suit is instituted.

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

Before the court had made the rule (of 1821) respecting applications for a change of venue, Mr. Jones, for plaintiff [Edward S. Lewis] had, as he stated, moved the court to change the venue in this cause, upon an affidavit stating no reasons for the plaintiff's belief that he would not have a fair trial in this county. The affidavit was handed to the court without being filed, and remained in the drawer of the chief judge. The court did not decide upon the motion, at the term at which it was made; and at the subsequent term, the affidavit not being found among the clerk's papers, it was supposed to be lost. After the court had made the rule (of 1821) requiring a statement of the reasons for the belief, &c., the affidavit was found and filed, and several terms elapsed without renewal of the motion.

Upon the motion now being renewed, CRANCH, Chief Judge, said that heretofore, and before the rule was made, it had been a prevailing opinion that the court had no discretion, but it was bound to change the venue, if the party would make oath that he believed he could not have a fair trial in the county. But a majority of the judges had decided that the court had a discretion; and that if the court had a discretion to change the venue or not, he could not consent to change it in any case upon a naked affidavit of the belief of the party, without stating the reasons of that belief.

MORSELL, Circuit Judge, was still of the opinion that the court had no discretion, and that the venue should be changed.

THRUSTON, Circuit Judge, being absent, the motion to remove the cause did not prevail.

NOTE. The words of the act of congress of the 24th of June, 1812, par. 8 (2 Stat. 755), entitled "An act to amend the laws within the District of Columbia," are, "That in any civil suit or action at law, or any criminal or penal prosecution by information or indictment now depending, or hereafter to be commenced, the court, upon a suggestion in writing by any of the parties thereto, supported by oath or affirmation, that a fair and impartial trial cannot be had in the county where such suit or action is depending, may order the same suit or action to be removed into the court holden in the other county in the said district; and the same shall be prosecuted and tried according to law, and the judgment carried into full effect." The rule of court, referred to, requires that the affidavit of the party should state the grounds of his belief, and be corroborated by the affidavits of others. [2]

[2] NOTE. "May term, 1821. "Rule as to the Removal of Causes under the Act of Congress. 1. The application shall be made, and affidavit filed on or before the first day of the trial court, or four days before the day assigned for the trial of the cause. 2. The affidavit of the party applying for the removal shall state the reasons of the belief of the party, that he cannot have a fair trial in the county wherein the suit is de-

LEWIS (GAYTES v.). See Case No. 5,288.

LEWIS (GIBSON v.). See Case No. 5,398.

LEWIS (GORDON v.). See Cases Nos. 5,612–5,614.

Case No. 8,324.

LEWIS v. GOULD et al.

[13 Blatchf. 216.] [1]

Circuit Court, S. D. New York. Dec. 14, 1875.

PLEADING AT LAW—IN FEDERAL COURTS—UNDER STATE CODE.

1. Under section 914 of the Revised Statutes of the United States, a pleading in a suit at law in this court, which is not authorized in a like suit in a court of this state, will be set aside on motion.

[Cited in Merchants' & Manufacturers' Nat. Bank v. Wheeler, Case No. 9,439.]

2. The common law forms of pleading are no longer necessary in the United States courts within the state of New York, nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the state, as to pleadings.

[Cited in Johnson v. Healy, Case No. 7,389; Oscanyan v. Winchester Repeating Arms Co., Id. 10,600; Rosenbach v. Dreyfuss, 1 Fed. 395.]

[This was a suit by Edwin M. Lewis, trustee, against Jay Gould and others. Heard on motion to set aside a replication.]

Sanford, Robinson & Woodruff, for plaintiff.

Thomas G. Shearman, for defendants.

JOHNSON, Circuit Judge. The defendants move to set aside the replication, upon the ground that the pleading is not authorized by law. It is entirely clear that, if this suit were in the supreme court of the state of New York, the pleading in question would be unauthorized, and might be set aside. The question is, whether that is also the law of the United States courts in this district. The answer to this question is given by section 914 of the United States Revised Statutes, which enacts that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." No language can be more direct or plainer than this to convey the will of the congress, that the pleadings in the circuit and district courts shall be conformed to those employed in the state practice, "as near as may be." The qualification contained in this last phrase is not to be construed to subvert the command of the statute. "As near as may be" allows only necessary variations from the state methods, growing out of the different organization of the courts, and other similar matters.

No one can doubt, that, if the Code of Procedure of New York had existed as the law of the state in 1789 and 1792, the practice, pleadings and modes of procedure which it contains would, by force of the process acts of those years, have been adopted into and become the law of the circuit and district courts of the United States within this state. Nor is there any more doubt that such was the intent and is the effect of the section in question. The common law forms of pleading are no longer necessary in the United States courts within the state of New York, nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the state, as to pleadings. The same view of this statute was taken in Butler v. Young [Case No. 2,245], by Sherman, J., in the circuit court for the Northern district of Ohio, and the same principles of interpretation were applied to the former process acts. Fenn v. Holme, 21 How. [62 U. S.] 481; U. S. v. Keokuk, 6 Wall. [73 U. S.] 514.

The motion to set aside the replication must be granted.

pending; and must be corroborated by the affidavit of some other person. 3. The other party shall be permitted to file a counter affidavit or affidavits stating any facts which may be proper for the consideration of the court, in the exercise of its discretion. 4. If the application for the removal of a cause be not made before the trial court, the party praying for the removal must pay the costs of that term, if the cause shall be removed."

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

Case No. 8,324a.

LEWIS v. HAMILTON.

[Hempst. 21.] [1]

Superior Court, Territory of Arkansas. April, 1824.

SHERIFF—LIABILITY FOR COSTS NOT COLLECTED—HOW PROCEEDED AGAINST.

1. When a sheriff fails to make the costs when practicable, he becomes responsible, nor will the order of the client or attorney as to costs change or affect that liability.

[Cited in People v. Palmer, 46 Ill. 398.]

2. He may be reached by motion.

Appeal from the Arkansas circuit court.

[This was a suit by Eli J. Lewis, clerk, against James Hamilton, sheriff.]

Before SELDEN and SCOTT, JJ.

OPINION OF THE COURT. In this case it appears that in the circuit court of Arkansas county, a motion was made by the appellant against the appellee to recover seven dollars and four cents, costs due him as clerk of that court, in the case of John Taylor, assignee of Richard Montgomery, v.

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

James Young, and which costs the sheriff of Arkansas county failed to make on execution placed in his hands. The motion was overruled on the ground that it appeared that Taylor had transferred the judgment to Samuel C. Roane, and that the latter directed the appellee to stay the collection of the debt. In our opinion it was error to deny the motion, for when a sheriff receives an execution on which costs are due a clerk, and fails to make them when practicable, the sheriff becomes responsible, nor will the order of the plaintiff in execution vary the case as to the costs, whatever may be the effect on the debt. Reversed.

LEWIS (JENKS v.). See Cases Nos. 7,279 and 7,280.

Case No. 8,325.

LEWIS v. KINNEY.

[5 Dill. 159; 25 Int. Rev. Rec. 138; 7 Reporter, 551; 11 Chi. Leg. News, 223; 26 Pittsb. Leg. J. 191.] [1]

Circuit Court, E. D. Missouri. March Term, 1879.

PART OWNERS OF STEAMBOATS—COMPULSORY SALE AS A MEANS OF PARTITION—STIPULATION TO RETURN.

1. In case of a dispute between part owners of a steamboat as to her employment, a court of admiralty will not decree a sale of the whole boat at the instance of the minority interest.

2. Nature of the stipulation which the majority interest, wishing to employ the boat, may be required to give for the protection of the minority interest, discussed.

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

The libellant, William J. Lewis, on the 27th day of June, 1878, filed his libel in the district court of the United States for this district against the steamboat R. W. Dugan, her engines, etc., and Joseph B. Kinney, part owner etc., in which he alleged the following facts: That about the 17th day of March, 1876, he, said libellant, purchased from said Kinney, the then sole owner, a third part of said steamboat, and that from said date of purchase until about November of the same year, by agreement of himself and co-owner, she was run in the "Missouri river trade," between St. Louis and Portland, Missouri; that about the last-named date said Kinney, in opposition to the expressed wishes of libellant, took the steamboat to New Orleans, Louisiana, and ran her, at a loss, in the "New Orleans and Red river trade," and afterwards took her to New Orleans, and, being in good condition, instead of loading her with a profitable cargo, caused her to be towed to St. Louis by the Kate Kinney—another steamboat belonging to said Kinney—at an expense to the owners of the R. W. Dugan of $600; that upon the arrival of the vessel at St. Louis, libellant objected to the course taken by his said co-owner, and requested that an account of the "boat's business" be rendered to him, which said Kinney failed and refused to do; that about April 1st, 1877, said Kinney, despite the repeated objections of libellant, took the steamboat R. W. Dugan to the Yellowstone river, and for more than a year used her as a tender for said steamer Kate Kinney in fulfilling a contract for the transporation of goods entered into by him individually with the government of the United States, and upon his return to St. Louis, in May, 1878, although requested, failed and refused to render any account to libellant of the business or earnings of the boat; that said Kinney, against the wishes and consent of libellant, has incurred large expenses for unnecessary repairs to the vessel, and refuses to permit libellant to have any voice in the use and management of the same. Libellant further alleges that he has repeatedly offered to sell his interest in the steamboat to said Kinney at a reasonable price, or to purchase his share on like terms, or to run the vessel in a trade and under a master to be agreed upon, all of which offers said Kinney has declined. In view of these facts, and of the disputes between himself and co-owner being irreconcilable, he prays for a decree for the sale of the steamboat and proper distribution of the proceeds. The said Kinney appeared as claimant of two-thirds part of the steamboat R. W. Dugan, and filed a "plea to the jurisdiction" of the court in the nature of a demurrer, on the general ground that no case is stated in the libel entitling the libellant to a decree for the sale of the vessel, and on the special ground that the owner of a minority interest is not entitled to such decree. The district court sustained the plea and dismissed the libel. Against this decree the libellant appeals and seeks to have the same reversed.

Given Campbell, for appellant.
William H. H. Russell, for appellee.

DILLON, Circuit Judge. The libellant is the owner of one-third, the claimant of two-thirds, of the steamboat. The object of the libel is to obtain a decree for the sale of the boat and a division of the proceeds. The district court decided that the case stated in the libel did not entitle the libellant to a decree for a sale. The libellant is doubtless entitled, on an application for that purpose, to require a stipulation from the respondent, if the latter insists on employing the vessel in voyages or upon ventures against the judgment and remonstrance of the libellant, to return the vessel, or in default to pay the value of the libellant's interest therein. As the respondent is the owner of the larger interest, he has, according to the settled doc-

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 26 Pittsb. Leg. J. 191, and 7 Reporter, 551, contain only partial reports.]

trine on the subject, the preferable right to the use of the vessel, on giving, if required by the libellant, the proper stipulation. If the respondent refuses or declines to employ the boat, the libellant, although the owner of the lesser interest, on giving such a stipulation, would be entitled to the possession of the vessel for the purpose of employing her. This much is clearly stated in the opinion of the supreme court in The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175. As I understand that case, it also settles, so far as this court is concerned, the question as to the libellant's right, on the facts stated in the libel, to a decree for a sale. In that case the owner of a one-sixth part in a steamboat asked the admiralty to decree a sale against the owners of the other five-sixths parts, alleging, to support his claim, that, as master and part owner, he had been dispossessed by the co-owners, who were navigating the boat contrary to his wishes; that they refused to have an amicable sale of the boat, and that, likewise against his wishes, they were about to send the boat on another trip up the Mississippi river. The question was made that the district court had no jurisdiction as a court of admiralty to entertain the libel. Mr. Justice STORY, delivering the judgment of the court, disposed of this point in the following sentence: "The jurisdiction of courts of admiralty, in cases of part owners having unequal interests and shares, is not and never has been applied to direct a sale upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called." It seems to have been assumed that no more favorable rule applied to steamboats, for he adds: "If, therefore, this was a vessel engaged in maritime navigation, the libel for a sale could not be maintained."

The statement in the present libel that the respondent is using the boat in voyages and in trades against the wish of the libellant, is identical with that made in the case before the supreme court. The respondent as part owner has the legal right to use the vessel, subject to giving a stipulation, if required. The fraudulent expenses incurred by the respondent would not be binding on the libellant. If the respondent is under a liability to account to the libellant in respect to the use or operation of said boat, the proper court will compel him to do so. As I cannot but regard the judgment of the supreme court in the case cited as conclusive in the present libel, I do not deem it necessary to go into the learning applicable to the question presented. It will be found summarized in Story, Partn. §§ 415–439; T. Pars. Partn. 558–563; Smith, Merc. Law, 184–187; Abb. Shipp. pt. 1, c. 3, p. 98 et seq.; Freem. Coten. §§ 389–392. The general doctrine of the maritime law, as well as the decisions in Great Britain and in this country, are stated in Tunno v. The Betsina [Case No. 14,236], which also holds that the owner of a minority interest has no right to a decree for a sale of the vessel against the wishes of the majority.

It would be extremely difficult to formulate rules for the adjustment of the relations of part owners of a vessel when discord arises between them, which would always be just in their operation. The majority may oppressively and unjustly use their conceded preferable right to employ the vessel. The minority owner may be cross-grained and unreasonable. Public policy requires that the vessel shall be employed and not suffered to lie idle, if any of the owners will use her. Neither the major nor minor interest should be armed with a club to hold in terrorem over the other. To allow the owner of a small fraction of the vessel to demand a sale as of right, would give him an undue advantage. To allow the majority to force a sale of his interest at pleasure, would put him too much in their power. The unreasonable refusal of the minor shareowner to unite with the majority interests in employing the vessel may be a hardship upon them by requiring more than their share of capital for equipment and outfit.

The consideration does not, however, have the same force with respect to western steamboats as in the case of sea-going vessels. The majority, because of their preferable right to the use of the vessel, and their right to prevent a sale, and, also, to use the vessel without compensation, if such right exists, have an inducement to act unfairly towards the minority. The only relief to the latter, if unfairly dealt by, would be to have a sale of the vessel or to get some more beneficial stipulation than a mere engagement to return the vessel. But a right to a sale at all is denied by the English courts. Equity has refused to decree a sale of a vessel, as it may do between part owners in respect to other indivisible chattels, but turned the parties over to the admiralty; and it is denied that the admiralty courts in England can ever decree a sale. In this country the practice is not to decree a sale except where the dispute is between the owners of equal shares, and there is, therefore, no other possible way of terminating it.

These considerations show the necessity for, as well as the difficulty of, settling the disputes which arise among part owners. What tribunal would be so competent to do this on broad and equitable principles as the admiralty courts, if they could exercise the comprehensive and flexible powers which are acknowledged to belong to the court of equity, and which ought equally to pertain to the admiralty?

I cannot say, therefore, that I am quite satisfied with the uncertain or limited protection which the English and American cases give to the minority interest, especially if the doctrines there maintained are applied without modification to steamboats on our western rivers. If, in case of irreconcilable

hostility between part owners, the only right of the owner of the minority interest under any circumstances is to require a stipulation simply for a return of the steamboat, he is almost wholly in the power of the majority.

The average life of a western steamer is very short, probably not exceeding eight or ten years, and if the majority interest, having the preferable right to all of the boat, can prevent a compulsory sale under any circumstances, and can also use the boat as long as it wishes by simply giving a stipulation for its safe return, this course may be pursued until the boat is worn out. The subject is full of difficulties, as Lord Tenterden and others have pointed out (Abb. Shipp. 98; The Margaret, 2 Hagg. Adm. 275, per Sir Christopher Robinson; The Marengo [Case No. 9,065], per Lowell, J.); but many cases may easily be supposed, and doubtless are constantly arising, in which it would be more equitable to the minority, and neither unjust to the majority nor incompatible with the interests of commerce and the policy of the law which favors the employment of the vessel, if the court, in its discretion, guided by the circumstances of the particular case, could, instead of the usual stipulation for a return of the boat, require a stipulation for an ascertained reasonable compensation for the value of the use of the minority interest, the owner of the latter interest in such case to be his own insurer. The power of the court to require such a stipulation is doubtful (The Apollo, 1 Hagg. Adm. 306, 312; The Marengo, supra), and I do not decide it or even intimate an opinion upon it; but that such a power ought to exist in respect of boats navigating our western rivers, however it may be in respect of sea-going vessels, would seem to be easy of demonstration. The libel, as acted on by the district court, presented only the question as to the right of the libellant, upon the facts therein stated, to a decree for a sale, and, for the reasons above given, my judgment is that its decree dismissing the libel was right, and the same is accordingly affirmed. Affirmed.

LEWIS (LINDER v.). See Cases Nos. 8,362 and 8,363.

LEWIS (LONGFELLOW v.). See Case No. 8,487.

LEWIS (LOWELL v.). See Case No. 8,568.

Case No. 8,326.

LEWIS v. MANDEVILLE.

[1 Cranch, C. C. 360.] [1]

Circuit Court, District of Columbia. Nov. Term, 1806.

WITNESS—ATTENDANCE—ATTACHMENT.

Quaere, whether the court can issue an attachment for a witness residing at Winchester, in Virginia, less than one hundred miles from this place.

Mr. Taylor, for plaintiff, offered the deposition of Anthony Moore, taken in Alexandria, de bene esse, under the laws of Virginia, and stated that the witness was a person employed in transporting the mail, and that his residence is near Winchester, not one hundred miles distant. That he does not know where he now is, but that he is not in the district. A subpoena has been issued and return served. These facts being admitted, THE COURT (DUCKETT, Circuit Judge, absent) suffered the deposition to be read, not having decided, and being still doubtful whether an attachment can properly issue and run into the state of Virginia, within one hundred miles, but intimated that they would hear an argument in a full court, on a motion for a new trial, on the ground of admitting improper evidence. Voss v. Luke [Case No. 17,014]; Woods v. Young [Id. 17,994]; Park's Adm'r v. Willis [Id. 10,716].

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

Case No. 8,327.

LEWIS et al. v. MARSHALL et al.

[1 McLean, 16.] [1]

Circuit Court, D. Kentucky. May Term, 1829. [2]

PARTIES—JOINDER OF DEFENDANTS—STATUTE OF LIMITATIONS IN EQUITY—ADVERSE POSSESSION.

1. Under the statute of Kentucky, passed 1796, several defendants may be joined in the same action, although they hold separate parcels of land, under different titles.

2. In equity the statute of limitations is regarded the same as at law.

[Cited in Schultz v. Board of Com'rs of Cass Co., 95 Ind. 324.]

3. Heirs must bring their action, under the statute, within ten years after the decease of their ancestor, if at the time of the decease, there be adverse possession.

[See note at end of case.]

4. Statutes of limitations, when judiciously enacted, are properly called "statutes of repose."

[This was a bill in equity by Josiah Lewis and others against Humphrey Marshall and others.]

Mr. Wickliffe, for complainants.

Mr. Haggin, for defendants.

OPINION OF THE COURT. This suit in chancery is brought to obtain a decree for a divestiture of the legal title to 32,000 acres of land, situated near the Lower Blue Licks, from the respondents, on the ground that the complainants have the superior equitable title. The complainants claim under an entry made by Charles Willing, the 27th December, 1783, which was amended the 11th and 12th March, 1784, for 32,000 acres of

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

[2] [Affirmed in part and reversed in part in 5 Pet. (30 U. S.) 470.]

land, on certain treasury warrants, beginning 1280 poles south west of the Lower Blue Licks, &c., which entry was carried into grant, &c. And the complainants state that by virtue of a void entry, Thomas Barbour obtained the elder legal title for a part of the same land, of which the defendants are in possession under him. In their answer the respondents insist that Willing's entry is void, and claims other than Barbour's are asserted under which the respondents, except Marshall and Fowler, settled. Marshall sets up an entry in the name of Isaac Halbert for 12,311 acres of prior date to that of Willing's; and he also states that he purchased an interest in Barbour's patent from Fowler, and afterwards conveyed to his co-respondents. The respondents rely on an adverse possession of twenty years, before the commencement of the suit. Several of the defendants claim distinct parcels of land under different titles; but this being authorized by the statute of Kentucky, passed in 1796, no objection is made to their being joined in the action.

The statute of limitations set up by the defendants provides, that if any person or persons entitled to such writ or writs or such title of entry as aforesaid, shall be or were under the age of twenty-one years, feme covert, or non compos mentis, imprisoned or not within the commonwealth at the time such right or title accrued or coming to them, every such person, his or her heirs shall and may, notwithstanding the said twenty years are, or shall be expired, bring or maintain his action, or make his entry within ten years next after such disabilities removed or death of the person so disabled and not afterwards. The complainants claim as the heirs of Willing who was not a resident of Kentucky, nor is it suggested that he was ever within the state subsequent to the possession of the land by the respondents. The statute, therefore, could not bar Willing if he were living and had filed this bill; but his heirs must bring themselves within the statute by prosecuting their action within ten years from the death of their ancestor, if at that time there was adverse possession. Although there is contradictory evidence on the subject, the decease of Willing is satisfactorily proved to have taken place in 1798. It is a well established rule that effect will be given to the statute of limitations, in equity as well as at law. And the proof is clear that adverse possession has been held by the defendants, not only ten years since the decease of Willing, but more than twenty years. Statutes of limitations, when judiciously enacted, are very properly denominated statutes of repose. They impose vigilance on claimants, and give certainty to the bona fide occupant who, for a series of years, has been in possession of land claimed to be his own. Bill dismissed.

[NOTE. From the decree of this court an appeal was prosecuted by the complainants to the supreme court. After hearing the evidence, Mr. Justice McLean, delivering the opinion of the court, reached the conclusion that the testimony clearly showed an adverse possession by the defendants and those under whom they claimed, with the exception of Marshall, for more than 20 years. It further appeared that the adverse possession commenced prior to the decease of Charles Willing, and consequently his heirs, the complainants, were limited to 10 years from that time for the prosecution of their claims. The view of the complainants that the statute of limitations did not run against their title until the defendants had acquired Barbour's title could not be supported. The defendants had entered under titles adverse, and it was of no consequence whether these titles were paramount to the complainants', in equity or at law. It was sufficient if they were adverse; and, if the statute of limitations had run before the commencement of this suit, no relief could be given. John Foster, one of the defendants, though served with process, had not answered the bill, and no decree pro confesso was entered against him in the circuit court. Humphrey Marshall, another defendant, set up adverse possession specifically in himself. In accordance with the views above stated, the court affirmed the decree appealed from as to all the respondents except Marshall and Fowler. As to Marshall, the extent of the interference of his claim with Willing's entry not appearing from the proof in the case, the decision of the circuit court was reversed, and the cause remanded for further proceeding. The cause as to Fowler was likewise sent down to the lower court with the direction to take further proceedings. 5 Pet. (30 U. S.) 470.]

LEWIS (MERCHANT v.). See Case No. 9,437.

Case No. 8,328.

LEWIS v. MEREDITH.

[3 Wash. C. C. 81.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1811.

LAWS RELATING TO TITLES TO LAND — LEVY ON LAND.

1. The law of Pennsylvania relative to titles to land under application, warrants, surveys, locations, payment of purchase money, and the rules established in the land office, relative thereto, by which such titles are ascertained and determined.

[Cited in Lanning v. London, Case No. 8,074; Herron v. Dater, 120 U. S. 474, 7 Sup. Ct. 625.]

2. Land, held under a special warrant, may be levied upon under a fieri facias, and sold under a venditioni exponas; but land held under an indescriptive warrant, cannot be so levied upon.

[Cited in Dubois v. Newman, Case No. 4,108.]

[This was an action at law by the lessee of Lewis, against Meredith.]

Plaintiff's title: An application by E. Slocum, 12th of February, 1793, for 400 acres of land, in Luzerne county, on the east side of Susquehanna, and the north side of Wyalooing creek, about six miles from the mouth of the creek, and fifty perches from the creek; adjoining a manor line of William Penn on

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

the west, and lands of John Shee on the south, and vacant lands on the east and north. Also, twenty-nine other tracts, of 400 acres each, in the names of different persons, adjoining said tract of Slocum; the first of them, on the east of said tract, and the others adjoining and adjoiners. The purchase money was paid by Eddy for the above lands, 10th of June, 1794, and regular deeds made from the different applicants to Eddy, 5th of May, 1795. Warrants issued to the several applicants, dated as of the day of the application, which agree with the applications, except that in Slocum's, the leading warrant, the words, "and lands of John Shee," are omitted. These warrants were surveyed on the 13th of August, 1804, though different from the calls of the warrants, and were accepted 23d of August, 1805, into the land office. Under a fieri facias against Eddy, the sheriff returned that he had levied on two-thirds of thirty tracts of land, on Wyaloosing, Wysock and Rummer's field run, in Luzerne county, without any further description. A venditioni exponas issued, and the sheriff sold and conveyed to the lessor of the plaintiff, the thirty tracts of land, held under the above warrants, describing them. This conveyance was on the 10th of September, 1801.

Defendant's title: 11th of December, 1793, application by P. Smith, for 400 acres of land, on the waters of Wyaloosing, to be bounded on the east by land granted to P. Decker, by warrant of 3d of April, 1792, on the north, by land granted to T. Yerkes by warrant of 14th of March, 1793, and to extend south and west in the county of Luzerne. Also, twenty-five applications in different names, adjoining the former as the leader, and each other. The purchase money for the above twenty-six tracts, was paid by the defendant, on the 17th of January, 1794, and warrants issued, as of the 11th of December, 1793. In February, 1794, these warrants were put into the hands of a deputy surveyor to execute, who completed these surveys, from the 18th to the 25th of June, 1794, and returned them into the land office, in September, 1794. On the 12th of August, 1794, Eddy caveated the defendant, which was tried 6th of April, 1795, by the board of property, who determined that the defendant's surveys should be accepted, they being better described, the purchase money paid, and surveys made, before Eddy's warrants were put into the surveyor's hands to execute; and ordered a patent to issue. Eddy, within six months from the time this decision was made, brought his ejectment against the defendant for these lands, which was contested till 1804, when Eddy suffered a nonsuit. The plaintiff's survey covers the lands claimed by the defendant, under the twenty-six warrants; and about one or two years after the above nonsuit, this ejectment was brought.

Mr. Binney, for plaintiff, contended: 1. That an execution might well be levied on this land, before it was surveyed, and upon any contingent or equitable title. 3 Bin. 4; [Turner v. Fendall] 1 Cranch [5 U. S.] 134. 2. That it is no objection to the plaintiff's surveys, that the tracts are not in oblongs, as mentioned in the law, whose length is double the breadth; that law being only directory, and applying only in cases of lands located on water courses, or where third persons are concerned. 3. That the plaintiff's application is sufficiently certain, at least in four respects; and if not so, it is as certain as the defendant's, and more so, since his land as surveyed, is a considerable distance from Wyaloosing; and even if more precise, still his survey is worth nothing, as it appears in evidence, that the surveyor did not survey it on the ground, or run his lines so as to enclose any land. 1 Bin. 148; 3 Bin. 36, 114.

Messrs. Gibson and Tilghman, for defendant, contended: 1. That if the plaintiff ever had a title, he lost it by laches, in not paying the purchase money, and having his survey made in a reasonable time. 2 Smith, Laws Pa. p. 205. 2. That the plaintiff's application is uncertain, and did not apply to the defendant's land, and was not surveyed according to its calls, and could not be so surveyed. 3. After the decision of the board of property, the plaintiff's survey could neither be made nor accepted. 4. A levy cannot be made, on land merely claimed by an indescriptive warrant. 5. The board of property having decided the question, that decision is conclusive, under the 11th section of the act of 3d April, 1792, unless the plaintiff had recovered in an ejectment, brought within six months after. But he was nonsuited, and did not bring his second ejectment for more than a year after. In this case, it was proved and admitted, to be the custom in the land office, to allow a person, who has filed an application, to alter it as he pleases, at any time before the warrant issues; but, in that case, the application is considered to be made, as of the day the alteration is made, and the warrant is dated as of that day.

Mr. Ingersoll, in reply, contended, that the 11th section of the act of 3d April 1792 [3 Smith, Law Pa. p. 74], applied only to lands north and west of the Allegheny, Ohio, and Conewango creek, and not to this land; all the sections of the law, except the first, reducing the price of the lands, clearly refer to those lands; and therefore, the decision on the caveat is not conclusive. But, if it were, still it is not so, unless the decision of the court in the ejectment is on the title; and such must be the certificate, to authorize the patent issuing, but not if a nonsuit is suffered, as in this case, in consequence of the court countenancing the idea, that the plaintiff must prove the defendant in possession, contrary to the express provisions of this section, if it does apply.

WASHINGTON, Circuit Justice (charging jury). In stating to you the opinion of the

court on this case, we shall first consider the title of Eddy, under whom the plaintiff claims, and then the title of the plaintiff. In order to a clear understanding of the principles on which this cause must be decided, it will be necessary to examine the different steps taken by Eddy, for the purpose of appropriating the land in question. On the 12th of February, 1793, he made an application to the land office. What is the extent to which this step carries the party, in acquiring a title? It is a declaration on his part, of an intention to make an appropriation. The state, on her part, impliedly agrees, that the applicant may obtain a title to the land specified in his application, upon the terms of his paying the purchase money, and proceeding regularly to complete that title, by having a survey made, and obtaining a patent. If the applicant specifies with sufficient certainty, the land he means to appropriate, the application is called a special one, and the warrant which he obtains is termed a special warrant. If he cannot, at the time he makes the application, designate the tract with convenient certainty, he obtains by his warrant a right to a certain quantity of land, to be fixed and located at a future day, by a survey, and this is called a general warrant. The former amounts to a location immediately; the latter, to a location when the survey is made and returned. After the application is made, it is expected that the applicant will proceed with all convenient speed, to pay the purchase money, which being done, the warrant to the surveyor issues, but not before; and though it bears date, as of the day of the application, it is, in fact, and in truth, a warrant of the day on which the money is paid. It is further expected, that he will, with reasonable diligence, proceed to perfect his title, by having a survey made. But, if he neglect to pay the purchase money, and take out his warrant, for any length of time, unless quickened by a special law, as in this case, his title, as between him and the state, is not jeoparded; because the state compensates herself for lying out of the money, by compelling him to pay interest. So, too, as between the state and the individual; the delay of the latter to make his survey, is no otherwise important, than as it may defeat the policy of the state, in having her lands settled and improved. But this is not important, if no other person wants to settle it. But, if another person applies for the same land, the case is entirely altered, and very different consequences result. The second applicant, has equal equity with the first, to appropriate this vacant land; and if he pays his money, and proceeds regularly and with due vigilance to perfect his title, he defeats the equity of the first applicant, and is entitled to a priority, because he pays his purchase money, and obtains a legal title to the land, which is a step towards promoting the political views of the state, in getting her vacant lands settled and improved. Since, then, the equity of the first applicant, may be defeated by his own neglect and the superior vigilance of the second applicant, in determining which of the two is entitled to a preference, the jury, where the application is special, must inquire and decide whether the first applicant has proceeded with due diligence to consummate his title; and in doing this, they must adopt some rational rule to guide their judgments. Can a postponement of payment of the purchase money, for sixteen months, and a delay in obtaining a survey for ten years, not accounted for, or palliated by any sufficient excuse, be considered as acts performed within a reasonable time? This is the question for the consideration of the jury. If not, then the plaintiff has lost the preference, which the priority of his application gave him.

2. But, what was the title of Eddy, independent of the objection noticed under the first head of our inquiry? what is the character of his application? If a special one, then it amounts to a location, from the time it is made, and will give him a title, unless he has lost it by unreasonable delay. A certain location is one which designates the land intended to be appropriated, so plainly, that subsequent applicants may know how to take up adjacent lands, without the danger of interference. We have heard, that a location may be certain, to a common intent, which must mean a location the reverse of one which is entirely uncertain. There is a clear distinction between a certain, or rather special location, accompanied by something in the description, which is in its nature uncertain, and one which from an incongruity in the description, is rendered altogether uncertain throughout, and which can equally be satisfied, by adhering to one part of the description or the other. In the former, that which is certain, cannot be vitiated by that which is uncertain. In the latter, all is uncertain. Thus, if the warrant calls to adjoin the lands of A. and B., and also of C. and D., and it is impossible to fulfil the call; but either of the descriptions will answer; that is, it may be made to adjoin A. and B., or C. and D.; this we call an uncertain indescriptive warrant; because, if the claimant under it, can at his election adjoin his tract to the former, and abandon the latter description, for the same reason, he may adhere to the latter, and abandon the former. But, how is it possible for a subsequent applicant, to know which he may choose to adjoin, and how can he with any degree of safety, know how to locate the adjoining land? But, if the call had been for well established boundaries, but to be within a certain distance of some other point, or to include a particular spot, the latter description only is uncertain; for, until the survey is made, it must be mere conjecture, whether the lines will ex-

tend to the supposed places. In this case, a subsequent applicant, can be at no loss how to locate adjoining, and the uncertain description may be rejected.

In this case, the land surveyed for Slocum, corresponds with three of the descriptions in the warrant, beyond all question. It is about six miles from the mouth of the creek, about fifty perches from the creek, and is on the north side of it. And we think it corresponds with the fourth call; because, we agree with the plaintiff's counsel, that the land to be located is to be on the west of the manor line, and not the manor line on the west of it. But, then, it is utterly impossible to place it, so as to adjoin John Shee on the south, without removing the location to the south of the creek. Now, by removing the location to the south of the creek, as many of the calls of the warrant will be complied with, as by fixing it where the survey has placed it. For, it may be laid off six miles from the mouth, and fifty perches from the creek, adjoining the manor line on the west, and John Shee on the south. But, then, one of the calls must be disregarded, for it will then be on the south, instead of the north of the creek. Thus, if it be located on the north, the call to adjoin John Shee on the south, must be abandoned; and if it be placed on the south, the call to lie on the north, must be disregarded. But if it was in the election of the applicant, to adhere to the former, and reject the latter, he might with equal reason have adhered to the latter, and rejected the former. How, then, was it possible, for the defendant or any other person, to any intent whatever, to know where the prior application would be located, so as to enable him to apply for the adjacent lands? It is said, that the land as now surveyed, lies on the south-west of John Shee, which is a reasonable compliance with this call. But even this is not the fact. No part of the location can be laid to the south-west of John Shee, without running in considerably upon the manor land. This uncertainty, however, in the application, may be remedied by the survey. But, then, the title of Eddy, in relation to one, who, in the mean time, had regularly obtained a title to the land, covered by the subsequent survey of Eddy, must date from the survey, because the survey of an uncertain warrant, can never, by relation to the date of the application or warrant, oust one, who, in the mean time, has regularly acquired a title to the same land. This, necessarily, brings into view the title of the defendant; and it is contended on the part of the plaintiff, that his survey was irregularly and illegally made, the surveyor not having gone round the boundaries of the land, so as to enable him to make a plat of the same, and the evidence of a person deputed at one time, to make this survey, which is to this effect, is relied upon. The fact may possibly be so. But one thing is clear, and that is, that a survey, with every appearance of accuracy, as if every tract had been regularly run, was returned by the surveyor, sworn to, was contested sixteen years ago, before the board of property, by Eddy, and then determined to be regular, and as such was accepted. Now, it would violate every principle of equity, to admit Eddy, who, to say the best for his title, had only an equitable estate, with full notice of the defendant's survey, to defeat by his survey, made nine years afterwards, the title of the defendant, thus supported by the decision of the board of property, upon the mere ground of irregularity in the survey, even if the fact were clearly made out. But, it is said, that the plaintiff is a purchaser for a valuable consideration, and is not bound by the notice to Eddy. But still he was the purchaser of a naked equity—was a pendente lite purchaser—and what is more, was affected by constructive notice, which the return of survey gave him. This point, then, is conclusive, in favour of the defendant.

3. As to the title of the plaintiff. If the doctrine endeavoured to be maintained, under the second head, be correct, then, this land could not be levied upon, and of course, could not be sold and conveyed by the sheriff. For, whilst it is conceded by the defendant, that lands held under a special warrant, may be levied upon and sold, it is with equal candour admitted on the other side, that land held under an indescriptive warrant, cannot be. And surely nothing can be more obvious. Whether such a warrant may be taken in execution, is a point not necessary to be decided. If it can, nothing is taken but the evidence of a right to land somewhere, and to be afterwards designated by survey. But land cannot be levied on, because, until it is surveyed, it exists only in idea—it has no locality—no real existence. This execution was levied on thirty tracts of land; and even if these were the thirty tracts actually intended, still, they were not the property of Eddy, any more than any other tracts of land. This point, therefore, is also against the plaintiff.

The plaintiff consented to suffer a nonsuit.

LEWIS (OLSHAUSEN v.). See Case No. 10,507.

Case No. 8,329.

LEWIS v. OREGON CENTRAL R. CO.

[12 Chi. Leg. News, 1; 8 Reporter, 358.[1]]

Circuit Court, D. Oregon. 1879.

DEMURRER—EASEMENT.

1. A demurrer does not lie to a part of a plea or defense, or immaterial matter therein, but it must deny its deficiency as a whole.

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[1] [8 Reporter, 358, contains only a partial report.]

2. A plea which states that the defendant in an action of ejectment is the owner of a perpetual right-of-way over the premises in controversy, and that the owners thereof granted it the same, is a sufficient statement of the nature and duration of such estate or interest in the premises.

[Ejectment. The company, as a special defense, pleaded a perpetual right of way over the premises in question for its railway, granted by the owners thereof. Demurrer to plea, omitting, however, the allegations in the plea as to the former ownership and the grant to the company by such owners.] [2]

J. H. Woodward, for plaintiff.
Joseph N. Dolph, for defendant.

DEADY, District Judge. This is an action to recover possession of lots one in blocks 6 and 10 in the Portland Homestead Association. The complaint alleges that the plaintiff is a citizen of the state of California, and the defendant a corporation duly organized under the laws of Oregon, and doing business therein as a railway company; that the plaintiff is the owner in fee simple of said premises, which are of the value of $2,000, and the defendant wrongfully withholds the possession of the same. The answer contains a general denial of the allegations of the complaint except the citizenship of the parties. It also contains a special defense to the effect that the road of the defendant is constructed over and operated upon a certain portion of said premises therein described, and amounting to 56-100 of an acre, of which it is in the possession; that in 1869, said premises were the property in fee simple of Philinder, the wife of James Terwilliger, and that said James, who is still living, was then in the possession of the same and had an estate therein for his own life; that said James was also the agent of his wife to manage said lots and receive from the defendant compensation for the right of way across the same, to construct and operate its railway thereon; that as said agent and for himself in the year aforesaid said Terwilliger received from the defendant the sum of $1,700 for timber taken by the defendant from the premises and other lands of said James and Philinder to aid in the construction of its railway, and in consideration thereof also agreed that the defendant should have a perpetual right of way over the premises for its railway, and for the consideration aforesaid then granted to the defendant such right of way and it is now the owner thereof; that the defendant relying upon said agreement built its railway over said premises, and has used the same ever since for the purpose of operating the same between Portland and St. Joseph; and that the interest of the plaintiff in the premises was acquired from said James and Philinder after 1869, and while the defendant was in the possession and use of the same for the purposes aforesaid.

[2] [From 8 Reporter, 358.]

The plaintiff demurs to the special defense. The demurrer is not taken to the whole of this plea or defense, but omits the allegations concerning the ownership of the lots by the Terwilligers and the portion now in possession of the defendant, and also the allegation to the effect that for the consideration mentioned, said James Terwilliger "granted" to the defendant said right of way, and it is now the owner thereof. A demurrer does not lie to a part of a plea or defense, but it must controvert its sufficiency as a whole. Redundant and irrelevant allegations may be stricken out of a pleading on a motion, but they cannot be objected to by demurrer. By sections 771, 775 of the Oregon Civil Code, taken from the statute of frauds of 29 Car. II., it is declared that "no estate or interest in real property" other than a lease for a year can be created otherwise than by operation of law or a writing subscribed by the party creating the same and "executed with such formalities as are required by law;" and that "an agreement * * for the sale of real property or any interest therein" is void unless the same is in writing and subscribed by the party to be charged. An easement—as a right of way—is an interest in lands within the meaning of this provision and can only be created by writing: 1 Washb. Real Prop. 398; 3 Kent, Comm. 452. Upon the agreement it was assumed that it appeared from the defense that the defendant never acquired any easement or right of way over the premises for want of a conveyance of the same, and the question principally discussed was, that admitting this proposition, whether or not the transaction set forth in the plea amounted to a license to the defendant to enter and occupy the premises for the purpose of a railway track, and if it did, is the same revocable at the pleasure of the licensor. I have carefully investigated the subject, but upon an examination of the pleadings I find that as they now stand, the question does not arise upon the demurrer.

The defendant having alleged in its plea that it was the owner of the track or tract upon which its railway is constructed, and that it had a grant from the plaintiff's grantor of the same, I am of the opinion that there is sufficient in the plea to constitute a defense to the action, notwithstanding all the other allegations thereof may be immaterial. The Code (section 316) only requires the defendant to plead the nature and duration of its estate in the premises, or license or right to the possession thereof "with the certainty and particularity required in a complaint." Now, in a complaint, it was never necessary to state more than that the plaintiff was the owner of a legal estate or interest in the premises, and entitled to the possession thereof, and whether said estate or interest was created by operation of the law or writing was unnecessary to state. Lamb v. Starr [Case No. 8,021]. The defendant having alleged that the owners of the premises—the Terwilligers—granted it the perpetual right of way thereon before

making the conveyance under which the plaintiff claims, thereby asserts every fact which the law implies therefrom. Chit. Pl. 253. A grant can only be made by a deed, and the allegation of the existence of a grant necessarily implies a deed, as livery of seizin is implied in the use of the word "infeoffed." The defendant also alleges in terms that it is the owner of such right of way. In either case, it has sufficiently stated the nature and duration of its right to the possession of the premises, or so much thereof as it defends for. Witherel v. Wiberg [Case No. 17,917]. The demurrer is overruled.

LEWIS v. The ORPHEUS. See Case No. 18,169.

Case No. 8,330.

LEWIS v. The ORPHEUS. JONES v. SAME. YOUNG v. SAME.

[3 Ware, 143.] [1]

District Court, D. Massachusetts. March Term, 1838.[2]

FEDERAL JURISDICTION—ATTACHMENT OF PERSONAL PROPERTY—POSSESSION OF PROPERTY ATTACHED.

1. When property is in possession of a state court it is exempted from the process of the United States courts.

[Followed in The Berkeley, 58 Fed. 922.]

2. The nature and kind of possession which an officer is bound to keep of personal property attached to save the attachment.

[These were libels by Daniel Lewis, Joseph Young, and —— Jones against the Orpheus, a vessel which, after attachment under process from the state court, was placed under arrest by the marshal of the district court for the district of Massachusetts.]

Mr. Hodges, for libelant.
Mr. Derby, for claimant.

WARE, District Judge. The first question which arises in these cases, is whether the court has jurisdiction. The right of the court to take cognizance of the subject-matter is not questionable; but the Orpheus was attached under process from the state court on the 5th of March, and she was arrested by the marshal under process from this court, on the 15th. If the vessel, at the time when the marshal served his precept was in the custody of the sheriff, it is well settled that the arrest of the marshal was illegal and void. The case of The Robert Fulton [Case No. 11,890], and that of The Oliver Jordan [Id. 10,503], decided at the last term of the circuit court in Maine are directly in point. It is said by the supreme court, that under our system of government there is no mode of preventing an embarrassing and dangerous conflict of jurisdiction between the courts of the states and those of the United States, but to consider personal property, which is in the custody of one to be withdrawn from the process of the other, except in those special cases provided for by statute. Act March 2, 1833, 4 Stat. p. 634; Harris v. Dennie, 3 Pet. [28 U. S.] 299; Hagan v. Lewis, 10 Pet. [35 U. S.] 401; Pulliam v. Osborne, 17 How. [58 U. S.] 471. To meet this difficulty, it is said that in the proceedings under the state process there were fatal irregularities and defects, which render the whole proceedings void. But the ready answer is that the case is still pending before the state court, and the question whether these irregularities are fatal must be decided there, and not by this court. It may be a good reason why these libels should not be dismissed, but allowed to remain on the docket till that case is decided. If the state court dismisses the suits, on which the vessel was attached by the sheriff, it may appear that the seizure of the marshal was lawful, and these cases proceed to a hearing. But until it is ascertained whether this court has jurisdiction, it would be altogether irregular to proceed to a final decree. When the sheriff made the attachment he appointed Mr. Jameson keeper, and put him in possession of the ship. The keeper was examined, and he says that he remained keeper for seventeen days, two or three days after the arrest by the marshal. At the time when he went aboard, the ship was unfinished and the carpenters were employed in completing the joiner work. During the whole time the weather was extremely cold, and no fire was allowed in the ship; and on account of the severity of the weather the keeper did not remain aboard during the nights. But as she lay at the wharf the vessel was so high that there was no entrance aboard but by a ladder, which was placed there in the morning and taken away at night, and the keeper was there first in the morning before the ladder was put up, and last in the evening when it was removed. Through the whole period of his custody, in the day time, he was either in the vessel or near her, on the wharf or in a counting-room, where the vessel was in plain sight, and was at no time during the day out of sight of the ship; so that it was impossible for her to be removed without his knowledge. During the whole time joiners were at work on the vessel, and many persons were coming and going to visit and look at her, and others were employed in taking in cargo. Mr. Jameson says that he does not know whether he was in the vessel or not when the marshal made the arrest, he not knowing personally the officer, and that he did not know of the arrest until two or three days after it was made, when he notified the marshal's keeper of his possession. Such are the facts with respect to the sheriff's custody, and the question is whether it was sufficient to satisfy the law. My opinion is

[1] [Reported by George F. Emery, Esq.]
[2] [Affirmed in Case No. 18,169.]

that it was. The nature and kind of possession of personal property that is required of an officer to preserve an attachment depends on the nature of the property. Light articles of small value may properly be removed and kept in immediate possession. But this is impracticable with large articles upon a ship. All that is necessary in respect to such articles is, that the custody be such as will enable the keeper to assert his possessory rights and prevent its being withdrawn without his knowledge. So it has been adjudged by the supreme court of the state. Where heavy blocks of granite were attached and put in possession of a keeper, whose house was within sight of them, and who passed them daily in going to and from his work, this was held to be a sufficient possession without removing them. Sanderson v. Edwards, 16 Pick. 144; Hemmenway v. Wheeler, 14 Pick. 408.

It is further contended that whatever objection there may have originally been to the jurisdiction it has been waived by the claimant's stipulation, by which he submitted to the jurisdiction. Whatever may have been the effect of a stipulation if it had been purely voluntary, I do not think it necessary to determine. As the subject-matter is clearly within the jurisdiction of the court, if it were wholly voluntary it might be taken as a waiver of any other objection. But with a consent extorted by duress it may be otherwise. It is true that an enforced consent is still consent, evicta voluntas est tamen voluntas, but it is voidable. To avoid it in this case, by an objection to the jurisdiction, I admit that the exception must be taken in a reasonable time. In the admiralty it may be taken by a voluntary plea before answering, or it may be taken in the answer. In this case the objection has been made in the answer, and this is in season. Is, then, the claimant's consent to submit to the jurisdiction voidable? The facts are these. The ship lay, when she was arrested, at Lewis' wharf in Boston, and being in the custody of the sheriff the arrest was void. She was then bound on a distant voyage, and partly laden. In order to liberate her from the arrest, and to enable her to proceed on her voyage, the claimant entered into this stipulation. But for this the voyage must have been broken up, and the vessel have remained in custody for an indefinite time, which the progress of the several suits show must have been from the middle of March to the middle of October, seven months at least. Was this consent, it being the only possible means of liberating the vessel, and saving to the owner a heavy loss, so far voluntary as to deprive him of the right of objecting to the legality of the seizure? I think it was not. It was a consent given under duress and constraint, not of his person but of his property, extorted from his fears, not of personal harm, but of a large pecuniary loss. A court professing to be guided in its jurisprudence by the principles of an enlarged and liberal equity, ought to be slow in lending itself to enforce an engagement obtained by such means. According to Domat, when the violence or constraint under which one acts is such as that reasonable prudence obliges him to surrender some property lien, some right, or some other interest, rather than resist, there is wanting that liberty and equality between the parties, which is required to render engagements binding, and a consent so obtained ought to be annulled. Domat, Liv. 1, tit. 12, § 4, in principia.

If this stipulation were to be considered as of the nature of a contract, there seem to be strong reasons in equity against enforcing it by the active agency of the court. But in fact it has none of the qualities of a contract. A contract is an agreement entered into by the mutual consent of the parties, but a stipulation is an instrument taken by order of the court; its terms are determined by the will of the court, and not by that of the parties. Consequently it is to be interpreted by the intention of the court only, as to the nature and intent of its obligation. It being an instrument taken in the interest of justice, to sustain the jurisdiction of the court, it ought not to receive such a construction as would deprive either party of any of his legal rights. This clause, by which the party submits to the jurisdiction of the court, seems to be taken from the stipulation entered into in libels in personam, in judicio sistendi, or answering to the action, and I think should be held to have the same force and meaning as in that. That required the promissor to remain in court and submit himself to its jurisdiction, as far as he was subject to it when the suit was commenced, no further. If, after the service of the process he acquired a new right of declining the former, that was waived, but it did not deprive him of any right of defense he had when the process was served. Lane v. Townsend [Case No. 8,054]. The object was to preserve the authority of the court as it then was, and not to enlarge it. My opinion is that any rights which the claimant had of objecting to the jurisdiction of the court when the stipulation was entered into he still retains.

In the present state of facts, it does not seem to me to be proper to dismiss the libels. They may remain on the docket and await the decision of the state court. If their decision is that the proceedings are so defective that the pending suit must be dismissed, the objection to the jurisdiction of this court may be removed and the case proceed. Or if the parties prefer so to do, the suits here may be discontinued, and they may seek their remedy in the state court.

[The decision of the district court in this case was affirmed by the circuit court where it had been brought up for review, on appeal by the complainants. Case No. 18,169.]

LEWIS (REVENS v.). See Case No. 11,711.

LEWIS (RINGGOLD v.). See Case No. 11,847.

LEWIS (ROGERS v.). See Case No. 12,014.

LEWIS (ROGERS' LOCOMOTIVE WORKS v.). See Case No. 12,024.

LEWIS (SCOTT v.). See Case No. 12,539.

Case No. 8,331.

LEWIS v. SHREVEPORT.

[3 Woods, 205.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1878.[2]

CHARTER—INTERPRETATION—ISSUE OF BONDS—AUTHORIZATION BY THE LEGISLATURE.

1. The charter of a city declared that "the city council may, when it deems it for the public interest, provide for the construction of a city hall, markets and other structures of public necessity and utility, the cost of which shall be paid by the city, provided that whenever the amount or cost * * * of erecting the structures aforesaid, from time to time, exceeds the amount of funds in the city treasury, then the council are hereby authorized to issue bonds of the city, * * * and said council shall have power to dispose of said bonds in such manner as they may deem for the best interests of the city, the proceeds of which shall be used solely for the purpose for which they shall be issued; and, also, that "no ordinance * * * providing for the purchase of real estate shall be passed except by a majority of the council." *Held*, that these provisions of the charter did not authorize the city council to issue bonds to pay for a tract of land within or near the city limits, to be given to a foreign railroad corporation on which to establish and maintain its depot and machine shops.

[Cited in note to De Voss v. City of Richmond, 18 Grat. 338.]

2. To authorize a municipal corporation to issue bonds for purposes not fairly coming within the ends for which municipal corporations are created, there must be a legislative grant of power either in express terms or by necessary implication.

3. A municipal corporation cannot clothe itself with power to issue bonds for extraneous purposes by the assertions of the legislative, executive and judicial departments of its government, and of its inhabitants, that it possesses the power.

4. In deciding whether a municipal corporation has power to issue bonds for a specific purpose, the construction put upon the charter by all parties in interest, and where rights have grown up under that construction, is entitled to weight only in a case where the power may be fairly inferred from the terms of the charter. In such a case, doubts and ambiguities will be resolved in favor of the power.

5. Where a municipal corporation issues bonds for a purpose not authorized by its charter, it cannot be estopped from denying its authority to do so by the acts of its inhabitants and officers, nor by receiving and retaining the consideration for which the bonds were issued.

6. An issue of bonds by a municipal corporation, without authority of law, cannot be ratified by its officers without the sanction of the legislature.

[Cited in brief in Peoria & S. R. Co. v. Thompson, 103 Ill. 195.]

This suit was brought [by Charles Edward Lewis] to recover the amount of certain over-due interest coupons belonging to nine negotiable bonds for one thousand dollars each, issued by the defendant. The parties waived the intervention of a jury, and having agreed upon the facts, submitted the case to the court upon the law arising on the agreed facts. It appeared, from the agreement of the parties, that on April 27th, 1871, an act was passed by the legislature of Louisiana, "to incorporate the city of Shreveport, to define its limits and provide for its better police and municipal government." [Acts La. 1871, p. 218.] This act constituted the charter of the city at the time the bonds in question were issued and sold. Section 3 of the charter provided that the government of the city of Shreveport, and the administration of its affairs, should be vested in a mayor and four administrators, who should form its council. Section 10 declared: "The council shall have full authority to make and pass such by-laws and ordinances as are necessary and proper, * * * to regulate and make improvements to the streets, public squares, etc., and, if for such purpose the land of any private person or body corporate is necessary to be had, the said city council shall have the right and power of purchasing the same at a reasonable price, or cause the same to be expropriated," etc. Section 17 declared: "The council may, when it deems it for the public interest, provide by ordinance for the paving, opening or widening of any street or streets, or the construction of a city hall, markets and other structures of public necessity and utility, the cost of which shall be paid by the city, provided that whenever the amount or cost of paving said streets, or erecting the structures aforesaid from time to time, exceeds the amount of funds in the city treasury, then the council are hereby authorized to issue bonds of the city running forty years, with interest coupons attached, and bearing interest at the rate of and not exceeding ten per cent per annum, payable semi-annually, * * * and said council shall have power to dispose of said bonds in such manner as they may deem for the best interest of the city, the proceeds of which shall be used solely for the purpose for which they shall be issued." Section 20 declared: "No ordinance * * * providing for the purchase or sale of real estate shall be passed, except by a majority of the council," etc. On June 26th, 1872, the city council enacted an ordinance which provided for the purchase of certain real estate to be given to the Texas & Pacific Railroad Company, upon which the company was permanently to establish and maintain its depots and machine shops; which provided for the payment of the purchase price of such real estate by the issue and sale of the bonds of the city to the amount of $260,000, payable forty years after date, with interest at eight per cent per

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

[2] [Affirmed in 108 U. S. 282, 2 Sup. Ct. 634.]

annum, payable semi-annually, and with interest coupons attached; which provided for the levy of an annual tax to pay the principal and interest of the said bonds, and which provided that said ordinance should be submitted to a vote of the people of the city for their ratification and approval. This ordinance is the one by virtue of which the bonds in question were issued and sold. On July 1, 1872, the said ordinance was submitted to a vote of the people of the city, and seven hundred and five votes were cast for and three votes against its ratification and approval. On July 1, 1872, in pursuance of the ordinance and vote aforesaid, and for the purpose named in the ordinance, the city issued its bonds for $260,000. On July 19, 1872, the city council passed an ordinace authorizing George Williamson, Esq., who was appointed the agent of the city for that purpose, to sell said bonds at sixty cents on the dollar. On July 23, 1872, the city council appropriated money to pay the cost of engraving said bonds, and the expenses incurred by Williamson in his effort to sell them. On October 31, 1872, the city attorney, as such officer, gave an opinion that the city had power to issue said bonds, and that the object for which said bonds were issued was of public utility, and clearly within the power conferred by the city charter. On the same day, the city council passed an ordinance whereby said Williamson was appointed special agent of the city to sell said bonds, and upon the failure to sell, authorized him to execute the promissory note of the city for $130,000, and to pledge said bonds as security for the payment of the same, and to pledge the faith of the city to make good any arrangement entered into by him in the sale of said bonds, or in raising money thereon. Williamson, as agent for the city, appointed one Jamison, of Philadelphia, to sell the bonds, and the city council, by ordinance, ratified the appointment. On November 7, 1872, the city council passed an ordinance whereby Williamson was authorized to turn over to Thomas A. Scott, Esq., $200,000 of said bonds upon his assuming the payment of the indebtedness incurred by the city in the purchase of said real estate, to be donated to the Texas & Pacific Railroad Company. The city council, on December 17, 1872, passed an ordinance levying a tax to pay the principal and interest of said $260,000 of bonds. The city administrator of finance, on March 1, 1873, made an official statement of the amount of the indebtedness of the city, in which statement was included the said bonds, and on March 27, 1873, Williamson, as agent of the city, wrote to Jamison a letter in which he stated that ample provision had been made by ordinance enacted by the city council for the payment of the principal and interest of the $260,000 of bonds. On June 13, 1873, the city council passed an ordinance pledging the faith of the city to pay the said promissory note made by Williamson, as its agent, to secure the payment of which the said $260,000 of bonds had been hypothecated, and instructing the city administrator of finance to hold sacred for such purpose the tax levied by ordinance of December 17, 1872. The official budget of the city, published on November 27, 1875, contained a statement of the indebtedness of the city on that day, in which was included the $90,000 of said bonds held and owned by the plaintiff, the same being the bonds to which the coupons sued on belong. The plaintiff was a bona fide holder of the bonds to which the coupons sued on belong, and of said coupons, having purchased said bonds, with the coupons attached, in open market, paying therefor eighty-five cents on the dollar. Both bonds and coupons were negotiable in form, being payable to bearer. The Texas & Pacific Railroad Company had never been chartered by the state of Louisiana, but held a lease from the Vicksburg, Shreveport & Texas Railroad Company, of the railroad between Shreveport and the Texas line, which lease is still in force. The coupons sued on were produced by the counsel of the plaintiff, and filed as evidence in the cause.

Alfred Ennis, Geo. S. Lacy, and Frank N. Butler, for plaintiff.

First. The defendant had power, under its charter, to make and issue the bonds. (See provisions of charter set out in the agreed facts.) The construction put upon the charter by the municipal corporation and the people, and followed by them, on the strength of which the municipal corporation has sold its bonds and received value therefor, will be maintained by the courts, even though the authority to issue the bonds is denied from an ambiguous and ill-expressed statute. James v. Milwaukee, 16 Wall. [83 U. S.] 159; Woodhull v. Beaver Co. [Case No. 17,974]; Luling v. City of Racine [Id. 8,603]; Van Hostrup v. Madison, 1 Wall. [68 U. S.] 291; Memphis v. Brown [Case No. 9,415]; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; Meyer v. Muscatine, 1 Wall. [68 U. S.] 393; Schenck v. Marshall Co. [Case No. 12,449].

Second. Having issued the bonds, sold them in open market, received and retained the consideration therefor, and the bonds having subsequently come to the hands of plaintiff bona fide and for value, the city is estopped from denying its authority to issue the same or denying the validity thereof. Hood v. New York & N. H. R. Co., 22 Conn. 502; Treadwell v. Commissioners, 11 Ohio St. 183; Hopple v. Trustees Brown Tp. 13 Ohio St. 311; Garrett v. Van Horn, 7 Ohio St. 327; Goshen Tp. v. Shoemaker, 12 Ohio St. 624; Supervisors v. Schenck, 5 Wall. [72 U. S.] 772; City of Nauvoo v. Ritter, 97 U. S. 389; Society for Savings v. City of New London, 29 Conn. 174; Ferguson v. Landram,

1 Bush, 548; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. [64 U. S.] 381; Cromwell v. Sac Co., 96 U. S. 51.

A. H. Leonard, J. D. Rouse, Wm. Grant, and W. A. Seay, for defendant.

WOODS, Circuit Judge. The power of the city of Shreveport to issue the bonds in question is denied. The power, according to the claim of plaintiff, is to be found in section 17 of the city charter, which authorizes the council, when it deems it for the public interest to provide for the construction of a city hall, markets and other structures of public necessity and utility, and under certain circumstances, to issue bonds in payment thereof, and section 20, which says, "no ordinance for the purchase or sale of real estate shall be passed except by a majority of the council." Under these provisions it is claimed that the city council had authority to issue and sells bonds of the city to the amount of $260,000 for the purpose of paying for real estate, to be given to a foreign railroad corporation, on which to establish and maintain its depots and machine shops. To my mind, the proposition seems utterly untenable. The power given is to erect a city hall, markets and other structures of public necessity and utility; clearly the purpose for which the bonds in suit were issued was not to erect a city hall or markets. Does the donation of land to a railroad company, on which to build its depot and shops, fall within the terms "other structures of public necessity and utility?" Lord Bacon observes that "as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." Hence the celebrated rule that "when particular words are followed by general ones, as it often happens after an enumeration of several classes of persons or things, there is added 'and all others,' the general words are restricted in meaning to objects of like kind with those specified." 1 Bish. Cr. Law, § 275. Applying this rule to the interpretation of the clause of the charter relied on for authority to issue bonds, it is clear how perfectly baseless is the construction claimed. The charter, under this rule, means to authorize the city council to erect a city hall, markets and other like structures of public necessity and utility. This would include houses for fire engines, water works, gas works, houses for public schools, all to be owned by the city, and in which all the citizens should have an interest. To stretch the clause so as to authorize the purchase of land by the city to be given away to a private corporation, on which it was to erect structures for its own uses, is, to my mind, entirely unwarrantable. Can it be claimed for a moment that such a use of the power to issue bonds entered into the contemplation of the legislature?

"A municipal corporation is but a subordinate branch of the government. It represents the state sovereignty in a limited district, and for specific purposes. These purposes are local government and police. The power of taxation is granted as a means of carrying out these purposes. The diversion of these revenues to other purposes is unlawful and ultra vires. If it is desirable that a municipal body should have the power of subscribing to railroads or plank roads, or of issuing commercial securities to be sold in the financial markets, it is time enough for it to do so when authorized thereto by legislation. It possesses no powers but such as are given to it expressly or by necessary implication." Mr. Justice Bradley, in Chisholm v. City of Montgomery [Case No. 2,686]. See, also, Dill. Mun. Corp. § 106; Mayor v. Ray, 19 Wall. [86 U. S.] 468; Knapp v. Mayor, etc., of Hoboken, 34 N. J. Law, 374; Jones, Ry. Sec. §§ 222, 223. Applying this rule to the question in this case, can it be said that the power exercised by the city council of Shreveport in issuing bonds for the purpose mentioned is expressly given by the charter, or results from necessary implication? It seems to me that it is unnecessary to multiply words to show that the power is not conferred. It is perfectly obvious that such was not the purpose of the legislature. The absence of such a power is too plain for argument. But the plaintiff claims that the people of the city and the judicial, legislative and executive departments of its municipal government have placed a construction on its charter and on the ordinance by virtue of which the bonds were issued, which justifies the issue of the bonds, and that the city is therefore liable to pay them. This proposition amounts to this, that a municipal corporation can clothe itself with power to issue bonds for extraneous purposes by asserting that it possesses it. On the other hand, the current of authority is unbroken that to authorize a municipal corporation to subscribe for stock in a public improvement and pay for it by the issue of negotiable securities, there must be a legislative grant of power either in express terms or by necessary implication. Thomson v. Lee Co., 3 Wall. [70 U. S.] 330; Dill. Mun. Corp. § 106, and many cases there cited. The proposition that when the power has not thus been conferred, it may be acquired by a municipal corporation by a persistent assertion that it has the power, and by acting as if it had it, is inconsistent with all the cases cited. The intention of the legislature is to be sought for; that whatever it may be constitutes the law. James v. Milwaukee, 16 Wall. [83 U. S.] 161.

In deciding whether a municipal corporation has power to issue bonds for a specific purpose, the construction put upon the charter by all parties in interest, and where rights have grown up under that construction, is entitled to weight only in a case

where the power may be fairly inferred from the terms of the charter. In such a case doubts and ambiguities will be resolved in favor of the power. Thus, in Woodhull v. Beaver Co. [Case No. 17,974], Judge Grier says: "But now, when all parties have given their construction to the act, and it can by its terms be made to include the power, the court will not exercise astutia to give it a stringent interpretation in order to enable a county to disown its obligations after having received their value." To the same effect are the following cases: James v. Milwaukee, 16 Wall. [83 U. S.] 159; Van Hostrup v. Madison, 1 Wall. [68 U. S.] 297; Meyer v. Muscatine, Id. 393. But in all these cases there was reasonable ground in the acts of the legislature for the construction by which the power to issue the bonds was derived. In this case authority for the power exercised is wholly wanting, and by no reasonable or fair construction can it be presumed. The plaintiff further claims that by the acts of its people and officers set in the record, and by the fact that the city has received and still retains the consideration for which the bonds were sold, she is estopped from denying their authority to issue the same, and from denying their validity.

The authorities cited by counsel for plaintiff from the United States Supreme Court Reports to sustain their proposition do not sustain it. They only decide that when the power to issue bonds is given to a municipal corporation, the corporation is estopped from setting up irregularities in their issue. But where the power is wanting there is no estoppel, and there can be no ratification by the municipal corporation or its officers. In Chisholm v. City of Montgomery, supra, Mr. Justice Bradley said: "The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the people whom they represent. * * * No municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it." In the case of Marsh v. Fulton Co., 10 Wall. [77 U. S.] 684, the supreme court of the United States says: "It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification, even by the supervisors. But the answer to all of them is, that the power of ratification did not lie with the supervisors. A ratification is in its effect upon the act of the agent equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act originally existed. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified." So in Loan Ass'n v. Topeka, 20 Wall. [87 U. S.] 667, the same court says: "We do not attach any importance to the fact that the town authorities paid one installment of interest on their bonds; such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest which was equally unauthorized cannot create of itself a power to levy taxes resting on no other foundation than the fact that they have once been illegally levied for that purpose." See, also, Town of South Ottawa v. Perkins, 94 U. S. 266. The want of power in the officers of the city of Shreveport to ratify the issue of bonds is as clear as their want of power to issue the bonds in the first instance. When contracts are ratified, it must be by a person or body having the power to ratify. Delafield v. Illinois, 2 Hill, 159; Hotchin v. Kent, 8 Mich. 526; Dubuque Female College v. District Township of City of Dubuque, 13 Iowa, 555; Estey v. Inhabitants of Westminster, 97 Mass. 324.

The decisions of the supreme court of the United States are uniform to the effect that a municipal corporation cannot without legislative authority issue bonds in aid of an extraneous object. Marsh v. Fulton Co., 10 Wall. [77 U. S.] 676; Pendleton Co. v. Amy, 13 Wall. [80 U. S.] 297; Kenicott v. Supervisors, 16 Wall [83 U. S.] 452; St. Joseph Tp. v. Rogers, Id. 644; Harshman v. Bates Co., 92 U. S. 569; Town of Colomo v. Eaves, Id. 484; Town of South Ottawa v. Perkins, 94 U. S. 260. That power cannot originate or be derived from a vote of the people. The source of the authority is the legislature. In this case there was no power in the city of Shreveport to issue the bonds in question. All persons dealing in the bonds are bound to take notice of this fact. There can be no bona fide holders without notice when there is no power to issue the bonds. The bonds are void and the holders are presumed to have had notice of this fact when they purchased them. There must be judgment on the agreed facts for defendant.

[NOTE. The plaintiff in this action suing out a writ of error, the judgment came up for review in the supreme court. Mr. Chief Justice Waite delivered the opinion of the court. It is a well-settled rule, he said, that unless power has been given by the legislature to a municipal corporation to grant pecuniary aid to railroad companies, all bonds for the municipality, issued for such purpose, and bearing evidence of that fact on their face, are void, even in the hands of bona fide holders, and this, whether the people

voted the aid or not. In the case at bar there was no claim that such power had been granted to the city of Shreveport, nor was there any provision in the charter from which anything of the kind could be implied. And as it appeared that the bonds carried on their face full notice that they were issued for a purpose not authorized by law, the court reached the conclusion that the decision of the court below should be affirmed. 108 U. S. 282, 2 Sup. Ct. 634.]

Case No. 8,332.

LEWIS v. SMITH.

[2 Cranch, C. C. 571.] [1]

Circuit Court, District of Columbia. May 17, 1825.

GARNISHMENT—MONEY DEPOSITED IN BANK.

1. If money be deposited in a bank, the cashier is not liable as garnishee of the depositor.

2. If the garnishee is not the debtor of the defendant, he is not liable to judgment of condemnation.

3. If the defendant himself could not recover against the garnishee, the plaintiff cannot.

[This was an action at law by Joseph Lewis against Richard Smith, garnishee of Nimrod Farrow.]

Attachment under the Maryland act of 1795 (chapter 56), and laid in the hands of Richard Smith, cashier of the office of the Bank of the United States at Washington, who was summoned as garnishee. An act of congress for the relief of Nimrod Farrow and Richard Harris, passed on the 3d of March, 1825, c. 84 (6 Stat. 331), appropriated $73,747.78 to be paid to Nimrod Farrow, a contractor for erecting a fort on Dauphin Island, provided that before he should receive it he should give bond to the secretary of war in the penal sum of $120,000, conditioned to appropriate the money towards the payment of the debts contracted by Farrow & Harris, or either of them, for supplies furnished, and services rendered in the erection of the fort; and to pay to Harris half of the surplus, if there should be any. The bond was given, the money received, and $21,500 of it deposited in the office of the Bank of the United States at Washington, of which the garnishee Richard Smith was the cashier, who gave Farrow two certificates; one purporting that Nimrod Farrow had credit in the office of the Bank of the United States at Washington, for $15,000, subject to his checks; and the other that N. F. had left with him $6,500, as a special deposit in lieu of special bail, to be released on his giving bail to the satisfaction of the marshal. This appeared upon the answers of the cashier to the interrogatories filed.

Mr. Jones, for the garnishee, objected to judgment against him. 1st. Because he had nothing in his hands, and was not indebted to Farrow, the defendant; and 2d. Because, if the Bank of the United States had been legally summoned as garnishee, they never held the money as the general property of N. Farrow. He was only a statutory trustee to apply the money to certain purposes mentioned in the act.

R. P. Dunlop and Mr. Key, for plaintiff.

Of the $6,500, Mr. Smith was the special bailee. The sum of $5,500, was drawn out by Farrow before service of the attachment, but $1,000 of that special deposit remained in Mr. Smith's hands at the time of the service of the attachment, and was afterwards drawn out by Mr. Farrow. It is sufficient if we show property of the defendant in the hands of the garnishee, in his possession, or under his care. After Mr. Farrow had given bond to apply the money according to the act, it became absolutely his property. The Bank of the United States could not be a garnishee, because it could not be held to bail under the 6th section of the act of 1795.

Before CRANCH, Chief Judge, and THRUSTON, Circuit Judge.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, contra). The return of the marshal, upon the writ of attachment, is "attached credits in the hands of Richard Smith, cashier of the Branch Bank of the United States at the city of Washington, and summoned him as garnishee, on the 30th of April, 1825." The plaintiff has filed interrogatories which Mr. Smith has answered; and the question is whether Mr. Smith had in his hands, at the time of the attachment, or since, any credits of Mr. Farrow; or, in other words, whether he was, at the time of the attachment or since, the debtor of Mr. Farrow. Mr. Lewis, claiming in the right of Mr. Farrow, cannot be in a better situation than Mr. Farrow himself. It appears, by the answers of Mr. Smith, that $21,500 "were deposited, or left in the office of the Bank of the United States in Washington; of which $6,500 were left as a special pledge for the indemnity of the marshal, lieu of special bail." That $5,500, part of those $6,500, were released by the marshal, and paid to Mr. Jones upon the order of Mr. Farrow, on the 23d of April, 1825, seven days before the attachment was served; and that the other $1,000, being the residue of the $6,500, were released by the marshal, and paid to Turner Ashby, upon the order of Mr. Farrow, on the 3d of May, 1825, three days after the service of the attachment. Mr. Smith says, that when the $21,500 were deposited, he gave Mr. Farrow two certificates; one purporting that Nimrod Farrow had credit in the office of the Bank of the United States at Washington for $15,000, subject to his checks; and the other purporting that Nimrod Farrow had left with him $6,500, as a special deposit in lieu of special bail, to be released on his giving bail to the satisfaction of the marshal. Was Mr. Smith at any time the debt-

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

or of Mr. Farrow? The money was deposited in the Bank of the United States to the credit of Mr. Farrow. If Mr. Smith had been dismissed from his office of cashier, on the day of the deposit, he could not have taken the money with him, nor drawn it from the bank. The bank was the only debtor of Mr. Farrow. Mr. Smith was never liable to Mr. Farrow for this money. It was not specifically holden by Mr. Smith, but went, at once, into the general cash fund of the bank, and Mr. Farrow had credit for it on the books of the bank. The only doubt I ever had, on this part of the case, was, whether Mr. Smith by the terms of his certificate to Mr. Farrow as to the $6,500, had not, by using the words "left with me," made himself personally liable. But, taking the whole of his answer together, I think the fair inference is, that the $6,500 were left with him in his character as cashier, and went into the general cash fund of the bank, and that the bank was answerable to Mr. Farrow for that sum, as well as for the residue of the $21,500, and that Mr. Smith did not make himself more responsible to Mr. Farrow for the $6,500, than for the residue.

It is said, however, that Mr. Smith had Mr. Farrow's property in his hands, possession, or charge, or under his care, and therefore, according to the expressions of the act of Maryland (1795, c. 56, §§ 5, 6), is liable to have that property condemned in his hands. It might be a sufficient answer to this suggestion, to say, that the marshal has not attached any property of Mr. Farrow in the hands, possession, or charge, or under the care of Mr. Smith. He attached nothing but credits; and if Mr. Smith was not the debtor of Mr. Farrow, Mr. Farrow was not the creditor of Mr. Smith, and consequently had no credits in his hands. The clause of the act of Maryland (1715, c. 40), which authorizes the attachment of credits, is the only clause applicable to the present question. But it does not appear that Mr. Smith ever had the property of Mr. Farrow in his hands, possession, or charge, or under his care. It was the bank that received Mr. Farrow's money, and took the charge of it. Mr. Smith was the keeper of the money of the bank only, and was liable only to the bank. He was never personally liable to Mr. Farrow.

In this view of the case, we do not think it necessary to say what weight ought to be given to the argument that this was a trust fund, and that Mr. Farrow might be restrained from paying away the money until the class of creditors described in the act for the relief of Nimrod Farrow and Richard Harris, should be satisfied. Nor do we give any opinion as to any equitable right which the creditors (intended to be protected by that act) might have, in any given case, to restrain him from exercising his legal rights, until their claims should be satisfied; nor as to the right of Mr. Lewis to the benefit of this process of attachment, if it had been served on the Bank of the United States.

But, being of opinion that Mr. Smith never was the debtor of Mr. Farrow, we think we must refuse the judgment of condemnation.

THRUSTON, Circuit Judge, dissented.

Case No. 8,333.

LEWIS v. SMYTHE.

[2 Woods, 117.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1875.

REMOVAL OF CAUSES—REMOVAL FROM STATE TO FEDERAL COURT AFTER TRIAL.

1. The trial before which application must be made for removal of a case from the state to the federal court, in order to warrant such removal under section 3 of the act of March 3, 1875 (18 Stat. 470), is such a trial upon either the law or facts of the case, or both, as settles and concludes the controversy between the parties.

[Cited in Meyer v. Norton, 9 Fed. 438.]

2. When such a trial has been commenced, though not concluded, the application for removal comes too late.

[Cited in Alley v. Nott, 111 U. S. 476, 4 Sup. Ct. 497.]

In equity. The bill stated, in substance, that the defendant George A. Smythe, a citizen of Mississippi, brought an action against the complainant [Robert N.] Lewis, a citizen of Louisiana, in the fourth district court of the parish of Orleans, on the 28th of November, 1874, to recover the sum of $3,518. Lewis, desiring to remove the cause to this court, by virtue of the provisions of the act of congress, approved March 3, 1875 (18 Stat. 470, §§ 2, 3), on the 2d day of July, 1875, filed his petition and bond for that purpose in said fourth district court, as required by the statute. The court refused to permit the case to be removed or to grant an order of removal. Nevertheless, Lewis procured a copy of the record of the case so far as it had progressed, and on the first day of November, 1875, filed the same in this court. The fourth district court after this proceeded with the case and afterwards rendered judgment in favor of Smythe, against Lewis, for $3,800. On this judgment, Smythe, it is alleged, threatened and intended to issue execution, and the bill averred that the property of Lewis would be seized by virtue thereof, to his great and irreparable injury. The prayer of the bill was, that Smythe might be restrained from proceeding to enforce the judgment. The theory of complainant was, that after the filing of the petition and bond for removal, the case was thereby removed, and the fourth district court had no further jurisdiction of the case, and its judgment was a nullity. The case came on for hearing upon the motion for the allowance of an injunction as prayed in the bill. The defendant

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

resisted the injunction, claiming that the case had never been removed to this court, but that the fourth district court remained in possession of the case till the rendition of the judgment. The ground of this claim was that the trial of the suit had commenced in the fourth district court before any attempt made to remove the case to this court. That this was the fact is shown by the record filed in this court, as appears by the following extracts therefrom: "May 21st. This case came on this day for trial. * * * When, after hearing the pleadings and evidence, the hour of adjournment having arrived, it is ordered that this case be continued to May 31st, at 10 o'clock a. m., for argument. May 31st. This case came on this day for argument, when by agreement of counsel it is ordered by the court that this case be continued indefinitely, to be fixed on motion." It was after this that the petition was filed for removal.

Samuel R. and C. L. Walker, for complainant.

G. A. Breaux and Charles E. Fenner, for defendant.

WOODS, Circuit Judge. The act of congress, prescribing how causes may be removed from the state to the federal courts (18 Stat. 470), declares: Sec. 3. That "whenever either party or any one or more of the plaintiffs or defendants, entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court, before or at the term at which said cause could be first tried, and before the trial thereof for the removal of such suit into the circuit court." By the word "trial," as used in this statute, I do not understand the argument, investigation or decision of a question of law merely, unless it is decisive of the case, and the decision results in a final judgment or decree. The decision of the court on a demurrer, for instance, or on exceptions to the sufficiency of a plea, which is followed by amendments or new pleadings, and which does not end the case, is not the trial meant by the statute. Blackstone defines a trial to be "the examination of the matter of fact in issue in a cause." 4 Black, Comm. 322. See, also, 2 Hale, P. C. p. 216, c. 28. "A trial has been held to be the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." U. S. v. Curtis [Case No. 14,905]. So in Steph. Pl. append. note 29, it is said: "The word 'trial' has long been used to express the investigation and decision of fact only." No argument or decision of questions merely preliminary, or questions of pleading, except such as settle and end the case (as where the facts are admitted and the case turns upon the law as applied to the facts) is meant by the word "trial." It involves the facts of the case, and whenever the investigation of the facts of a case simply, or the facts in connection with the law is entered upon by the court alone, or by the court and jury, the trial may be said to have begun.

It seems to me too clear to admit of argument that the petition for removal must be filed before the trial commences. The filing of such a petition during the trial, while it is in progress, is not a filing before the trial. To hold otherwise, would be to allow a party to experiment with the court, by going into the trial, and if the rulings of the court were not favorable or the prospects for a propitious result good, to interrupt the proceedings by a transfer of the cause to another forum. Some cases occupy several weeks in their trial. It could hardly be in the contemplation of the act of congress to allow a party, after he has occupied the attention of the court or the court and jury for days, and it may be weeks, with the trial of a cause, to interrupt the proceedings by a transfer of the cause to another court. And yet this would be the effect of the construction claimed by counsel for complainants, namely, that the words "before the trial thereof" mean before the trial is completed and ended. In my judgment, the petition and bond for removal must be filed "before or at the term at which the cause could be first tried, and before the trial thereof" commences. As the petition and bond for the removal of this case were not filed until after the parties had entered upon the trial, and until after the pleadings had been read and the evidence submitted to the court, they were not filed in compliance with the statute, and they were not effectual to remove the case out of the state court, or to interfere with its jurisdiction to proceed therewith. The judgment of the state court is therefore valid until reversed in a direct proceeding. The motion for the injunction must be overruled. Whether, if the case had been properly removed, this court could grant the relief prayed by the bill, I will not now undertake to decide.

Case No. 8,334.

LEWIS et al. v. SPALDING.

[2 Cranch, C. C. 68.] [1]

Circuit Court, District of Columbia. Dec. Term, 1812.

MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE.

In an action upon the case for maliciously conspiring to deprive the plaintiffs of their slave, it is necessary for them to prove malice in the defendant. And it is competent for the defendant to show probable cause, and the want of malice.

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

This was an action upon the case charging that the defendant, "unlawfully, wickedly, and maliciously," conspired with divers ill-disposed persons to the plaintiffs unknown, to kidnap and carry off the slave of the plaintiffs, then in their peaceable possession; and in pursuance of such conspiracy, falsely and maliciously, by false pretences, procured a warrant to have the slave apprehended and delivered to the defendant; and hired persons to seize and carry away the slave out of the peaceable possession of the plaintiffs, for the lucre and gain of the defendant and to defraud the plaintiffs; and attempted to bribe persons to seize and carry away the slave, he the defendant thereby wickedly and maliciously keeping the plaintiffs in continual alarm and danger of having their said slave taken from them by force or fraud: by means of which unlawful conspiracy the plaintiffs were put to great labor, expense, and trouble, in watching and protecting their said slave, and were deprived of his labor and hire, &c.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion that it was necessary for the plaintiffs to prove malice in the defendant; and that it was competent for the defendant to show probable cause, by showing color of title, &c., and to disprove malice.

LEWIS (UNION HORSESHOE WORKS v.). See Case No. 14,365.

LEWIS (UNITED STATES v.). See Case No. 15,595.

LEWIS (VOIGHT v.). See Case No. 16,989.

LEWIS (WESTERWELT v.). See Case No. 17,446.

Case No. 8,335.

LEWIS v. WHITE et al.

[7 Chi. Leg. News, 116.]

Circuit Court, N. D. Ohio. Dec. Term, 1874.

REMOVAL OF CAUSE UNDER ACT OF 1866.

Motion to remand cause from the common pleas of Ottawa county upon the grounds: First, that the cause could not be heard as to the removing defendants without the other defendants being present; second, that all the non-resident defendants should have joined in the petition for removal.

Prentiss, Baldwin & Ford, for the motion.

Willey, Terrell & Sherman and W. B. Sloan, contra.

Before EMMONS, Circuit Judge.

Held: That under the act of 1866 [14 Stat. 306], for removing causes, all the non-resident defendants need not join. That, however restricted the 12th section of the judiciary act [1 Stat. 79] and the act of 1867 [14 Stat. 558] might be in this respect, the act of 1866 clearly permitted a severance of defendants and gave the right of removal to any of the non-resident defendants on the proper affidavit, showing: Second, that a final determination of the cause could be had as between the plaintiff and the removing defendants, for that, although it was alleged that the title to the real estate sought to be set aside was held by one for the benefit of all, yet as the petition alleged that such title was obtained by fraud of all of the defendants there could be no trust to be protected as to any of the defendants. Motion overruled.

LEWIS, The HENRY. See Case No. 6,377.

LEWIS, The MATILDA A. See Case No. 9,281.

LEWISTON (PHELPS v.). See Case No. 11,076.

Case No. 8,336.

The LEXINGTON.

[1 Adm. Rec. 167.]

Superior Court, Florida. April 11, 1835.

SALVAGE—AMOUNT—SALE OF VESSEL.

[1. The court awarded a moiety, amounting to $6,875, where the vessel and cargo aground on the Florida reef would have been a total loss but for the timely assistance of the salvors, rendered at great hazard.]

[2. A sale of the damaged vessel requested by her master will not be ordered, though the repairs will nearly equal her present value, where the court does not think it to the interest of her owners and insurers and the owners of the cargo.]

[This was a libel for salvage by Richard Roberts and others against the brig Lexington and cargo.]

A. Gordon, Esq., for libellants.

W. R. Nackley, for respondent.

WEBB, J. This cause, in its most important feature, is similar to many others which have been decided by this court. It is of that class in which the preservation of the property has been wholly dependent upon the exertions of the salvors, without whose exertions, and rendered, too, in the most timely and efficient manner, everything must have been lost. The vessel struck upon one of the most dangerous parts of the Florida reef, at a time when the wind was blowing heavily and the sea running so high, as to break over her with almost every wave, and she was driven so high upon the rocks as to render it impossible for the crew to have gotten her off, even though every part of her lading had been thrown overboard. Indeed, so thoroughly convinced was Capt. Perry of his inability to relieve her, or to save any portion of the cargo (after throwing overboard his entire deck load), he prepared himself to abandon her in his boat, and was only prevented doing so by the appearance of the wreckers, and the prospect which was thus afforded of obtaining assistance. The services of the actors were therefore immediately secured, and the

whole of the remaining cargo was transferred from the brig to the smaller vessels by them, under circumstances of peculiar difficulty, and of great hazard to their own property, and personal danger to themselves; and the brig was then taken from the rocks, and brought to this port, after receiving so much injury while thumping upon them as to require a sum of money almost equal to her present value to put her in a proper state of repair. It is a general rule of decision in this court, and I believe in all other courts of admiralty in this country, when property has been saved from inevitable destruction, under circumstances of much difficulty, hazard and risk to the salvors, to direct that one moiety of that property, or its value, be paid as a compensation for the services thus rendered. This rule, it is true, is not inflexible, and should yield to extraordinary circumstances; as, if the property saved were of great value, and its preservation was not attended with extraordinary danger and labour on the part of the salvors, the proportion of salvage in reference to that value would be much diminished; and, on the other hand, if the value of the property were small, and the hazard and labour of saving it very great, the proportion should be increased so as to afford a compensation in some degree equivalent to the services rendered.

In this case, however, there is nothing perceived which should take it out of the ordinary rule, and the proportion established by it will be decreed to the actors as a reward for their timely and meritorious exertions.

The court has also taken into consideration the request of Captain Perry, that a sale of the brig be directed in the decree to be rendered in this cause, in consequence of the great injury she has sustained, and the difficulty of getting such repairs made at this port as are indispensable to enable her to proceed in safety to sea. But upon an examination of the report of the port wardens as to her condition and value, and the cost necessary to repair her, the court believes that it is not to the interest of those to whom she belongs, or to the office where she is insured, that she should be sold; especially as a sale of her would make it necessary that the whole of her cargo should likewise be sold, as that portion of it which will remain after the payment of salvage could not be reshipped for its destined port without incurring an expense for the charter of a vessel which its value would not justify.

Whereupon it is ordered, adjudged and decreed, that the marshal, after giving five days' notice of the time and place of sale, proceed to sell at public outcry, for cash, the bacon, loose pork, molasses, and such other articles pertaining to the cargo of the brig Lexington as have been reported by the surveyors as being already damaged, or likely to become so by being kept on hand, and so much of the residue of said cargo as will, with that already specified, produce the sum of $6,875 (being 50 per cent. of the appraised value of said brig and cargo), and also the costs of this suit, and that, after raising said sums of money, he pay them into the registry of this court to be distributed according to the terms of this decree; and that he forthwith restore said brig to Nathan Perry, Esquire, her commander, in order that he may have such repairs put upon her as will enable her to proceed to sea; and, after raising said sums of money as aforesaid, that he then restore all the residue of said cargo to the said Nathan Perry, for and on account of all concerned and interested therein. And it is further ordered, adjudged, and decreed, that out of the sums of money to be raised, and paid into the registry of the court, the clerk pay the libellant Roberts, on account of himself and all others concerned, and interested as salvors, in this cause, the aforesaid sum of $6,875, in full for the services rendered by them in saving said brig and cargo; and that he also pay out and distribute the costs of this suit to the persons entitled to the same.

LEXINGTON, The (HOUSE v.). See Case No. 6,767a.

LIBBEY (GILMAN v.). See Case No. 5,445.

LIBBY (HARRINGTON v.). See Case No. 6,107.

LIBBY v. PLATT. See Case No. 8,235.

LIBBY (UNITED STATES v.). See Cases Nos. 15,596 and 15,597.

LIBERTA, The RELIGIONE E. See Case No. 11,694.

Case No. 8,337.

LIDDERDALE v. ROBINSON.

[2 Brock. 159.] [1]

Circuit Court, E. D. Virginia. Nov. Term, 1824.[2]

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—VOUCHERS — ADMINISTRATOR DE BONIS NON — JUDGMENTS AGAINST ADMINISTRATOR—PRIORITY OF DEBTS—PRINCIPAL AND SURETY — SUBROGATION.

1. A commissioner of this court, to whom the accounts of a surviving administrator were referred for settlement, adopted the report of a former commissioner, (to whom the accounts of all the administrators had been referred), made many years before, in a distinct suit, to which there were different parties plaintiffs, and which report did not appear ever to have been acted on or approved by the court to which it was made. When the first report was made, all the administrators were living, but they had been dead long before the accounts of the surviving administrator were referred in the second suit, and the office of the surviving administrator, in the mean time, had been consumed by fire, and many of his papers destroyed with it. *Held*, that vouchers to sustain the account in such a case will not be required. The books of the administrators, if they appear to have been fairly kept, and the account of the former commissioner founded upon them, ought to be received as prima facie evidence, subject to be disproved, so far as either

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

[2] [Affirmed in 12 Wheat. (25 U. S.) 594.]

party can disprove them, or to such exception as either party may be able to sustain.

[Cited in Pulliam v. Pulliam, 10 Fed. 56.]

2. Where an administration bond is joint, one administrator is responsible for his co-administrator.

[Cited in Cox v. Thomas, 9 Grat. 318; State v. Farmer, 54 Mo. 447; Caskie v. Harrison, 1 Hans. (76 Va.) 94.]

3. An administrator de bonis non, who is also the executor of the surviving administrator, who fails for a long period of time to call the agents of the former administrators to an account, is chargeable with the whole balance appearing to be due from those agents, unless he can relieve himself from the charge of gross negligence.

4. Many judgments when assets were rendered against administrators, and assets to a large amount subsequently came into the hands of the administrator de bonis non—*Held*, that these judgments retained the same rank which would belong to the particular instruments on which they were founded. The only effect of such judgments is to give priority to other debts of the same dignity, on which either no judgments or subsequent judgments were rendered.

5. Where there are two sureties on bills of exchange and specialties, and one of them has paid more than his proportion, and his representatives seek contribution out of the estate of his co-surety, the surety who has overpaid will be subrogated to the rights of the creditor. Equity would, indeed, restrain him from recovering more than his proportion, but to that extent, his claim upon his co-surety is precisely as valid as upon his principal, and the representatives of the surety who has overpaid, are entitled to rank according to the dignity of the claims on which such excess was paid. The principle of substitution applies equally to cases arising between co-sureties and those between a surety and his principal.

[Cited in McLean v. Lafayette Bank, Case No. 8,888; Glasgow v. Lipse, 117 U. S. 336, 6 Sup. Ct. 761.]

[Cited in Lyon v. Bolling, 9 Ala. 463; Bowen v. Hoskins, 45 Miss. 183. Quoted in Orem v. Wrightson, 51 Md. 44. Cited in note to New Bedford Inst. for Sav. v. Hathaway, 134 Mass. 73; Hazelton v. Valentine, 113 Mass. 479; Smith v. Rumsey, 33 Mich. 196; Wright v. Grover, 82 Pa. St. 82. Followed in Felton v. Bissel, 25 Minn. 20; Robertson v. Trigg, 32 Grat. 86; Welch v. Strother, 74 Cal. 412, 16 Pac. 22.]

This suit was brought by William Rae and Julia Lidderdale, of London, executor and executrix of William Robertson Lidderdale, who was executor of John Lidderdale, deceased, against James Lyons, administrator de bonis non of John Robinson, deceased. The bill, which was filed in 1820, states, that in the year ——, William Robertson Lidderdale, executor of John Lidderdale, filed his bill against Edmund Pendleton and Peter Lyons, administrators of John Robinson, deceased, claiming satisfaction for four bills of exchange drawn by John Robinson, and taken up under protest by the testator John, for the honour of the drawer. In June, 1797, the cause came on to a hearing, during the sickness and absence of Andrew Ronald, the plaintiff's counsel, when a decree for assets was rendered in their favour for £793 16s. 8d. sterling, with interest on £500 16s. at five per cent. from the 4th day of November, 1765, and on the residue from the 1st day of May, 1766, to be considered as a debt due by simple contract: That William Robertson Lidderdale departed this life in the year 1814, in England, and the plaintiffs, his executors, had lately come to a knowledge of the said decree. That the said Edmund Pendleton and Peter Lyons were both dead, and that administration de bonis non on the estate of John Robinson had been granted to James Lyons, to whose hands assets had recently come to a great amount. The bill prayed that the decree of June, 1797, might be reviewed and reversed, because the debt was decreed as a simple contract, whereas the plaintiffs were in possession of the protested bills on which it was due, which gave it the dignity of a judgment, and that James Lyons, the administrator de bonis non, should be required to render an account, and that the plaintiffs, should be paid their demand out of the assets. A copy of the decree was filed as stated in the bill, and the copy of a judgment, by consent, of November 22, 1797, in an action on the case for $1735 80 and costs, when assets.

On the 12th of June, 1822, the cause came on to be heard on the bill taken for confessed, and on the decree sought to be reviewed, which was filed as an exhibit, on consideration whereof, the court, being of opinion that the complainants were not entitled to have the decree, sought to be reviewed, set aside or opened, directed one of its commissioners to settle and report the administration account of the defendant, and also to report the different debts due from the estate of John Robinson, and of the debts paid by the administrators of the said estate, stating the dignity of each debt, and also the outstanding assets. The commissioner made his report in December, 1822. At the same time, the report was recommitted, with instructions to the commissioner to complete the same, by reporting the accounts between Peter Lyons, surviving administrator of John Robinson, and the estate of John Robinson; and it was farther ordered that he report the debts paid by the administrators, stating the dignity of each, and any additional evidence in support of debts now claimed from the estate. And liberty was allowed for any creditors to exhibit their claims. This report was made in June, 1824. In the progress of the cause, other creditors exhibited their claims against the estate of John Robinson. The representatives of Hanberry claimed the amount of a judgment when assets, rendered in June, 1767. The judgment was for £2089 17s. 4d. sterling, and costs, and a copy thereof was filed as an exhibit. The commissioner reported a very large fund, partly in the hands of the administrator de bonis non, and part not yet collected, respecting which he required the direction of the court. He also reported the claims of creditors, to a great amount, leaving it to the court to ascertain, and settle their respective rank and dignity.

Among these, is the claim of John Smith,

executor of John Smith, deceased. The case is this. John Robinson and John Smith were the joint sureties of Thomas Reid Rootes, who died insolvent, in consequence of which, the sureties paid the debt. John Smith paid more than a moiety of the debt, and his representative filed his bill to obtain contribution from the estate of John Robinson, deceased, who was his joint surety. The original debt was a protested bill of exchange, which, according to the law then in force in Virginia, was of equal dignity with a judgment. On the part of Smith, it was contended that the joint surety who had discharged this debt, was substituted in the place of the original creditor, and that his claim for contribution against his joint surety, held the same dignity that the claim of the original creditor, against the same person, would have held. On the part of the defendant, and of the other creditors, it was contended, that the claim of John Smith was that of a simple contract creditor only, and that he must rank with simple contract creditors. The cause came on, on exceptions to the report of the commissioner of June, 1824.

Before MARSHALL, Circuit Justice, and TUCKER, District Judge.

MARSHALL, Circuit Justice. The counsel for the plaintiffs, Lidderdale and Hanberry, have filed several exceptions to this report, the most important and difficult of which, respects a sum alleged by the administrator de bonis non of John Robinson, to be due to Peter Lyons, the surviving administrator of John Robinson, whose executor the said James Lyons is. The commissioner has stated this claim in different ways.

The counsel for the plaintiffs objects to this account altogether, because he alleges: (1) That it is not supported by vouchers. (2) That Peter Lyons is responsible for his co-administrator, Edmund Pendleton, they having given a joint bond, and Edmund Pendleton appearing to be largely indebted to Robinson's estate. (3) That balances are stated to be due from George Brooke and others, the agents of the administrators for which the said Peter Lyons is responsible.

1. The commissioner states that this account, from 1766 to 1784, inclusive, was collected from the books of Peter Lyons, and from 1799 to the date of the report, is supported by vouchers, and this court must presume that his statement is correct, unless the contrary is shown. The account from the year 1784, to January, 1799, is taken from a report made by Commissioner Hay, in pursuance of an order of the high court of chancery, in which —— were plaintiffs, and the administrators of John Robinson, deceased, were defendants. This part of the account does not show the particular items, but the annual amount of receipts and disbursements. Commissioner Hay's report was made in the year 1799, while the administrators were alive, but does not appear ever to have been acted on by the court. If the transactions were recent, vouchers to sustain the account would of course be required. But in a case of such long standing, where the parties are all dead, strict proof is not to be looked for. It is the less to be expected in this case, as it is known that the office of Peter Lyons was consumed by fire, and that very many of his papers were destroyed with it. In such a state of things, the court is much inclined to the opinion that the books of the administrator, if they appear to have been fairly kept, and the account of Commissioner Hay, founded on those books, ought to be received as prima facie evidence, subject to be disproved, as far as either party may disprove them, or to such exception as either party may make, or be able to sustain. If this course be not pursued, and the books and account be discarded, it would be necessary to remodel the account on such vouchers as either party may be able to adduce. The result of such an account could not be as satisfactory, and probably would not approach the truth as nearly as that which is now before the court.

2. The responsibility of Peter Lyons for his co-administrator must be admitted, but the amount due from that co-administrator cannot be assumed, unless his representative were before the court. It is the duty of the administrator de bonis non of John Robinson, to bring him to an account before that forum which can take cognizance of the case, and he is chargeable with great neglect of duty in this respect, as Edmund Pendleton has been dead twenty years. The court will not, for the present, decide positively on this subject, but must resume the consideration of it, should this unjustifiable delay be continued.

3. The surviving administrator ought to have brought the agents of the administrators to a settlement of their accounts, and this duty, on the death of Peter Lyons, devolved on the administrator de bonis non, who is also executor of the surviving administrator. It appears to me to be reasonable that the whole balances due from these agents should be chargeable to him, unless he can free himself from the charge of gross negligence for having failed to call them to a settlement. The debt due to Peter Lyons, whatever may be its amount, is admitted to be a debt of the first dignity. It is next to be inquired how the remaining creditors rank.

There being many judgments rendered, to be discharged when assets shall come to the hands of the administrators, the first question was, whether these judgments should rank according to their date, and should take rank of other debts on which no judgment had been rendered, or should retain the same rank which would belong to the particular instruments on which they were rendered. This court is of opinion that they retain their original rank, because every

creditor is supposed to be entitled to a judgment when assets, and it is not reasonable that such a judgment should disturb the order in which debts are payable by law, or should have any other effect than to establish the amount, and to give priority to other debts of equal dignity on which either no judgment, or a subsequent judgment, may have been rendered.

Money due to the estate of a deceased person, committed by a court to the said John Robinson (1 Rev. Code 1819, p. 389, § 60), or on judgments against the said intestate in his lifetime, are first in rank. Next, are protested bills of exchange, and then specialties.[3] Among these, judgments on bills of exchange first rank according to their date; and next, protested bills on which no judgments have been obtained, if the requisites of the law have been complied with. Next in order, are debts due on bills which have been paid by securities; on this subject, a question of difficulty has been made. John Smith and John Robinson, were co-sureties on bills of exchange and specialties to a very great amount, on which John Smith paid more than his proportion, and his representatives now claim contribution from the estate of John Robinson. This claim is admitted, but it is contended that it is to be considered merely as a debt on simple contract. The question submitted to the court is, whether a co-surety who has paid a debt, has a right to stand in the place of the creditor, and to be clothed with all the rights and privileges of the creditor, so far as his equity extends, or can resort only to the implied contract which the law raises in such a case. This is a question which depends on the authority of decided cases; it has occurred most frequently in controversies between a surety and the principal debtor.

In the case of Eppes v. Randolph,[4] a bond was executed by Randolph to Bevins, with Wayles as his surety. Randolph afterwards conveyed his estate to his sons, and the creditor obtained a decree against the executors of Wayles for the amount of the bond. A suit was brought by the executors of Wayles against the representatives and heirs of Randolph, alleging the insufficiency of the personal estate, and praying that the estates conveyed to the children might be subjected to the claims of creditors. Other creditors also filed their claims, and insisted that the debt to the executors of Wayles had only the dignity of a simple contract. In delivering his opinion the chancellor said: "That if Wayles's executors had taken an assignment to their trustees of Bevins's bond, they would, in his name, have been entitled to the same relief that Bevins himself would, and that a court of equity would have enjoined the heir of Richard Randolph, deceased, from pleading payment by the sureties' executors: that they ought to have the same remedy as if such assignment had been made." In affirming this part of the chancellor's decree, the president of the court of appeals said "that the appellees, executors of John Wayles, ought to stand in the place of John Bevins, and be considered as bond creditors, so far as may effect the distribution of remaining assets, but not so as to charge the executors with a devastavit on account of payments or judgments to simple contract creditors."

In the case of Tinsley v. Anderson, 3 Call, 329, where the proceeds of the real estate of a living debtor were to be distributed according to the priority of the several liens upon it, the court said: "That all the creditors by judgments or decrees, ought to be paid out of the general fund, according to the priority of recovery, with this reservation, that when a prior creditor shall not have received his money of sureties, or sued out execution on his judgment within a year, he shall yield priority to subsequent judgments on which executions shall have been so issued, or the money received of sureties. In both instances of the money paid by sureties, as well as in all other instances, sureties ought to be placed in the situation of the creditors they shall have paid, or be bound to pay." These two cases establish the principle incontrovertibly in Virginia, that the surety who has paid a debt stands, as respects his claim on the principal or his estate, to every purpose in the place of the creditor. The same principle is recognised in New York, as appears by 4 Johns. Ch. 123, 530.[5] In Lawrence v. Cornell, 4 Johns. Ch. 545, it was enforced against a junior mortgagee. This principle is also recognised in South Carolina, 4 Desaus. Eq. 44.[6]

The principle that a person who has paid money as surety, or on account of another, shall be substituted in the place of the creditor, seems to be familiar in England. In 3 P. Wms. 400, it is laid down by the chancellor, that an executor who has paid beyond the assets which have come to his hands, shall rank as the creditor whose debt he has paid; and in 1 Atk. 134,[7] the chancellor says: "Indeed, where there is a principal and surety, and the surety pays off the debt, he is entitled to have an assignment of the security in order to enable him to obtain satisfaction for what he has paid over and above his own share." The principle is also laid down in 2 Ves. Jr. 302,[8] and 11 Ves. 22.[9]

[3] But by the act of March 29, 1831, which took effect the 1st of June thereafter, it is declared "that in the administration of the personal assets of decedents' estates, debts due by specialty and promissory notes, or other writings signed by the decedent, or some other person, by him or her thereunto lawfully authorized, shall be regarded and taken to be of equal dignity." Sess. Acts 1830–31, p. 102, c. 33.

[4] 2 Call, 103 (Tate's Ed.).

[5] Hayes v. Ward and Scribner v. Hickok.

[6] Tankersley v. Anderson.

[7] Ex parte Crisp.

[8] Ex parte Mills.

[9] Wright v. Morley.

Indeed it seems to be too well settled to be controverted, and we find it generally laid down as an acknowledged rule rather than decided in a contested case.

But it has been supposed that, though this rule must be admitted as applicable to cases between a surety and his principal, it will not apply between co-sureties. I can perceive no reason for this distinction. The principle which the cases decide is this: Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor, as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent, his claim upon his co-surety is precisely as valid as upon his principal. In reason, I can draw no distinction between the cases, and none, I think, has been drawn by the courts. In Parsons v. Briddock, 2 Vern. 608, the sureties who had paid a bond debt, on which a judgment was obtained against Dr. Briddock, were substituted in the place of the creditor, as against the bail to the action in which the judgment against Briddock had been rendered, and the bail was compelled to pay them the money they had paid to the creditor. In this case, the principle of substitution was applied against a surety.

The liability of co-sureties, and the dignity of a debt in a case where a judgment had been discharged by a co-surety, who was entitled to contribution, was decided, on great deliberation, after very solemn argument, in the case of Burrows v. Carnes' Adm'rs, 1 Desaus. Eq. 409.

I was originally strongly inclined to the opinion that, in a case where a party could sue at law, and would be, in a court of law, a simple contract creditor only, he would retain the same rank in a court of equity also, and would not be substituted in the place of the original creditor. But I am satisfied, on examining the subject, that the decisions are otherwise, and I must acquiesce in those decisions. The representatives of John Smith, then, will rank according to the dignity of the claims on which they have paid more than their equal proportion. All other sureties will, in like manner, be substituted for the creditor whose debt they have discharged, and will rank as he would have ranked were he before the court.

NOTE. The court, consisting of Marshall, Circuit Justice, and Tucker, District Judge, being divided in the opinion upon the question whether the claim of John Smith to contribution was entitled to be substituted to the same rank and dignity with the debt which he had paid, as to the excess over and above a moiety thereof, certified that question to the supreme court for its decision. The supreme court unanimously sustained the opinion of the chief justice. See 12 Wheat. [55 U. S.] 594; 6 Cond. Rep. Sup. Ct. U. S. 656.

[NOTE. Further decisions in reference to the interests of James Lyons and Hanberry's executors in the Robinson estate were rendered by a decree (not reported) of this court at the December term, 1828. The claims of the representatives of Capel and Osgood Hanberry having been established by the court as a debt of lowest dignity and the receivers of the estate having transferred, without authority, securities belonging to the estate, to their attorney, the legatees of Peter Lyons objected to this transfer, and obtained an injunction (case not reported) restraining the attorney from paying over the money to his clients. The latter thereupon moved to dissolve the injunction. The motion was overruled. Case No. 5,759.]

Case No. 8,338.

LIDDLE v. CORY et al.

[7 Blatchf. 1.] [1]

Circuit Court, S. D. New York. Oct. 16, 1865.

PRACTICE IN CIVIL CASES—NECESSITY OF COLLATERAL ACTION—MASTERS IN CHANCERY—PROOF TAKEN BEFORE MASTER.

1. Where an injunction, restraining the infringement of a patent, was issued on a final decree in a suit in equity, and a motion was afterwards made for an attachment against the defendant, for violating the injunction by selling an article alleged to be an infringement of the patent, and it appeared that no such article had been sold by the defendant prior to the making of the decree, and it did not appear that such an article existed before the making of the decree, and an issue was fairly raised, on the facts, as to whether such article was an infringement of the patent: *Held*, that such issue could not be disposed of on a motion, on affidavits, but must be determined in a suit brought for the purpose.

[Cited in Buerk v. Imhaeuser, Case No. 2,108; Smith v. Halkyard, 19 Fed. 602.]

2. The case was not a proper one in which to direct proofs to be taken before a master.

This was a motion for an attachment against the defendants [Uzal Cory and William D. Cory] for violating an injunction issued upon a final decree, in a suit brought for the infringement of letters patent, granted to the plaintiff [Robert T. Liddle] for an improvement in air-heating furnaces. After the issuing of the injunction, the defendants sold and caused to be erected, a furnace, which they called the Excelsior Furnace, and which the plaintiff insisted was an infringement of his patent. The motion was founded on affi-

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

davits of experts and others, tending to show that the furnace as erected by the defendants was in principle the same as the plaintiff's furnace. The motion was opposed by affidavits of experts and others, tending to show that all the parts and combinations patented by the plaintiff had been omitted in constructing the furnace in question, leaving it a furnace of common and unpatented form, wholly different in principle from the plaintiff's furnace.

Thomas P. How, for plaintiff.
John J. Latting, for defendants.

BENEDICT, District Judge. The affidavits on both sides have covered many matters which I do not deem pertinent to the question involved in this motion. For the purposes of this motion, the decree in favor of the plaintiff must be deemed conclusive of all questions fairly involved in the suit, and, until it be set aside, as determining beyond dispute the validity of the plaintiff's patent, and that the acts complained of in the suit were an infringement. I therefore pass over the conflicting statements as to what was intended by the parties to be the effect of the decree, and consider only the question whether the sale and erection of the furnace now complained of, was an act manifestly, in substance, a repetition of the acts before complained of, and passed on by the decree rendered in the suit. This question a statement of the facts, as I find them on the proofs before me, will determine.

The plaintiff's invention consists in the construction of the main body of the furnace of one piece of corrugated metal, on the inside of which, by means of plates extending from the top downwards, across the corrugations, a series of tubes is formed around the circumference, so as to form smoke flues opening near the bottom of the body, without any vertical joints between the interior and exterior surfaces, and without the employment of cores in casting. A further part of his invention consists in making the lower section of a circular radiator, which rests upon the body, with its lower sides forming an acute angle, and in combination with small ledges cast at intervals around the V-shaped bottom of the radiator, the object being, by the detention, by means of these ledges, of ashes, soot, and dust upon the bottom of the radiator, to render the bottom more non-conducting. Now, it is shown, beyond dispute, in the affidavits before the court, and, indeed, is conceded by the plaintiff, that the Excelsior furnace, although it has a corrugated body, is without the plates on the inside or the outside, and without any contrivance in their place intended to produce the same result as that produced by the plates in the plaintiff's furnace, the body of the Excelsior furnace being a simple corrugated body, without tubes of any sort whatever upon it. It is conceded, also, that the ledges cast upon the bottom of the radiator of the plaintiff's furnace are omitted in the Excelsior furnace, leaving the radiator with a smooth bottom, not calculated to detain upon it ashes, dust or soot. It is, moreover, made to appear, that no furnace like the Excelsior furnace had been sold by the defendants prior to the entry of the decree in this action, and there is no evidence before me that such a furnace existed before the decree. The Excelsior furnace was got up after the decree, and the defendants swear that it was intended, in good faith, to be so constructed as to avoid using any of the parts or combinations patented by the plaintiff. The experts produced by the defendants sustain them in this view, and make affidavit that the Excelsior furnace embraces none of the improvements secured by the plaintiff's patent, while the experts produced by the plaintiff express the opposite opinion. Such an issue, fairly raised by the facts of the case, cannot properly be disposed on a motion like the present, but should be left to be tried before the court in an action brought for that purpose. To hold otherwise would be to undertake to try an original cause upon affidavits.

It was strongly urged, upon the argument, that an order should be made directing proofs to be taken before a master, where the witnesses could be cross-examined. I should make such an order, without hesitation, if there was any reason to suppose that further proofs would show the changes made by the defendants in their furnace to be merely colorable alterations, introduced for the purpose of escaping the effect of the decree, or if there was any doubt as to what was the extent of the alterations made by the defendants; for, a defendant is not to be permitted to avoid a decree against him by making some slight changes in the article, and then boldly asserting that the new article is materially different from the one already passed upon and is no infringement. But here there is really no dispute as to what the alterations were, and the defendants call upon the court to say whether, in view of the plaintiff's patent, such alterations can be deemed merely colorable, and whether they have not the right to have their effect upon the principle of the plaintiff's patent passed on in a trial before the court, instead of upon a proceeding like the present. It seems to me clear, upon a statement of the case, as I find it, that the differences disclosed to exist between the plaintiff's furnace and the Excelsior furnace should not here be held to be colorable, but that they raise questions not shown to have been raised before between these parties, and which cannot, with propriety, be decided in a proceeding like this.

The motion is, therefore, denied, leaving the plaintiff to his action, where his rights can be fully protected and properly adjudicated upon.

LIDDLE (UNITED STATES v.). See Case No. 15,598.

Case No. 8,339.

LIEB v. INTERNATIONAL INS. CO.

[The case reported under above title in 3 Am. Law T. Rep. U. S. Cts. 143, is the same as Case No. 5,298.]

Case No. 8,340.

LIEBART et al. v. The EMPEROR.

[Bee, 339; [1] 3 Hopk. Rep. 163.]

Admiralty Court, Pennsylvania. Oct. 3, 1785.

SHIPPING—BOTTOMRY BOND — HYPOTHECATION TO CONSIGNEE.

1. A bottomry bond can be entered into by the master only under circumstances of great distress, and when he has no other means of repairing.

[Cited in The Hunter, Case No. 6,904; Leland v. The Medora, Id., 8,237.]

2. Hypothecation cannot be made to a consignee.

[Cited in Greely v. Smith, Case No. 5,750.]

In admiralty.

HOPKINSON, J. Judgment: This is a suit brought on a bottomry bond given by John Walsh to the libellants at Ostend, whereby he hypothecates the ship Emperor, of which he was then the captain, for 4500 florins, equal to £409. 1s. 9d. sterling money of Great Britain, advanced for repairs of the said ship. Whereupon James Oellers, the owner of this ship, and others his assignees, come in and answer to the libel, alleging that this bottomry bond ought not to take effect as an hypothecation, according to the maritime law. The power vested in a master of a vessel to impawn his owner's ship or goods for necessaries furnished in a foreign port, is a legal indulgence founded on the urgency of the case, and for the general benefit of commerce. There are few rules of law more strictly defined than this of hypothecation, and none in which the reason and intention of the law are more manifest. It is thus delineated: "A master of a ship hath no power to take up money by bottomry, in places where his owner or owners dwell." "But when a master is out of the country, and where he hath no owners, nor any goods of their's, nor of his own, and cannot find means to take up by exchange or otherwise. and that for want of money the voyage might be retarded or overthrown, moneys may be taken up upon bottomry." Moll. de J. Mar. bk. 2, c. 11, § 11. "And the money so taken up by the master, is done upon great extremity, and that for the completing of the voyage, when they are in distress and want in some foreign parts." Id. § 12. All the books agree in the spirit of this doctrine. The extreme necessity appears, every where, to be the reason of the law, and the intention, to favour commerce.

Let us now take a view of the circumstances of the present case. The leading facts appear, from the testimony exhibited, to be these: The ship Emperor, John Walsh master, belonging to James Oellers of Philadelphia, sailed for Ostend with a cargo of tobacco on board; the ship and cargo being consigned by the owner to Bine, Overman and Co. merchants at Ostend. This ship was so damaged by a storm at sea, that the captain was obliged to put into the port of Dover, in England, in distress. The captain on his arrival at Dover, immediately sent notice of his situation to the consignees at Ostend, and they speedily furnished him with a credit on London, from which he raised money sufficient to refit his ship. After this, he sailed for and arrived at Ostend, where the consignees took charge of the ship and cargo. Before the vessel arrived at Ostend, Bine, Overman and Co. had accepted bills, to a considerable amount, drawn upon them by Oellers, on the credit of this consignment. Upon closing all accounts, Bine, Overman and Co. found that Oellers had not only drawn upon them to the full amount of the cargo and freight ("the tobacco not selling so well as was expected"), but that there remained a considerable balance in their favour. To secure this balance, they tell Captain Walsh that he shall not leave the port, and even threaten to attach the ship, unless he will repay them the moneys advanced at Dover for repairs, or hypothecate the ship, for security. It was not in Captain Walsh's power to do the one, that is, to repay the money, and he declined the other proposal for some time. But finding expenses accumulating, and that he could not sail without some accommodation, he at last consented to hypothecate the ship. Bine, Overman and Co. then recommended him to Liebart, Baes, Durdeyn and Co. telling him that they would lend money on bottomry; and conducted him to their house, where he executed the bottomry bond, now in question. But no money was paid to Walsh; for the bills for repairs, for which the ship was hypothecated, had long since been discharged by the produce of the credit on London. After this, Bine, Overman and Co. permitted Captain Walsh to sail, and in due time he arrived in the port of Philadelphia. During these transactions, Oellers had failed, and assigned this ship to his creditors, and the question now is, whether this bottomry bond shall operate to the exclusive security of the merchants at Ostend against all other creditors, as a genuine hypothecation would do, on the principles of maritime law.

After a careful consideration of these circumstances, I cannot discover one real feature of that rule of law, which should be the ground of the present suit. True it is that the ship was in necessity, and so is every ship that wants essential repairs. But the owner had credit within reach. The consignees were not far distant. The application was easy and certain, and the consignees no sooner heard of the disaster but they

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

furnished the means of relief. In fact, Bine, Overman and Co. had the strongest inducements to exert themselves in getting the ship repaired at Dover, to enable her to get round to Ostend, for they had made themselves answerable for Oellers' bills, upon the credit of this cargo; it was, therefore, of great importance to them that the cargo should arrive safe to their hands. So that, instead of advancing money to a distressed stranger, they were only taking care of their own security. This motive is manifested by their letter to Walsh at Dover, and still further by their subsequent conduct; for, after they had disposed of the cargo, and found a balance due from Oellers to them, they insist that Walsh shall not sail unless he will hypothecate the ship to Liebart, Baes, Durdeyn and Co. which, from all appearances, seems to be the same thing as hypothecating her to themselves. For the captain received no money from Liebart, Baes, Durdeyn and Co. who were not at all interested in the transaction, and whose names were only made use of to save appearances; for Bine, Overman and Co. well knew that, being consignees, the captain had no power to hypothecate the vessel to them. And, in order to give the bottomry bond the appearance of a genuine hypothecation, they select from the general account the moneys spent in repairs at Dover, and compel the captain to hypothecate the ship, as for those particular charges, to the libellants, who had not advanced one shilling towards that expense. Further, if we look into the accounts we shall find, that although this voyage was not a very successful one, yet the ship cleared all charges accrued since she sailed from Philadelphia, even including the repairs at Dover. But Oellers had drawn upon Bine, Overman and Co. on the credit of the future voyage, long before the vessel sailed from Philadelphia, to raise money to fit her out, and it is these drafts brought into account which make a balance due to the consignees. So that, instead of an hypothecation made to enable a ship to complete her voyage, it was, in fact, made to enable her owner to begin one. Which was never the object of the maritime law in cases of hypothecation. Neither was this law ever designed to give partial advantages in mercantile connexions, or intended to secure the balance of a running account between owners and consignees.

The importance of the present decision to the commercial character of our country has been strongly urged, in favour of the libellants. But I am not apprehensive on this account. The question in view is not to be determined by any municipal law of the country, but by a general law, universally received and understood. And I am of opinion, that our national character would much more suffer by an adjudged precedent, which might open a door for dangerous collusions, by putting it in the power of captains of vessels to saddle their owners with unnecessary engagements, or to give an unfair advantage to foreign creditors, by a fraudulent use of that preeminent lien which the law lays on a ship and goods properly hypothecated. I do not mean to suggest that there has been any fraud or collusion in the present case. It is enough that I do not find the claim of the libellants within the spirit or intention of the maritime law. And, therefore, I adjudge that the bill be dismissed, and that the libellants pay the costs of suit.

From this decision there was an appeal to the high court of errors and appeals. The cause was again argued there, but the judgment of the court of admiralty was confirmed. The following notes, taken at the time, contain the substance of the judgment given in the high court of errors and appeals in the above cause:

"October 3, 1785. The court observed, that the power of a master to hypothecate his owner's ship was a necessary, but sometimes a dangerous power: the court was unwilling to extend this power farther than the law strictly authorized. A genuine hypothecation ought to be the voluntary act of the master at the time when, and in the place where, the moneys were advanced for necessaries or repairs. The money advanced ought to be solely on the faith of the hypothecation, and not on any personal credit. These are incontrovertible principles—the present case not applicable to them. Although the hypothecation was made to Liebart, Baes, Durdeyn and Co. yet it was to secure moneys advanced by Bine, Overman and Co. the consignees. No authority shewn, and none can be shewn, because none ought to be, that an hypothecation can be made to a consignee: great mischiefs might arise if captains could hypothecate to consignees. No authority produced to prove that an hypothecation can be made in any port but that in which the vessel first arrives after the distress and damage sustained. Bine, Overman and Co. did not repair the vessel on the faith of the hypothecation; but this hypothecation was made to secure to consignees the balance of a running account. The court unanimous in confirming the sentence of the admiralty."

LIEMAN (HEYE v.). See Case No. 6,445a.

Case No. 8,341.

LIENOW v. PITCAIRN et al.

[2 Paine, 517.] [1]

Circuit Court, D. Connecticut.[2]

BILLS AND NOTES—LETTER OF CREDIT—GUARANTOR.

1. A letter of credit given by the writer of the letter on himself, as an accommodation,

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

[2] [Date not given. 2 Paine includes cases from 1827 to 1840.]

does not create any debt or contract between the immediate parties to it, for the payment of a sum of money direct; but is only an authority to create a debt by a draft on the party giving it, and an engagement on his part to accept and pay such draft. The latter stands in the character of surety or guarantor for the payment of drafts to the extent of the credit given, if the former chooses to avail himself of it.

2. If the person receiving the letter of credit decline to avail himself of it, it will be a waiver and abandonment of the credit given.

3. The party giving the letter of credit has a right to claim a strict compliance with his engagement.

This was a motion for a new trial on the ground of misdirection in the charge of the court to the jury.[3] The material facts in the cause were briefly these: The plaintiff [Henry Lienow] having in the hands of Samuel Williams, of London, funds to the amount of five hundred pounds sterling, and having occasion for money at Hamburgh and elsewhere in his travels upon the continent, procured from Williams a letter of credit, dated 14th July, 1825, addressed to the defendants [Pitcairn & Brodie] at Hamburgh, requesting them to furnish the plaintiff with money, at Hamburgh, and a credit at Stralsund to the extent of four hundred pounds, and to draw upon him (Williams) for their reimbursement. This letter of credit was presented by the plaintiff to the defendants, upon which they advanced to him £150, and gave him a letter of credit on themselves, dated the 28th July, 1825, at Hamburgh, in which they say: "We hereby accredit you with us to the extent of three thousand six hundred and six marks and twelve shillings, Hamburg Banco, for which sum, or any part, your drafts on us will meet ready honor, on account of the credit opened you with us by our mutual friend, Samuel Williams, of London." The plaintiff, by a letter dated the 21st August, 1825, at Stralsund, addressed to Samuel Williams, informed him that he should leave there the next day for Southern Germany, and mentioning that he had presented his (Williams') letter of credit on the defendants for the partial payment of £150, for which he gave his receipt; and that if he should be in want of funds on the continent, he should draw upon him (Williams). The plaintiff, after his arrival at Paris, and on the 30th of October, 1825, wrote to the defendants that he had seen by the public papers that Williams had failed; and referring to their letter of credit of the 28th of July, informed them that he should shortly be in want of funds, and should avail himself of his credit on them. The answer to this letter, dated the 7th of November, 1825, (which was introduced in evidence on the part of the plaintiff,) contained the following statement: "Mr. Williams' letter of credit, to which ours referred, was for a credit at Stralsund, and money here, (Hamburgh;) the latter we furnished, and the former you informed us would not be required after you went to Paris, whence you would draw direct. His (Williams') failure annuls all credit opened on his account, and we are sorry to be obliged to say we cannot accept any of your bills." The plaintiff, after his return to Boston, on the 9th of January, 1826, drew on the defendants for three thousand six hundred and six marks and twelve shillings, Hamburgh Banco, in favor of Messrs. Godeffray & Son, which the defendants refused to accept. Upon this evidence the court below charged the jury that the plaintiff was not entitled to recover.

THOMPSON, Circuit Justice. From this statement of the case it is very clear that none of the plaintiff's funds have, in point of fact, come into the hands of the defendants, and if they are to be made responsible for the loss occasioned by the failure of Williams, it ought to be thrown upon them by reason of some well-settled rule of law. This letter of credit given by the defendants to the plaintiff, did not create any debt or contract between the immediate parties to it, for the payment of a sum of money direct; it was only an authority to create a debt by a draft on the defendants, and an engagement on their part to accept and pay such draft. The defendants, therefore, stand in the character of sureties or guarantors of the payment of the plaintiff's drafts to the extent of the credit given, if the plaintiff choose to avail himself of it. If A. should give to B. a letter of credit upon a mercantile house, for goods to a given amount, and B. did not see fit to avail himself of it, this would surely not give him any cause of action against A., and it could make no difference whether A. had collateral security given to him or not. From the nature of such transactions it must necessarily rest in the discretion of the person who receives the letter of credit, whether he will avail himself of it or not; he may, therefore, relinquish or abandon the authority or right which he had to use the credit given him by such letter. The letter of credit is given to enable the party receiving it to contract a debt with some third person, under the guaranty of the person giving the letter. The bill drawn by the plaintiff, after his return to Boston, and with full knowledge of the failure of Williams, cannot affect the rights of the present parties, or alter the nature of this transaction; this was evidently done as a mere matter of form. There is nothing to warrant the conclusion that the drawers took this bill upon the credit of the defendants' letter, or that any consideration was paid for it; and, indeed, the action itself shows that the interest of no third party is involved in the transaction.

The question then resolves itself into the inquiry whether the plaintiff had not, before

[3] For rules, and numerous cases relative to new trial on the ground of misdirection of the judge, see 3 Grah. & W. New Trials, p. 705 et seq.

he heard of the failure of Williams, so far relinquished all right to avail himself of this letter of credit, as to preclude him from throwing the loss upon the defendants. The letter, upon its face, assumes to guarantee the plaintiff's drafts, on account of the credit opened by Williams; and his letter to the defendants shows that the credit which the plaintiff wanted was at Stralsund.[4] The undertaking of the defendants was, therefore, to give the plaintiff such credit at that place, and not at any other place where he might see fit to draw or make his bills payable. This might have been a matter of some importance to them; and if they stand in the character of sureties, they have a right to claim a strict compliance with their engagement. But, independent of this, it is very clear, from the evidence, that this credit was to be used at Stralsund, and if not used there, it was not to be used at all.

The defendants' letter to the plaintiff, of the 7th of November, shows very satisfactorily that such was the understanding of the par-

[4] In England it seems to be at this time questionable whether a party who advances money upon a general letter of credit can sustain an action upon it. Russell v. Wiggin [Case No. 12,165]; Bank of Ireland v. Archer, 11 Mees. & W. 383. The reason assigned is, that there is no privity of contract between them. It is there assumed that it is only a contract between the drawer of the letter and the person for whose benefit it is drawn. But in this country the contrary doctrine is well settled. Letters of credit are of two kinds, general and special. A special letter of credit is addressed to a particular individual by name, and is confined to him, and gives no other person a right to act upon it. A general letter, on the contrary, is addressed to any and every person, and, therefore, gives any person to whom it may be shown, authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes in legal effect the same as if addressed to him by name. Russell v. Wiggin [supra]; 12 Mass. 154; 2 Metc. [Mass.] 381; 12 Wend. 393; [Adams v. Jones] 12 Pet. [37 U. S.] 207; Birckhead v. Brown, 5 Hill, 641; Story, Bills. See Beam. Lex. Mer. 444. But these general letters of credit may be subdivided into two kinds, those that contemplate a single transaction, and those that contemplate an open and continued credit, embracing several transactions. In the latter case they are not generally confined to transactions with a single individual; but if the nature of the business which the letter of credit was intended to facilitate, requires it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him. Thus a general letter of credit may be issued to a person to enable him to purchase goods in the city of New York, for a country store. The very nature of the business requires him to deal with different individuals and houses, in order to obtain the necessary assortment. It has never, as I am aware, been questioned that the guarantor might be bound to several persons who should furnish goods upon the credit of the letter. So letters are issued by commission houses in the city, to enable persons to purchase produce in the Western states. The money is obtained from the local banks in those states by drafts drawn upon those houses, and upon the faith of the letters of credit. It may often happen that a single bank cannot furnish the requisite amount, or it may be necessary to use the money in different and distant localities. I am not aware of any question ever having been raised as to the authority of different banks to act upon the same letter of credit. It is absolutely necessary that such should be the effect of them, in order to facilitate the commerce of the country, and to carry out the object of the parties in issuing the letters of credit. Birckhead v. Brown, 5 Hill, 641; Russell v. Wiggin [supra]. Pratt, J., delivering the opinion of the court in Union Bank v. Coster, 3 Comst. [3 N. Y.] 203.

Letters of credit usually contain a request that some one will advance money, or sell goods to a third person, and an undertaking on the part of the writer that the debt which may be contracted by the third person in pursuance of the request shall be duly paid. These letters have been divided into two classes, general and special. They are general when addressed to any and all persons, without naming any one in particular. They are special when addressed to a particular individual or firm by name. When the letter is addressed to all persons, it is in effect a request made to each and every one of them, and any individual may accept and act upon the proposition contained in it; and on his doing so, that which was before indefinite and at large, becomes definite and fixed: a contract immediately springs up between the person making the advance and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter at the beginning. I can see no difficulty in this, for there is plainly a privity of contract between the parties. Watson v. McLaren, 19 Wend. 557, and 26 Wend. 425, in error; Boyce v. Edwards, 4 Wheat. [17 U. S.] 111; Adams v. Jones, 12 Pet. [37 U. S.] 207; Lawrason v. Mason, 3 Cranch [7 U. S.] 492; Bradley v. Cary, 8 Greenl. 234; Russell v. Wiggin [supra]; and same case cited in Story, Bills, 546, note. And see Carnegie v. Morrison, 2 Metc. [Mass.] 381. When the letter is special, or, in other words, addressed to a particular individual, he alone has the right to act upon and acquire rights under it. If any one else attempts to accept and act upon the proposition contained in the letter, he comes in as a mere volunteer, and he cannot by thus thrusting himself forward create any legal obligation on the part of the writer. There has been no communication, and is no privity of contract between them. Robbins v. Bingham, 4 Johns. 476; Walsh v. Bailie, 10 Johns. 180.

In Russell v. Wiggin [supra] and cited in Story, Bills, 546, note, the defendants gave a letter of credit to Breed, by which they engaged to honor the bills which might be drawn in India by Breed's agent. The agent drew bills on the defendants, which the plaintiffs took on the faith of the letter. The defendants refused to accept when the bills were presented, and the plaintiffs thereupon sued and recovered on the letter of credit. Mr. Justice Story went mainly upon the ground that the letter amounted to a virtual acceptance of the bills. If that be so, and the action had been brought upon the bills themselves, there could be no good objection to the recovery. But I should find great difficulty in saying that the plaintiffs could sue on the letter of credit, for the reason that they were not parties to it. I should agree with the four eminent English barristers who gave their opinion that by the law of England the action would not lie, because there was no privity of contract between the parties. But it is not necessary to pass upon that question, for here the defendants never agreed with any one that they would accept and pay bills. They only requested Brown & Co. to accept, and undertook to keep them indemnified. That was not a negotiable promise upon which the plaintiffs can sue. The case of Carnegie v. Morrison, 2 Metc. [Mass.] 381, stands much upon the same principle with the one which has just been noticed.

ties; and this letter being introduced by the plaintiff, is competent evidence for the defendants, so far as it makes in their favor as well as against them. They there say: "You informed us you should not require the letter of credit after you went to Paris, whence you would draw direct." That is, direct on Williams. This fact, as also this construction of the letter, is fully corroborated by that of the plaintiff to Williams of the 21st of August, at Stralsund, where, he says, he had presented his letter of credit to the defendants for a partial payment of £150; and that, if he should be in want of funds on the continent, he should draw direct on him (Williams). If the plaintiff had supposed that his funds, to the amount of £400, had been transferred from Williams to the defendants, where the necessity or propriety of their writing him? This letter will not admit of the construction that he should draw on account of other funds which he had in Williams' hands; for, if that had been the case, it was altogether irrelevant and unimportant to state that he had only drawn for a partial payment on the defendants. This letter admits of no other reasonable interpretation than that he had drawn on the defendants for £150, and that for the residue of the £400, he should draw direct on him, (Williams,) and not circuitously through the defendants, if he should want any more funds on the continent. After this letter, Williams could not have transferred these funds to the defendants, and thereby exonerated himself from payment to the plaintiff. Williams had in no way become absolutely responsible to the defendants for the amount of the £400. He had engaged to become security or responsible for advances to the plaintiff to that amount; but until such advances were made, or the defendants had made themselves answerable therefor, they could have no claim upon Williams; he had only authorized them to draw on him for reimbursement, which necessarily presupposes advances to have been made by them to the plaintiff. The plaintiff had undoubtedly a right to waive or relinquish the benefit or use of this letter of credit; and whether he had done so or not was submitted to the jury; and I see no ground upon which that verdict ought to be disturbed. Motion for a new trial denied.

LIEUTENANT ADMIRAL CALLOMBERG, The (LAWRENCE v.). See Case No. 8,139.

LIFE ASS'N OF AMERICA (STELLWAGEN v.). See Case No. 13,359.

LIFE ASS'N OF AMERICA (WILSON v.). See Case No. 17,818.

LIFE INS. CO. (HOLLOMAN v.). See Case No. 6,623.

LIFE INS. CO. (PARTRIDGE v.). See Case No. 10,786

LIFE INS. CO. (TERRY v.). See Case No. 13,839.

Case No. 8,342.

LIGGETT et al. v. MARSHALL et al.[1]

Circuit Court, D. Kentucky. Nov. 27, 1812.

PUBLIC LANDS—LOCATION AND DESCRIPTION—NEGATIVE AND POSITIVE TESTIMONY.

[1. A certificate and entry describing the land as "lying on the north side of the Kentucky river, * * * about four miles from the river," is too general, and is not saved by the special locative description "on a small branch called Rockhouse," where it does not appear that there was at that time a branch generally known by such name by the persons conversant in that vicinity.]

[2. The rule as to comparative weight of positive and negative testimony does not apply where witnesses testify that a certain fact was notorious in a certain vicinity, while others residing there testify that they had no knowledge of it.]

[3. Notoriety as to the name of a small branch used as a descriptive and locative call in a certificate and entry subsequent to the time of such entry, but prior to the time the rights of others attached, is not sufficient to sustain a claim thereunder.]

[Cited in Simms v. Dickson, Case No. 12,869.]

[This was an action in ejectment by Robert Liggett and others against Thomas Marshall and others.]

J. Allen, for complainants.

H. Marshall, for defendants.

TODD, Circuit Justice. The defendants, having the legal title, claim that they shall not be divested of it, unless the complainants can show a superior equitable title, derived agreeable to the provisions and directions of the land laws. This principle has been long well and correctly settled as it is claimed.

The complainants claim and found their equity on the following certificate and entries:

"December 27th, 1779. Bartlett Searcy this day claimed a settlement and pre-emption to a tract of land in the district of Kentucky, lying on the north side of the Kentucky river, on a small branch called Rockhouse, about four miles from the river, by the said Searcy's settling in the country in the year 1777, and residing ever since. Satisfactory proof being made to the court, they are of opinion that the said Searcy has a right to a settlement of 400 acres of land, to include the above location, and the pre-emption of 1,000 acres adjoining. Certificate not to issue until the further order of the court. Certificate issued for 1,400 acres, by order of the court at Bryants."

"January 17th, 1780. Bartlett Searcy enters 400 acres in Kentucky, by virtue of a certificate, etc., lying on the north side of Kentucky, on a small branch called Rockhouse, and about four miles from the river."

June 23rd, 1780. Robert Burton, Ass'ee of Bartlett Searcy, 1,000 acres on Rockhouse, a branch of Kentucky, on the north side.

[1] [Not previously reported.]

about four miles from the river, adjoining and around his settlement."

The description and location calls in the certificate, granted by the court of commissioners, and of the entry for the settlement made with the surveyor, are substantially the same. It is contended on the part of the defendants, and it is measurably yielded on the part of the complainants, that both the certificate and entry with the surveyor for the settlement of 400 acres are defective in general description. The general descriptive parts of each are "lying on the north side of the Kentucky, about four miles from the river." At what point on the river is a subsequent inquirer or locator to set out to travel the four miles from the river? He has the whole distance from Leestown, as the lowest, to Boonesborough, as the highest, point (at that time of general resort and notoriety), to examine, —a distance nearly (if not upwards) of one hundred miles. This is giving too great scope of country for subsequent locators to explore, and is imposing on them more than the reason of the case or law requires, and therefore the general description given in the certificate and entry must be considered defective. An entry defective in general description might still be good and valid if it contains special locative or descriptive calls. What are the special locative or descriptive calls of this certificate and entry? They are "on a small branch called Rockhouse." This location and description is also defective, upon the face of the entry, because no clue or description is given by which "a small branch called Rockhouse" can be found, for which the entry must be decreed invalid, unless from the proof in the cause it shall appear that there is a small branch which was generally called and known by the name of "Rockhouse" at the time the certificate was granted and the entry was made, by the generality of those persons who were conversant in its vicinity. This renders it necessary to examine the proofs in the cause.

The depositions of six or seven witnesses have been taken on the part of the complainants to identify and prove the notoriety of Rockhouse before and at the time the certificate was granted and the entry was made. Some of these witnesses swear that in 1775 or 1776 they became acquainted with a spring called Rockhouse, and have never known it called by any other name since. Only one of them deposes that it has been generally called and known by that name since that time, and he, on his cross-examination, is not certain at what time he first saw it, nor in what year he first heard it, or by whom or from what circumstances it was so called, but believes it was in his early acquaintance in those parts, and that it was pretty generally so called at that time; yet he can't tell from what circumstance he founds his belief as to time. He is certain he saw it in 1784. Another witness deposes that he became acquainted with the spring called Rockhouse in the year 1775. He has since seen it, and has never heard it by any other name. This does not prove that he then knew it by that name. He does not state the time when he first knew it by that name. Others of these witnesses, on their cross-examination, disclose an ignorance of other objects in the vicinity which would attract attention and impress themselves upon the mind as strongly as this spring. Some of them are ignorant of Power's Run, immediately in the neighborhood, a water course running above ground and ninety-two miles long; yet they have no recollection of it, but can speak with certainty as to this spring in a sink hole, the water of which runs under ground, and is visible only a short distance. These depositions, alone considered, leave the mind doubtful as to the fact of notoriety. The witnesses on the part of the complainants have in their depositions named many persons who composed the different companies conversant in that quarter of the country at that time, a great number of whom, together with others equally well acquainted and conversant in the vicinity, have deposed that they never heard of a spring or branch called Rockhouse till subsequent to the granting of the certificate and the making the entries. Some of them knew the spring by one name, some another, and some say it was called by various names, but they never heard it called by the name of Rockhouse till a time subsequent to the origin of Searcy's claim. A review of this mass of testimony negatives the fact as to notoriety.

It has been urged by the counsel for the complainants, that it is the rule in law, that the evidence of one positive witness countervails the evidence of many negative witnesses, and therefore the great preponderance in numbers on the part of the defendants should not avail, and that great allowance should be made on account of the death, removal, and recollection of witnesses. The preponderance in favor of the defendants is three to one. The witnesses on the part of the complainants say that fact as to which they depose was notorious, or, in other words, known to the generality of those who were conversant in that quarter of the country. Now, if three out of four who are referred to as knowing the fact, whose objects were exploring lands, hunting springs, and making improvements, and these were the topics of conversation and full and free communication thereon, depose that they have no knowledge of it, can it be said that the fact did exist? If they had no knowledge of it, it was not generally known. Nor can this kind of testimony be properly called "negative." This point has been well and correctly settled by the court of appeals of this state in the cases Wilson

v. McGee [1 Bibb, 34], and Williams v. Taylor [Id. 41]. The complainants have also taken the depositions of other witnesses as to the notoriety of Rockhouse, about the time the certificate was granted and the entries were made, some of whom, interested in the question, though not in the event of this suit, show a strong bias in their testimony to support this claim. Although these witnesses are deemed competent, their interest in the question is a circumstance which might have influence in weighing their credit; but their testimony, as well as the others, will be found to relate to a time posterior to the granting the certificate and the making the entries. The counsel for complainants contends that the notoriety acquired subsequent to the time of the making the entries, and prior to the time when the claim of the defendants attached to the land in controversy, will be sufficient to sustain this claim. This position appears plausible, and was illustrated with much ingenuity, but will be found to be contrary to the whole current of decisions in this country. Scarcely a case can be examined but it will be seen that the court of appeals, when speaking on the subject of notoriety, uses the phraseology, "before and at the time of making the entry." Frazier v. Steele [Sud. 334]; Morgan v. Robinson [Sud. 228]; Wilson v. McGee [1 Bibb, 34]; Cleland's Heirs v. Gray [Id. 35]; Ward v. Lee [Id. 32]; Craig v. Baker [Hardin, 281]. Were I convinced that these cases were decided upon incorrect principles, I might disregard them; but, as I am not, they will be respected as the decisions of the highest tribunal of the country. It is therefore considered by the court that the complainants' bill be dismissed, and their injunction dissolved, and that the defendants recover of the complainants their costs by them in this behalf expended.

LIGHTER.

[NOTE. Cases cited under this title will be found arranged in alphabetical order under the names of the boats; e. g. "The Lighter Una. See The Una."]

Case No. 8,343.

LIGHTNER v. BOSTON & A. R. CO.

[1 Lowell. 338.] [1]

Circuit Court, D. Massachusetts. June, 1869.

PATENT—INFRINGEMENT.

The Boston and Worcester Railroad Company was consolidated with the Western Railroad Corporation under authority of an act of the legislature of Massachusetts, which vested in the new corporation called the "Boston and Albany Railroad Company," all the powers, rights, franchises, &c., of the old corporations. *Held*, the new corporation might lawfully use a patented axle box which both the old corporations had been licensed to use.

[Cited in Montross v. Mabie, 30 Fed. 236; Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 79.]

By an agreed statement of facts it appeared that the plaintiff [John W. Lightner] was the patentee of a certain improvement in axle boxes for railway cars, and that his letters-patent [No. 5,935, originally granted Nov. 21, 1848] were extended for seven years from November 19, 1862; that he afterwards granted licenses to the Boston and Worcester and Western Railroad Corporations, respectively, to use his improvement on all cars belonging or which might thereafter belong to said corporations. The defendant corporation [The Boston & Albany R. Co.] was formed by the consolidation of those two companies under the provisions of an act of the legislature of Massachusetts passed in 1867 (chapter 270), since said licenses were granted. The questions presented were whether these licenses authorized the defendants to use the invention on cars formerly belonging to the old companies and on those made by the defendants since the union, or either of them. The legislature of Massachusetts, by the act already referred to, granted to the Western Railroad Corporation, whose road then extended only to Worcester on the east, the right to buy the road property and franchise of any other railroad ending in Boston, or to unite and consolidate its stock with any other such company, and especially with the Worcester Railroad Company, or to make a new and independent line of railroad from Worcester to Boston. And it declared that if a consolidation should be made, the new corporation should have, hold, and enjoy all the powers, rights, privileges, franchises, property, claims, demands, and estates which at the time of such union were held and enjoyed by either of the then existing corporations.

J. E. Maynadier, for plaintiff. It is not disputed that upon the union being made there vested in the new corporation, by virtue of this act, all the property, &c., which was in its nature capable of assignment, as, for instance, the cars themselves to which these axles were attached; but the right to use the improvement could not pass by any grant legislative or other, because that right existed only in each licensee as a distinct legal entity, and was not capable of transmission.

G. S. Hale, for defendants.

LOWELL, District Judge. A mere authority to use a patented invention will not always and perhaps not usually be transferable. Whether it is so or not will depend in each case on the terms or nature of the contract. The authority given by the licenses produced in evidence extends to all cars which either of the companies might find it

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

necessary or convenient to own, wherever they might use them, and to the use even of the unlicensed cars of others, so far as any demand against these companies is concerned, upon the licensed roads respectively; reserving a right to sue unlicensed owners of cars, but not to enjoin their use upon the licensed roads.

The gist of this contract clearly is an unlimited use on the roads from Boston to Albany without interruption, and the use of an unlimited number of cars bonâ fide owned by the companies. There is nothing personal in all this, not even a reliance on the personal credit of the licensees, for the consideration was money paid down. I cannot see that the union of the two lines under one management can affect the plaintiff unfavorably. Indeed it was admitted at the argument that the use was not changed. The nearest analogy that I can think of is that of two persons, each authorized to use the invention, becoming partners and using it jointly in precisely the same business as before. Can it be contended that such a use would be unlawful, and that the two could be enjoined from doing what either alone might do? It is true that the defendant corporation is distinct from either of its component corporations, but that is a mere matter of detail and convenience. The old corporations have never been dissolved, and might well enough be held to exist for all purposes for which their continuance is necessary, as indeed the statute says they shall continue for certain purposes.

The license to the Western Railroad Corporation appears to contemplate a state of things analogous to what now exists; for it stipulates that the licensee may use the invention on all roads, "that may be operated by said company, or may hereafter be constructed, owned, used, or leased by said company."

Upon consideration of these contracts, I hold that they are transmissible by succession to a corporation formed of a union of the two licensees, and succeeding to the rights, duties, and obligations of both. Judgment for the defendants.

Case No. 8,344.

LIGHTNER v. BROOKS.

[2 Cliff. 287.] [1]

Circuit Court, D. Massachusetts. May Term, 1864.

TRESPASS—PARTIES DEFENDANT—JOINT AND SEVERAL LIABILITY—INDEPENDENT CONTRACTOR.

1. A railroad corporation made a contract with a manufacturer for the building of certain cars, to contain, among other things, a certain patented improvement of a third party. The contract was, in behalf of the corporation, signed by the chairman of the directors, as chairman. The contractor had no license to use the patented improvement. Suit by the patentee against the said chairman. *Held*, the defendant's contract could not be construed as authorizing or contemplating any trespass upon the rights of the patentee, and that he was not liable.

2. Both the master who commands the doing, and the servant who commits the act of trespass, may be made responsible as principals, and may be sued jointly or severally.

[Cited in Estes v. Worthington, 30 Fed. 466.]

3. But in this case, even if the contract be regarded as that of the defendant, it does not amount to a command, direction, or authority to the contractor to use the patentee's invention without license, neither is there any reason to infer that there was any such relation as that of master and servant, either between the contractor and the defendant or between the contractor and the railroad company.

[Cited in Lightner v. Kimball, Case No. 8,345.]

4. Whether the rule would be different if the materials had been furnished by the company, and the contractor had been at work in their shop, quaere.

5. Unless it be assumed that the defendant contracted that the builder of the cars should use the plaintiff's improvement without license, it cannot be admitted that the contract furnishes any ground to infer, that any violation of the rights of the plaintiff were intended by a stipulation for the delivery of the cars to the railroad company.

Trespass on the case [by John Lightner against J. W. Brooks] for an alleged infringement of a patent [No. 5,936]. Facts agreed. The defendant was a stockholder in the Hannibal and Saint Joseph Railroad Company, which is a corporation created by the laws of the state of Missouri, and was also chairman of the board of directors of said company. The meetings of the directors were usually held in Boston, in this commonwealth. In November, 1858, the corporation made an agreement with one Osgood Bradley to construct for them twenty-six passenger cars. Among other things, the contract provided that the trucks were to be furnished with safety-beams, double-connection brakes, swing-motion, and Lightner boxes. The agreed statement also showed that the contract was negotiated and executed in behalf of the corporation, by the defendant, as chairman of the board of directors, and that he transacted the business pursuant to a vote of the directors authorizing his predecessor in office to contract for such amount and kind of rolling stock as he might deem expedient. The contract was made in behalf of the company by J. W. Brooks, chairman. The cars were built by the contractor as agreed, and contained what are called Lightner boxes, which it was admitted were the same, or substantially the same, as those described in the plaintiff's patent. All the cars were completed within the time specified in the declaration, delivered to the railroad company pursuant to the terms of the contract, and up to the time of the commencement of the suit had been used by the corporation as part of their rolling stock. It was agreed, if the court was of opinion that the defendant was

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

not liable, then a verdict was to be rendered in his favor; otherwise, the agreed statement was to be discharged and the case to stand for trial.

Causten Browne, for plaintiff.

The facts show a valid patent. Infringement by the making of certain cars for, and their use upon, the Hannibal and Saint Joseph Railroad. The cars were made and put on the road by the direction of the defendant, acting upon his own judgment and responsibility. These facts are understood by the plaintiff to bring the case directly within the terms of a late decision of the United States circuit court for the Second circuit. Goodyear v. Phelps [Case No. 5,581], November 28, 1853, Nelson, J.; Poppenhusen v. Falke [Id. 11,280], 1862, Shipman, J. It is claimed that defendant is liable, both for making and using the infringing cars. As to making, it was done by one Bradley, but to order, and his employer is liable as well as himself. Bryce v. Dorr [Id. 2,070]. Brooks and Bradley might have been joined. Buck v. Cobb [Id. 2,079]; Dodge v. Bassett [unreported], Sprague, J. 1861. And if so either may be sued separately. But the defendant was the employer, who, in the exercise of his own discretionary power, procured these cars to be made. So with the use of the cars on the Hannibal and Saint Joseph Railroad. They were put upon the road by the direction of the defendant. They were continued in use by his direction or that of the board of directors; and if the board of directors would be liable as users, the defendant is liable as user, as one of that unincorporated body. The defendant seeks to defend himself both as to the making and using, by showing that he has done so by authority of the company. But the unlicensed manufacture and use are mere torts. Not nonfeasances or misfeasances for which a principal alone is answerable; but malfeasances which no agency can protect, and for which the agent is directly and personally answerable. Story, Ag. §§ 311, 312, and cases; Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & S. 259. These cases are selected because the acts for which the agents are personally charged were simple torts without fraud, &c. Cases bearing specially upon the defendant's case as a director of the company, are Salmon v. Richardson, 30 Conn. 360; 1 Chit. Pl. 81, 83; Bell v. Josselyn, 3 Gray, 311; 2 Greenl. Ev. § 68; Com. v. Ohio & P. R. Co., 1 Grant, Cas. 329; Calhoun v. Richardson, 30 Conn. 210. The directors, by their agent, Brooks, put these cars in use upon the road; they had the right to put whatever cars they thought proper (for they gave Brooks that power) in use on the road. They had a right to substitute others, if they found those already there improperly there. It is a fair inference from the agreed facts that the directors knew the cars had gone upon the road and contained Lightner boxes. They then directed their continued use with Lightner boxes, and are users themselves. If so they are liable jointly and severally.

Sidney Bartlett, for defendant.

As a general principle an agent of a corporation, acting in its behalf, who authorizes the commission of a tort, for its benefit (whether such agent be president, director, superintendent, or stockholder) is personally responsible to the injured party. The fact that he has or has not an interest, or does or does not derive a benefit from the act, has no influence upon the question of his liability. That liability results from his knowingly participating in an act which is a tort. This contract is not an authority or direction to affix a patented article to the cars without license of the patentee. The legal and just implication is not, that it is intended to violate the patent of the plaintiff, but that the manufacturer charges in his price and will obtain, or has, the required license. If it could have been shown that defendant, after the delivery of the cars to the corporation, learned and knew that Bradley had affixed Lightner boxes to the cars without license, and that they had since been used by the corporation, and that defendant had had authority to interfere and direct the general agent to cease using them, still defendant could not be charged with a tort. Mere inaction, when one has power to interfere and prevent a trespass, does not make one a trespasser. His failure to interfere might make him liable to his employers for neglect of duty. In such case plaintiff's remedy is against the manufacturer or the corporation. Story, Ag. 370. There is nothing to show that defendant ever knew that Bradley had, without license, affixed plaintiff's boxes to the cars, and he must consequently be deemed ignorant of any violation of plaintiff's patent. Moreover, in the agreed statement of facts there is nothing to show that defendant had in himself any authority in any manner to interfere to prevent the use of the cars; and there is nothing in the case or in the law, to authorize any single director, though he be chairman of the board, and a stockholder, to govern the proceedings of the superintendent and general agent.

CLIFFORD, Circuit Justice. The argument for the plaintiff is that the defendant is liable, because it is insisted, that whenever an agent of a corporation assumes to authorize, or directs the commission of a trespass, the agent assuming to confer the authority, or who gives the directions, is himself personally liable to the injured party, although he did not directly participate in the commission of the wrongful act. Undoubtedly all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in

damages to the injured party. Both the master who commands the doing, and the servant who does the act of trespass, may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect. Herring v. Hoppock, 15 N. Y. 413; Castle v. Bullard, 23 How. [64 U. S.] 185; Baker v. Lovett, 6 Mass. 80; Smith v. Rines [Case No. 13,100]; Murray v. Lovejoy [Id. 9,963]. But the question in this case is whether the agreed statement shows that the defendant ever commanded, procured, or in any manner authorized or directed the wrongful act which is the subject of complaint.

He denies that the terms of the contract, even if it be regarded as his contract, which it is not, amounts to any command, direction, or authority to make or use the improvement of the plaintiff without license, and consequently insists that none of the principles suggested, which he admits are correct, have any application whatever to the facts of the case. Referring to the agreed statement, it will be seen that all the defendant did, whether as agent or otherwise, was to make the contract for the twenty-six cars, which when completed, were to be delivered to the company for their use. The terms of the contract were that the cars, when completed and ready to be delivered, should contain the improvement in question, but he neither commanded, directed, or stipulated that the contractor should infringe the patent of the plaintiff, or that he should make or use his invention unlawfully or without license. Patentees have the exclusive right to make and use their inventions, and vend the same to others to be used, for the period of time specified in their patents. The exclusive right of vending the improvement to others to be used is as much a part of the monopoly, as the exclusive right to make and use the same, and in respect to improvements like that of the plaintiff, much the greater portion of the value of the monopoly secured by the patent consists in the right of sale, and transfer of that right, by license or assignment. The assignees and licensees accordingly become the lawful manufacturers of the patented improvement, and common experience shows that they are as frequently, if not much oftener, the lawful vendors of the improvement than the patentee. When the defendant in this case contracted that the cars should contain the improvement of the plaintiff, he did not command or authorize the contractor to infringe the patent of the plaintiff, and there is not a word in the contract to indicate that the defendant contemplated any such infringement, or that he had any reason to believe that any infringement of the rights of the plaintiff would ensue, as a legitimate consequence of the contract. The person contracting in this case was not the servant of the defendant, and the agreed statement furnishes no ground to infer that there was any such relation as that of master and servant, either between the contractor and the defendant, or even between the contractor and the railroad company. On the contrary, the clear inference from the whole case is, that the contractor was in the exercise of an independent business, working in his own shop, furnishing his own materials, and selecting, employing, and paying his own workmen, wholly independent of the company or of the defendant. Whether the rule might or might not be different if the materials had been furnished by the company, and the contractor had been at work in their shop, as their servant or mere employee, it is not necessary to determine, because there is not a fact or circumstance in the case to justify or support any such theory. The case shows that the contractor was a carbuilder, and that the defendant, as the agent of the company for that purpose, contracted with him to construct twenty-six cars for the company, according to certain written specifications, which made a part of the contract. The specifications, as furnished, enumerated the improvement of the plaintiff, and the contractor agreed that the cars when completed and offered for delivery to the company, should contain that improvement. He built the cars containing that improvement, and within the time specified in the contract delivered the same to the company, and the same have ever since been in their use as part of their rolling stock. Taken as stated, it is clear that no reasonable construction of the contract can authorize the conclusion, either that the defendant committed a trespass, or commanded or directed one to be committed by the contractor.

Where parties contract for implements, machines, or structures to contain any of the modern patented improvements, without any knowledge that the contractor is an infringer, or intends to use the improvement without authority, it is not the just and legal implication from the contract that the party ordering the article contemplates that the contractor will violate the rights of the patentee, or that he thereby commands or directs an infringement. Such contracts are now of daily occurrence, and unless there is some proof of concert, or something in the terms of the contract to indicate a contrary intent, the presumption must be that the person ordering the article either supposed that the contractor had the right to use the improvement, or, as part of the price to be paid by the purchaser of the article ordered, would procure the right of use from some person authorized to grant it for that purpose. The opposite theory cannot be supported without imputing fraud to the party ordering the article, which is never to be presumed without proof, and therefore, as there is no proof of the imputation, the theory cannot be sustained. Granting

the rule of law to be so, still, it is insisted by the plaintiff that the defendant is nevertheless liable, because it appears that the cars so contracted for by him were to be delivered, and were delivered to the railroad company, and have ever since been in use by the corporation. The proposition of fact deduced from that statement is, that the cars were put upon the railroad by the direction of the defendant, and that they have ever since been continued in use by his direction. Were the facts so, it may be that the consequences supposed would follow, but the difficulty with the proposition is that the theory of fact assumed is not sustained by the agreed statement. The contractor delivered the cars to the railroad company, pursuant to the terms of the contract. The defendant gave no directions upon the subject, and the cars have ever since been continued in use by the company, because they hold the property in them under the purchase. Unless it be assumed that the defendant contracted that the builder of the cars should use the improvement of the plaintiff unlawfully and without license, it cannot be admitted that the contract furnishes any ground to presume that he contemplated any such violation of the rights of the plaintiff, in stipulating for the delivery of the cars to the railroad company. The error in the latter proposition is as apparent as in the former, and in both it is too obvious to require further elucidation. The proofs show that the defendant was the agent of the railroad company for the purpose of contracting for such an amount and kind of rolling stock as he might deem expedient; but there is no proof whatever in the case that he was the general agent of the company. The general agent and superintendent of the company resided at Hannibal, in the state of Missouri, and the agreed statement shows, that he contracted in behalf of the corporation for other cars which contained the improvement of the plaintiff, and that the same were used by the corporation. The independent power of the defendant upon that subject was exhausted when he had made the contract for the twenty-six cars, and stipulated for their delivery within the time specified. The delivery was to be made by the contractor to the railroad company, and it was not in the power of the defendant to rescind the contract, or countermand the delivery of the cars. When delivered, the property of the cars vested in the company; and having acquired both the property and the possession of the cars, it was the right of the company, and of their general agent and superintendent, to determine the question as to their use.

The corporation may be liable to the plaintiff for the unlawful use of the improvement, and so may their general agent and superintendent, if he has used the cars, or directed their use; but it will be in season to determine those questions, when they arise and come before the court.

In view of the whole case, I am of the opinion that the defendant, under the agreed statement, is not liable in this action, and, according to the agreement of the parties, he is entitled to a verdict in his favor, and to judgment.

[The same patent was involved in Case No. 8,345.]

Case No. 8,345.

LIGHTNER v. KIMBALL.

[1 Lowell, 211.] [1]

Circuit Court, D. Massachusetts. Feb., 1868.

TRESPASS—PARTIES DEFENDANT — PRINCIPAL AND AGENT.

A transportation company was organized for the purpose of providing a through line for freight between certain cities in the Eastern and others in the Western states, and contracted with the companies owning railroads between those cities to furnish cars for use throughout the line. The defendant was the general agent of the transportation company, with power to contract for the carriage of goods, but without power to say in what cars they should be carried, nor what axle boxes should be used on the cars. Axle boxes which infringed the plaintiff's patent were used on the cars in which the goods were so forwarded by the transportation company. *Held*, the defendant was not liable to an action as an infringer of the plaintiff's patent.

[Distinguished in American Cotton-Tie Supply Co. v. McCready, Case No. 295. Cited in United Nickel Co. v. Worthington, 13 Fed. 393.]

Case for damages for using the invention of the plaintiff [John Lightner], known as Lightner's axle boxes, for which he has a patent. It came before the court on an agreed statement of facts in which, for the purpose of ascertaining whether the defendant [Otis Kimball] is liable to an action, it was admitted that the patent is valid, and that axle boxes substantially like those described therein are used upon certain cars of the Red Line Transit Company, so called. A contract between certain railroad companies whose roads form a continuous line from Albany to Chicago, was put into the case, by which it appeared that those companies furnished freight cars in a certain proportion, and agreed to transport them upon certain terms, in order to establish a continuous daily line for freight between Chicago, as the western point, and Boston, Albany, and New York at the east. This contract contemplated the formation of a company or association to be composed of the presidents of the several contracting railroad corporations, and to be called the Red Line Transit Company, and this transit company purported to be the party of the second part to this contract, though it was signed only by the several railroad corporations. These corporations were to set apart certain cars, mark them, keep them in

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

repair, &c., and the transit company agreed to see that freight was obtained and a freight train made up of these cars or some of them, and despatched each way between the termini daily. The intention seemed to be to create a legal person authorized to contract for the conveyance of goods over the whole line, with power and responsibility to superintend the conveyance for the interest of all parties. What the organization of this new company in fact was, whether a partnership or a corporation, what its by-laws, officers, &c., was not stated. The case assumed that it had some proper organization, for it found that the defendant was appointed general manager of the company. It further found that the defendant contracts with merchants and others for the transportation of goods; that the railroad corporations furnished the cars, and that the defendant has nothing to do with the cars or their construction, selection, or repair, nor any authority to direct what axle boxes shall be used on the cars or removed therefrom, nor what particular cars of the whole number furnished by the several railroad corporations shall be used in transporting the goods for whose carriage he contracts. If upon this state of facts the defendant was not liable, judgment was to be entered for him; otherwise, the case was to stand for trial.

J. E. Maynadier, for plaintiff.
G. S. Hale, for defendant.

LOWELL, District Judge. The plaintiff contends that the transit company are the trustees or lessees of the cars, running them, or ordering them to be run, and having a special property therein which cannot be divested, even by the several railroad corporations which furnish them, until the expiration of the contract. If this be the proper construction of the contract, it may be true that the transit company are liable as infringers, but it does not follow that their agent for making contracts for transportation would be liable. It is a general rule that in actions of tort all the wrong-doers may be sued jointly or severally, and one cannot set up that he did the wrong by the command of another. Even this rule is not absolutely and universally true. A refusal by a servant to whom his master has intrusted goods, to deliver them to a stranger without the master's order, has been held not sufficient evidence of a conversion by the servant: Alexander v. Southey, 5 Barn. & Ald. 247; Mount v. Derick, 5 Hill, 455. So when the gist of the action is a breach of contract, although the form be tort, the defendant is entitled to the benefit of the same defenses that he would have had in the other form of action; and if he be a mere servant, he will not be liable, unless he can be held as a party to the contract: Williams v. Cranston, 2 Starkie, 82; Cavenagh v. Such, 1 Price, 328. So a mere bailee for a particular purpose, whose custody begins and ends without notice of any defect of title, is sometimes exempted from suit: Greenway v. Fisher, 1 Car. & P. 190. But with comparatively few and unimportant exceptions, an agent or servant is equally liable with his master or principal to actions of trespass, trover, and even case for wrongs done to the property of a third person. See Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & S. 259; Wilson v. Anderton, 1 Barn. & Adol. 450; Catterall v. Kenyon, 3 Q. B. 310; Wilson v. Peto, 6 Moore, 47.

It is said by an eminent judge that where the master has a color of right the servant is not bound to examine the justice of his title, but that the title must be litigated with the master: Berry v. Vantries, 12 Serg. & R. 92, citing Mires v. Solebay, 2 Mod. 242. There is much to be said in favor of this proposition as a matter of reasoning, but I have not found many cases which support it.

Granting, for the purposes of this argument, that every person who intermeddles with a patentee's property, that is, with his exclusive right to use his invention, is liable to an action at law for damages, this case does not show that the defendant does so intermeddle. He neither makes, uses, nor sells the invention, but is a mere stranger to the infringement, for it is agreed that he has no power or control over the matter. He is the agent of the transit company for making contracts for freight, but he does not appear to have any thing more to do with the use of the axle boxes than the several shippers who contract with him. If all merchants who ship goods by these cars, should refuse to do so until the axle boxes were changed or licensed, it might be a very good thing for the plaintiff, but they are under no obligation to do so. Nor is the defendant bound to know what axle boxes his principals use, or to refuse to be their freight agent until they obtain a license to use them. His defence is not that he is the servant of the transit company in doing the wrong, but that he is a stranger to the wrong done. If the servant were liable for acts of the master, instead of the reverse, there might be some ground for holding this defendant responsible for the use of the axle boxes by his principals; but the case finds that he has neither the property, the custody, nor the control of the cars in which this contrivance is used, that he can neither command the use nor the discontinuance of it, and that his duties have relation to an entirely distinct subject-matter. If the plaintiff were the owner of these axle boxes, which is a supposition more favorable to him than the fact, it is plain that he could maintain neither trespass nor any other action concerning them against the defendant; and that a demand on the defendant would be no evidence of a conversion, because he is not in a situation either to yield to or refuse such a demand.

The case of Lightner v. Brooks [Case No. 8,344], decided by the presiding judge of this court in 1864, is much in point. There the

present plaintiff sued a director of a railroad company; and the court held that in the absence of evidence that the defendant had used or directed the use of the invention, he was not liable. Whether the general agent or superintendent of the company might be sued was not decided. Here it is not only shown that the defendant did not command the use of the invention by the transit company, but that he had no authority so to do. The fact that he is called a general manager is unimportant, because the agreed facts show what his powers were, and that he was not a manager in respect to the infringement. I do not find it necessary to decide whether the transit company or only the several railroad companies would be liable; nor whether in equity, where the controversy is expected to be settled in one suit, and between the parties really claiming adverse rights, a servant is ever a proper party; nor, indeed, what the precise limits are to the right to sue at law, but only that the facts here do not show that this defendant has infringed the plaintiff's exclusive rights. Judgment for the defendant

[The infringement of the same patent was the subject of the action in Case No. 8,344.]

Case No. 8,346.

The LILIAN M. VIGUS.

[10 Ben. 385.] [1]

District Court, S. D. New York. April, 1879.

SEAMEN'S WAGES—JURISDICTION — BRITISH STATUTE—DESERTION—OFFICIAL LOG.

1. Seamen filed a libel against a British vessel to recover wages. The owners of the vessel objected to the court's entertaining jurisdiction of the cause, and the British consul also protested against it. *Held*, that, while under such circumstances, the court would refuse to entertain jurisdiction unless there were special circumstances in the case, yet in this case, as none of the seamen belonged in Nova Scotia, where the vessel belonged, and when the libel was filed it was uncertain for what port the vessel would sail, and when the cause was heard the vessel had finished her voyage and it was uncertain where she was, a refusal to entertain the cause would be practically a denial of justice and the same would be entertained.

2. The 190th section of the British merchant's shipping act [of 1854] did not preclude the sailors from maintaining the action.

[Cited in The Sirius, 47 Fed. 827, 828.]

3. The libel of the seamen alleged a wrongful discharge from the vessel, in the port of New York, and the answer set up as a defence that the men had deserted. On the trial, the libellants were allowed to amend their libel so as to allege a refusal by the master of the vessel to furnish proper food and other ill treatment by him, by reason of which their contract was broken. It appeared on the trial that the men had complained of being compelled to work more hours in port than they thought was right, and that whatever refusal of food there had been, had been in consequence of their refusal to work. The men complained to the consul, who heard their case and decided that they must go back to the ship and go to work, whereupon they went back to the ship, got their clothes and left her. Entry of their having left had been made in the official log by a person not attached to the ship, but under the captain's direction. The entry was not made on that day, and the date when the entry was made was not stated in the entry. *Held*, that the lack of the date when the entry was made was fatal to the value of the entry as a proof of desertion of the men under sections 244, 250, and 281 of the act above mentioned.

4. The certificate of the British consul that he had examined the entry and that the desertion was properly entered would be disregarded, inasmuch as it was not made to appear that the fact of the entry's not having been made on the day of the occurrence was made known to him.

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

5. The circumstances of the case, as shown in the evidence, did not show a justification of the seamen in leaving the ship, but their so doing was so far mitigated by evidence of apparent connivance on the part of the second mate in efforts by boarding-house keepers to induce them to desert, that the court would not hold that their wages were forfeited, and the libellants might recover the amount of wages due.

In admiralty.

Andrews & Smith (W. R. Beebe, advocate), for libelants.

Hill, Wing & Shoudy (L. S. Gove, advocate), for claimants.

CHOATE, District Judge. This is a libel for seamen's wages. The vessel is a British vessel belonging to Halifax, Nova Scotia. In February, 1877, she sailed on a voyage from Liverpool to Havana, thence to another port in the West Indies and thence to New York and thence to a port of discharge in Great Britain or Ireland, the voyage not to exceed eighteen (18) months. The bark arrived at New York upon this voyage on the 6th of July, 1877. The crew were regularly shipped for the voyage under written articles. The libellants, eight of the crew, left the vessel on the 10th of July, while she was at New York. In their libel, which was filed on the 21st of July, 1877, they alleged that they were discharged on the 10th of July. The vessel having been attached, the claimants appeared and answered, denying the discharge and averring that the libellants, without notice or reason, deserted the ship; that an entry thereof was duly made in the official log, and that by the British Merchant's Shipping act and by the terms of the articles they thereby forfeited their wages. Upon the trial the libellants were permitted to amend their libel by alleging "that at the port of New York the master refused to give them good and proper food; that he furnished to libellants rotten and maggotty food; that he furnished no fresh meat or vegetables; that for several days he deprived them of any food; that he did not permit food to be cooked for them for several days; that they were compelled to go on shore and purchase food for their necessary sustenance; that they were compelled unnecessarily to work at unreasonable hours without food or

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

proper rest, which was a breach on the part of the master of his proper duty and in violation of his contract with them, by means whereof the same was terminated."

It is insisted on the part of the claimants, that this court ought not to entertain jurisdiction of the cause, but should leave these libellants to seek their remedy, if they have any, in the courts of Great Britain, to which country the vessel belonged. The British consul at this port also protests against this court taking jurisdiction. But while it is doubtless true that the court will in such a case refuse to entertain the jurisdiction unless special circumstances require that protest to be disregarded (The Becherdass Ambaidass [Case No. 1,203], yet I think in the present case a refusal to hear and determine the cause would virtually amount to a denial of justice. The domicile of the parties is an important fact in determining this question. Patch v. Marshall [Id. 10,793]. Of the eight libellants it does not appear that any belong in Nova Scotia, and several of them are from different European countries. The bark, though bound to some port in Great Britain or Ireland, has long since finished her voyage, and it is uncertain now where she is, and at the time the libel was filed, it was wholly uncertain for what port she would sail. To send these sailors, therefore, to Halifax for the prosecution of these claims at this late day would be practically equivalent to denying their claim altogether, since there appears to be no probability that they would find there either vessel or owners to sue. Whether or not the court will take jurisdiction of a controversy between foreign seamen and the master of the vessel or her owners, is a question to be determined upon the circumstances of each particular case. Bucker v. Klorkgeter [Id. 2,083]; The Napoleon [Id. 10,015]. Nor does the 190th section of the English act preclude the seamen from maintaining this suit, if it appears to the court that justice requires that it should entertain the jurisdiction. By that section it is provided as follows: "No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, shall be entitled to sue in any court abroad for wages, unless he is discharged with such sanction as herein required, and with the written consent of the master, or proves such ill usage on the part of the master or by his authority as to warrant reasonable apprehension of danger to the life of such seaman if he were to remain on board." It is urged on the part of the claimants that this constitutes a part of the contract. It is not, however, embodied in the shipping articles, either directly or by reference thereto, as a part of the agreement between the seamen and the vessel. Even if it had been, this court might still entertain the suit. The rule is thus stated by Judge Betts in the case of Bucker v. Klorkgeter [supra]: "While in general, our courts will respect and enforce a stipulation between the foreign master and the crew, which limits them to suing in their own country, they have frequently asserted both their power and their willingness to grant relief, whenever the interests of justice demand that they should do so." While the English courts have given effect to such stipulations in the articles, and on that ground refused relief, they have not recognized such a prohibition of the foreign law as in itself precluding them from entertaining suits by seamen. Johnson v. Machielsne, 3 Camp. 46; Gienar v. Meyer, 2 H. Bl. 603; The Nina, L. R. 2 Adm. & Ecc. 44.

In view of the fact, therefore, that the connection of these seamen with the ship has been actually severed, and that the destination of the vessel was wholly uncertain, and that they have no certainty of relief, if remitted to the foreign jurisdiction, and have not their domicile there, I think it clear that this court should determine this controversy, which is, in substance, whether the circumstances under which the libellants left the vessel were such that they have thereby forfeited the wages earned by them up to the time of their arrival here.

There is no evidence whatever to sustain the allegation of the original libel that the seamen were actually discharged in New York. After some disagreement with the captain, they summoned him before the British consul, and all hands appeared at the consul's office, before the 2d vice-consul, on the forenoon of the 10th of July, and the 2d vice-consul, after hearing the complaint of the men, and the statement of the master, directed the seamen to return to the ship. The same day, between one and two o'clock, they came back to the ship, with a wagon, went into the forecastle, packed up their clothes, and left the ship, taking all their traps with them, and never returned. They asked leave of no one to go. They were bound, by the articles, to remain by the ship, till her return to the final port of discharge in the United Kingdom, and there can be no question, independently of the question whether the statute requirements to prove desertion have been complied with, that they deserted the ship, unless their leaving was justified or excused by the circumstances of the case. The defence set up is a desertion, and a forfeiture of wages by reason thereof, under the provisions of the British merchant's shipping act. The statute requires that upon the commission of the offence, "an entry thereof shall be made in the official log book, and shall be signed by the master, and also by the mate or one of the crew," and if the offender is still in the ship, he is to be furnished with a copy of the entry, or it is to be read over to him, and his reply is to be also entered in the log. This last requirement obviously does not apply to the case of desertion, where the seaman does not return to the ship (section 244). By the same act (section 281), it is provided that: "Every entry in every official log shall be made as

soon as possible after the occurrence to which it relates, and if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence, and of the entry respecting it, and in no case shall an entry therein in respect to any occurrence happening previously to the arrival of the ship at her final port of discharge, be made more than twenty-four hours after such arrival." In this case, the master kept no official log on the voyage prior to the ship's arrival in New York. He made memoranda on pieces of paper of matters taking place on the voyage, which, by law, he was required to enter in the official log. The mate was wholly incompetent to keep this log, and immediately on the arrival of the ship in New York, the mate left the ship and did not return. On the morning after his arrival, the master engaged one Ferris, a shipping-broker, to do some business for him, and among other things, to write up the official log. Some entries were thus made, dated in the preceding February, from the captain's memoranda, which it is unnecessary to refer to further. In accordance with this request, Ferris wrote in the official log entries dated July 6th, 7th, 8th, 9th and 10th. These entries were all written either from memoranda in writing furnished by the master, or at the dictation of the master or the second mate, and, after being written, they were carefully read over to the master, mate and steward, by whom they were signed. The second mate could not write, and he signed by mark. It is objected by the libellants, that this is not to be considered as an official log such as the statute requires, that it cannot be thus made up by a stranger; but I see no legal objection to the master or the mate thus using an amanuensis, provided that the person so employed acts simply as such, and that the proper officers and others of the ship's company duly make the entry their own by signing it, and provided they fully understand and intend that which they thus adopt and make their own. Nor does it seem to be a valid objection to these entries that prior to the arrival in New York no official log was kept. The entries for these days in port constitute none the less on that account, if they conform to the act in all respects, an official log for the days to which those entries relate. It seems, however, to be an absolute requirement of the act that if the entries for a particular day are not made on that day, the entry itself shall show the date on which it is made. (Section 281 cited above.) Ferris testifies that the entry for the 6th of July, which was Friday, was made on Saturday; that for the 7th and that for the 8th were made on Monday, the 9th; that generally, the entries were made on the day following the day they bear date. He does not speak positively as to those of the 10th, but upon his whole testimony they must be taken to have been made on the 11th. Yet in no one of these entries is the date on which the entry was made given. A strict compliance with the statute is required as a condition precedent to the enforcement of any forfeiture of wages under the statute. Macl. Shipp. (2d Ed.) p. 233; The Two Sisters, 2 W. Rob. Adm. 144. Although I do not find any case in which this particular defect has been made the ground of excluding the log as evidence of the alleged desertion, in any decided case in England, I have no hesitation in holding that the entry is on this ground fatally bad. Under a statute of the United States, which was somewhat different in its terms, but which had a similar purpose; it was required that the entry be made upon the very day that the offence had been committed. A strict compliance with the statute in that respect has been held to be absolutely essential to the forfeiture of wages under it. Cloutman v. Tunison [Case No. 2,907]; The Rovena [Id. 12,090]; Knagg v. Goldsmith [Id. 7,872]. And see The Catawanteak [Id. 2,510]. These statutes have received a strict construction because they are highly penal in their character. I cannot distinguish between this requirement that the date of the entry should appear in the entry itself, if it be not made on the day of the alleged offence, and any other requirement of the statute regulating the nature and mode of the entry to be made. It is not merely directory and a non-essential part of the evidence of desertion prescribed. Parliament having expressly required it to be so made, the method thus directed must be regarded as equally essential with the other parts of the act respecting the entry in the log. A certificate of the British vice-consul on the shipping articles, that he has inquired into the matter and found that the allegation of the desertion is true and that a proper entry of such desertion in the official log has been produced to him, has been produced by the claimants. The opinion of the representative of the British government upon such a question of the construction of an English statute would, in the absence of any authoritative decision of an English court, receive the most respectful attention of this court; but in this case the irregularity in the entry in the log is not disclosed by the entry itself. It is shown by testimony dehors the instrument. And there is no evidence nor any reason to believe that the fact thus testified to was brought to the attention of the vice-consul. His certificate, therefore, only shows that in his opinion the entry in the log is, on its face, a proper entry. This is doubtless correct, and in the absence of any evidence to show when an official entry is made the presumption is that it was made the day it bears date. Douglas v. Eyre [Id. 4,032]. The defence therefore set up in the answer, that the libellants have forfeited their wages under the provisions of the merchant's shipping act is not made out. Nor does the answer set up any defence by way of diminution or subtraction of wages on the ground of misconduct or breach of contract, working dam-

age to the ship or her owners, which may, it seems, be shown by other evidence though not sustained by a proper entry in the log. Abb. Shipp. (11th Eng. Ed.) p. 153; The Cadmus [Case No. 2,280]; Knagg v. Goldsmith [supra].

I see no legal ground, therefore, on which the libellants can be refused a decree for their wages. Though the act proved would, if properly entered in the log, amount to desertion, and would lead to a forfeiture of wages already earned, in whole or in part, according to the terms of the merchant's shipping act, yet if no such proper entry is made, the forfeiture that would otherwise be incurred is deemed waived or released. By the 250th section of the same act it is provided: "Whenever a question arises whether the wages of any seaman are forfeited for desertion, it shall be sufficient for the party insisting on the forfeiture to show that such seaman was duly engaged in or that he belonged to the ship from which he is alleged to have deserted, and that he quitted such ship before the completion of the voyage or engagement, or, if such voyage was to terminate in the United Kingdom and the ship has not returned, that he is absent from her and that an entry of the desertion has been duly made in the official log book, and thereupon the desertion shall, so far as relates to any forfeiture of wages or emoluments under the provisions hereinbefore contained, be deemed to be proved, unless the seaman can produce a proper certificate of discharge or can otherwise show to the satisfaction of the court that he had sufficient reasons for leaving his ship." This provision of the statute, in connection with its other parts, appears to be understood as abrogating the general rule of the maritime law which punishes desertion by forfeiture of wages, in all cases where the statute is applicable, so that the proper entry in the official log is, in such a case, an essential part of the proof required to make out the defence of desertion from a British ship. The Two Sisters, 2 W. Rob. Adm. 137; Macl. Shipp. (2d Ed.) p. 234. From these authorities it seems to follow that the payment of wages cannot be resisted on the ground of desertion and consequent forfeiture where no such entry has been made in the official log, even though when the suit is brought the voyage is not completed or the ship has not returned, and though the evidence would sustain the charge by the general maritime law. It, perhaps, is unnecessary therefore, to examine further into the alleged excuses of the libellants for leaving the ship. But as the case has been fully tried and argued upon the merits as well as upon the technical ground of the compliance with the terms of the statute on the part of the ship, I will briefly state the result of my examination of the evidence. The seamen complain that they were served, while in port, with biscuit having maggots in them, and five of them have so testified. This charge is, in my judgment, completely disproved by the testimony of the steward and one of the seamen, the captain and second mate, and by an entirely disinterested witness, a baker, who examined the bread, and the proof is, I think, entirely satisfactory that the bread shown to him was a fair sample of that served to the crew. The provisions furnished to the crew while in port were such as the articles required, and I find nothing in the articles or elsewhere to require the master to furnish any thing not stipulated by the articles, because he happens to be in port, where fresh meat and vegetables may easily be obtained. The charge that the master deprived them of food for several days has this foundation: The bark arrived on Friday evening. On Saturday the master was on shore most of the time, leaving the ship in charge of the second mate. The men were called up at half-past four or five o'clock in the morning and they complained to the second mate that they should not be required to work in port longer than from six to six. In consequence of the trouble between this officer and the men on Saturday morning, the master called them all aft that afternoon and told them that there was nothing in the articles limiting their work between the hours of six to six, and that they must work whenever required, and must obey the second mate, and he told them that if they refused to work their grub would be stopped, and he directed the mate to give them nothing to eat so long as they refused to work; that when they were willing to go to work again they should have their meals. Afterwards, and on the same day, the master not being on board, the men refused to do duty which the second mate required of them, insisting that it was after six and that they could not be required to do such work, knocking rust out of the bob-stays, after working all day, and that they were entitled to rest, as it was Saturday night. The mate kept them at work at other ship's duty and gave them no supper. They, or some of them, then left the ship without leave, and remained away till late at night. On Sunday and Monday they all had breakfast. Most of them left the ship without leave on Sunday after breakfast and were gone all day. Those who remained and did duty, had their dinner and supper on board. On Monday they were turned to very early, and after breakfast several of them left without leave. About two o'clock they returned, and offered to go back to work, but the second mate refused to let them turn to, and told them that they could do no more work on the ship that day. In this he clearly went beyond the instructions of the master, and in connection with what had already taken place, it was a plain intimation to them that they could get no more meals on the ship that day. Aside from this instance, which affects three or

four of the men, it is not proved that there was any refusal of the master or mate to give them their meals, while they were on board, except while they were actually insubordinate. No authority is shown either justifying or condemning this mode of punishment or coercion by depriving seamen of their meals. It is obvious that it cannot safely or properly be carried very far, but as actually applied or threatened in this case, I do not think it constituted any such harsh or cruel treatment, or breach of contract on the part of the ship, as released the seamen from their contract. The refusal to let them come back to work on Monday, was after a prolonged absence without leave, and was understood by both mate and seamen to extend to that day only, for they all came back at night and had their breakfast Tuesday morning, and went to work. It was not a case where the seamen were deprived of food and were without reason to expect they could get any. The Castilia, 1 Hagg. Adm. 59. On Monday they got a summons for the master to appear before the consul the next day, and on Tuesday, the master and the men went to the consul's office, as above stated. The direction of the consul was proper, and in my judgment nothing had been done by the master in the way of harsh or cruel treatment, which, as matter of law, justified the men in refusing to go back to their duty. They had no reason to apprehend any deprivation of food if they returned to the ship and to their duty. Instead of doing so, they went to the ship later in the day with a wagon, took away their clothes, and finally left the vessel. While, however, the case does not show circumstances which, in law, amount to a justification of the seamen in leaving the ship, it does show circumstances which so far mitigate their offence, that even if a technical desertion were made out, it would, in my judgment, call for the forfeiture of very little of their wages already earned. The forfeiture under the English statute may be of the whole or any part of the wages already earned. It appears in this case, that from the time the ship arrived, the second mate, who was left in command of her, suffered a seaman's boarding-house keeper to remain on board, and to consort with the seamen and to stimulate them to insubordination, to induce them from time to time to leave the vessel. Although by his own testimony, he overheard this person on Monday, when the men refused to do duty, tell the seamen: "Never mind, boys, I'll get you your wages," yet, he still tolerated him on the ship, and allowed him to stir up the men to disobedience, and to tempt them to leave the ship, and apparently made no effort to counteract his influence with the men. It was clearly the duty of this officer to have expelled this person, and to have cautioned the seamen against him. Both the English and American statutes make it a misdemeanor for such a person to solicit the sailors on the ship during the twenty-four hours after her arrival. This necessity for legislation to protect the seamen from this class of persons, shows how dangerous to the discipline of the ship their presence is. And it is, I think, the proper conclusion from the testimony in this case, that the second mate was either a consenting party to the seamen being enticed away, or that he was, at the least, grossly negligent of his duty in protecting them from this interference. Three days' persistent effort of one of these persons, having a strong interest to foment trouble between them and the ship, resulted in their being enticed away and misled as to their rights. He put them in communication with lawyers on shore and it may well be presumed that the advice they got was such as would further his own purpose to induce them to leave the ship. All this the mate should and probably did foresee. I have given no credit to the testimony of the two boarding-house masters, called as witnesses by the seamen. Their statement that the master took them into his confidence and told them that he wanted to get rid of the crew, is incredible in itself, and not sustained by any other evidence; and the general appearance of these witnesses and their contradiction on many points compel me to withhold all credit from them. But I found the foregoing conclusion on the testimony of the second mate and the master. There was about five hundred dollars due to these seamen when they arrived in New York. They should not have been knowingly permitted to be enticed away so as to forfeit their wages, either through the direct acts of the master or mate, or their negligent omissions of duty. Such circumstances have been held to excuse or mitigate the offence of desertion, even where an entire justification could not be made out. And in addition to the circumstances above stated, the method of discipline adopted by the second mate, with the concurrence of the captain, was such as to aid the efforts of the boarding-house master. This discipline was work at extraordinary hours while in port, no change from the diet served at sea, deprivation of meals for refusal to work. These modes of discipline, though not illegal, could not well have been improved if intended to assist those who were well known to be endeavoring to induce the sailors to leave. I think the language of Judge Hopkins, in Magee v. Moss [Case No. 8,944], applicable to this case: "The forfeiture of wages earned by a hard and perilous service is a severe penalty and should be exacted only on a clear legal cause. So it has been considered by the courts, and those who claim this penalty have always been required to show themselves to be clearly entitled to it by the performance on their part of all the requisitions of the law. The master of the vessel must throw the fault on the offending seamen. He

must deal with them fairly and honestly and in good faith. He should neither endeavor to drive them from their duty, nor deceive and entrap these rash and ignorant men into a course of conduct which he sees may draw upon them the loss of their wages while they have no such suspicion. If they are really and truly acting under a mistaken opinion of their rights and not from a dishonest or rebellious disposition, they should be undeceived, their error should be explained, or at least they should not be drawn, or permitted, by an insidious silence or inattention to their proceedings, to involve themselves in the crime of desertion with its ruinous consequences. A practice of this sort upon sailors may well be considered as a fraud, and the contriver ought not to gain by it." While it is important to adhere to the rule forfeiting wages for wilful desertion, regularly proved, for the sake of maintaining the proper discipline of the ship (The Cadmus [Id. 2,282],) it is equally the duty of the courts to secure to the seamen fair and just treatment and to protect them against practices such as they were exposed to in this case and which are often the means adopted to deprive them of their fairly earned wages. There is, I think, no serious injustice done to the owners of this vessel, therefore, although the failure to prove the desertion is owing to what may seem to be a technical defect in the official log. Decree for the libellants with costs, and a reference to compute amount due.

LILIENTHAL (UNITED STATES v.). See Case No. 16,105.

Case No. 8,347.

LILIENTHAL'S TOBACCO v. UNITED STATES.

[The case reported under above title in 15 Int. Rev. Rec. 19, is the same as Case No. 16,106a.]

LILL (BRADLEY v.). See Case No. 1,783.

Case No. 8,348.

The LILLA.

[2 Spr. 177;[1] 25 Law Rep. 81.]

District Court, D. Massachusetts. Sept., 1862.[2]

PRIZE—CAPTURE IN NEUTRAL WATERS—CLAIMS OF PRIVATE PERSONS — PROCEEDINGS OF PRIZE COURTS OF THE CONFEDERATE STATES — RESTORATION OF MERCHANT VESSELS—RIGHTS OF OFFICERS AND CREW OF A PRIZE.

1. No private person can interpose in a case of prize and make claim for the restoration of the captured property, on the ground that the capture was made within neutral waters. Whatever claim is made must be presented by the neutral nation whose rights have been infringed. Even a consul, by virtue of his office merely, cannot interpose.

2. Where a claimant had his domicil in the enemy's country, was a permanent resident there, and the property captured was purchased as stock in a trade to be there carried on, the claim was dismissed, as coming within the decision of the court in the case of The Amy Warwick [Case No. 341].

3. If a neutral owner of a portion of the property captured, claims another part, which belongs to an enemy, for the purpose of deceiving the court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct.

4. The admission of further proof rests wholly in the discretion of the court; but the exercise of this discretion is aided by certain rules. Some of these rules stated. A motion for further proof refused, where there was no reason to suppose that any further evidence of value could be produced.

[Cited in Cushing v. Laird, 107 U. S. 82, 2 Sup. Ct. 206.]

5. The proceedings of a prize court of the so-called Confederate States are of no validity here, and a condemnation and sale by such a court do not convey any title to the purchaser, or confer upon him any right to give a title to others.

6. The rule under the statute of the United States, 1800, c. 14, § 1 [2 Stat. 16], concerning the restoration to their owners, upon payment of certain salvage, of merchant vessels recaptured, before their valid condemnation, by public armed vessels, applied by analogy to the case of a vessel recaptured after a capture by a Confederate privateer, and a condemnation and sale by a Confederate prize court.

7. The officers and crew of a prize, in case of condemnation, are not entitled to wages from the prize property. Where a prize is condemned, the officers and crew who are sent in as witnesses in pursuance of the law of nations, are not entitled to witness fees or compensation for their necessary detention from out of the prize property. Where such persons, after their examination is satisfactorily completed, are further detained, not for the purposes of the prize cause, but under an order from the navy department for public reasons, their compensation or damages, if they are entitled to any, cannot be charged on the prize property.

In admiralty.

R. H. Dana, Jr., U. S. Atty., for the captors.

F. C. Loring, for Maxwell and others, the Americans claimants.

C. G. Thomas, for R. G. Bushby and others, the British claimants, cited The Bermuda, 3 Wall. [70 U. S.] 514; The Springbok, 5 Wall. [72 U. S.] 1; The Pearl, Id. 574.

SPRAGUE, District Judge. This vessel and cargo were captured on the 3d day of July last, off Abaco, by the United States gunboat Quaker City, and sent into this district for adjudication. The counsel for the claimant contends that the capture was made within British waters, and that the property should be restored to the claimants for that reason.

To this there are two answers. First, the fact that the capture was made within the jurisdiction of a neutral country, is not proved. Second, if it were proved, no private person can interpose or rest a claim

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

[2] [Affirmed in Case No. 15,600.]

upon that ground. In such case, whatever claim may be presented must be by the neutral nation whose rights have been infringed. So far from a private individual being authorized to represent the nation in this respect, even a consul cannot do so by virtue of his office. The Anne, 3 Wheat. [16 U. S.] 435; The Sir William Peel, 5 Wall. [72 U. S.] 517. In the case now before me, neither the British consul, nor any other British officer, has interposed in any manner.

I now proceed to the several claims, and shall first consider that of Hewetson to the medicines, a part of the cargo. It appears that he is a British subject having his home in Charleston, S. C., where he was a permanent resident prior to his capture. "His son-in-law keeps a druggist's shop in Charleston, and Hewetson is interested with him; these medicines were for his shop." It further appears that this vessel, with Hewetson on board, sailed from Charleston the 2d of March last, with a cargo of cotton and tobacco, ran the blockade, and arrived at Liverpool on the 2d day of April.

Hewetson there procured these medicines, shipped them on board this vessel, and himself took passage in her, and sailed from Liverpool on the 15th of May, bound for Nassau, New Providence, and was captured on the voyage. This claimant had his domicil in the enemy's country, was a permanent resident there, and this property was purchased as stock in a trade to be there carried on. This claim, therefore, comes within the decision of this court in the case of The Amy Warwick [Case No. 341].

There are other facts proper to be noticed in this connection, which have a bearing not only upon this claim of Hewetson, but on other parts of the case. Not one of the documents or papers found on board this vessel states or indicates that Hewetson had any property on board. On the contrary, all these drugs and medicines are documented in the name of R. G. Bushby, the claimant of the vessel. The freight list declares that Bushby was the shipper thereof. The bill of lading states the same, and that they are to be delivered to order or assigns. This bill of lading is not indorsed; that is, the shipper does not appear to have ordered the contents to be delivered to any one. Here was not only a suppressio veri, a concealment of the fact that these goods were shipped and owned by Hewetson, but the documents falsely represent that they were shipped by R. G. Bushby, a British subject residing in Liverpool.

I have thus far treated the question of Hewetson's right, as if he were regularly before the court as a claimant. But he is not. He has been in Boston ever since this vessel was brought in, and was in court at the hearing: and yet the only claim filed is by Applebee, as master, in behalf of the owners of the cargo, as well as of the vessel. And even in this claim Hewetson's name is not mentioned, and he is described only as "a passenger, the owner of thirty-seven packages of medicines on board." Not only his name, but his residence, is omitted. The language of the claim is so peculiar, that, without the exposition of it given by the counsel, I should not have deemed it a claim in behalf of Hewetson.

I next proceed to the claim to the vessel made through the master by the same R. G. Bushby. This vessel was built in Wells, in the state of Maine, and was called the Betsy Ames, and was owned by the American claimants, Maxwell and others, inhabitants of that place. After the breaking out of the rebellion, she was captured by a Confederate privateer, under the command of Henry S. Libby, and carried into Charleston, S. C. There it is supposed certain proceedings were had in a tribunal, acting under the assumed authority of the Southern Confederacy, by which the vessel was condemned and sold; and her name was changed to the Mary Wright. The purchasers were John Fraser & Co., a commercial house doing business in Charleston. Afterwards, on the 2d of March last, she ran the blockade as before stated, and was commanded by the same Captain Libby.

She arrived at Liverpool on the 2d day of April, and on the 24th of the same month was registered as a British vessel, called the Lilla, and in the name of R. G. Bushby as sole owner. On the 15th of May she sailed from Liverpool for Nassau, N. P. Two objections are made to this claim: First, that Bushby is merely a nominal owner, that the beneficial interest is in Fraser & Co., and that, if he holds the legal title, it is only as trustee for enemies; second, that even if Bushby was an actual purchaser for value, and for his own use, still that the original title of Maxwell and others has never been divested, and that their claim must prevail. As to the first objection, there are certainly facts which seem to be irreconcilably opposed to the supposition that Bushby was a real purchaser for his own use; while every circumstance is consistent with his having lent his name to cover enemy's property, and taken the legal title in trust for that purpose.

The shipping articles declare that Fraser, Trenholm, & Co. are the managing owners. These articles bear date the 13th of May, the same day on which the vessel cleared at the custom house. In this document, they are not only declared to be the owners, but the managing owners. Further than this, it appears from the testimony that the advance wages of the crew were actually paid by Fraser, Trenholm, & Co., and there was found on board a return list of the crew, stating the monthly wages and the amount of the advance wages of each. This is directed on the back to Messrs. Fraser, Trenholm, & Co. It is without date or signature, and may have been kept as a copy. Of these

facts no explanation has been offered even in argument.

In what relation Fraser, Trenholm, & Co. stood to John Fraser & Co. does not appear by any satisfactory evidence. Of all the witnesses, Libby probably knows the most concerning them. He says in his deposition that he was consigned to Fraser, Trenholm, & Co., and that he supposes that they had a power of attorney to sell the vessel.

By the ship's papers, Applebee appears to have been the master. But this same Captain Libby, who sailed in her nominally as a passenger, actually took the command as soon as she left Liverpool, and acted as master until she came in sight of the United States gunboat Quaker City, when Applebee became the acting commander. This is shown by the testimony of several of the crew, and particularly that of Sanderson, the mate, who also testifies that Applebee informed him that he, Applebee, was to act as mate until they reached Nassau. Indeed, it is not now controverted that Libby did, to some extent, act as master of this vessel after she left Liverpool. How is this to be accounted for, if neither Libby nor his former employers had any interest in the vessel?

Here was a British master with a mate and a majority of the crew British, on board a vessel sailing from one British port to another, permitting a foreigner to take the command of the vessel, who, according to some of the testimony, exercised it with a high hand. Captain Applebee, in other parts of the case, does not seem to have been of a pliable or submissive disposition. When this vessel was boarded from the Quaker City, and he was directed to go on board that ship, he drew a pistol and threatened to shoot the first man who should attempt to enforce that order, and this while he was under the guns of the man-of-war.

Among the papers found on board is a bill in favor of a block and mast maker, for various articles, at various dates, from the 22d of April to the 14th of May, the day before her sailing, amounting to £48. This bill is against Captain Libby and owners of brig Lilla. It is well known that the military and other wants of the South have in a great measure been supplied from Great Britain, by the way of the West Indies, and especially through the port of Nassau. This trade, so detrimental to us, must, of course, be watched with jealous scrutiny by our cruisers. If, therefore, Fraser & Co., having this vessel at Liverpool, intended to send her to Nassau, they would seek the cover of some neutral flag, and none would be so convenient or safe as the British. There is evidence tending to show that that firm had a steamer at Liverpool called the Scotia, which was to follow the Lilla to Nassau, and there take her cargo and Libby on board for Charleston. If the Scotia should leave Liverpool with a full cargo, the coal consumed in crossing the Atlantic would leave a considerable capacity to be filled at Nassau. On the other hand, if an English merchant were disposed to engage bonâ fide in trade from Liverpool to Nassau, he would hardly select or employ a vessel of the antecedents of the Mary Wright, and employ her former master, Libby. Both must have become notorious by the previous capture and running the blockade, and liable to be recognized by a boarding-officer from an American man-of-war.

It is quite improbable that a British merchant, carrying on a legitimate trade, would unnecessarily have encumbered it with these suspicious circumstances, which might subject it to interruption, and cause the vessel and cargo to be sent in for investigation

Nor is this all. It has already been stated that Hewetson's part of the cargo was covered by the name of this claimant, R. G. Bushby. In his examination before the prize commissioners, Hewetson stated that he had his bills of lading in his trunk. They have never been seen by the prize master or commissioners. Hewetson further stated that the bill of lading which was found on board, and which is marked No. 10, is a copy of his bills of lading, and that it has upon it the initials both of his name and that of his son-in-law; that he never knew R. G. Bushby, and does not know how this bill of lading came to be made out in his name. He further states that he paid the freight of his shipment in advance,—that they would not take it on other terms. It thus appears that he did not contract with Bushby for the carriage of his goods, but with some other persons, who required the freight in advance; and they, it must be presumed, caused his goods to be covered by a bill of lading and freight list in the name of this claimant. This unquestionable fact, that the name of Bushby was used to cover enemy's property belonging to Hewetson, must at least inflame every presumption arising from the evidence that his name was also used to cover the vessel. If a neutral owner of a portion of the property claims another part which belongs to an enemy for the purpose of deceiving the court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct. The St. Nicholas, 1 Wheat. [14 U. S.] 431; The Betsy [Case No. 1,364]; The Graaff Bernstorf, 3 C. Rob. Adm. 111.

In The Eenrom, 2 C. Rob. Adm. 1, a portion of a cargo belonging to a neutral was condemned because he had documented in his own name another portion belonging to an enemy, for the purpose of deceiving belligerent cruisers, and with the evident intention of claiming it as his own before a prize court, although that intention was never carried into effect, and his claim actually embraced only his own property. There is no doubt that enemy's goods were documented in the name of the claimant Bushby for the purpose of deceiving the cruisers of the

United States. I am not under the necessity of deciding what would have been the effect of this masking of enemy's property if it were the only circumstance adverse to this claim, because there are other stringent facts against it. The only letter of advice found on board this vessel was one from R. G. Bushby to Adderley & Co., at Nassau. It is as follows:—"Liverpool, May 15, 1862. Messrs. Henry Adderley & Co., Nassau: Dear Sirs,—This will be handed to you by Captain Applebee, of my brig Lilla, leaving this for your port to-day; and whom I have directed to report himself on his arrival to your good selves and to confer with you as to the disposition of the cargo. Further instructions will follow by the Nassau mail, leaving this in about three weeks, which will most probably anticipate the present and the arrival of the vessel with you. In the meanwhile, hoping for a safe and speedy voyage for Captain A., dear sirs, yours faithfully, R. G. Bushby."

These were the only instructions found on board, either as to vessel or cargo. They are certainly remarkable for abstinence and reserve. Not one word as to what is to be done, either with the vessel or goods on board. The writer merely informs his correspondents that the master will confer with them as to the disposition of the cargo, and that further instructions will follow by the Nassau mail. But why did not the instructions accompany the vessel and cargo? They would then be sure to be at Nassau the moment they were wanted. The mail which was to follow would be subject to all the contingencies of a sea voyage, and might be long delayed or never reach its destination. If there had been nothing to conceal, the plain course would have been to have sent letters of advice by this vessel, and to have followed them afterwards by duplicates and perhaps additions. If Libby was to control vessel or cargo on reaching Nassau, the peculiarities of this letter of advice may be accounted for. It might serve to give to a boarding officer the appearance of a letter of instructions, when in fact none were given. In The Flying Fish [Case No. 4,892], there were no invoices or letters of advice on board, and it was said that they were transmitted by land. Mr. Justice Story held that "this, if true, affords an irresistible presumption of the hostile character of the cargo."

I am at this moment dealing only with the claim to the vessel, as to which the want of instructions to a correspondent abroad would not ordinarily create the same presumptions as in the case of the cargo. But R. G. Bushby does not appear merely in the character of a ship-owner carrying goods with which he has no concern. He was ostensibly the shipper and owner of a part of the cargo, and his name was used to cover a portion belonging to Hewetson; he had, or pretended to have, correspondents at Nassau, and directed his master to confer with them respecting the cargo; and he wrote the only letter of advice. His reserving all real information or instructions for some other channel of conveyance is such evidence of designed concealment as must greatly prejudice any claim he may present.

A full hearing has been had upon the preparatory evidence, at which some views were expressed by the court. The counsel for the claimant has since filed a motion for an order for further proof. The admission of further proof rests wholly in the discretion of the court. But the exercise of that discretion is aided by certain rules. Further proof is admitted to remove doubts, not to create them. If the preparatory evidence present a clear case of enemy's property, the court will not hear further proof. But even if the case be doubtful, a party may forfeit all claim to the indulgence of further proof by bad faith. The Alexander [Case No. 164]; The Dos Hermanos, 2 Wheat. [15 U. S.] 80. Mala fides and attempts to deceive have been held sufficient grounds for refusing further proof. The Juffrouw Anna, 1 C. Rob. Adm. 126; 1 Wheat. Append. 505; The Graaff Bernstorf, 3 C. Rob. Adm. 117; The Betsy [Case No. 1,364]. If the difficulties do not admit of a fair and satisfactory explanation, if they are out of the reach of any rational solution, further proof will be refused. The Vrouw Hermina, 1 C. Rob. Adm. 163.

Under these rules, it would be difficult for the court to grant a motion for further proof in this case, however sustained. Still I have been willing to hear this motion and the affidavits in support of it, that I might see what evidence the party expects to produce. The motion is sufficiently general. It requests permission to prove that Bushby was a bonâ fide purchaser for a good consideration. In support of this motion were affidavits by the proctor of the claimant, by Applebee, the master, and by Harris, one of the firm of Adderley & Co., at Nassau, and a letter from Bushby to his proctor. The great question is whether Bushby was a bonâ fide purchaser for value, and for his own use. This question the affidavits and the letter can hardly be said to touch. They exhaust themselves upon other topics, viz., in showing that this vessel was regularly documented in the name of Bushby, and was really bound to Nassau, and not to the Southern states,—points not relied upon by the captors, and not requiring further proof. The affidavit of Applebee re-affirms the statement made in his primary examination, that he was employed by Bushby, and hired the crew. He states his introduction to Bushby, and that he did not know of any other owner. But how Bushby came to be owner, for whose benefit he held the legal title, whether he paid any consideration, he does not state. Of all this he says nothing: nor does he explain why Fraser, Trenholm & Co.

paid the advance wages to the crew, and says that he does not know why their names were put into the shipping articles as managing owners. The affidavit of Harris merely gives a letter under date of 7th of June, from Bushby to Adderley & Co. This letter requests that after the discharge of the outward cargo, they will assist the captain in obtaining a homeward cargo to such port in the United Kingdom as they shall consider most advantageous for the ship, and to be advised thereof.

So far as the vessel is concerned, this letter goes to supply the defect of that previously sent by Applebee, and repels the inference that no instructions were ever given in the name of Bushby. The bearing of this letter upon the cargo will be considered hereafter. It seems, from Harris's affidavit, that Bushby was not a person previously known to his firm. He says they received from a certain R. E. Bushby the letter hereto annexed. The claimant's name is R. G.; here the initial E. is substituted for the true one, G., a mistake not likely to have occurred as to a known correspondent.

The affidavit of Mr. Thomas, the proctor, states that he wrote to Mr. Bushby, informing him that the papers were sealed up, and inquiring if the vessel and cargo were in fact bound to Nassau, and if his vessel was duly documented, and his papers in order on board. The answer of Bushby, dated 23d of August, is produced, and states that the vessel was really bound to Nassau, and that he is ready to make affidavit of that fact, and that the vessel was duly documented, and the papers on board were in order. He does not speak of his title to the vessel, or say whether he paid any consideration, or whether he holds her for his own use, or for the benefit of others. Upon these topics this letter, and, for aught that appears, that of the proctor, to which it is an answer, are wholly silent. The correspondence and the affidavits are quite unsatisfactory. They say nothing of the purchase or title of the vessel, and do not state that either of the affiants has any expectation or belief that evidence can be produced of the payment of any consideration by Bushby, or that he holds the vessel for his own benefit. There is no reason to suppose that any further evidence of value can be produced.

The second objection to this claim is also fatal. There is no doubt that this vessel was the property of Maxwell and others, until her capture by a Confederate privateer. But it is contended that she has since been condemned and sold by a prize court in Charleston, S. C., and the purchasers conveyed her to the claimant Bushby. If this were so, of which there is no sufficient proof, still, such proceedings would not divest the title of the original owner. In the case of The Amy Warwick [supra], this court held, that treating the Confederates in some respects as belligerents was not an abandonment of sovereign rights, and by no means precluded us from treating them in other respects as rebels. Most assuredly I shall not recognize the Southern Confederates as a nation, or as having a government competent to establish prize courts. No proceedings of any such supposed tribunals can have any validity here, and a sale under them would convey no title to the purchaser, nor would it confer upon him any right to give a title to others. But it is argued, that, under the queen's proclamation, recognizing the Confederates as belligerents, a British court would hold a sale to be valid. What the decision of a British court might be upon that question, we do not know, it never having been there litigated. But such a decision, if made, would be no more binding upon our courts than the political views of the British government would be upon the president or the congress.

If this second objection were the only matter before the court, it is questionable whether I ought to entertain or listen to it. If this vessel had been arrested on the ocean, without any reason for supposing she was enemy's property, or infringing belligerent rights of the United States, but merely to settle a contested title between a citizen of the United States and a neutral subject, this court would perhaps refuse to go into the question of title, and at once restore the vessel to the person from whose possession she had been thus wrongfully taken. A due regard to the peace of the world might require that, in questions of property between citizens of different nations, the court of one of such nations should not acquire jurisdiction by the wrongful exercise of force upon the ocean. But such is not the posture of this case. There has been no improper exercise of force. There was abundant reason for taking this vessel as enemy's property, and bringing her in for adjudication. She is rightfully within this jurisdiction, and if not condemned as prize, the court should deliver her to the person having the highest title. If, indeed, the question of ownership were wholly between foreigners, the court might refuse to decide it, as we are not bound to exercise jurisdiction merely to settle controversies between foreigners. But we cannot refuse to listen to the claims of our own citizens to property legitimately within our jurisdiction.

The motion for further proof must be refused, and the claim of R. G. Bushby be dismissed, and the vessel restored to the claimants, Maxwell and others, upon what conditions will be stated hereafter.

I now proceed to the claim of Bushby & Co. to the cargo, made through Applebee, the master. This claim embraces all the cargo except what belongs to Hewetson. The only documents found on board, tending to show the ownership of the cargo, are the freight list and bills of lading. These concur in representing that there were five different

shippers; namely, John Senier & Co., Bushby & Co., R. G. Bushby, J. Perrin, Son, & Co., and Henry Lafone.

There is nothing in the evidence to connect these claimants, Bushby & Co., with any part of the cargo, except that shipped in their own name. As to all the shipments, therefore, which appear by the papers to have been made by other persons, this claim must at once be dismissed. The freight list states that Bushby & Co. were the shippers of two parcels of saltpetre, one of 634 bags, and the other of 702 bags, consigned to order. All the other shipments are also consigned to order. The bills of lading all correspond with the freight list, both in the names of the shippers, kinds, and qualities of goods shipped, and state that they are to be delivered to order.

There are two bills of lading, in which Bushby & Co. are the shippers of the above-named quantities of saltpetre, to be delivered to order. On each bill the name of Bushby & Co. is indorsed in blank, and then erased by a line drawn through it. There are four bills of lading in favor of John Senier & Co., all indorsed in blank. The other bills of lading—viz., four in the name of R. G. Bushby, one in favor of J. Perrin, Son, & Co., and one in favor of Henry Lafone—have no indorsement upon them.

From the documents, there is as much reason to suppose that the several shippers who have made no claim were the owners of the goods documented in their name, as that these claimants were the owners of those shipped in their name. It does not appear to whom any of them were consigned. No letter of advice or instructions accompanied the cargo except that already mentioned from R. G. Bushby to Adderley & Co., and that letter, as we have seen, merely said that the master would confer with them respecting the cargo, and that instructions would be sent by mail. This was most extraordinary. Why were not instructions sent with the cargo, rendering it certain that they would arrive when needed? Why kept back for a mail-steamer, which might be delayed, or never reach its destination?

The case of The Flying Fish has already been mentioned, in which Mr. Justice Story, after referring to the statement of the master, that the invoices and letters had been sent by land, says, "This, if true, affords an irresistible presumption of the hostile character of the property." Here some papers accompanied the cargo, but they gave no information as to the consignee, or the disposition to be made of the goods. All this was reserved for a conveyance more safe from search and inspection. Even the letter that did accompany the goods, such as it was, was written only by R. G. Bushby, one of the apparent shippers, and the ostensible owner of the vessel. Neither these claimants nor any other shipper sent any instructions or communications whatever. Nor does it appear that they have ever done so, either to any person at Nassau, or to any agent or proctor conducting this cause.

A motion has been filed for further proof in relation to the cargo. This motion is by, and in the name of, the proctor. It states that said shippers, John Senier & Co., and Bushby & Co., and R. G. Bushby, and J. Perrin, Son & Co., and Henry Lafone, have ever been, and still are, bonâ fide shippers and owners of the cargo, each in the proportion standing in their names in the freight list on file. No claim has been made by, or in behalf of, any of the shippers except Bushby & Co. and Hewetson. For these Applebee, the master, intervened, stating that he was informed and believes that a passenger was the owner of a part, and Bushby & Co. of all the rest of the cargo. And this was supported by his test affidavit. The proctor now, in his motion, asserts that each and every shipper was the owner of all the goods shipped in his name; thus declaring that Bushby & Co. never owned any part of the cargo except the saltpetre above mentioned. In the freight list, R. G. Bushby is the shipper of 600 boxes of soap and 1137 coils of rope and other articles. In his letter of the 23d of August, this same R. G. Bushby, after speaking of the vessel, says, with reference to the cargo, This does not belong to me, but was shipped by various parties; and, as ship-owner acting for the interest of all concerned, I approve of the course determined upon with the saltpetre. Here is a distinct disclaimer of the ownership of the cargo without reservation of any part.

He undertakes, merely as ship-owner, to sanction the sale made at Boston of the saltpetre. Where are Messrs. Bushby & Co., of Liverpool, the alleged owners of the saltpetre? Why were they not consulted? If they have any real interest in the matter, why have they not been heard from, either directly or indirectly, since the commencement of these proceedings? We do not learn that they have, up to this moment, ever made any communication whatever to any person, either at Nassau or Boston, in relation to this cargo. All that has been written respecting it has been by R. G. Bushby. His letter of the fifteenth day of May, to Adderley & Co., stated that further instruction would be sent by the Nassau mail. By the affidavit of Harris, it appears that a subsequent letter was sent dated the 7th of June, giving some instructions as to the vessel, but not a word as to the cargo shipped at Liverpool. Nor does it appear that any one of the ostensible shippers has ever made any consignment, order, or communication, or manifested any interest respecting the cargo.

The affidavits in support of this motion do not set forth any further evidence in support of this claim, or state any facts from which it may be inferred that any such exists. Indeed, not one of the affiants states that he expects or believes that any such further proof

can be produced. The difficulties which encompass this claim seem not to admit of any rational solution. No explanation, in any degree satisfactory, has been offered; and there is no reason to suppose that any further material evidence can be obtained.

The motion for further proof must be refused, and the claim made on behalf of Messrs. Bushby & Co. dismissed, and the cargo condemned. To prevent misapprehension I think proper to say that I do not question that trade may be lawfully carried on between one neutral port and another, even in goods contraband of war. However detrimental may be the bringing of such articles to the immediate vicinity of the enemy's country so as to facilitate the running of the blockade, still, if the voyage is really to terminate at a neutral port, it cannot be interrupted. But if it is not to end there,—if the actual destination be to the enemy's country, to touch only at the neutral place for the purpose of facilitating the enterprise by concealing the destination as far as possible,—then the voyage may be treated according to its true character, as one to an enemy's port. But that inquiry is unnecessary here. My decision rests entirely upon other grounds.

It remains only to determine upon what conditions the vessel shall be restored to Maxwell and others. By Act 1800, c. 14, § 1 (2 Stat. 16), it is provided that when a merchant vessel, belonging to any person under the protection of the United States, shall have been taken by a public enemy, and shall be recaptured by a public armed ship of the United States, such vessel not having been condemned by competent authority before the recapture, the same shall be restored to the former owners upon payment of one-eighth part of the true value, for and in lieu of salvage. The language of this statute is perhaps in strictness applicable only to captures in an international war. But the analogy is so close, that I think it most proper to adopt the rule therein prescribed in the present case. By the 4th section of the statute, the whole of such salvage is to go to the captors. I shall order restoration of the vessel to Maxwell and others upon payment, to the captors, of one-eighth part of the value thereof, and of all costs and expenses which they have incurred on account of the vessel.

After the vessel and cargo were condemned, a hearing was had upon the petition of the mate and four of the crew of the prize that wages and compensation for their detention as witnesses might be allowed them out of the proceeds of the vessel and cargo.

SPRAGUE, District Judge. The petitioners are British subjects, and joined the brig in Liverpool, under articles to go to Nassau and back, the vessel being documented as British and under a British flag, with British subjects held out as owners and as master. There is no evidence that the petitioners knew or suspected that these appearances were false, when they shipped, or sailed. She was captured near Nassau, and has been condemned as enemy's property. The master, officers, and crew were brought in and examined by the prize commissioners, and these petitioners seem to have testified fairly.

As the capture has been held justifiable, the captors are not personally responsible to the crew of the prize. Their claim for wages must rest on their lien on the vessel and cargo. But courts of prize do not regard these liens in favor of neutrals on prize vessels or cargoes. I have asked the counsel for the petitioners to find me a precedent for allowing wages out of the proceeds of a condemned vessel, and he admits that he can find none. The claim for wages, therefore, cannot be allowed against the fund, either on principle or authority. If the petitioners engaged on board this vessel with knowledge of the falsity of her assumed neutral character, they can expect nothing of the belligerent. If they were deceived, they have a claim for damages upon the merchants in Liverpool who deceived them.

The other branch of the petitioners' claim is for their detention here after the vessel's arrival. The law of nations requires captors, when they take in a vessel, to send in also the master, and some of the crew. They are sent in in obedience to the international law, as much for the benefit of the owners of the property, as of the captors. The failure to send them in is cause of grave complaint by neutral powers whose citizens may claim a vessel or cargo as their property. It is supposed that, if the voyage and title are honest, such persons may be able, by their testimony, to corroborate the documents, or to explain any unfavorable appearances. Here again I have asked the counsel for the petitioners, if a precedent was to be found for allowing compensation from the prize fund, in case of condemnation, to the crew of the prize, for their necessary detention for the purposes of the examination. No such precedent has been found. In this respect, therefore, as in regard to wages, I must disallow the claim, as without precedent, and as not consistent with the general principles of prize law.

But it seems that after the prize commissioners had completed the examination, and there was no longer need to detain the petitioners for the purposes of this cause, they were further detained for more than forty days. For this further detention, they claim compensation. It is said that this detention was by an order from the secretary of the navy to the prize commissioners. It must be supposed that the department had sufficient reasons for making this order, and for continuing the detention of the men; but the reasons do not appear to have been connected with any judicial proceedings in this cause. The further detention was not at the request of the captors, nor was it for their benefit. When the petitioners had completed their tes-

timony, which was fairly given, and turned out to be useful to the captors and the government, this court and the captors had no farther control over them or right to detain them. The further detention was an executive act of the government, for its own purposes. I do not think that I ought to charge compensation or damages for this detention, upon the captors, or upon the prize fund. To charge it on that fund would be to charge it upon the captors.

[This case was affirmed on appeal in Case No. 15,600.]

LILLA, The (UNITED STATES v.). See Case No. 15,600.

Case No. 8,349.

LILLEY v. KELSEA.

[1 MacA. Pat. Cas. 568.]

Circuit Court, District of Columbia. Jan., 1858.

[This was an interference proceeding between Alfred T. Lilley, assignee of Samuel Porter, and H. Kelsea, assignor to himself and Henry Dunklee.]

The invention in controversy in this case is the same as that involved in the case of Hill v. Dunklee [Case No. 6,489].

[The case is not reported.]

Case No. 8,350.

LILLIBRIDGE v. ADIE.

[1 Mason, 224.] [1]

Circuit Court, D. Rhode Island. June Term, 1817.

WILLS — CONSTRUCTION — FEE TAIL — VESTED REMAINDER — CROSS REMAINDERS IN TAIL — JOINT TENANCY — TENANCY IN COMMON.

Devise by testator to his wife for life, and after her decease to his two daughters, A and B, to them, their heirs and assigns; but in case they should die without issue, that the same should go to, and vest in, their two sisters, C and D. *Held*, that the devise to A and B. was a fee tail, and not a fee simple, the contingency, upon which the limitation was to take effect, not being limited to a life in being, but being upon an indefinite failure of issue; and that the estate to C and D, was a vested remainder, to take effect upon the death of both A and B, without issue. That cross remainders in tail were to be implied between A and B. That, at common law, A and B would take joint estates for life, with several remainders in tail to their issue; but by the statute of Rhode Island, it would be turned into a tenancy in common, and several estates tail in possession vested in them. Quaere, whether C and D took estates for life, or in fee, under the will.

[Cited in Arnold v. Buffum, Case No. 554.]

This was a real action, brought by [Gardner Lillibridge] the demandant, as son and heir of Charlotte Lillibridge, deceased, to recover one undivided fourth part of a certain estate, situate in Providence. There was a special count in the nature of a formedon, to which the general issue was pleaded. At the trial at November term, 1816, the parties agreed to the following statement of facts: That Thomas Sabin, the testator, being seised of the demanded premises in fee simple, made his will, which is in the case, dated the ninth day of August, 1797; and afterwards, being seised of the same premises, died in August, 1800. And the said will was afterwards duly proved and approved on the 3d of November, 1800. That after the death of said Thomas, Mary Sabin, the wife of the testator, entered into, and remained seised of, the premises in her demesne as of freehold, with remainder expectant thereon, as stated in said will, and afterwards, in January, 1805, the said Charlotte, the daughter, died, leaving the demandant, her son and sole heir at law. And afterwards, in June, 1817, the said Harriet, the daughter, died without issue. And in June, 1808, the said Mary Sabin, the mother, died. And afterwards, in 1815, the said Clementina, who was the wife of the said Alexander Adie, died, leaving issue by the said Alexander, which issue are yet alive. And the said Mary Sabin, the daughter, is yet living. And after the death of the said Mary Sabin, the mother, the said Clementina, and the said Alexander Adie entered into the premises, and became seised of the same in right of the said Clementina; and after her death as aforesaid, the said Alexander Adie, the defendant, remained seised of the premises, claiming the same as tenant by the courtesy, and the other defendants hold as tenants under said Adie. The above statement of facts was agreed by the parties to be in the nature of a special verdict. If the court thereon should be of opinion, that the plaintiff was entitled to recover, judgment to be entered accordingly; otherwise judgment to be entered for the demandants. The material clause in the will, referred to in the statement of facts, is as follows: "I give, grant, and devise, unto my beloved wife, Mary Sabin, all that my lot, where I now dwell, with the dwelling-house, store, and wharf thereon standing and being, for and during the term of her natural life; and after her decease, to my two beloved daughters, Harriet and Clementina, to them, their heirs, and assigns for ever; but in case they should die without issue, my will is, that the same shall go to, and vest in, their two sisters, Mary and Charlotte."

Bowen & Searle, for demandant.
Tristram Burgess, for tenants.

After argument the case was continued to this term for advisement.

Mr. Bowen, for demandant. We conceive the plaintiff is entitled to recover the demanded premises, upon the principle, that the devise vested an estate in fee simple in Harriet and Clementina, determinable upon the contingency of either or both dying without issue; and in that event vesting in Mary and Charlotte by executory devise. The first in-

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

quiry is, what was the intention of the testator? The second, can this intention be carried into effect, consistently with the established rules of law? The obvious intention of the testator we conceive to be, that in case either or both of the first devisees died without issue living at their death, the estate of the one or of both so dying should go over to Mary and Charlotte. He clearly did not mean, as is insisted by the demandant, that Harriet or Clementina should take the part of her, who happened to die first without issue, as joint tenant; because if such had been his intention, he would have so expressed it. By the common law, perhaps, the devise to Harriet and Clementina, to them, their heirs, and assigns, without more, would have created a joint tenancy; but the subsequent clause, "if they should die without issue, that the same shall go to, and vest in, their two sisters, Mary and Charlotte," directly overthrows this principle. Our statute, also (Laws R. I. p. 272, § 8), decides this point, and undoubtedly makes it a tenancy in common. It will not do for the demandant to contend, that the statute was not passed at the date of the will, for the same construction must be put upon the will as at the testator's death. Goodman v. Goodright, 2 Burrows, 878. The statute was passed in 1798, and the testator died in 1800; and the statute extends to all cases, where the estate had not then actually vested. The cases cited all show, that Harriet and Clementina took a fee simple contingent; and that the devise over is a good executory devise. Thus in the case of Hughes v. Sayer, 1 P. Wms. 534, where there was a devise over to the survivor, in case either devisee died without children, it was held, that the testator meant a dying without children living at the death of the parent, and consequently that it was a good executory devise. In Pells v. Brown, Cro. Jac. 590, there was a devise to Thomas and his heirs for ever, paying to his brother Richard twenty pounds at the age of twenty-one, and if Thomas died without issue, living William, then William should have the lands. The words "living William" probably had some influence at that time, in deciding the case; but we submit that from the current of authorities, without this limitation, the words "dying without issue" would have been properly construed, not an indefinite failure of issue, but a dying without issue living at the death of the first taker. And in direct affirmance of this principle, in Porter v. Bradley, 3 Term R. 143; Wilkinson v. South, 7 Term R. 555,—Lord Kenyon says, "If indeed the first words, 'leaving no issue,' had been used, they, according to the opinion of Lord Mansfield, in Forth v. Chapman, [infra], must be restrained to leaving issue at the time of his death." Lord Kenyon again observes, in Roe v. Jeffery (7 Term R. 589), "This question, in this and similar cases is, whether, from the context of the will we can collect, that where an estate is given to A, and his heirs for ever, but if he die without issue, then over, the testator meant dying without issue living at the death of the first taker." These are the leading cases on this subject in the English books, and we find their principles have been adopted by some of the most distinguished state courts in this country. Fosdick v. Cornell, 1 Johns. 440; Jackson v. Blanshan, 3 Johns. 292; Jackson v. Staats, 11 Johns. 348; Richardson v. Noyes, 2 Mass. 56; Ray v. Enslin, 2 Mass. 554. Kent, Justice, in Jackson v. Blanshan, says, that in Fosdick v. Cornell the Court reviewed the leading authorities, and held that the devise over was a good executory devise, and that the true construction was, a devise over to take effect on failure of male issue during the life of the first taker. That devise too contained the technical words "heirs male of their bodies."

We are aware of the rule, that an executory devise shall be void, if it be not limited to take effect within a life or lives in being. But we conceive, that the limitation over is to take effect within the time above described. The authorities referred to decisively show, that an indefinite failure of issue was not intended. Indeed, since the case of Pells v. Brown, but few, if any, cases can be found to support the technical rule, that dying without issue means an indefinite failure of issue. Courts have seized the slightest circumstances to prevent its operation, when it would evidently go to defeat the intention of the testator. There is another principle which will, probably, be urged by the defendant, viz. that if a contingent estate be limited to depend upon a freehold, which may support a remainder, it shall be construed a remainder and not an executory devise. This is not in our way, because here was a life estate first given to the widow with a fee after it, and the contingent limitations depend, not on the life estate, but the fee. Nor is this principle immutable, where the intention of the testator contradicts it. Again: This contingent estate cannot take effect, as a remainder, if the first devise is a fee simple, with a limitation in fee to Mary and Charlotte, because it would be limiting a fee upon a fee, contrary to the common law, which gives birth to remainders; but may be done by an executory devise, as a testamentary disposition. Again: There can be no doubt, that the ulterior devise over is as extensive as the antecedent one, although there are no express words of inheritance. The testator gave a fee to the first devisees, and he intended the same, in a certain event, should go to, and vest in, the last. We have not touched the doctrine of estates tail, because the defendant put the case expressly upon the ground of a joint tenancy. If he changes his position, we pray an opportunity to answer and amend our declaration accordingly.

Tristram Burgess, for tenant, contended,

first. Clementina and Harriet are joint tenants, and therefore, Clementina, being survivor, takes all. To prove joint tenancy, see Blackstone on that title. 2 Bl. Comm. 179. There are no restrictive words in the will. They have one interest, commencing at one time, by one title, and held by one possession. But the statute of the state is objected. This statute was made after Sabin made his will, though before his death; if therefore he uses the words, which, at the time of making the will, would convey a joint tenancy, the words ought now to be so construed. The words "to them, their heirs and assigns for ever," always conveyed a joint tenancy. But the statute says, that if from the words of the will it appears to be the intention of the party, that the lands should be holden in joint tenancy, they shall be so holden. Now if it appears by the will, that the testator intended, that other parts of the estate should be held as a tenancy in common, we must conclude he did not intend this should be so holden. The will was written by a professional man. Several devises are made to several devisees, "to them, their heirs and assigns for ever," with these words added, "to be equally divided between them." These words cut off survivorship, and reduce a joint tenancy to a tenancy in common. King v. Rumball, Cro. Jac. 448; 3 Coke, 39; 3 Mod. 209. The words "equally to be divided," being used in other devises in the will, and not in the devise to Clementina and Harriet, it is manifest, from the words of the will, that the testator intended the devise to Clementina and Harriet should be a joint tenancy, and not a tenancy in common. The words of the devisee are very technical, viz. "All that my estate," &c. The subject of the devise is one, "to them, their heirs," &c.; the object is one, viz. "them, their heirs," &c. expressly; and no implication of law can divide the estate, and give a part of it to the plaintiff, as heir at law of Charlotte. But if it be not a joint tenancy in Clementina and Harriet, it must be in them an estate tail; for though the words "to them, their heirs and assigns for ever," are used, yet in the condition, heirs seem to be restricted, by the words "issue of," to heirs of their bodies. Davie v. Stevens, Doug. 321; Wood v. Baron, 1 East, 259; Cruise, 278, § 20; Fearne, Exec. Dev. 350. If Clementina and Harriet took estates tail by the devise, then they also took cross remainders. Dyer, 303, 330; Chadock v. Cowley, Cro. Jac. 695; Holmes v. Meynel, T. Raym. 452; Wright v. Holford, Cowp. 31; Swinb. Wills, 172; 4 Leon. 14. But if Clementina and Harriet took cross remainders, then the plaintiff cannot take, until the deaths of Clementina and Harriet and all their issue. In the case of Wright v. Holford, it is said, that a limitation over in default of all the issues creates cross remainders. But the present plaintiff claims under the clause, "but in case they (Clementina and Harriet) should die without issue, my will is, that the same shall go to, and vest in, their two sisters Mary and Charlotte." If, therefore, Clementina and Harriet do not take estates tail with cross remainders, nor take as joint tenants, they take fee simple estates; and the devise over to Mary and Charlotte is an executory devise, to take effect on failure of issue of both Clementina and Harriet. But a devise executory to take effect after a dying without issue is void. Fearne, Exec. Dev. 11, 321; Lee's Case, 3 Leon. 111; Tilbury v. Barbut, 3 Atk. 617; Moore v. Parker, 1 Ld. Raym. 37; Id., 4 Mod. 316; Fearne, Exec. Dev. 363, 364, 336; Goodman v. Goodright, 2 Burrows, 873. There cannot be an executory devise after an indefinite failure of issue. But if this be not void, as an executory devise, yet the estate cannot vest in Mary and Charlotte, until the event has happened on which it is limited to them, viz. the dying of Clementina without issue, and Harriet without issue, that is, both of them, not one only. They have not so died, and therefore Mary and Charlotte, or their heirs, cannot now take. Swinb. Wills, 173.

Searle, in reply, for demandant. It is contended, that the two first devisees took as tenants in common. Our statute imposes on this devise a construction of a tenancy in common, unless a clear and manifest intention appears to the contrary. And surely nothing of the kind appears in the will. For although, in a subsequent devise, a tenancy in common is expressly given, yet it is in a distinct clause from the one in question, and I doubt whether it can be used legally to aid in the construction of it. Different clauses, or devises in a will may be used to explain each other, but in cases only, where the different clauses relate to the same devises, or the same subject matter. Besides, it is not presumable, that the testator dictated the phraseology in the clause, especially the technical words used in the latter; and if he did dictate the technical words, it is presumed he would have dictated technical words in relation to the first clause, if he had intended a joint tenancy. It cannot be presumed, therefore, that either the testator or the scribe had any idea, that the language of the last devise would or could affect the construction of the first devise, and it ought not, of course, to affect it. No part of the will can be called in to aid this particular devise as to this point, and it must, therefore, be decided by the rules of law; and our statutes settle it beyond all doubt to be a tenancy in common in Harriet and Clementina. This construction is, I think, confirmed by reflection. The testator no doubt supposed, that this was a very liberal provision for both of those daughters, and their families, and it is not presumable, that he could intend, that one should have a provision, which is large and liberal for both. If half was sufficient for one, while both lived, it would be equally so, when the other was dead. It cannot fairly be presumed, that the testator intended entirely to disinherit the

children of the daughter, who might die; for although on the having of issue the fee simple was in such deceased daughter, yet the testator clearly contemplated a benefit thereby to the children such daughter might leave. He supposed, that if his daughter left a fee simple, her children might directly or indirectly be benefited by it, and their mother would be able to provide for them. And although they took nothing from him, yet they might take from her. And hence he limited the fee simple to her on the contingency of her having issue, indicating very clearly to my mind, an expectation, that the surviving children might be benefited, as their mother's heirs, by means of the devise to her. It cannot therefore fairly be presumed, that he intended the first devisees should take as joint tenants; for if they did, the survivor would take the whole, although the deceased sister had left a large number of children. But it was, as before stated, evidently his idea and intention, that if the deceased sister had children, she should have an estate in fee simple, from which she would have it in her power to provide for them. It is contended on the other side, that admitting the two first devisees took as tenants in common, yet the second devisees cannot take the deceased sister's half. That before the devise over can take any effect in all, both the first devisees must die leaving no issue. This is a preposterous construction; and if it be a sound one, the deceased sister's half might have been in abeyance fifty years, waiting the event of the survivor's death without issue. And if she died leaving issue, it seems, that this half would have been undisposed of by the will, and remained as an intestate estate, and descended to all his heirs at law, some of whom it is very evident he never intended should have any part of this estate. The survivor could not take as tenant in common, and the second devisees could not take, as the survivor left issue. Surely there can be no foundation for such a construction. The testator clearly intended to dispose of all his estate, and by the will has legally disposed of all of it. And he has disposed of the estate in question among his four daughters, intending that the two several devisees should take all or half, or none, according to the contingency of the first devisees, or either of them, dying leaving no issue. The only just exposition of the devise is, to construe it distributively throughout, viz. He gives his two daughters, Harriet and Clementina, the estate as tenants in common; but if they, or either of them, die leaving no issue, then the share of such as so die leaving no issue, is to pass over immediately to the second devisees by way of executory devise.

STORY, Circuit Justice. Upon the facts in this case several important points have arisen; and as every question, touching the nature and effect of devises of real estate, materially affects the title of purchasers, we have taken time to consider them. In no branch of the law is a more cautious examination of authorities necessary; and indeed in no branch are the principles more generally built upon artificial and technical reasoning. It is quite another consideration, whether these principles were originally the most correct or equitable, that could have been adopted. It is sufficient, that they are now incorporated into the law, and cannot be separated from it without shaking the very foundations of all landed titles. We are at liberty in last wills and testaments to effectuate the intention of the testator, if by law it can be done. But in ascertaining what that intention is, the construction, which has been put upon like words, and the artificial rules, by which it is sifted and fixed in the authorities, are to be our inflexible guides, where they distinctly and pointedly apply. We are not permitted to indulge in conjectures, however plausible, as to the private intention of the party, when the law has already pronounced its own mode of investigating and deciding it.

The first question is, what is the nature and quality of the estate taken under the devise by the daughters of the testator, Harriet and Clementina? Is it an estate tail, or a fee simple? Is it a joint tenancy, or tenancy in common? The testator, after devising a life estate in the lands in controversy to his wife, devises it, "after her decease, to his two beloved daughters, Harriet and Clementina, to them, their heirs and assigns for ever." If the will had stopped here, there would have been no question, that the daughters took a fee simple. But the testator adds, "but in case they should die without issue, my will is, that the same shall go to, and vest in, their two sisters, Mary and Charlotte."

It was supposed at the argument, that the words "if they should die without issue" did not mean a general failure of issue at an indefinite period of time, but a failure at the death of the first takers, or one of them. If this be the legal import of the words, it will certainly add some weight to the argument, that they do not operate to abridge the absolute fee given by the previous clause; for then the limitation over being to take effect, if at all, upon the death of a person in esse, might clearly be good, as an executory devise. Fearne, Exec. Dev. 352; Pells v. Brown, Cro. Jac. 590; Goodtitle v. Wood, Willes, 211, and other cases cited in Lippett v. Hopkins [Case No. 8,380]; Doe v. Wetton, 2 Bos. & P. 324; Jackson v. Staats, 11 Johns. 337. If, on the other hand, these words are to be construed as referring to an indefinite failure of issue, then, unless the estate be in tail only, the limitation over will be on a contingency too remote, and consequently void. Fearne, Exec. Dev. 322; Denn v. Shenton, Cowp. 410; Chadock v. Cowley, Cro. Jac. 695; Brice v. Smith, Willes, 1; Comyn, Dig. "Devise," 5,

and cases cited in Lippett v. Hopkins [supra]; 6 Cruise, Dig. "Devise," c. 17, § 22, etc.; Id. c. 18, § 17, etc. The general principle to be extracted from the authorities is, that the words "dying without issue," in reference to freehold estates, are to be construed an indefinite failure of issue, unless there be something in the context, which manifestly confines the sense to a definite period of time. In respect to terms of years, and other personal estate, courts have very much inclined to lay hold of any words to tie up the generality of the expression "dying without issue," and confine it to dying without issue living at the time of the person's decease. But in respect to freeholds, the rule has been rigidly enforced, and rarely broken in upon, unless there were strong circumstances to repel it. Fearne, Exec. Dev. 357, 361 (Butler's Ed., 471, 476); Crooke v. De Vandes, 9 Ves. Jr. 197; Dansey v. Griffiths, 4 Maule & S. 61. The cases of Porter v. Bradley, 3 Term R. 143, and Roe v. Jeffery, 7 Term R. 589, have gone a great way; but they turn on distinctions, which though nice, clearly recognise the general rule. In the first case, the devise was "to my son A and his heirs and assigns, and in case he should happen to die, leaving no issue behind him, then to my wife B during her widowhood, and after her decease or marriage, to my son C, his heirs and assigns for ever." Great stress was laid upon the words "leaving no issue behind him," and upon the circumstance of there being a life estate to B, as confining the contingency to the death of A; and the court held, that A took a fee, and that the devise over was a good executory devise. In the last case, the devise was "to my grandson A, and his heirs for ever, but in case A should depart this life and leave no issue, then the premises should return unto his granddaughters B, C, D, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike." The court held, that A took a fee, and that the executory devise over was good, the contingency being confined to a life then in esse. Great stress was laid upon the circumstance, that the granddaughters were then living, and only took estates for life. If the estates over in this last case had been in fee, it seemed admitted, that the other words would not have pointed to any other period than an indefinite failure of issue; and consequently to support the limitation over it must have been held, that A took an estate tail only. In the case now before the court, assuming that the devise over to Mary and Charlotte was in fee, there is not the slightest circumstance, from which we can infer, that the testator intended, that it should take effect (if at all) only upon the failure of issue at the death of the first devisees. In this view, it falls completely within the authorities, which pronounce the limitation over to be upon a general and indefinite failure of issue. I need not recite these authorities; they are numerous, and so pointed, that it is impossible to make any solid distinction. See authorities cited; Lippett v. Hopkins [Case No. 8,380]; Fearne, Exec. Dev. 322, etc. (Butler's Ed., 444); 6 Cruise, Dig. "Devise," c. 17, § 22, etc.; Id. c. 18, § 17; Denn v. Shenton, Cowp. 410; Tenny v. Agar, 12 East, 253; Dansey v. Griffiths, 4 Maule & S. 61. On the other hand, assuming that the devise over gave life estates only to Mary and Charlotte (a construction, which puts an end to the demandant's claim), it does not follow, that the previous estate is at all events to be held a fee simple. That is only one circumstance, from which an intent to limit the contingency to the death of the first devisee may be inferred; but it is not decisive as to the extent of the estate previously devised; for such a contingency may as well be limited upon an estate tail as an estate in fee. Spalding v. Spalding, Cro. Car. 185, and cases cited; Lippett v. Hopkins [supra]; Fearne, Exec. Dev. 308, 398. In Porter v. Bradley, Lord Kenyon said, "If the devise had been, and in case he (A,) shall die without heirs, then over," it would have given to A an estate tail. Yet in that case there was a subsequent limitation on failure of A's issue to the testator's widow for life. So in Webb v. Hearing, Cro. Jac. 415, the devise was "to A, my son, after the death of my wife, and if my three daughters, or either of them, do outlive their mother, and A, their brother, and his heirs, then they to enjoy the same for term of their lives;" and it was held, that A took an estate tail only. See, also, Tyte v. Willis, Cas. t. Talb, 1; Forth v. Chapman, 1 P. Wms. 663; Roe v. Scott, Fearne, Exec. Dev., note by Powell, p. 363. It may also be admitted, as is asserted by the late learned Mr. Fearne,—Fearne, Rem. 376 (Butler's Ed., 488),—that though an executory devise in tail, or in fee, to one in esse, after a dying without issue, is void; yet that an executory devise for life to one in esse, to take place after a dying without issue, may be good; because in the latter case the future limitation being only for the life of one in esse, it must necessarily take place during that life, or not at all; and therefore the failure of issue in that case is confined to the compass of a life in being. But it by no means follows from this admission, that every such limitation over for life is to be construed an executory devise; for an estate for life may well be limited to take effect after an indefinite failure of issue, in which case it is a mere vested remainder for life, after an estate tail. Fearne, Rem. 148 (Butler's Ed., 215, etc.). What, therefore, shall be the effect of a limitation over for life to one in esse after a previous estate devised, which may be either an estate in fee, or in tail, depends upon the context and intention of the testator, to be collected from the whole will. It may be ei-

ther a regular remainder, or an executory devise, as the intention of the testator may be best answered.

Upon a full consideration of this will, I am of opinion, that Harriet and Clementina took estates tail only, and that the devise over to Mary and Charlotte is a technical remainder, either for life, or in fee, and not an executory devise. In my judgment, the testator intended the devise over to take effect upon the regular determination of the preceding estate, whenever it should happen, and not merely upon the event of its happening at the death of the first devisees. It is clearly settled, that though after a limitation to A and his heirs, a devise over to a stranger, after a dying without heirs, is void, as being too remote; yet that if such devise over be to a person, who is a relation of, and capable of being a collateral heir to, the first devisee, in that case the first devisee takes only an estate tail; because the limitations over to a collateral heir shows, that lineal heirs only could have been intended by the testator. Fearne, Exec. Dev. 350 (Butler's Ed., 466); Porter v. Bradley, 3 Term R. 143; Parker v. Thacker, 3 Lev. 70; Brice v. Smith, Willes, 1; Morgan v. Griffiths, Cowp. 235; Preston v. Funnell, Willes, 165; Goodright v. Goodridge, Id. 370. But if in such a case the devise over be after a dying without issue, there the word "issue" clearly qualifies the meaning of the preceding word "heirs," and will reduce the first estate to a fee-tail, whether the devise over be to a stranger, or to a collateral heir. Denn v. Shenton, Cowp. 410; Chadock v. Cowley, Cro. Jac. 695; Brice v. Smith, Willes, 1; Comyn, Dig. "Devise," note 5; Lippett v. Hopkins [supra], and cases there cited. These cases completely govern all cases, where the limitation is upon an indefinite failure of issue, and that as well, when the estate over is for life, as in fee. Porter v. Bradley, 3 Term R. 143; Webb v. Hearing, Cro. Jac. 415; Tyte v. Willis, Cas. t. Talb, 1; Forth v. Chapman, 1 P. Wms. 663; Roe v. Scott, Fearne, Exec. Dev. 363, note by Powell; Tilbury v. Barbut, 3 Atk. 617; Tenny v. Agar, 12 East, 253; Dansey v. Griffiths, 4 Maule & S. 61. In the present case, there is no intent appearing to make the words carry any other sense, than what they import at law, viz. an indefinite failure of issue. If so, then the estate in the first devisee is clearly an estate tail. This interpretation will be conclusively established, if cross remainders are to be implied between Harriet and Clementina, and the devise over is to take effect only upon the death of both of them without issue, a point, which it now becomes necessary to consider. The devise over, is, "in case they (Harriet and Clementina) should die without issue, then my will is, that the same shall go to, and vest in, their two sisters, Mary and Charlotte." It is argued, that Harriet and Clementina take as tenants in common, and not as joint tenants; and that the devise over ought to be construed to take effect upon the death of either of them without issue, as to the moiety of the party so dying.

At common law, if the first devisees took a fee simple, the estate would clearly be a joint tenancy in fee (Co. Litt. p. 181, § 277); and if a fee tail, then they would be joint tenants for life, with several estates tail (Co. Litt. pp. 182, 184, § 283; 2 Vern. 545; Fearne, Rem. 27). But the statute of Rhode Island of 1798 (page 272, § 8) has altered the common law in this respect, and declared all such estates shall be estates in common, unless it shall be expressly declared, or shall manifestly appear to be the intention of the party, that the estate should be joint and not in common. There is no such express declaration or manifest intention in this will, and therefore it must be held, that the first devisees took as tenants in common. It does not, however, follow that the devise over is to take effect upon the death of either of the devisees without issue, as to her moiety; for the language of the testator is, "if they shall die," not if "either of them shall die," then over to Mary and Charlotte. It is argued, that this is the necessary construction, because otherwise the estate as to one moiety might be in abeyance for fifty years, if one sister or her issue should so long survive the other sister and her issue. This supposed difficulty, however, could not occur, except upon the supposition, that the first devisees take in fee simple, and the limitation over is an executory devise; for if they take a fee tail only, then cross remainders in tail may well be implied between them, with a subsequent remainder to Mary and Charlotte. And I am clearly of opinion, that cross remainders in tail are to be implied between the first devisees. This construction comports with the language of the will, and the apparent intention of the testator, and stands confirmed by indisputable authorities. In Holmes v. Meynel, T. Jones, 172, Poll. 425, and T. Raym. 452, the devise was, in effect, to my two daughters, A and B, and their heirs equally to be divided betwixt them; and in case they should happen to die without issue, then to my nephew C, and his heirs male, &c. A died without issue, B surviving, and the question was, whether C was entitled to a moiety of the land; and the court held, that he was not, and that upon the words of the will an estate tail in remainder was given to B by implication. This case is in all material respects like the present, and has been uniformly recognised as law. It is supported by a series of modern decisions, which, so far from narrowing the implication as to cross remainders, have uniformly enlarged every presumption in their favor. Wright v. Holford, Cowp. 31, 6 Brown, Parl. Cas. 156, etc.; Phipard v. Mansfield, Cowp. 797; Atherton v. Pye, 4 Term R. 710; 1 Saund. 185, note 6; Watson v. Foxon, 2 East, 36.

Upon the whole, my opinion is, that Harriet and Clementina took estates in fee tail in the demanded premises, with cross remain-

ders in tail to each in the moiety devised to the other. and an ultimate remainder in the whole to Mary and Charlotte. The only doubt, that has ever occurred to me, was upon the construction, that Mary and Charlotte took life estates only; for if they take in fee, there is nothing on which to hang a reasonable doubt; and if they took life estates only, the present demandant can have no title to recover.

Whether Mary and Charlotte took an estate of inheritance or not, it is unnecessary to decide. To pass an estate of interitance by a will, there must be express words of limitation, or words tantamount. Right v. Sidebotham, Doug. 759. Many of the devises, which have been held to pass life estates only, seem much more strongly to point to a fee than the present. Woodward v. Glasbrook, 2 Vern. 388; Pettywood v. Cook, Cro. Eliz. 52; Hawkins' Case, 2 Leon, 129; Roe v. Holmes, 2 Wils. 80; Roe v. Jeffery, 7 Term R. 589; Foster v. Romney, 11 East, 594; Denne v. Page, Id. 603, note; Roe v. Daw, 3 Maule & S. 518; Doe v. Pearce, 1 Price, 353; Paice v. Archbishop of Canterbury, 14 Ves. 364; Hay v. Earl of Coventry, 3 Term R. 83; Doe v. Allen, 8 Term R. 497; Comyn, Dig. "Devise," note 7; Clayton v. Clayton, 3 Bin. 476. Let judgment be entered, that the demandant take nothing by his writ.

Case No. 8,351.

LILLIE v. REDFIELD.

[4 Blatchf. 41.] [1]

Circuit Court, S. D. New York. April 21, 1857.

CUSTOMS DUTIES—INVOICE VALUATION—FRAUD IN VALUATION—CORRECTION OF ERROR.

1. Semble, that the proviso which concludes the 8th section of the tariff act of July 30, 1846 (9 Stat. 43), was not repealed by the act of March 3, 1851 (9 Stat. 629), and that such proviso applies to entries made without any increase in the valuation given in the invoice, as well as to those in which an addition has been made to the invoice under the provisions of that section.

2. Where a fraud was committed on an importer of segars, by the manufacturer of them, by invoicing them erroneously as to their grades, and the duties were deposited on the valuation in the invoice, and the government appraisers decided that the fraud had been committed, and that the invoice should be reduced accordingly, but the collector refused to permit the reduction, because the secretary of the treasury, after correspondence on the subject, would not authorize it, and exacted duties on the invoice value, and the entries were then adjusted and liquidated under a protest annexed to a copy of the appraisers' report setting forth the error in the grades, the protest referring to the report and the correspondence: *Held*, that the collector ought to have allowed the error to be corrected, and that the protest was sufficient, and was made in time.

This was an action [by Benjamin H. Lillie and others] against [Heman H. Redfield] the collector of the port of New York, to recover back an alleged excess of duties exacted on certain entries of segars, of various brands and different grades, which had been procured under a contract, and were invoiced as of first, second, and third grades. The duties were deposited on the valuations in the invoices. On an examination of the segars, it was discovered that they had been fraudulently invoiced by the manufacturer, seconds being invoiced as firsts, and thirds as seconds. It was proved that there was no difficulty in determining the different grades. The government appraisers, after this fact was called to their attention, decided that seconds had been invoiced as firsts, and thirds as seconds, and that the invoices should be reduced accordingly. The jury found a verdict for the plaintiffs.

John S. McCulloh, for plaintiffs.
John McKeon, Dist. Atty., for defendant.

HALL, District Judge. I am not prepared to say that the counsel for the plaintiffs in this case is right in supposing that the proviso which concludes the 8th section of the tariff act of July 30, 1846 (9 Stat. 43) was repealed by the act of March 3, 1851 (9 Stat. 629.) On the contrary, I am strongly inclined to the opinion that the proviso referred to is in full force. I am also quite clear, that the proviso applies to entries made without any increase in the valuation given in the invoice, as well as to those in which an addition has been made to the invoice under the provisions of that section. I do not, however, intend to decide these questions, as I do not deem it necessary to do so in the present case.

I regard the evidence in this case, and the finding of the jury, as sufficient proof that there was a fraud committed upon the importers, by a mis-description, in the invoices, of the goods intended to be, and in fact, entered; and I am of the opinion that, when this fraud was discovered, it was the duty of the collector to correct the assessment of duties accordingly. The grades are matters of description. If, under like circumstances, coffee had been invoiced as best Java coffee, when it was in fact a low grade of St. Domingo coffee, worth not more than half the price of the former, and had been honestly entered according to the invoice, but, before the duties were liquidated, it had appeared that, through error or fraud on the part of the foreign merchant, the importer had entered it by a wrong description, and at double its fair dutiable value, I think the importer would have had a right to demand that the duties should be assessed upon it as St. Domingo coffee, and only at its fair dutiable value. Certainly, if the invoice was of "pure white lead," and by error or fraud, the article actually entered was "whiting," of half the value, it would hardly be contended that the proviso referred to should conclude the importer. I can see no real difference

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

in the cases, for the grades are a necessary part of the description of the article invoiced. I see no reason for rejecting the plaintiff's claim.

The protest was annexed to a copy of the appraisers' report or statement, which set forth this error in the grades, and it referred to that statement, and to the correspondence between the plaintiffs and the secretary of the treasury. It must, I think, be considered sufficient. Indeed, no objection was taken to the form of the protest, but it was insisted it was not made in time. Under the case of Marriott v. Brune, 9 How. [50 U. S.] 619, it was in time. The matter was for a long time in negotiation after the deposit or advance of the duties claimed, and the collector, as appears from the correspondence, was apparently willing to correct the error, if he could do so under the authority of the secretary of the treasury. This authority was refused, after which, as the case states, "the said entries were adjusted and liquidated on the 13th of September, 1855," and after the protest had been made. The plaintiffs must have judgment on the verdict, the amount to be adjusted at the custom-house.

Case No. 8,352.

The LILLIE MILLS.

[1 Spr. 307;[1] 18 Law Rep. 494.]

District Court, D. Massachusetts. Nov., 1855.

MARITIME LIEN—SUPPLIES—FURNISHED IN HOME PORT—REASONABLE OPPORTUNITY TO ENFORCE.

1. By the general maritime law, there is no lien upon a vessel for supplies in her home port.

2. The lien which attaches to a vessel for supplies furnished while in a foreign port, continues as against bona fide purchasers and attaching creditors, without notice, only until the furnisher has had a reasonable opportunity to enforce it.

[Cited in The D. M. French, Case No. 3,938; The Dubuque, Id. 4,110; The Artisan, Id. 567; The Bristol, 11 Fed. 163; Re Wright, 16 Fed. 483; Nesbit v. The Amboy, 36 Fed. 926; The Lyndhurst, 48 Fed. 840.]

3. The lien does not necessarily continue until the vessel has returned to the place at which the supplies were furnished.

This was a suit in rem, for supplies furnished for the brig Lillie Mills, in March, June, and October, 1853. The libel was filed October 12th, 1855. It appeared in evidence, that the brig was built at St. Mary's, Florida, in 1853, was registered there, and that port continued to be her home port, until October, 1854, when she was registered in Portland, Maine. A large portion of the claim was for articles furnished while the vessel was building at St. Mary's, or before she left her home port, for the first time. And as to all this portion of the claim, the respondent contended that it never constituted a lien upon the vessel. It further appeared, that in October, 1853, the vessel was in the port of New York, the residence of the libellant, who then furnished her with a portion of the supplies now sued for. Since these supplies were furnished, the vessel had been three times at St. Mary's, remaining two or three weeks each time; three times in the port of Boston,—once for a period of two months, and once for a period of twenty days; and three times in Portland. The libellant had notice of her being in Boston, at the several times she was there. The respondent, George Baker, had purchased seven-sixteenth parts, and the respondents, Yeaton & Hale, five-sixteenth parts of said brig. These purchases took place about a year after the supplies were furnished. The respondent, Joseph D. Coburn, a sheriff, held the remainder of the said brig, under attachments upon mesne process issuing out of the state courts of Massachusetts, in favor of creditors. Upon these facts, the respondents contended, that if any lien ever existed for the supplies furnished in New York, it had been lost as against bona fide purchasers and attaching creditors.

C. W. Loring, for libellant.
John C. Dodge, for respondents.

SPRAGUE, District Judge. There is no lien, by the general maritime law, for the supplies furnished to this vessel in her home port. It is not contended that there is any by the statute law of Florida. For the supplies furnished in New York, the libellant, undoubtedly, once had a lien upon the vessel. The question is: Has it been waived or lost by lapse of time, or otherwise? If there had been no transfer or attachment of the property, I should hold the lien was not lost. When the rights of third persons have intervened, the lien will be regarded as lost, if the person in whose favor it existed has had a reasonable opportunity to enforce it, and has not done so. This is the well-settled rule of the admiralty. The lien for supplies has its origin in the necessities and convenience of commerce and navigation [and it will not be extended further than is required by the necessities in which it originates. It exists only for supplies in a foreign port. In the home port the law presumes the supplies may be had upon the credit of the owner. So when the vessel has had time to return to her home port, these necessities are answered.][2] It is for the interest of navigation and commerce that these liens should exist, and it is equally so that they should not be allowed to extend unnecessarily, to the injury of innocent third persons. In this case there can be no doubt the libellant has had ample opportunity to enforce his lien, and it cannot now be allowed to prevail against the rights of bona fide purchasers, or attaching creditors. Whether, if there had

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

[2] [From 18 Law Rep. 494.]

been no attachment of the four-sixteenths, the lien would have continued and been enforced against that part, notwithstanding the conveyance of the twelve-sixteenths, is a question which I have no occasion to consider.

It is urged by the libellant, that the lien must be regarded as continuing, until the vessel has returned to the port where the supplies were furnished. This is not so. She might never return there, and thus the lien would continue indefinitely. [As to all that portion of this vessel which has been conveyed, the lien is lost. As to that portion which has not been conveyed, the rights of attaching creditors are to be protected. It may be they will not maintain their actions. This can only be ascertained by the judgments of the courts in which the suits are pending. If the libellant elects to retain possession of the five-sixteenths to await the result of these suits, he can do so.] [2] Libel dismissed.

NOTE. See The Chusan [Cases Nos. 2,716, 2,717]; The Eliza Jane [Case No. 4,363]; The Antarctic [Id. 479]; The Utility [Id. 16,806]; The Romp [Id. 12,030]; The Canton [Id. 2,388]; Stillman v. The Buckeye State [Id. 13,445]; 1 Pars. Mar. Law, 433, note 2; 2 Pars. Mar. Law, 664, note 2.

LILLIE MILLS, The (ROBINSON v.). See Case No. 11,958.

LIMANTOUR (UNITED STATES v.). See Case No. 15,601.

LIMINGTON (BARRELL v.). See Case No. 1,040.

LINCK (FOOTE v.). See Case No. 4,913.

Case No. 8,353.

In re LINCOLN et al.

[7 N. B. R. 334; [1] 20 Pittsb. Leg. J. 1; 3 Pittsb. Rep. 440.]

District Court, W. D. Pennsylvania. Aug. 12, 1872.

BANKRUPTCY—DISCHARGE—PROPERTY WORTH FIFTY PER CENT.

A bankrupt, who has otherwise conformed to the requirements of the bankrupt law [of 1867 (14 Stat. 517)], is entitled to his discharge if, at the time he filed his petition in bankruptcy, he was possessed of property fairly worth fifty per cent. of the debts proved against his estate, upon which he was liable as principal debtor. The fact that the property was sold below what it was actually worth, should not prejudice his right to a discharge, for the reason, that, after the appointment of an assignee, the bankrupt had no further control over the property, or its disposal, all of which was left to the skill and discretion of the assignee.

[Cited in Re Taggert, Case No. 13,725; Re Waggoner, 5 Fed. 917.]

By SAMUEL HARPER, Register:

Alexander Cherry one of the bankrupts, has petitioned for his discharge. None of the creditors appeared in opposition. All of the debts proved were contracted subsequently to January 1st, 1869. No assent of creditors to the discharge has been filed, and the bankrupt's right to his certificate depends upon a sufficiency of assets. The whole amount of money actually coming into the hands of the assignee is $1,180.50. The total amount of debts proved is $2,640.15. If the word "assets" in the 33d section of the bankrupt law means, as some contend, money actually realized, it would require $1,320.08 to entitle the bankrupt to a certificate, and in this matter the certificate would have to be refused. I do not think that so restricted a construction should be placed upon the word. A bankrupt should have the full benefit of his property when he seeks a discharge, and ought not to be made the victim of circumstances over which he has had no control. When he files his petition he may be possessed of ample property to pay fifty per cent. of all his liabilities, but before there is time to sell and realize, many circumstances may happen resulting in depreciation and loss. Between the filing of the petition and a sale by an assignee, a considerable period must elapse, during which a commercial panic may occur, resulting in serious loss to the estate; or a fire may destroy or so seriously damage the property as to reduce the amount of money realized by the assignee below the requisite fifty per cent. The property may be in the stock of incorporated companies, and whilst it is in the hands of the assignee may become of greatly less value, or entirely worthless. Before the passage of the bankrupt law an insolvent debtor had a right to make such disposition of his property for the benefit of his creditors as he pleased. But this right is taken away, and his safety lies only in filing a petition in bankruptcy. This course necessarily results in delays. A stock of merchandise will generally command better prices before the business is closed than it will afterwards. Now, if the bankrupt possesses property fairly worth one-half of his liabilities when he files his petition, it seems unreasonable to deny him the advantages of a law designed for his relief, because, for causes over which he has no control, a less amount of money should be realized.

There is still another important consideration in this matter. In the appointment of an assignee the bankrupt has no voice—that belongs entirely to the creditors or the court, as the case may be. It is true that neither the creditors or the court will select, knowingly, an incompetent assignee; but still results do sometimes show that improper appointments have been made, and that serious losses have thereby occurred. I think it would do violence to the spirit and intent of

[2] [From 18 Law Rep. 494.]

[1] [Reprinted from 7 N. B. R. 334, by permission.]

the bankruptcy system, to say that the bankrupt should be held responsible, and suffer the penalty, in the case of an incompetent, dishonest or corrupt assignee, over whose appointment and in whose management he had no control. Where the bankrupt has acted in good faith, and performed his duty under the bankrupt law, I am of opinion that he should have his certificate, if, at the time he filed his petition, he was possessed of property fairly worth one-half of the debts proved against his estate, upon which he was liable as principal debtor. In this matter, the property consisted of a stock of watches, clocks, jewelry, and plate—standard articles, whose value could be correctly appraised by any one in the trade. The bankrupt testifies that when he filed his petition he took an inventory of stock, and that it amounted to between $3,000 and $3,500; that all of the goods were delivered to his assignee; that they could not have been bought for cash for less than $2,500; that a majority of them were first-class in manufacture, material and finish; that he assisted the auctioneer at the sale; that the goods sold greatly below their actual cost value—some fully fifty per cent. below, and others were almost given away; and that the goods were bought at low prices, principally by himself. This testimony is corroborated by Cummings Cherry, Jr., a brother of the bankrupt, who was book-keeper for the firm. The assignee also testifies, from his knowledge of the goods, that they realized on an average about fifty per cent. of cost price. There is no reason given for this considerable loss; and though I might conjecture one, it is unnecessary, so long as there is no shadow of reason for holding the bankrupt culpable. Nor does any blame attach to the assignee, for he is a merchant of this city signalized for his personal integrity, and his energy and success in business. It was because he possessed such qualities that he was selected by the creditors. I am aware it required much persuasion to induce him to accept the appointment, urging, as he did, his want of knowledge of the trade in which the bankrupts were engaged. In that view I entirely concur; for I think there can be no doubt that the best results can be obtained by those best acquainted with the business, and that creditors are generally blind to their own interests when they select an assignee who has no knowledge, or little if any, of the bankrupt's trade. Entertaining the views I have hinted at, more than expressed, and carefully considering all the facts, I have no hesitation in making the accompanying certificate of conformity recommending that Alexander Cherry, one of the bankrupts be discharged.

McCANDLESS, District Judge. Opinion of the register approved, and discharge of the bankrupt ordered.

Case No. 8,354.

The LINCOLN.

[1 Lowell, 46.] [1]

District Court, D. Massachusetts. Jan., 1866.

COLLISION—VESSEL AT ANCHOR — PRESUMPTION—PRUDENT AND SAFE POSITION—WATCH.

1. When one vessel drives upon another, which is at anchor in a proper position, the presumption is that the former is in fault.

[Cited in The Echo, 19 Fed. 454.]

2. It cannot be affirmed, as matter of law, that a vessel, coming to anchor in a harbor, is only obliged to swing clear of other vessels already anchored there. She is bound, if possible, to take up such a position as is prudent and safe under all the circumstances.

3. Where a brig was brought to anchor in the daytime, when the wind was blowing heavily and seemed likely to increase, ten fathoms astern of one schooner, and twenty fathoms ahead of another, and had out, when so anchored, only half the scope of her chains, and, during the night, the schooner ahead fouled the brig, which dragged on the schooner astern: *Held*, the brig was responsible to the latter schooner, whether she was at all in fault for the first collision or not, because she was anchored too near the schooner astern.

4. Semble, she was too near the other schooner also.

5. The injured schooner should have had an anchor watch; but as the neglect to keep one did not contribute to the collision, she was decreed to recover her whole damage.

In admiralty.

H. A. Scudder, for libellants.

J. C. Dodge, for respondents

LOWELL, District Judge. This is a cause of collision promoted by the owners of the Annie Magee, a schooner of two hundred and twenty tons burden, against the Lincoln, a brig of one hundred and ninety tons, for the consequences of a collision which occurred in the harbor of Boston on the night of the second of November, 1861. The pleadings were filed, and some of the evidence was taken soon after the event happened; but the hearing was, for some reason, not brought on until lately.

The libellants' schooner, having discharged a cargo of coal in Boston, took up her anchorage towards noon, on the edge of the flats, from half a mile to a mile to the southward and eastward of Long wharf, and about half way between two schooners already lying there, of which the only one we are concerned with in this case, the Eliza & Rebecca, was directly to windward. The wind was blowing fresh from the east-south-east, and seemed likely, as all the witnesses say, to increase. It did, in fact, increase during the afternoon, and some part of the night, until it was blowing very heavily.

An hour or two after the schooner came to anchor, the brig, with a load of coal on

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

board, was towed down from a comparatively insecure position near Rowe's wharf, and anchored between the Eliza & Rebecca and the Annie Magee directly to leeward of the one and to windward of the other, or very nearly so. Towards nine o'clock in the evening the Eliza & Rebecca and the brig were in collision, and the port anchor of the latter was lost, and presently after she drove down afoul of the Annie Magee and carried away her jib-boom, and was cleared and brought up nearly abreast of her. When the tide turned ebb, some hours later, the brig again fouled the schooner by swinging against her stern. So far the facts are clear.

The brig, then, having driven upon a vessel at anchor, a primâ facie case is made out against her, and to exonerate herself it will not be enough to show a recent collision by which she was rendered unmanageable, unless it appears that she was without fault in that collision; and, besides, that the second collision was a necessary consequence of the first, and not caused in whole or in part by her fault or negligence co-operating with her first and innocent collision. The Annapolis, 5 Law T. (N. S.) 326, 1 Lush. 376, note; The Egyptian, 8 Law T. (N. S.) 776; Seccombe v. Wood, 2 Moody & R. 290; The Christiana, 7 Notes Cas. 2; 7 Moore, P. C. 160. See The Louisiana, 3 Wall. [70 U. S.] 164.

In this case the claimants say that the collision, now in question, was caused solely by the earlier one with the Eliza & Rebecca, which was itself caused either by the negligence of the Eliza & Rebecca, or by the violence of the gale, and that, in either view, no fault can be imputed to the brig; and, finally, that the Annie Magee either caused or contributed to the misfortune by her negligence in not keeping an anchor watch. The libellants, on the other hand, allege that the brig was anchored dangerously near to both schooners, and is, therefore, responsible in this suit, whether the Eliza & Rebecca were in any fault or not; but that, in fact, she was not in any fault in the first collision, nor was their schooner in the second.

No vis major is proved. The gale does not appear to have been such as to drive a well-moored vessel from her anchors. We hear of no other disasters from drifting. All of the vessels whose history for that evening is given in evidence here, were riding securely, most of the time, at single anchors. Whether the Eliza & Rebecca dragged or not is in controversy; but if she did, it was only for a very short distance, and she was brought up instantly upon her second anchor being thrown over. The brig had but one anchor after the collision; and she appears to have been held by it; while, therefore, the wind was so strong as to be called a gale by several of the witnesses, it does not seem to have been of such great violence that no further cause need be sought for this misfortune.

To the contention of the libellants, that the brig was anchored too near the schooners, it is answered, by the claimants, in the first place, that, as matter of law, a vessel coming to anchor in a harbor, is bound only to swing clear of other vessels, and that, if she does this, she is at a proper distance, and is not responsible for the dragging of her own anchors or those of other vessels, which is said to be one of the necessary risks of navigation, like those which arise from sailing on a dark night, or in a fog. No authorities were cited for this position, and I have found none. The rule of law I take to be, that vessels must be navigated with all reasonable precaution against the happening of accidents, and with all reasonable preparation to extenuate the consequences of accidents, when they occur, and, amongst others, against dragging. It is on this principle, that a vessel which had been well and carefully anchored, and was driven from her anchors in a very severe gale, and forced against another vessel, was held liable for the damage, upon proof that she had been left with no person on board during a night when the gale, which occurred, was evidently threatened. And this, not because any precaution would have prevented her striking adrift, but that the crew, if on board, might perhaps, by prompt action, have prevented its injurious results to the libellants' vessel; Clapp v. Young [Case No. 2,786].

And so are the following authorities: In the case of The Volcano, 2 W. Rob. Adm. 337, Dr. Lushington, with the advice of the trinity masters, pronounced a steamer to be negligently moored because she had taken her berth at two cables' lengths or two hundred and forty fathoms, to windward of the injured vessel. In another case, very like the present, the trinity master pronounced it bad seamanship to anchor so near to another vessel, directly ahead or directly astern, that in case of striking adrift there would not be room to bring up or shear the drifting ship without danger of collision; and such was the opinion, he said, of the writers on navigation. And the damage was pronounced for, although the immediate cause of the drifting was the breaking of a chain cable, concerning which the owners were not proved to be in any fault. The Cumberland, Stu. Adm. 75. In a case before Judge Sprague it was held that one hundred and twenty-five fathoms directly to leeward was ample distance under the circumstances, and upon the nautical testimony of that case; and his judgment seems to imply that something more than swinging clear was required, although there was nothing like a gale existing or threatened. And the whole examination was conducted on the assumption that room enough must be given for the windward vessel to get under weigh. The Julia M. Hallock [Case No. 7,579].

No doubt this is in large part a question

of seamanship; and if it were shown that the chance of dragging was so slight as to be practically disregarded by prudent and skilful navigators, the court might well hold that the precautions ordinarily adopted by such men under like circumstances would be sufficient in a given case. But the evidence does not go to that extent. The attention of the experts, in the case at bar, was chiefly directed to this question of distance, as applied to the relative positions of the brig and the Eliza & Rebecca. And I think it is the fair result of their testimony that, under the circumstances of night, and a heavy blow approaching, they would consider it more prudent to take up a greater distance, if possible, from a vessel already anchored to windward of them, than that of ten fathoms, assumed by the libellants to have been the distance at which the anchor was dropped by the brig to the leeward of the Eliza & Rebecca. It is true that some of these gentlemen seem to think that as they would be in the leeward vessel and the risk would be chiefly theirs, they would be justified in choosing that position though unsafe; but it is not easy to see how they could rightfully assume any risk for themselves without at the same time undertaking it for all others whose interests might prove to be involved by their imprudence; and that is the very question here. Their evidence therefore appears to confirm the decisions, and to look to the question of prudence under all the circumstances as the test, and not merely swinging clear. So far as the fact of distance is concerned, I am entirely satisfied that the brig did drop her anchor at not far from ten fathoms astern of the windward schooner. (The judge here stated the evidence on this point.) It seems to me, therefore, that the brig was anchored imprudently near to the Eliza & Rebecca, and is therefore liable for the consequences to the libellants' vessel of the first collision, whether the Eliza & Rebecca were to blame in that matter or not; concerning which it becomes unnecessary to inquire.

It is still more plain that the brig was too near the libellants' schooner, and it is upon this part of the case that I chiefly rest my judgment, though I have considered the other very fully because it was fully argued and rests upon the same grounds of law. After careful examination of all the testimony, I am convinced that the mate of the brig, who anchored her, and whose deposition, as already stated, was taken soon after the collision, and who on this point agrees substantially with the libellants' witnesses, allows all the distance the facts would warrant in his statement, that when he went ashore for the night, the vessels were about twenty fathoms apart. And I understand this estimate to refer to the hulls of the vessels, as it naturally would, and in which sense I accept it as tolerably accurate; and of course the stern of the brig would be several fathoms nearer than this to the jib-boom of the schooner. Taking next the evidence of the respondents' witnesses, which are the most favorable to them in this particular, the brig had over not more than thirty fathoms of chain at this or at any time. It follows that she could not have given her anchors their full scope, if occasion should demand it, without fouling the schooner; for that scope was sixty fathoms. It follows again that the brig did not swing clear of the schooner, if by that is meant that she would clear her when the brig had her full play of cable. And I should not readily decide that it is either the law or usage of the sea to require when a gale is approaching that the anchoring vessel should swing clear of others with only so much chain as may happen to be needed at the moment of anchoring, without allowance for further scope, and I do not see that that allowance can well be less than the whole of her supply.

My judgment upon this point is strongly confirmed by the fact that our coasters usually come to anchor by one anchor only, and expect to use the other when occasion may require; but this necessity may be developed suddenly, and in many instances is known only by the dragging of the first anchor, and it is obviously necessary to have some sea-room to bring up a drifting vessel, and although it is a question of skill in each case how much should be allowed, extending, it appears, to two hundred and forty fathoms in one instance, and being less than one hundred and twenty-five in another; yet I cannot think, as I have said, that it can ever be less than the full scope of the vessel's chains.

The evidence discloses a considerable probability, at least, that the accident here was substantially what I have last supposed, and that the only anchor which really held the vessel was carried away, and that she was brought up as soon as the second and larger anchor took firm hold of the ground. (The judge considered the evidence of this.)

I am therefore of opinion that the brig was anchored imprudently near to both schooners, and especially to that of the libellants, and is responsible for this damage in whole, or in part; for the evidence is full to there being ample room in the harbor that afternoon for the brig to have taken up a safer position.

The only remaining question is whether the Annie Magee is likewise in fault. She had no anchor watch; and the preponderance of the nautical evidence is that she was bound to have one under such circumstances, and I should have no doubt of it without evidence. If, therefore, I could see any reason to believe that the collision might have been avoided by any exertions or manoeuvres which a wakeful crew upon the schooner could have adopted, I should require the losses to be divided. But the testimony is

very clear that she could have done nothing. The brig was in much better condition to shear, because she was loaded and took more hold of the water, but she could not avoid the Eliza & Rebecca, though discovered at a distance which was probably equal to that between these two vessels. And there has been no evidence which has any tendency to show that this fault on the part of the libellants can have contributed, in any way, to the disaster. I must therefore pronounce for the whole damage. Damage pronounced for.

LINCOLN (BAILEY WASHING & WRINGING MACH. CO. v.). See Case No. 750.

LINCOLN v. The JULIA M. HALLOCK. See Case No. 7,579.

LINCOLN (LEE v.). See Case No. 8,195.

LINCOLN (PURCELL v.). See Case No. 11,471.

Case No. 8,355.

LINCOLN v. TOWER.

[2 McLean, 473.] [1]

Circuit Court, D. Illinois. June Term, 1841.

FOREIGN JUDGMENT — RECORD — JURISDICTION OF COURT RENDERING—PERSONAL SERVICE.

1. Judgments of the several states, under the constitution and laws of the United States, have the effect, as evidence, in all the states.

[Cited in Burnham v. Webster, Case No. 2,179.]

[Cited in Melhop v. Doane, 31 Iowa. 400.]

2. The record imports absolute verity and cannot be traversed. But when the record of a judgment is offered in evidence, the court called to act upon it must inquire whether the court rendering the judgment had jurisdiction. If it had no jurisdiction the judgment is a nullity.

[Cited in Tenney v. Townsend, Case No. 13,832; U. S. v. Walsh, 22 Fed. 648.]

[Followed in Babbitt v. Doe, 4 Ind. 359. Cited in brief in Warren v. Lusk, 16 Mo. 102; Stansbury v. Inglehart, 20 D. C. 136. Cited in Rape v. Heaton, 9 Wis. 306 (O. S. 333); Dunlap v. Cody, 31 Iowa, 260.]

3. A proceeding by attachment is a proceeding in rem, and cannot bind the defendant in personam, unless he appears to the action.

4. If a suit be commenced by attachment, and there is no personal appearance, the judgment beyond the jurisdiction and the property levied on will be of no validity.

5. No state can bind, by its judgment personally, a defendant who is not within its jurisdiction, and on whom no notice has been served.

[Cited in U. S. v. Walsh, 22 Fed. 648.]

[Cited in Melhop v. Doane, 31 Iowa, 402.]

6. Where it appears, from the record, that process was served on the defendant, or that he appeared in the suit, the fact cannot be denied by plea.

[Cited in Thompson v. Emmert, Case No. 13,953; Logansport Gaslight & Coke Co. v. Knowles, Id. 8,467.]

[Cited in Wilcox v. Kassick, 2 Mich. 170; Westcott v. Brown, 13 Ind. 85.]

7. The facts on the record necessary to give jurisdiction are material, and cannot be controverted.

[Cited in Sprague v. Litherberry, Case No. 13,251.]

[Cited in Wilcox v. Kassick, 2 Mich. 170.]

8. The judgment of the court on these facts, if it go beyond the power of the state, will be disregarded.

9. A plea may show in what manner, whether by personal service or by attachment, notice is given, as this does not contradict the record but limits its operation.

10. Every government can exercise jurisdiction over the persons and property within its limits but not beyond them.

At law.

Mr. Lincoln, for plaintiff.

Messrs. Edwards and Hall, for defendant.

OPINION OF THE COURT. This is an action of debt brought on a judgment obtained in the state of Massachusetts. The first and second counts in the declaration are on the judgment, and two other counts are added on the consideration on which that judgment was obtained. To the first two pleas the defendant pleaded that he was not served with process in the suit in Massachusetts, and that he did not appear in the case. To the two other counts the defendant pleaded the recovery of the judgment in bar. The plaintiff demurred to the pleas, and for causes of demurrer assigned the following reasons: First: The plea to the first and second counts does not show to the court but that the said defendant was served with notice in some one of the ways provided by the laws of Massachusetts for the service of process. Second: It does not appear from the plea that at the time of the service of the process in the plaintiff's suit, in his former action, the defendant was an inhabitant of the state of Massachusetts. Third: The said pleas to the first, second, third and fourth counts, are inconsistent and irreconcilable. Fourth: The plea to the third and fourth counts does not aver that said former recovery was by a court of competent jurisdiction. Fifth: In other respects the pleas are defective in substance.

There is a repugnancy between the plea to the first and second counts, and that to the third and fourth counts. The former denies, in effect, the validity of the judgment, and the latter sets up the judgment in bar. If the first plea should be sustained, the latter, as a consequence, must be overruled. For, if the process was not served and no valid judgment was entered, the original cause of action is open, and may be examined and recovered under the third and fourth counts. But if the first plea shall be overruled, on the ground that the Massachusetts judgment is valid, the second plea must be held good, should the plaintiff claim under the third and fourth counts. When matter of record forms the gist of the action and issue is joined upon nul tiel record, the record itself must

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

be brought into court, or an exemplification of it under the act of congress. In England, if nul tiel record be pleaded and it be a record of the same court, the record itself must be produced. 2 Archb. Pr. B. R. 38; Tidd, Prac. 801. On an issue of nul tiel record, of the record of a superior court, as if an action in the common pleas or record of the king's bench be put in issue, as the inferior court cannot send for the record of the superior, a certiorari must be sued out with the cursitor, directed to the chief justice of the king's bench, requiring him to certify the record of the court of chancery, and the record being thereupon accordingly certified, an exemplification of it under the great seal is thence sent by mittimus to the inferior court to be there used as evidence. 1 Archb. Pr. B. R. 139. A record of an inferior court, if directly put in issue, is proved by the tenor of the record, which may be obtained without the intervention of the court of chancery, and certified under a certiorari issued by the superior court. Tidd, Prac. 804. In cases where the record is not directly put in issue by nul tiel record, it may be proved by an exemplification, or by an examined copy. 2 Saund. Pl. & Ev. 755. Where a record of any of the superior courts is pleaded, it must be pleaded with a prout pater per recordum, and not with a profert; and, it seems, that oyer of it is not demandable. 1 Ld. Raym. 250; 1 Term R. 149; Com. Dig. tit. "Pleader," E 29; 5 Coke, 75a.

In the case of Westerwelt v. Lewis [Case No. 17,446], several of the points raised in this case were considered and decided. A reference was made in that case to the constitution of the United States and the act of congress, and to several decisions of the supreme court, which gave the same effect to a judgment within any state, in every other state of the Union, as it has in the state where it is rendered. Some of these points, being very important, will be considered more at large.

It is a well-settled principle that there can be no averment in pleading against the validity of a record, though there may be against its operation. 1 Chit. Pl. 320; 2 Saund. Pl. & Ev. 754. The plea of nul tiel record is proper either where there is no record, or where there is a variance in the statement of it. Com. Dig. tit. "Pleader," 2, W 13, and Id. tit. "Record," C. Now if it be essential to the validity of the judgment that the record should show the jurisdiction of the court over the person of the defendant, by a service of process, it may be doubted whether nul tiel record was not the proper plea to raise the question. If the judgment be a nullity without the service of process on the defendant, he may well say there is no such record; or which, in effect, is the same, there is no effective judgment against him. But if the record shows that process has been served, it would seem to be clear that the defendant cannot deny the fact. In this case no profert was made of the record, and no oyer has been prayed, or, according to the rules of pleading, could be given to the defendant. He has pleaded generally that no process or notice was served on him, and that he did not enter his appearance.

As the object of the counsel is, on both sides, to present certain questions to the court for their decision, we will consider them as the counsel desire, without a special reference to the form of the pleadings. And first, as to the jurisdiction of the court of Massachusetts, by whom this judgment was rendered: This court are presumed to be acquainted with the local laws of the respective states, and we necessarily know that the judgment in question was given by a court of general jurisdiction. And it is insisted that this court are bound to presume jurisdiction in favor of judgments rendered by such court, whether the jurisdiction appears upon the face of the record or not. In Voorhees v. Bank of U. S., 10 Pet. [35 U. S.] 449, the court say, there is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. In Kentucky it has been held, that when the judgment or decree of a sister state is produced, the court will presume the tribunal rendering it possessed of competent jurisdiction and authority, and that it is binding on the parties. Scott v. Coleman, 5 Litt. [Ky.] 349, 350.

It is a universal principle in all courts that an order, decree or judgment of any court which has no jurisdiction of the matter is a nullity; and must be so treated when the record is offered in evidence, or used for any other purpose. Borden v. Fitch, 15 Johns. 121; Newdigate v. Davy, 1 Ld. Raym. 742. And in this respect there is no difference between a foreign judgment and the judgment of a sister state. The inquiry necessarily arises, had the court jurisdiction of the subject matter of the judgment? Rose v. Himely, 4 Cranch [8 U. S.] 241, 269; The Neueva Anna and Liebec, 6 Wheat. [19 U. S.] 193. In Obicini v. Bligh, 8 Bing. 335, suit was brought to recover damages awarded by the vice admiralty of the Island of Malta; and it was held that the decree, to be binding, must show that the defendant was brought within the jurisdiction of that court. There are presumptions which arise in favor of the jurisdiction, in a particular case, of a court which exercises general jurisdiction, that do not apply to courts of a special and limited jurisdiction. But it may be somewhat difficult to draw the line between these jurisdictions, as regards the present question, and especially in relation to foreign judgments, or the judgments of a neighboring state. Perhaps, in the one case, the character of the courts being determined, the jurisdiction will be presumed until the contrary be shown; and in the other, no such presumption arises, and the jurisdiction must be proved. Mills

v. Martin, 19 Johns. 33; Peacock v. Bell, 1 Saund. 73, 74; Kemp's Lessee v. Kenedy, 5 Cranch [9 U. S.] 173, [Case No. 7,686].

The extent to which the jurisdiction is exercised often becomes a question of great importance; and, in the argument, it has been raised in this case. In many of the states suits are commenced by a process of attachment, which, being levied on any article of property of even five or ten cents value, authorizes a judgment against the defendant to the full amount of the plaintiff's demand. On this judgment an execution may issue, and any property which the defendant may have within the jurisdiction of the court, may be levied on and sold in satisfaction of the judgment. This judgment, within the state, is binding on the defendant; and the question is, shall it be equally binding on him in any other state. That this question is not clear of difficulty may be admitted. In the case of Mills v. Duryee, 7 Cranch [11 U. S.] 481, the court held a record duly authenticated gives the same effect to the judgment as evidence, as is given to it in the state where it was rendered. That the only inquiry is, the effect of the judgment in such state. And to this import are the other decisions cited in the case of Westerwelt v. Lewis [supra]. Now if it be admitted that the judgment on the attachment be as conclusive against the defendant, in the state where it is rendered, as a judgment on personal notice, why should not the same effect be given to it in any other state. The constitution and act of congress refer to the effect of the judgment as evidence, and in no other respect. By the constitution congress have power, by "general laws, to prescribe the manner in which public acts of a state, its records and judicial proceedings, shall be proved, and the effect thereof." Not the effect of the authentication, as some courts have decided, but the effect of the public act, record and judicial proceedings. And by the act of 1790 [1 Stat. 122], congress provided the mode of authentication, and declared "that records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the court of the state from whence the said records are or shall be taken." It will not be contended by any one, that the constitution or law enlarges the jurisdiction of the state court. The power to do this is not conferred on the federal government. If a state shall assume jurisdiction over the persons or property of individuals, not within the state, such a proceeding could be of no validity. It is true a state may prescribe certain penalties for acts done by its citizens beyond the limits of the state, and not within the organized jurisdiction of any other power; but such penalties cannot be enforced until the offenders shall come within the state.

When any court is called to receive as evidence the record of a judgment, foreign or domestic, its form and substance must necessarily be examined. Not, it is true, as a court of errors, but to see that it is what it purports to be, the record of a judgment. And if, upon the face of such record, a want of jurisdiction appears, it cannot be received as evidence. It does not bind the defendant, nor can it conclude his rights. The laws of every empire have force only within its own limits. And all persons who reside temporarily or permanently within a government, are subject to its laws. And these laws, on principles of comity, are respected and enforced in other states in cases originating under them, provided they do not conflict with the rights of such states or of their citizens. These are the axioms of Huberas, and they are maintained by Boullenois and Vattel. No judgment of a state can act on property beyond its limits. If the person or property of an individual be within a state, it is subject to its jurisdiction. But if the proceeding be against the property only, the binding effect of the proceeding is limited to the property. In 3 Atk. 589, Lord Hardwicke says, "he would not permit the plaintiff to avail himself of the law of any other country, to do what would be gross injustice." And in the case of Buchanan v. Rucker, 9 East, 192, 194, which was a judgment obtained in the Island of Tobago, by nailing up a copy of the declaration at the court house door, which, under the local law, amounted to a service on the defendant; Lord Ellenborough said, "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, fairly construed, does not warrant such an inference; for 'absent from the island' must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court, out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an assumpsit in law upon the judgment so obtained." And this principle is sustained by American adjudications. Mills v. Duryee, 7 Cranch [11 U. S.] 481, 486; Piequet v. Swan [Case No. 11,134]; Borden v. Fitch, 15 Johns. 121. In Douglas v. Forrest, 4 Bing. 686, the court sustained its jurisdiction under the following circumstances: Hunter, who was the testator of Forrest, the defendant, being a native of Scotland, and owning heritable property there, contracted debts in 1799, and shortly afterwards left the country and went to India, where he died in 1817. In 1802 decrees for these debts were pronounced against him in the court of sessions. Of these proceedings Hunter had no notice, but the decrees stated that, according to the law of Scotland, he had been summoned at the market cross of Edinburgh, and at the pier and shore of Leith. These decrees adjudged

that the property of Hunter should belong to the creditors in satisfaction of the debts. But the defendant, at any time within forty years, had a right to dispute the merit of the decrees. By the death of Hunter these decrees, it seems, did not operate as a satisfaction of the debts, and the above action was commenced against the executor, founded on them, which was sustained by the court. In his opinion Chief Justice Best draws a distinction, in regard to such proceedings, between a person who owes allegiance to the country and one who does not owe it. That was a proceeding under the civil law, as adopted and modified by Scotland, and was somewhat analogous to the proceeding by attachment. The decrees, it seems, were enforced by a judgment in England. The doctrine in that case, so far as regards the enforcement of the decrees, independently of the lien on the property, would not be sanctioned in this country.

Mr. Justice Story, in his Conflict of Laws (461), remarks, treating on this subject, "Sometimes the arrest or attachment is purely nominal, as of a chip or case, or both. In other cases the arrest or attachment is bona fide of real or personal property within the territory, or of debts in the hands of debtors, of the nonresident, who live within the country. In such cases, for all the purposes of the suit, the existence of such property, within the territory, constitutes a just ground of proceeding to enforce the rights of the plaintiff, to the extent of subjecting such property to execution upon the decree or judgment. But it is to be treated to all intents and purposes, if the defendant has never appeared and contested the suit, as a mere proceeding in rem, and not personally binding on the party as a decree or judgment in personam. In other countries it is uniformly so treated, and considered as having no extra territorial force or obligation." Philps v. Halker, 1 Dall. [1 U. S.] 261; Pawling v. Bird's Ex'rs, 13 Johns. 192; Bissell v. Briggs, 9 Mass. 462. In the case of Bissell v. Briggs, Chief Justice Parsons says: "A debtor living in Massachusetts may have goods, effects, or credits, in New Hampshire, where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that state, in the hands of the bailiff, factor, or garnishee, of his debtor; and, on recovering judgment, those goods, &c., may be sold in satisfaction of the judgment." But he held that such judgment, not being satisfied by a sale of the property, could give no foundation for an action in another state against the defendant, he having had no personal notice of the proceeding. And he further held, that if the defendant had appeared to the attachment, it could not have given the court of New Hampshire jurisdiction of his person. On this last point Judge Parsons was, probably, mistaken. The attachment is a mode by which to compel the appearance of the defendant, and if he do appear and contests the validity of the claim, there seems to be no reason why he should not be bound, in personam, by the judgment. A person who enters within the limits of any country, is subject to its laws, and amenable to the ordinary process of its courts. We can entertain no doubt when a record of a judgment is offered in evidence, if a want of jurisdiction is shown, or appears upon the face of the proceeding, it must be held as wholly void. If the proceeding has been by attachment, and no personal notice has been given, and the defendant has not appeared, it does not bind the defendant. It is an ex parte proceeding, and beyond the property attached, and the local jurisdiction, the judgment establishes no right against him.

In the case under consideration the record states the fact, that notice was served on the defendant; and this he denies in his plea. Can the record in this respect be controverted? Now, if the plea had stated that the notice was given by an attachment of property, and in no other form, the question, perhaps, might have been raised, whether such a notice was binding beyond the property attached. Such a plea would not have contradicted the record, but would have shown what effect was to be given to it. In the case of Starbuck v. Murray, 5 Wend. 148, the court held that "any fact stated in the record, upon which jurisdiction depends, may be put in issue, and controverted with the same freedom as other facts to which the record has no relation." And Mr. Justice Marcy, in delivering the opinion of the court, very much to his own satisfaction, and, no doubt, to the satisfaction of the court, sustains the above doctrine.

In reference to the argument that the record imports absolute verity and can not be controverted, he says—"It appears to me that this proposition assumes the very fact to be established, which is the only question in issue." "For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and, therefore, the supposed record is not, in truth, a record." And he says that this "process of reasoning is, to his mind, little less than sophistry." "The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact." Now, with the greatest respect for this opinion, I am obliged to incur the imputation of reasoning in a circle, and of using what, to Mr. Justice Marcy's mind, is little less than sophistry. It must be admitted that the "proposition assumes the fact to be established." The fact is, that the defendant was served with process, or appeared to the action, and this the record asserts. And the plaintiff insists that

this being a fact which is matter of record, can not be denied by a plea. But this, says Justice Marcy, assumes the fact to be proved. Most certainly it does. The fact is proved by the highest evidence. It is not to be questioned in any court. Apply the same argument, as to the fact of judgment having been rendered. If this be shown by the record, can it be denied by a plea? And this, too, would assume the proposition to be proved. In the language of Mr. Justice Marcy it may, perhaps, be asked, for what purpose does the defendant question the fact of judgment? Solely to show the invalidity of the record. Now, the record, and the record only, can prove the rendition of the judgment, as it proves the appearance of the party. Of both these matters the court, before whom the proceedings were had, had judicial cognizance, and they are equally established by the record.

A defendant comes into court in his proper person and confesses judgment, or acknowledges the service of process, and this becomes matter of record. And yet it would seem, from the above opinion, the fact may be denied by a plea. If this may be done, it is difficult to say what part of a record may not be denied. Every thing of which the court must take judicial cognizance, and which is stated in the record under their judicial sanction, must be held to be absolutely true. If a clerical error has intervened in making up the judgment, or any other part of the record, application should be made to the court, before whom the proceedings were had, and they are authorized to correct it. But the doctrine that these matters, or the verity of a record, may be tried on an issue before the country seems to be new. Where the action is on a foreign judgment, in some of the states, the plea of nul tiel record may conclude to the country. But it is believed the truth of the material facts stated upon the record, has not heretofore been subjected to this ordeal. If effect be given to the constitution and the act of congress, in relation to this subject, the record must be taken as true, and can not be controverted. The appearance of the defendant is a material fact, and so is the service of process. It is admitted that the allegations in a record which were not material nor traversable, are not conclusive on the parties. But the record is conclusive of all matters in relation to the judgment which were material, and which might have been traversed. And these can not be contradicted. Berks & D. Turnpike Co. v. Hendel, 11 Serg. & R. 123; Leech v. Armitage, 2 Dall. [2 U. S.] 125; Green v. Ovington, 16 Johns. 58; Fields v. Gibbs [Case No. 4,766]; Com. v. Churchill, 5 Mass. 176, 182; Whiting v. Cochran, 9 Mass. 532. In Thompson v. Talmie, 2 Pet. [27 U. S.] 165, the court say: "The age of the heirs was, at all events, a matter of fact upon which the court was to judge; and the law no where requires the court to enter on record the evidence upon which they decided that fact. And how can we now say, but that the court had satisfactory evidence before it that one of the heirs was of age? If it was so stated in terms on the face of the proceedings, and even if the jurisdiction of the court depended upon that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree made by the court. But to permit that fact to be drawn in question, in this collateral way, is certainly not warranted by any principle of law." In the case of Rose v. Himely, 4 Cranch [8 U. S.] 241, the court remark: "Where a claim to property is set up in one court, founded on a sentence of another tribunal, the court in which the claim is preferred, must, of necessity, examine the powers of the others in order to decide whether its sentence has charged the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered." And, also, the court of a foreign nation must judge of its own jurisdiction, so far as depends on municipal rules, and its decision must be respected; but if it exercises a jurisdiction, which, according to the laws of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This illustrates the question under consideration, though the remarks were made of a maritime court.

Upon the whole we can entertain no doubt that when the judgment of a neighboring state is offered in evidence, the inquiry must be made, whether the court had jurisdiction over the parties and the subject matter. Not that any error in this collateral manner could be considered, but the rights of the defendant can not be concluded, unless he was properly before the tribunal. And of this the court, which shall be called to give effect to the judgment, must judge. But we think that the facts material to the case, and which appear in the record, can not be controverted. If, from these facts, it appears that the court had no jurisdiction over the person of the defendant, the judgment will be disregarded. And we see no objection to pleading such facts as go to restrain the effect of the judgment, but do not contradict, in a material part, the record. Of this character, as before remarked, would be a plea showing that the notice could only affect the property of the defendant and not his personal liability. Without deciding whether the want of notice could not be shown under the plea of nul tiel record, it is enough to say that in no form of pleading can the defendant deny the service of process, or his appearance, which, in the present case, is matter of record. We think the allegation in the declaration a most material one, as it lies at the foundation of the jurisdiction of the court.

It was clearly unnecessary for the defend-

ant, in his plea, to allege, as supposed in the second cause of demurrer assigned, that the defendant was an inhabitant of Massachusetts at the time the process was served. It was enough that the process appears to have been served on him within the state. The pleas are, as stated in the third cause, inconsistent. And as regards the fourth cause of the demurrer, that the plea which sets up the recovery of the judgment, in bar, does not show it was before a court of competent jurisdiction; the title of the court was given in the plea, and the court officially know, from the laws of Massachusetts, that it was a court of competent jurisdiction. A plea need not state matters of law. The fifth cause is formal and general. We think the judgment is conclusive and final against the defendant, the court in Massachusetts having had jurisdiction in the case.

Case No. 8,356.

LINCOLN et al. v. The VOLUSIA.

[The case reported under above title in 19 Hunt. Mer. Mag. 80, is the same as Case No. 16,992.]

Case No. 8,357.

LINCOLN et al. v. The VOLUSIA.

[6 Pa. Law J. 469; 4 Pa. Law J. Rep. 65.]

District Court, E. D. Pennsylvania. Sept. 21, 1846.[1]

SHIPPING—PORT REGULATIONS—WHARVES.

1. If a berth at any of the wharves of the city of Philadelphia be for the time occupied by a vessel in which the owner or possessor of the wharf has an immediate interest, whether such vessel be loading, discharging or empty, no other vessel can claim a right to occupy that berth.

2. If an adequate berth be vacant at any wharf it may be occupied at once with the owner's consent, otherwise the master or agent of the vessel must apply to the owner or possessor of the wharf for permission to occupy it, and if within twenty-four hours after such application the vacant berth is not filled by some vessel in which the owner or possessor of the wharf has an immediate interest, it may then be lawfully occupied by the vessel for which the application was made, for such time as the despatch of business may require.

3. A vessel arriving from sea and desirous of discharging her cargo may claim the inner berth at the wharf for a reasonable time, not exceeding six days, and may require vessels that are empty or receiving freight, to take for the time the outer berth, unless between the 10th December and 1st March.

4. The custom of the port of Philadelphia has established the right of a vessel, which has legally occupied an outer berth, to claim the next inner berth which she covers whenever it has become vacant.

5. The wardens of the port represented by the master wardens, and the harbour masters, are the officers entrusted with the interpretation, application and enforcement of the legal and customary regulations of the port.

The libellants [E. Lincoln & Co.] were the owners of a line of packets trading between Philadelphia and Boston, and were lessees, and for the purposes of their business, occupiers of a wharf on the River Delaware within the city limits. On the 15th of September, 1846, the outer end of their wharf was occupied by one of their vessels, the Robert Waln, which had just completed her discharge. The south side was occupied by another of their vessels, the Sulla, which was then nearly empty, and, according to the regulation of the packet line, was to receive freight till the following Saturday, the 22nd, and then to sail on her regular trip. The Volusia, a schooner just arrived with a cargo from Palermo, occupied with the consent of the complainants the outer berth abreast of the Robert Waln, and was secured by her hawser to the complainants' wharf. The Robert Waln being in the act of running from her berth, efforts were made by both the Sulla and the Volusia to occupy it. The Sulla succeeded, and early on Monday she discharged the rest of her cargo. The proprietors of the wharf desired to retain her there to await the arrival of freight, but the harbour master, acting under the authority of the wardens of the port, compelled her to give place to the Volusia.

Mr. Waln, for libellants.
H. M. Phillips, for respondent.

KANE, District Judge. The complainants claim damages from the owners of the Volusia for their alleged loss and wharfage at a rate greatly above the usage, for the forcible occupation of their wharf at a time when it was wanted for their own purposes. They have failed however, to connect the agents or officers of the Volusia with the action of the harbour master, and they cannot set up his misconduct, if any such were proved, as a reason for enhancing the charge of wharfage. But I have been asked on both sides to examine the question whether the Volusia, under the circumstances was or was not entitled to claim the berth which was assigned her by the harbour master, and as I am told that there are cases constantly occurring which make an exposition of the law of the port on this subject desirable, I have reviewed with some care the different regulations that appear to bear upon it. By the laws of Pennsylvania, the right to the bed of a navigable stream resides in the commonwealth. The title of the riparian owner extends only to low water mark. The privilege of erecting wharves to project into the stream, is therefore one which may be granted or withheld at the pleasure of the state. An act of the assembly authorizes the wardens of the port of Philadelphia to confer this privilege as to the River Delaware on certain parties, the wharves, when constructed, being of course subject to such legal regulations as may be prescribed. Some of these are set forth in the different statutes, and the duty of making others is delegated to

[1] [Reversed in Case No. 16,992.]

the wardens. The master warden is the president of the board, and may in certain cases act as its representative in the intervals of its meeting, but its executive officer is the harbour master. The duty of the harbour master, so far as the present question is concerned, is to enforce and superintend the execution of all laws of the commonwealth, and all regulations of the corporation of Philadelphia, or of the wardens of the port, for regulating and stationing all ships or vessels in the stream of the river, or at the wharves within the boundaries of the city, for removing from time to time ships and vessels to accommodate and make room for others, and for compelling masters of vessels to accommodate each other, so that vessels arriving from sea shall for a reasonable time, not exceeding six days, be entitled to a berth next to the wharves, such as are loading being in the meantime removed to the outside and receiving their cargoes over the decks of the others.

The regulations not immediately and necessarily implied in this summary of the powers of the harbour master are included, so far as regards the present inquiry, in the 14th section of the act of assembly of 29th March, 1803, and in the 6th rule adopted by the wardens in February, 1819. The corporation of the city has not, I believe, legislated on the subject.

I deduce from these regulations, taken together, the following conclusions:

1st. If a berth at any of the wharves be for the time occupied by a vessel, in which the owner or possessor of the wharf has an immediate interest whether such a vessel be loading, discharging, or empty, no other vessel can claim a right to occupy that berth.

2nd. If an adequate berth be vacant at any wharf, it may be occupied at once, with the owner's consent, otherwise the master or agent of the vessel must apply to the owner or possessor of the wharf for permission to occupy it; and if within twenty-four hours after such application the vacant berth is not filled by some vessel in which the owner or possessor of the wharf has an immediate interest, it may then be lawfully occupied for such time as the dispatch of business may require by the vessel for which the application was made.

3rd. A vessel arriving from sea and desirous of discharging her cargo, may claim the inner berth at the wharf for a reasonable time, not exceeding six days, and may require vessels that are empty, or receiving freight, to take for the time the outer berth, unless between the 10th December and 1st March.

4th. The custom of the port, according to the evidence before me, has established the right of a vessel which has legally occupied an outer berth to claim the next inner berth, which she covers whenever it has become vacant.

5th. The wardens of the port, represented by the master wardens and the harbour masters, are the officers intrusted with the interpretation, application and enforcement of the legal and customary regulations of the port.

I believe that this may be regarded as a summary of the regulations on the subject of the occupation of the wharves of the Delaware within the city limits. The powers which they confer are great, and, like all other powers, may, in bad hands, be abused. But the interest of commerce at this port, and the safety of the vessels engaged in it, require that the police regulation of the river and quays should confer ample authority, and that its exercise should be direct and summary. A remedy will not be wanting when abuses shall be shown to exist; but the primary indispensable duty of those whom the law subjects to these regulations is obedience to the officer charged with their enforcement.

It is clear, from the view I have taken, that in the case of the Volusia the harbour master did not mistake his duties or transcend his authority. It is not contended that she took the outer berth, at the complainant's wharf, without permission, or that acquiescence which implies consent; and being there, she was entitled, not only by the custom of the port, but by the express terms of the written regulations to claim the inner berth as soon as the vessel she covered had been discharged. The respondents, therefore, must pay wharfage according to the accustomed rates, as set forth in their answer. As to the rest, the libel is dismissed, but without costs.

[NOTE. Upon appeal by the libellants the circuit court reversed this decree. It was held that no vessel could occupy without the consent of the owner a wharf, unless after proper notice. Case No. 16,992.]

LINCOLN, The ALBION. See Case No. 144.

LINCOLN BANK (SUFFOLK BANK v.). See Case No. 13,590.

LINCOLN COUNTY (UNION PAC. R. CO. v.). See Cases Nos. 14,378–14,380.

LINCOLN COUNTY (UNITED STATES v.). See Case No. 15,503.

LIND, The JENNY. See Case No. 7,287.

Case No. 8,358.

In re LINDAUER.

[7 Blatchf. 249.] [1]

Circuit Court, S. D. New York. May 31, 1870.

HABEAS CORPUS — LOTTERY TICKET DEALERS—INTERNAL REVENUE LAWS—SPECIAL TAX.

1. The various provisions of the internal revenue laws imposing penalties on persons for carrying on the business of lottery ticket dealers or lottery dealers without complying with the laws, considered.

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

2. The 13th section of the act of March 3, 1865 (13 Stat. 485), as amended by the act of July 27th, 1866 (14 Stat. 301), is not inconsistent with the 73d section of the act of June 30, 1864 (13 Stat. 249), as amended by the act of March 2, 1867 (14 Stat. 471), and the two can stand together.

3. A person may be indicted under the 13th section of the act of March 3, 1865, as amended by the act of July 27, 1866, for engaging or being concerned in the business of a lottery dealer without having paid the special tax required by law, and, on conviction, be punished by imprisonment.

[Cited in U. S. v. Page, Case No. 15,988.]

4. The special tax on lottery dealers named in the act of July 27, 1866, is the special tax imposed on lottery ticket dealers by the act of July 13, 1866 (14 Stat. 113).

[In the matter of Louis Lindauer.]

Elijah M. Hussey, for the application.

BLATCHFORD, District Judge. This is an application for a writ of habeas corpus. The petitioner was convicted in this court, by pleading guilty to an indictment found against him therein, and was sentenced on such conviction, the court which imposed the sentence having been held by Judge Woodruff. I have conferred with him on the questions raised in the case, and we concur in the conclusion that the application must be denied.

The indictment was found on the 24th of November, 1869. The petitioner, on his conviction, was sentenced, on the 19th of March, 1870, to be imprisoned for six months. Under that sentence he is now confined in the custody of the marshal, in the jail of the city and county of New York. The application for the writ is made on the ground that the sentence was erroneous, for the reason that the statute under which the conviction was had does not authorize imprisonment, but authorizes only a fine.

The indictment consists of two counts. The first count charges, that, on the 1st of August, 1869, the defendant, knowingly and unlawfully, did engage, and was concerned, in the business of a lottery ticket dealer, within the meaning of the statute of the United States, without having paid the special tax of one hundred dollars, as in that behalf is required to be paid by the statute of the United States in such case made and provided. The second count charges, that the defendant, on the 1st of August, 1869, did exercise and carry on the business of a lottery ticket dealer, upon which said business a special tax is imposed by law, without having paid the special tax, as in that behalf required by the statute of the United States. The two counts are, in substance, the same, except that the first charges him with having engaged, and been concerned, in the business of a lottery ticket dealer, while the second charges him with having exercised and carried on the business of a lottery ticket dealer—in each case without having paid the special tax required by law. The first count mentions the amount of the tax—one hundred dollars. The second count does not mention any amount, but merely says that a special tax was imposed on the business, and that he exercised and carried on the business without having paid such tax. Why this distinction in the language was made—one count using the words "engage, and was concerned, in," and the other using the words "exercise and carry on," will appear from the statutes on the subject.

The first time that the imposition of a penalty upon any person for carrying on any business without complying with the law on the subject, appears in the statute book, is in the 73d section of the act of June 30, 1864 (13 Stat. 249). Under that act, a license was required to be taken for the carrying on of various trades, businesses and professions, and, among others, that of lottery ticket dealer. Subdivisions 6 of the 79th section of that act required lottery ticket dealers to pay one hundred dollars for each license, and provided, that every person who should make, sell, or offer to sell, lottery tickets, or any device representing or intended to represent a lottery ticket, or any policy of numbers in any lottery, or should manage any lottery, or prepare schemes of lotteries, or superintend the drawing of any lottery, should be deemed a lottery ticket dealer, under the act. The 73d section of the same act provided, that, if any person should exercise or carry on any trade, business or profession, for the exercising or carrying on of which a license was required by the act, without taking out such license, he should, for every such offence, besides being liable to pay the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both.

On the 3d of March, 1865, an act was passed (13 Stat. 469), amending various sections of the act of June 30, 1864, but not amending the 73d section of that act. The 13th section of this act of March 3, 1865, was a new enactment on the subject of lotteries, and provided as follows: "All persons, and every person, who shall engage or be concerned in the business of a lottery dealer, without first having obtained a license so to do, under such rules and regulations as shall be prescribed by the secretary of the treasury, shall forfeit and pay a penalty of one thousand dollars, and shall, on conviction by any court of competent jurisdiction, suffer imprisonment for a period not exceeding a year, at the discretion of the court." This 13th section unequivocally implies the understanding of congress, that there was then required by law a license for engaging or being concerned in the business of a lottery dealer; otherwise, it would have been absurd for congress to say, that a person who should engage or be concerned in such business, without having first obtained a license so to do, should, on conviction, suffer imprisonment. The only provision of law which then existed in re-

spect to the obtaining of licenses by lottery dealers, was the provision of the act of 1864, for the payment of one hundred dollars for each license by lottery ticket dealers. It follows, that, when congress spoke of a "lottery dealer," in the act of 1865, they meant such a "lottery ticket dealer" as was defined in the act of 1864; otherwise, the provision of the 13th section of the act of 1865 would have been utterly meaningless. Therefore, it is apparent that congress intended, by the 13th section of the act of 1865, to take lottery ticket dealers out of the general provisions of the seventy-third section of the act of 1864, which imposed on all persons who should exercise any business requiring a license, without taking out such license, a certain punishment, and to place them under the special provisions of the 13th section of the act of 1865. The act of 1864 provided, as a punishment, imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both. The act of 1865 imposed imprisonment for a period not exceeding a year, nothing being said about a fine.

The act of July 13, 1866 (14 Stat. 113), amended the 73d section of the act of 1864, by imposing the punishment of imprisonment or fine, or both, imposed by the 73d section of the act of 1864, upon any one who should exercise or carry on any trade, business or profession, for the exercising or carrying on of which a special tax was imposed by law, without paying such special tax. The reason for this amendment was, that, by the act of 1866, congress abolished the system of granting licenses, and merely required special taxes to be paid for the exercising or carrying on of the trades, businesses or professions. The special tax for lottery ticket dealers was fixed by the act of 1866 at one hundred dollars, and that act gave the same definition to the term "lottery ticket dealers," as was given to it in the act of 1864. The amendment made by the act of 1866 to the 73d section of the act of 1864 was, to re-enact the latter section, only imposing the imprisonment or fine, or both, as a punishment on a conviction for carrying on the business without paying the special tax, instead of imposing it as a punishment on a conviction for carrying on the business without obtaining the license. There is nothing in this legislation that makes the 13th section of the act of 1865 inconsistent with the 73d section of the act of 1864, as amended by the act of 1866. The two can stand together, quite as well as the 73d section of the act of 1864 could, before the amendment of 1866, stand with the 13th section of the act of 1865.

We come, next, to the act of July 27, 1866, (14 Stat. 301). Congress having, by the act of July 13, 1866, adopted the system of special taxes instead of the system of licenses, and applied it to the provisions of the act of 1864, found in existence the 13th section of the act of March 3, 1865, imposing a punishment by imprisonment, on a conviction for engaging or being concerned in the business of a lottery dealer without having first obtained a license so to do. It was apparent, that, as licenses had been abolished, such 13th section must be amended, to conform to the new system. Therefore, the act of July 27, 1866, was passed, which contained nothing but a provision amending this 13th section of the act of 1865, by striking out the words, "without having first obtained a license so to do," and inserting, in lieu thereof, the words, "without paying the special tax therefor;" thus making the 13th section of the act of 1865 to provide, that, on a conviction for engaging or being concerned in the business of a lottery dealer without paying the special tax therefor, the party convicted should suffer imprisonment for a period not exceeding a year. This enactment shows, that it was the intention of congress that the 13th section of the act of 1865 should continue in force, notwithstanding the amendments made to the 73d section of the act of 1864.

We then come to the act of March 2, 1867, (14 Stat. 471), the 9th section of which amended again the 73d section of the act of 1864, by striking it out, and providing instead, that any person who should exercise or carry on any trade, business or profession, for the exercising or carrying on of which a special tax was imposed by law, without payment thereof, should be subject to a fine or penalty of not less than ten nor more than five hundred dollars. In other words, they struck out of the general provisions of the 73d section, as they had existed up to that time, the provision for imprisonment, and made the punishment merely a fine. But the section, as amended, went on to provide, that if the person should be a manufacturer of tobacco, snuff or cigars, or a wholesale or retail dealer in liquor, he should be further liable to imprisonment for a term not less than sixty days and not exceeding two years. There is nothing in the 73d section of the act of 1864, as amended by the act of 1867, which is inconsistent with the provisions of the 13th section of the act of 1865, any more than there was any inconsistency between the 73d section of the act of 1864, as originally enacted, and the 13th section of the act of 1865. The two have stood together always and they continue to stand together. There is nothing inconsistent between them. It is evident that congress intended that the two should run on pari passu. It is evident, also, that the "lottery dealer" mentioned in the act of 1865 must be considered as being the "lottery ticket dealer" defined in the statute; otherwise, we have an inhibition against the exercise of the business of a lottery dealer without paying a special tax, when no special tax is imposed except on the exercise of the business of a lottery ticket dealer. Moreover, it is impossible to conceive how a person can, under the designation of a lottery dealer, do any thing in connection with lotteries, that is not

embraced in the statutory definition of a lottery ticket dealer. It was suggested, on the argument, that a man might be a lottery dealer, by selling out to another the good will of a business of selling lottery tickets. But that would not make the person a lottery dealer within the good sense of the statute; and it is quite evident that congress intended the same person by both designations—a "lottery dealer" and a "lottery ticket dealer."

It follows, therefore, that, as each count of the indictment charges the defendant with having violated the law in respect of the business of a lottery ticket dealer, he was properly punished by imprisonment, under the 13th section of the act of 1865. He was indicted under that section, as well as under the 73d section of the act of 1864, as amended. That 13th section imposes the punishment of imprisonment upon any one who shall engage or be concerned in such business, without having paid the special tax; and the first count of the indictment, which charges that the defendant did engage, and was concerned, in such business, was evidently framed on that 13th section. The second count charges him with having exercised and carried on such business without having paid the special tax, and is framed on the 73d section of the act of 1864, as amended. As the defendant pleaded guilty to both counts of the indictment, and as at least one of them is good, and as the conviction and sentence apply to each count, it follows, that there is no cause for the defendant's discharge, and that the writ of habeas corpus must be refused.

The question involved in this case was before Judge Benedict, in this court, in the case of U. S. v. Bauer [Case No. 14,546], in December, 1869, where the defendant was indicted under the 13th section of the act of 1865. A motion to quash the indictment was made, on the ground that such 13th section was repealed, by implication, by the act of 1867, because that act repealed all previous provisions of law inconsistent with it. Judge Benedict held that there was no inconsistency between the two sections, and that they could stand together, and refused to quash the indictment.

Case No. 8,359.

LINDENBERGER v. BEALE.

BILLS AND NOTES—DEMAND OF PAYMENT—GRACE.

[Cited in Beeding v. Pic, Case No. 1,227, to the point that demand of payment of a promissory note on the day after the third day of grace is too late, and in Auld v. Mandeville, Id. 653, to the point that notice to the indorser on the third day is too soon.]

[Nowhere reported: opinion not now accessible.]

[NOTE. The supreme court, in reversing this case,—6 Wheat. (19 U. S.) 104.—said: "After demand of the maker on the third day of grace, notice to the indorser on the same day was sufficient, by the general law merchant; and that evidence of the letter containing notice having been put into the post office, directed to the defendant, at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before such evidence could be admitted."]

Case No. 8,360.

LINDENBERGER et al. v. MATLACK.

[4 Wash. C. C. 278.] [1]

Circuit Court, Pennsylvania.[2] April Term, 1822.

DESCENT—WILLS—POWER TO SELL BY EXECUTOR—RENTS AND PROFITS UNTIL SALE.

A testator by his will directed his executors to sell his land, and to distribute the proceeds according to the directions of his will and codicil; or to divide the same equally between his widow, his eight children, and his grandson. The lands descended to the heirs at law of the testator, who held a right, at law, to enter upon the same and to receive the profits; and may maintain an ejectment for the same, until a sale or division should be made.

[Cited in Gratz's Ex'rs v. Cohen, 11 How. (52 U. S.) 21.]

At law.

WASHINGTON, Circuit Justice. The single question for the consideration of the court is, whether the lessors of the plaintiff have a legal right of entry into the premises in question, so as to enable them, severally, to make the demises stated in the declaration? And this question will turn upon the construction of the will of Abraham Dubois, which, as it concerns this point, is in the following words: "As to the residue of my property or estate, both real and personal, or of whatsoever nature or kind soever, or wherever situate, lying, or being, I do hereby authorize, order, and empower my executors, and the survivors or survivor of them, to sell and convey, or divide the same whenever they may judge it consistent for the interest of the estate, into eight equal parts for my wife, six children, and grandson (naming them,) all share and share alike, deducting from the share of my grandson what I have advanced for his father, Samuel Dubois, since he came of age, with interest, which is to be equally divided between my wife and six children, or the survivors of them. It is my wish and desire, if consistent with the interest of my affairs, that my children be brought up and educated out of the interest or proceeds of my estate, so that no charge be made against their shares respectively until they come of age. It is also my desire, that my sons may receive from my executors, as soon as it can with propriety be done, after they are of age, so much of their share or portion as

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

[2] [District not given.]

may be judged consistent with the situation of my estate, as a great proportion of it will probably be in lands unimproved." By a codicil, the testator desires that two other sons, born since the making of his will, should share equally his estate with his wife, other children, and grandson, agreeably to his said will. Each of the lessors claims one tenth of the premises in controversy.

We are of opinion that, upon the true construction of this will, the executors took no interest in the real estate, but were clothed with a mere naked authority to sell the land, and to distribute the proceeds according to the directions of the will and codicil, or to divide the same equally between the widow, the eight children, and the grandson. The consequence is, that the lands descended to the heirs at law of the testator in co-parcenary, who had a right at law to enter upon the same, and to receive the profits, until a sale or division should be made by the executors. The authorities upon this subject are both ancient and uniform, and we are aware of no modern case which contradicts them. Pow. Dev. 292–310; Co. Litt. 113, 181b, 236. It may not, however, be improper to remark, that the remedy would have been more complete on the equity side of the court, to compel the executors to execute the trust.

The plaintiff is therefore entitled to recover one ninth upon the demise of Lindenberger, in right of Nicholas Dubois, under whom he claims; and the same proportion under the demise of Abraham Dubois, another of the sons of the testator.

Case No. 8,361.

LINDENBERGER v. WILSON.

[1 Cranch, C. C. 340.] [1]

Circuit Court, District of Columbia. July Term, 1806.

BILLS AND NOTES—NOTICE OF PROTEST—FOREIGN BILL.

It is necessary that the holder of a foreign bill, protested for non-acceptance, should give notice of the protest as soon as possible under all the circumstances, according to the usual course of communication.

Assumpsit by the indorsee against the indorser of a foreign bill of exchange, drawn by Foreman on Rutcher & Westphalia, at Hamburg, in favor of the defendant, and by him indorsed to the plaintiff.

The action was upon the non-acceptance only, and THE COURT instructed the jury, that the plaintiff was bound to give notice to the defendant of the non-acceptance of the bill, as soon as possible under all the circumstances, according to the usual course of communication, whether by land or water; and that it was the duty of the plaintiffs, who reside at Baltimore, to give notice to defendant as soon as possible, according to the course of the mail between Baltimore and Alexandria. See Chit. Bills, 93, 98, 139, 140; Kyd, Bills, 76.

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

Case No. 8,362.

LINDER v. LEWIS et al.

[10 Ben. 49.] [1]

District Court, S. D. New York. July, 1878.

VOLUNTARY ASSIGNMENT—EXECUTION LIEN—PRIORITY.

1. On the 28th of June, 1875, the firm of W. & Co. made a voluntary assignment to L. Thereafter K. & Co., H. W. & Co., L. & Co., and C. & Co. obtained judgments against W. & Co. and issued executions, under which the sheriff levied on the goods formerly belonging to W. & Co. and then in the possession of L. as assignee. L. notified the sheriff of his claim and the sheriff called on the execution creditors for indemnity, which each of them gave, and the sheriff proceeded to sell the goods. Before the sale, C. & Co. notified the sheriff that they withdrew the indemnity which they had given and that he must proceed only by virtue of the direction endorsed on their execution. The sheriff sold the property for $2,606, which he applied on the executions of K. & Co. and L. & Co. and returned the others unsatisfied. Thereafter on the 3d of September, 1875, proceedings in bankruptcy were commenced against W. & Co. by other creditors, the act of bankruptcy alleged being the making of the voluntary assignment to L. They being adjudged bankrupts and an assignee having been appointed, he filed a bill in equity against L. and against the execution creditors to set aside the assignment to L. and to compel the execution creditors to account to him for the property taken under their executions: *Held*, that the title of the assignee in bankruptcy related back to the time of the making of the voluntary assignment and that the intervening levies of the judgment creditors were therefore cut off.

[See In re Beisenthal, Case No. 1,235.]

2. The sheriff and the judgment creditors, except C. & Co., must account for the property taken under their executions. As to C. & Co. the bill must be dismissed, because the sale was not their act.

3. L., having done all that he was bound to do to protect the property, was not liable to account for the property sold on execution.

4. As the evidence proved only that the assignment was void under the bankrupt law, the assignee was not estopped to deny that it was absolutely void under the law of New York, by the fact that it was averred in the creditors' petition to have been made with intent "to hinder and defraud creditors," especially as the petition averred also as an act of bankruptcy that it was made in contemplation of insolvency and to defeat the bankrupt law, and the adjudication may have been decreed under this last averment.

5. It seems that the averments of the creditors' petition as to the act of bankruptcy are not conclusive on the assignee.

[Bill by Joseph Linder, assignee of Wallack & Co., against Frederick Lewis and others.]

C. C. Yeaman, for complainant.

M. H. Regensberger, for judgment creditors.

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

W. B. Putney, for defendant Lewis.
H. F. Bookstaver, for sheriff.
J. D. Taylor, for Cowdin & Co.

CHOATE, District Judge. This is a suit in equity brought by an assignee in bankruptcy to set aside a voluntary assignment for the benefit of creditors. The assignment sought to be set aside was made June 28, 1875. The proceedings in bankruptcy were commenced by creditors' petition, Sept. 3, 1875. After the assignment and before the filing of the petition in bankruptcy, certain creditors of the bankrupts recovered judgment against them and issued their executions. The sheriff levied on the stock of goods, formerly of the bankrupt and then in the possession of the defendant Lewis, as their assignee. Lewis notified the sheriff of his claim, and the sheriff called on the execution creditors, whose executions he then held, namely, the defendants, William Kiefer & Co., Henry Wellstern & Co., Frank Leisler & Co. and Elliott C. Cowdin & Co., for bonds of indemnity, and they complied with the demand and gave the sheriff the customary bonds. The executions of Kiefer, Wellstern and Leisler were put in the sheriff's hands, July 9, at 11:55 a. m. and Cowdin's on the same day at 3:35 p. m. The other executions, those in favor of Muratt and Hershmann & Co., were put in the hands of the sheriff on the 15th and 16th of July. A jury was called and found the title in Lewis. The sheriff having received the bonds, proceeded with the sale of the property seized. The sale took place July 19. Before the sale took place, Cowdin & Co. notified the sheriff that they withdrew their bond of indemnity, that it was given under a misapprehension in the absence of their attorney, and directed him to proceed only by virtue of the direction endorsed on the execution and as he would have done if no bond had been given. The direction on the execution was to levy and collect the amount of the judgment with interest and charges. The property sold for $2606, which the sheriff applied to satisfaction of the executions of Kiefer & Co. and Leisler & Co. and his own fees. The other executions have been returned wholly unsatisfied.

The complainant is clearly entitled on the proofs to a decree avoiding as against him the assignment to the defendant Lewis. It is the settled law in this circuit, that when a voluntary assignment is avoided as a fraud upon the bankrupt law, the title of the assignee in bankruptcy relates back to the time of the execution of the voluntary assignment and thus cuts off intervening levies by judgment creditors of the assignor. In re Beisenthal [Case No. 1,236]. It is claimed, however, by the judgment creditors that the assignment in this case was not merely voidable as against the assignee in bankruptcy, but that it was absolutely void, and also void as against these judgment creditors, because made to delay and defraud them, and that therefore they had a right to treat it as a nullity and to levy on the goods as the property of the assignor. But the evidence does not show any invalidity in the assignment other than that alleged in the bill, and fully proved, that it was made in contemplation of insolvency and with intent to defeat the bankrupt law [of 1867 (14 Stat. 517)]. The assignment was therefore voidable merely, and not void, and the case cannot be distinguished from In re Beisenthal [supra]. Nor is there any force in the suggestion that the assignee in bankruptcy is estopped to claim that the assignment was made with a different intent from that alleged in the creditors' petition on which the adjudication was made. The petition charges the making of this assignment "with intent to hinder and defraud creditors," as one of several acts of bankruptcy. The averments of the petition are not inconsistent with those of the bill, and if they were, it is not perceived that an adjudication on the petition ought to be held to estop the assignee if the facts are erroneously stated in the petition, especially where the facts properly stated would support the adjudication, and for aught that appears the adjudication was also well made upon the other alleged acts of bankruptcy.

The complainant is also entitled to a decree against the sheriff and all of the judgment creditors, by whose direction the sheriff sold the goods covered by the assignment. The three creditors, Kiefer & Co., Wellstern & Co. and Leisler & Co., are all responsible to account for this property because it was sold by their direction and procurement, and although two of them only have received the proceeds. The sale was the act of all. The sale does not justify either them or the sheriff, having been made in violation of complainant's rights and they must be held to account for the value of the property at the time they took it.

The notice given by Cowdin & Co. withdrawing their bond was clearly in its effect a direction to the sheriff not to sell except on his own responsibility. The circumstances were such that he was under no obligation to sell on their execution without receiving a bond of indemnity, and his subsequent acts after receiving the notice cannot be deemed to have been done under their execution. They were not called on to withdraw the execution or to countermand the direction endorsed on it. It was proper for them, while declining to give him the authority to sell this property on their account, to leave the execution for service, according to the ordinary course of business, till it should be in due time returned by him. No case for relief therefore is made out against the defendants Cowdin & Co.

The defendant Lewis appears to have done all that was required of him as assignee to

protect the property against the claims of the judgment creditors. He had no power to prevent the sheriff from selling, and he cannot be required to account for the goods so sold. He must account for all the other property which came to him as assignee.

Decree to be entered in accordance with this opinion.

[NOTE. This case was subsequently heard in the district court upon exceptions on behalf of the respondents on the master's report, and upon motion of the complainant for final decree. The respondents (the sheriff and the judgment creditors) objected to the entering of the decree against them, and claimed that in the former decision of the court there was error; that no case for equitable relief was made out against them. The exceptions were overruled, the report confirmed, and a final decree for complainant entered. 4 Fed. 318. Certain of these respondents perfected an appeal from this decision to the circuit court. Before the hearing of the appeal, and after the time for appeal had elapsed, one of the creditors, Wellstern, Meyer & Ochinger, against whom a decree for $3,109.24 had been entered, moved to open the decree, so that they might be heard upon the merits of their case. They were served with process, but never filed an answer or made any defense. It was claimed that this happened by mistake and misunderstanding of counsel; that they stood upon the same ground and had the same defense as Cowdin & Co. Their motion was denied, but says Judge Choate: "The case is clearly one in which the court would gladly give these parties relief if it had the power. They are apparently in the position of being called on to pay what other defendants, upon the same state of facts, have been held not liable to pay." 1 Fed. 378. Circuit Judge Blatchford delivered the opinion upon appeal, in which he said: "All the points urged by the appellants appear to have been carefully considered by the district judge in his decision. So far as the main questions at issue are concerned, I think they were all properly disposed of except the question of interest." The only question involved in the interest was as to the time for which it should run. 4 Fed. 324.]

Case No. 8,363.

LINDER v. LEWIS.

[See 4 Fed. 318.]

Case No. 8,364.

Ex parte LINDO.

[1 Cranch, C. C. 445.] [1]

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

WITNESS—ANSWER TENDING TO CRIMINATE.

A witness must answer whether he saw the defendant at a public gaming-table, inasmuch as the answer cannot criminate or tend to criminate the witness himself.

Rule to show cause why an attachment of contempt should not issue against a witness for not answering this question by the grand jury, "Did you within the last three months see Richard Lewis play at any public gaming-table within the county of Alexandria?"

The witness [Abraham Lindo] objects that it may tend to criminate himself, by showing that he was present at a public gaming-table, and may induce Lewis to prosecute him.

Mr. Swann, for the witness, cited 1 Morgan, Essays, 438; 2 Hawk. p. 609, c. 46, § 20; 1 Atk. 539.

But THE COURT (DUCKETT, Circuit Judge, absent) decided that he must answer, inasmuch as the answer could not criminate nor tend to criminate himself. Whereupon he submitted to answer.

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

LINDO (GARDNER v.). See Cases Nos. 5,231 and 5,232.

LINDO (GORDON v.). See Cases Nos. 5,231 and 5,616.

LINDO (SKYREN v.). See Case No. 12,931.

LINDO (SNOWDON v.). See Case No. 13,152.

LINDO (WELSH v.). See Cases Nos. 17,408 and 17,409.

Case No. 8,365.

LINDROP v. DALL.[1]

District Court, D. California. Oct. 5, 1868.

SHIPPING—MASTER — PUNISHMENT OF OFFENDERS —LIABILITY FOR PUNISHMENT WITHOUT INVESTIGATION.

[1. It is not a cruel or excessive punishment to keep two waiters ironed together for 10 hours for fighting in the cabin of a vessel.]

[2. A master who without investigating the circumstances unjustly causes a seaman to be punished for an offense he did not commit is liable though he did not act in a cruel or oppressive spirit.]

[This was a libel in personam by John Lindrop, a waiter on board the steamer Sierra Nevada, against the master, C. C. Dall, to recover for personal injuries.]

Thompson & Wilson, for libelant.

H. & C. McAllisters, for respondent.

HOFFMAN, District Judge. I do not perceive that the mode of punishment adopted by the master was either cruel in its nature or excessive in its degree, if the libellant had committed the offence for which he was punished. The master supposed that he had been fighting in the cabin with another waiter. He therefore caused the two to be ironed together, and kept them in that condition some nine or ten hours. It was demonstrated by actual experiment in court that persons confined in this way could sit down, and that their situation, though certainly uncomfortable, did not occasion any torture or severe suffering. Had the master taken any measures to investigate the truth of the charges against the libellant, and, after due inquiry, acted on the best information he could obtain, his justification would have been complete, even though he might have been mistaken as to the facts. But in this case he seems to have assumed that the libellant was in fault, and even that

[1] [Not previously reported.]

he was drunk. I think it clear from the proofs that the libellant was not in fault, and that he was not drunk on the occasion referred to, or any time during the voyage. On the contrary, he seems to be a man of entirely sober habits. I think, therefore, that the master acted hastily and without due regard for the feelings and rights of the libellant.

I cannot believe that the subsequent ill-health of the libellant was due to the punishment he received. Undoubtedly the abrasion on his wrists was caused by the irons. But this would have been but a temporary inconvenience if he had been willing to submit to treatment. The irons are said to have been rusty, but they appear to have been new, and were probably as free from rust as exposure to the moist air of the ocean could allow.

The feelings of the libellant, who seems to be a very respectable young man, have evidently been deeply wounded by the injuries as well as harshness of the treatment he received, and as it was wholly undeserved, I think he is entitled to damages. I do not attribute to the master any cruel or oppressive spirit or any desire to abuse his authority. Had the facts been as he supposed, he would have been justified in his treatment of the men. But he is to blame for not taking pains to investigate the circumstances. There was no emergency that called for instant action, and the second steward and several others could have informed him how the dispute between the men arose and who was to blame. His statement on the stand that the libellant was drunk when he came to his room, shows a hastiness in forming conclusions and an incautiousness not to use a stronger word, of statement which cannot be justified. The rightful authority of the master, to punish seamen when necessary to maintain discipline and enforce obedience, will at all times be sustained by the court. But this authority he must exercise with circumspection, and after due inquiry into the facts so that no injustice be done. Had the master made such inquiry in this he would have learned that the libellant did not deserve punishment. I shall decree $100 damages to libellant.

LINDSAY (FOSTER v.). See Cases Nos. 4,975 and 4,976.

LINDSAY (HARRIS v.). See Cases Nos. 6,123 and 6,124.

LINDSAY (McCOBB v.). See Case No. 8,704.

Case No. 8,366.

LINDSAY v. RIGGS.

Circuit Court, District of Columbia. December Term, 1811.

[Cited in Paul v. Lowery, Case No. 10,844, to the point that a deposition may be read in evidence in the circuit court of the District of Columbia which deposition purports to be taken before the superintendent of the city of Charleston, and is certified under the seal of the corporation, and taken in due form under the act of congress, without other proof of the fact that the superintendent was the magistrate of the city than is contained in his own certificate and the official seal, and the further evidence introduced and proved by the testimony of a witness that the superintendent before whom the deposition was taken was the intendant and chief magistrate of the city of Charleston at the date of the certificate, and that he believed it was the seal of the corporation, but did not know the handwriting.]

[Also cited in a note to Waller v. Stewart, Case No. 17,109, upon the question whether the calling for and inspecting the books of the opposite party authorizes the owner to read them in evidence, if the party calling for them refuses to use them.]

[NOTE. This case was taken to the supreme court upon writ of error by one of the defendants, and the judgment of the circuit court was affirmed; but, in the opinion delivered therein by Mr. Justice Livingston, the two points to which the case was cited as noted above were not considered. Riggs v. Lindsay, 7 Cranch (11 U. S.) 500.]

Case No. 8,367.

LINDSAY v. TWINING.

[1 Cranch, C. C. 206.] [1]

Circuit Court, District of Columbia. Dec. Term, 1804.

PRACTICE AT LAW—REINSTATEMENT OF CAUSE.

The court will not, at a subsequent term, reinstate a cause which has been non prossed for want of security for costs.

Non pros. at last term for want of security for costs.

Mr. Woodward moved to reinstate the cause, upon the affidavit of Colonel D. C. Brent, that he had directed the clerk to enter him security, but the clerk had failed so to do. The clerk stated that Colonel Brent had, in his office, told him he would get security.

Motion refused; the term being passed, and the clerk having no right to judge of the sufficiency of the security offered. It should have been offered to the court. The clerk was in no default.

LINDSAY (UNITED STATES v.). See Case No. 15,602.

LINDSEY (HARRIS v.). See Cases Nos. 6,123, and 6,124.

LINDSEY (MILLER v.). See Case No. 9,580.

Case No. 8,368.

LINDSEY v. The SOUTH CAROLINA.

[Bee, 173.] [2]

District Court, D. South Carolina. Oct. 27, 1801.

SEAMEN'S WAGES—PART OF CARGO SOLD—CAPTURE.

Ship went to a port out of the course of the voyage stipulated, and there sold part of the car-

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

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

go. She was afterwards captured. Wages decreed from the time of her leaving Charleston till the partial sale took place.

The actor [Samuel Lindsey] was one of the crew of the South Carolina, and with the rest had signed articles to proceed from Charleston to Leghorn, and back; with liberty to touch at Gibraltar. The vessel sailed from hence about the 1st May, 1800, and put into Malaga, where the captain sold 200 bags of cocoa, part of his cargo, and received on board 23 casks of wine. The ship left Malaga on the 6th July; but on the 15th was taken by a British frigate, and ordered into Port Mahon for adjudication. On her way there, she was recaptured on the 25th by three Spanish, and one French, privateers, and carried into Majorca, where the ship and cargo were condemned. An appeal has been made to the supreme tribunal at Madrid; and the ship and cargo, by the last advices, remained in possession of the mate and cook, the captain being at Madrid for the purpose of prosecuting the appeal. The rest of the seamen left the vessel in February, 1801, having first obtained a certificate from the mate that they were detained by the captain's order to that time.

BEE, District Judge. The only question for my decision is, what wages are due to the actor. This ship and cargo have been condemned at Majorca:

1st. As taken from the possession of an enemy; though this is directly contrary to the treaty between Spain and us. It has been contended that the deviation to Malaga entitled this crew to their wages then due, and even to a discharge. But I do not consider this alteration of the original voyage as sufficient to induce these consequences, whatever might be the case as to an insurance. Besides, nothing of this sort was insisted on at the proper time and place. I shall, indeed, decree wages up to that time, viz. from the 1st May to the 14th July, upon the ground of the captain's having sold part of his cargo at Malaga. It has been said further that the condemnation of this vessel shall not affect the wages of the crew, because she was engaged in an illicit trade. But no such thing appears. The captain and owners are blameless. They knew nothing of the Spanish edict newly proclaimed, and in direct violation of our treaty with Spain, by which it is provided that our property, recaptured by them from an enemy, shall be restored upon payment of salvage.

The second ground of condemnation at Majorca was, that certain of the ship's papers had been thrown overboard. This must have been done, if done at all, by the British captors, for the captain had no inducement to conceal any thing relative to a voyage perfectly fair. If he had seen cause to do an act of this sort, it must have been when he was first taken, in which case the British commander would have been justified in using this as a plea for condemnation. It is nevertheless true that the sentence of a court of competent jurisdiction in Spain will be binding upon these parties, and may ultimately destroy the right of these seamen to the balance of their wages after leaving Malaga. For this I can give no redress; but in consideration of all the circumstances of this case, and that the men never quitted the ship till they were dismissed by the captain, I decree that the actor receive an additional compensation of one month's wages, and that costs of suit be paid by the defendants.

LINDSEY (UNITED STATES v.). See Case No. 15,603.

LINDSEY, The ANNIE. See Case No. 422.

LINEGAN (GARRETSON v.). See Case No. 5,251.

LINENS (UNITED STATES v.). See Case No. 15,604.

Case No. 8,369.

In re LINFORTH et al.

[4 Sawy. 370; [1] 16 N. B. R. 435; 1 San Fran. Law J. 199.]

Circuit Court, D. California. Nov. 22, 1877.

BUYER AND SELLER, NOT PRINCIPAL AND AGENT.

Where A. agreed to furnish goods to B., at schedule prices, less a certain discount, and B. was to pay all freight, storage, and other charges, and, at the end of every three months, was to settle for all goods sold by him or shipped from his warehouse, by giving his notes for the stipulated price, and, at the end of a year from the date of the agreement, to settle, if required, for all goods remaining on hand, *held*, that this arrangement created the relation of seller and buyer, and not that of principal and agent or factor; and that on the bankruptcy of B., A. could not recover from his assignees the proceeds of goods sold by B. and collected by them, or notes of purchasers of such goods in their hands as assignees.

[Cited in Hamilton v. Willing (Tex. Sup.) 11 S. W. 845; House v. Beak, 141 Ill. 300, 30 N. E. 1068.]

The petition in this case prayed that the court would order the assignees of the above bankrupts to pay to the petitioner certain moneys in their hands, being the proceeds of goods heretofore sold by the bankrupts, and also turn over certain notes and accounts for the unpaid purchase-moneys of other goods sold by them. No objection is made to the form of the proceeding. The goods were obtained, by the bankrupts, from the petitioner, under the following agreement: "Memorandum of agreement made this first day of June, 1876, by and between the Furst & Bradley Manufacturing Company of Chicago, Illinois, parties of the first part, and Messrs. Linforth, Kellogg & Co., of San Francisco, California, parties of the second part: Witnesseth, that the said parties of the first part agree to furnish to the said

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

parties of the second part such goods of their manufacture as they may, from time to time, order, delivered free on board cars in Chicago, Illinois, on the following terms and conditions, viz.: The Furst & Bradley Manufacturing Co. agree to allow Messrs. Linforth, Kellogg & Co. the following discounts from their present price-lists, dated Chicago, 1876, which are hereto attached; on sulky rakes, a discount of 33⅓ per cent.; on wheel cultivators, a discount of 33⅓ per cent.; on sulky plows, a discount of 33¾ per cent.; on Texas or southern plows, a discount of 25 per cent.; on common plows and other goods, 33⅓ per cent.; and further agree to give the said parties of the second part the exclusive sale of such goods as they may order, in sufficient quantities to supply the demand in the following described territory, to wit: The state of California, the state of Nevada, as far east as Elko—but not to include that place or tributary trade—the territory of Arizona, and the Republic of Mexico. The said parties of the second part agree to pay all freights, storage, and other charges, on the goods shipped to them by the said parties of the first part, and to sell no other goods of the same class than those manufactured by the Furst & Bradley Manufacturing Co. in the territory above named, and further agree to keep insured at all times, at their own cost and expense, such goods as they may have in store or warehouse, at the full list price, less 33⅓ per cent., for the sole benefit of the Furst & Bradley Manufacturing Co. The parties of the second part further agree to render an account of sales every three months, beginning with September 1, 1876, and to settle for all goods sold or shipped from their warehouse or store, by giving their note, payable in sixty days from the dates fixed for rendering accounts of sales, as provided. It is further agreed, on the part of Messrs. Linforth, Kellogg & Co., to settle for such goods as may be on hand June 1, 1877, by giving their note, with interest at the rate of ten per cent. per annum, payable in six months, from June 1, 1877, if so required by Furst & Bradley Manufacturing Co. The Furst & Bradley Manufacturing Co. further agree to allow an additional discount of one per cent. per month for all cash paid in advance of the times specified above. This agreement to go into effect June 1, 1876, and to continue during the year and up to June 1, 1877. Furst & Bradley Manufacturing Co.; Linforth, Kellogg & Co."

HOFFMAN, District Judge. In the case of Nutter v. Wheeler [Case No. 10,384], Lowell, J., observes: "It has been settled for a very long time that upon the bankruptcy of a factor his principal may recover of the assignees any of the goods remaining unsold, or any proceeds of such goods which the assignees themselves have received, or which remain specifically distinguishable from the mass of the bankrupt's property. The action may be brought at law as well as in equity, subject, of course, to the factor's lien for advances or commissions—and it makes no difference that the factor acted under a del credere commission, or sold the goods in his own name." For these positions, which are substantially those maintained by the counsel for the petitioners in the case at bar, the learned judge cites numerous authorities. I do not understand them to be controverted by the counsel for the assignees.

But the question presented in this case is not as to the rights of the assignee of a bankrupt factor as against the principal, but whether the relation of principal and factor existed as to the goods in question, or their proceeds, between the petitioner and the bankrupt. The same question arose under very similar circumstances in the case before Lowell, J., and it is discussed by him with characteristic vigor, clearness and learning. In that case it appeared that the defendants were in the habit of sending their manufactured goods to Gear, the bankrupt, and he sold them at such prices and to such persons, and on such terms as he pleased, not less than the trade prices fixed by the defendants. Whenever he sold any tools, and not before, he was to pay the defendants in thirty days the prices shown on the list, less an agreed discount. The defendants had the right to sell any goods which remained in his shop unsold, and he was permitted to sell any of their goods at the factory, and the defendants would then deliver them according to his order, and charge him with the trade price, less the discount. Instead of paying in thirty days, Gear would sometimes give his note for the balance due, and the defendants held one such note at the time of the bankruptcy. On this state of facts Mr. Judge Lowell held that the goods sent to the bankrupt, by the defendants, remained the property of the latter until sold, and that when a sale occurred the bankrupt became their debtor, at a fixed price, and was bound to pay at a definite time, and that the relation of the bankrupt to the consignor was that of a bailee, with power to sell as principal, but not that of agent or factor.

The authority chiefly relied on by Lowell, J., is Ex parte White, 6 Ch. App. 397. In that case the court, in its opinion, describes the bargain between the parties as disclosed by their course of dealing, as follows: "We will give you the goods; you shall be the sole person whom we supply in a particular district, and we shall not call upon you to pay until you have disposed of them. You are at liberty to sell upon your own terms. We have nothing to do with the persons with whom you deal, but we look to you to pay at our trade prices for the goods you sell. You must return the sales you have made up to certain times. We will give you

a certain credit, but when that is expired we look to you for the cash."

Under this agreement the court held that no relation of principal and agent subsisted between the parties; that the consignee of the goods was not acting in a fiduciary capacity, and that the proceeds of sales were his own moneys, and he was at liberty to deal with them as he pleased, and that the consignors of the goods had no right to follow them in the hands of bankers to whom they had been paid.

It will be noticed that this case is almost identical with the case at bar. By the agreement between the bankrupts and the petitioners the latter agreed to "furnish" the bankrupts goods of their manufacture, at a fixed price. The bankrupts were to pay all freight, storage, and charges on the goods shipped to them. They had the right to sell or dispose of them in any manner, and for such prices and on such terms as they chose, and were to pay, at the expiration of three months, a fixed price for all goods sold or shipped from their warehouse. They were not bound to render any account sales to their consignors. The agreement speaks, it is true, of an account sales to be rendered by the bankrupts, but this evidently means an account or statement of the articles sold or shipped from their warehouse, for which they were to pay the agreed price every three months. They were not bound to render any account of the prices obtained by them, or of the terms of sale. At the end of the year they were bound to pay, if required, for all goods remaining on hand. It is plain that this transaction in no respect resembles a consignment by a principal to a factor, of goods to be sold on commission. It is a consignment of goods to be paid for at a price agreed upon, and which bore no relation to the prices at which the consignees might sell, or the amounts they might be able to collect. A credit was given, but all goods sold or removed were to be paid for at stipulated periods, and all goods remaining on hand were to be paid for at the expiration of a year from the date of the agreement. The transaction was thus a sale on credit, and the petitioners can make no claim to the goods sold or removed from their warehouse by the bankrupts, or to their proceeds. The case is not affected by the circumstance that the bankrupts have, in pursuance of their agreement, given their notes for the goods sold by them, which notes the petitioners now hold. The latter may, if they choose, surrender these notes, and prove for the original debt. No question is made as to the goods remaining in the bankrupt's possession at the time of the bankruptcy. It is understood that the assignee has agreed to relinquish them to the petitioners, as it was found more advantageous to the estate to reduce the amount of the petitioners' claim by the amount of their contract price, than to sell them at the present market rates, and admit the petitioners to prove for their whole claim.

As the assignee is in possession of all the assets to which the petition lays claim, no order will be necessary, except to deny the prayer of the petition.

Case No. 8,370.

LINGAN v. BAYLEY.

[1 Cranch, C. C. 112.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

BANKRUPTCY — IMPRISONMENT OF BANKRUPT DURING EXAMINATION.

The court will not commit a bankrupt for want of bail, who has surrendered to the commissioners, and whose examination is not closed, although the forty-two days have expired.

The bail surrendered the defendant, and the plaintiff prayed that he might be committed.

The defendant was declared bankrupt, on the 21st of August, 1802, and on the 2d of September he surrendered himself to the commissioners. The examination is not yet closed, although the forty-two days have expired. Bayley has appealed from the decision of the commissioners.

THE COURT refused to commit the defendant.

Cooper's Bankr. Law, pp. 175, 343, was cited.

Case No. 8,371.

LINGAN v. MARBURY.

[1 Cranch, C. C. 365.] [1]

Circuit Court, District of Columbia. Dec. Term, 1806.

JURY—ALIEN.

A juror cannot object to serve because he is an alien.

A juror objected to being sworn on the petit jury because he was an alien, a North Briton.

THE COURT thought it no objection, coming from the juror himself, however it might be if he was challenged by either party.

FITZHUGH, Circuit Judge, absent.

By consent of parties, however, he was not sworn.

Case No. 8,372.

LINGER v. WOOSTER.

[See Case No. 12,901a.]

LINK (THORNHILL v.). See Case No. 13,993.

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

Case No. 8,373.

LINKER v. SMITH.

[4 Wash. C. C. 224.] [1]

Circuit Court, D. Pennsylvania. April Term, 1818.

MARRIAGE SETTLEMENT—WITHOUT KNOWLEDGE OF HUSBAND—SECRET.

A secret settlement by a woman on the eve of her marriage, and in contemplation of that event, is fraudulent and void against the husband.

This is a bill to set aside a secret settlement made by the plaintiff's late wife, a few days previous to her marriage. The conveyance was to Mary Graham, the sister of the plaintiff's wife, in trust for the grantor during her life, and, if she died leaving no children, &c. then in trust for Jane, the daughter of the trustee. The wife died a few months after the marriage without issue, and the plaintiff qualified as her administrator. The particular prayer of the bill is, that the defendant, Newberry Smith, may be decreed to transfer to the plaintiff certain shares in the Bank of the United States, standing in his name, but purchased with the money of the plaintiff's late wife, and held by him in trust for her, which bank shares constituted a part of the property conveyed by the aforesaid deed of settlement. Mary Graham having died since the institution of this suit, and her daughter Jane being an infant of about ten years of age, the only answer put in is by N. Smith, who, since the death of Mary Graham, qualified as her executor, in which he states his belief that the plaintiff's wife was indebted to his testatrix, and annexes an account of the same, stated and sworn to by Mary Graham in her life time, amounting to $1129, for work and services rendered, and for the use of her furniture. The answer alleges, but no proof is given of the fact; that the plaintiff has given insufficient security for his administration of his wife's estate; and that the debt so due to his testatrix will be lost, unless the fund in the plaintiff's hands should be made liable. The answer submits the rights of Jane Graham, the other defendant, to the protection of the court. The only witness who gave any evidence of a debt due from the plaintiff's wife to Mary Graham, stated in her deposition, that the plaintiff's wife and Mary Graham kept an inn for some time in partnership, and that the latter applied for a settlement of the partnership concern, which the former refused. That in consequence of the refusal, and because there had been no written articles of co-partnership between the parties, Mary Graham, after the commencement of this suit, made out her account against the plaintiff's wife for work and services, which the said Mary had performed in the house, and for the use of the plaintiff's wife.

WASHINGTON, Circuit Justice. That the secret settlement made by the plaintiff's wife, shortly before her marriage, and in contemplation of that event, and without the knowledge of her intended husband, was a fraud upon his marital rights, admits not of a doubt; and has been candidly acknowledged by the counsel for the defendant. But he contends, that the fund in his hands, which forms the subject of this suit, ought not to be taken from him, until the plaintiff has done equity on his part, by paying to the defendant the debt alleged to be due to the estate of his testatrix; to ascertain which, it is insisted that an account ought to be directed. Without giving an opinion upon this question, if a proper foundation for directing an account were presented to the court; it is a sufficient answer to the argument, that there is not the slightest evidence that the debt referred to in the answer was due by the plaintiff's wife to Mrs. Graham. The answer does not contain such an allegation, and the witness relied upon to establish the claim does, in effect, disprove it. That witness indeed speaks of another, and a very different claim asserted by Mrs. Graham, which she arbitrarily converted into the one which is annexed to the answer. There is no proof that there was any balance upon the partnership concern alluded to by the witness, due to Mrs. Graham; and if it were proved, still it is not the claim asserted in the answer, and consequently it could not be made the foundation of a decree for an account. There is, in short, no evidence to establish any claim against the plaintiff's late wife, or which affords sufficient ground to warrant this court in entangling the parties in the settlement of a partnership account between two deceased partners; when there are probably no materials for making such a settlement, and to withhold from the plaintiff an acknowledged right to the bank shares in the name of the defendant, until that account should be taken. If the defendant, as executor of Mary Graham, has a claim of any kind against the plaintiff, the remedy is plain; and so far as appears to the court, it is safe, as the plaintiff has given security, and there is no evidence of its insufficiency. Decree that defendant transfer, &c.

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

Case No. 8,374.

LINKMAN v. WILCOX.

[1 Dill. 161.] [1]

Circuit Court, E. D. Missouri. 1871.

BANKRUPTCY—ILLEGAL PREFERENCE—INTENT.

A judgment creditor who levies upon the entire stock in trade of his debtor, with knowl-

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

edge, or reasonable cause to believe, that he is insolvent, is not entitled to the proceeds of the sale in the hands of the sheriff, as against the assignee in bankruptcy; the requisite intent, on the part of such a creditor, to defeat the bankrupt act [of 1867 (14 Stat. 517)] will, under such circumstances, be inferred.

[Cited in Giddings v. Dodd, Case No. 5,405.]

Error to the district court for the Eastern district of Missouri.

Winter owed Linkman $2,300, and interest, to recover which the latter commenced suit in July, 1870, and obtained judgment November 22, on which execution issued November 29, 1870, and was levied by the sheriff on Winter's stock of goods. On the next day after the levy, Winter filed his petition in bankruptcy to be adjudicated a bankrupt, and was on the 3d day of December, 1870, adjudged a bankrupt. On the 15th day of December, the sheriff sold the stock of goods levied on, and there arose from the sale the sum of $1,583.05. Linkman filed a petition in the district court of the United States for the Eastern district of Missouri, asking for an order upon the sheriff that the proceeds of the sale be paid to him. The assignee in bankruptcy answers, and insists that the money be paid to him for the benefit of the estate of the bankrupt. The evidence shows that as the time judgment was obtained by Linkman against Winter, the latter was insolvent. It also shows that Linkman knew, or had reasonable cause to believe, that Winter was insolvent, and that Winter was aware of his own insolvency. Winter did not procure suit to be brought, and although he had no real defense to Linkman's action, he employed an attorney who filed an answer and defended the action as best he could, to gain time; but the only defence made related to the interest claimed, which being waived by the plaintiff, the court gave him judgment. There was no contrivance or collusion between Linkman and Winter, to give the former a preference; on the contrary, the debtor's desire seemed to be to prevent the judgment and execution. And the question is, whether, under the circumstances, the judgment creditor, or the assignee in bankruptcy, is entitled to the proceeds of the sale under the execution. The district court decided in favor of the assignee. A bill of exceptions was taken, and the cause is here on a writ of error prosecuted by the judgment creditor. No question is made as to the mode of reviewing the decision below.

Finkelnburg & Rossieur, for Linkman.
Fisher & Rowell, for the assignee.

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

DILLON, Circuit Judge. Before the bankrupt act was passed, the law allowed a debtor to prefer a creditor, and it permitted the latter to secure a preference by contract or by suit. To prevent this is one of the main purposes of the bankrupt act. Hence the many provisions in the enactment leveled against preferences, and intended to place all creditors, with few exceptions (section 27), upon a plane of perfect equality, "without any priority or preference whatever." This cardinal purpose of the legislation in question must never be everlooked in construing the special provisions of the act.

Assuming the facts of the case to be as above stated, it is the opinion of the court that to hold the judgment creditor to be entitled to the money in the hands of the sheriff, would be to give him a preference over other creditors under circumstances which contravene the purpose of the bankrupt law.

It is provided (section 39) that any person, who, being insolvent, shall procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with intent to defeat or delay the operation of the bankrupt act, shall be deemed to have committed an act of bankruptcy, and the assignee may recover back the money, &c., paid, &c., contrary to the act.

In this case Winter did suffer his property to be taken on legal process, and if it is not an act of bankruptcy for a merchant to have his stock of goods levied on and sold under judgments against him, the bankrupt law is much less extended in its operation than is generally supposed, and so defective in preventing preferences as to be almost ineffectual to secure the equality among creditors which is its chief purpose.

The main argument in favor of the judgment creditor is, that the law requires an actual intent on the part of the debtor to give a preference, or to defeat or delay the operation of the law; and that here there is no such intent, since the debtor did not collude with the creditor, but did what he could to prevent the latter from obtaining judgment.

In our opinion the requisite intent is to be inferred from the circumstances in which the debtor was placed, and the knowledge of the parties as to the debtor's insolvency. The debtor was insolvent, and knew it. The creditor knew it, or had reasonable cause to believe it, and because of this he made a sacrifice of more than a year's interest on his debt to procure judgment at the first term after suit was brought. If the 14th, 23d, 29th, 35th, 39th, and 44th sections of the bankrupt act are studied, it will appear plain that to allow the creditor to get a priority by reason of a judgment thus obtained, would subvert the law and continue the system of preferences which it was designed to abolish. By the 14th section, all attachments made within four months are dissolved by the assignment, and the effect of allowing the judgment creditor to receive the money under a levy made with knowledge or belief of the debtor's insolvency, is the same as if the money had been voluntarily paid to him by a known insolvent, or the debtor had desired

and intended to give a preference to the creditor who recovered judgment. Affirmed.

See, also, Giddings v. Dodd [Case No. 5,405]; Vanderhoof v. City Bank [Id. 16,842]; Rison v. Knapp [Id. 11,861]. And compare Wright v. Filley [Id. 18,077].

LINN (ROGERS v.). See Case No. 12,015.

Case No. 8,375.

LINN et al. v. SMITH.

[4 N. B. R. 46 (Quarto, 12);[1] 3 Am. Law T. 218; 1 Am. Law T. Rep. Bankr. 229; 2 Leg. Gaz. 299.

Circuit Court, E. D. Michigan. 1870.

BANKRUPTCY—PETITION—CLAIM NOT DUE.

1. A creditor can file a petition against his debtor even though his claim is not due.

2. If the debts are provable under the act they are such as the act contemplates as sufficient on which to base a bankruptcy petition.

[Cited in Re Stausell, Case No. 13,293.]

3. The act surely does not contemplate such inequality as there would be in precluding a creditor holding notes to amount of ten thousand dollars from the right to petition, when one holding an open account to amount of two hundred and fifty dollars is allowed to have the debtor declared a bankrupt if he has been guilty of the acts prescribed as acts of bankruptcy.

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

[In the matter of Alexander R. Linn and others against Loring M. Smith.]

A. Russell, for appellant.

Don M. Dickinson, for appellee.

EMMONS, Circuit Judge. The act of bankruptcy having been traversed, the matter was tried before a jury in the district court, before his honor, Judge Withey. Two objections are argued in this court: (1) That the petition alleged a debt which was due and payable, and there was a variance between it and the evidence. (2) That as the debt was not due when the petition was filed it cannot be sustained. The 39th section of the act [of 1867 (14 Stat. 536)], provides that creditors whose debts are provable under the act may petition, and section 19 authorizes debts not due to be proved. The 32d section discharges the bankrupt from all debts which are provable. Literally construed, these provisions are wholly unambiguous, and authorize a creditor whose debt is not due to become a petitioner. The consequences, too, of a different construction would seem clearly to justify this rendering of the law. Unless such a creditor can petition he cannot, before the maturity of his debt, become a party in any other form, and the injustice will result of discharging a citizen's debt by proceedings which he can neither originate nor aid in controlling. The petition must be filed within six months from the commission of the act of bankruptcy, and a fraudulent preference made more than four months before the petition cannot be defeated. If, therefore, an immature demand will not authorize a proceeding, every creditor whose debts do not fall due within this period may be wholly deprived of all the protection intended to be secured. In numerous instances the fraudulent debtor would be without restraint. Other equally impolitic results might be stated, rendering it, in the last degree, improbable that the lawmakers intended to deny a creditor who held a debtor's note for ten thousand dollars, due in one year, the liberty of petitioning, while he who had an open account of two hundred and fifty dollars, because no credit was agreed upon, was allowed to do so. It is claimed this reading is erroneous, and an argument of much learning and plausibility was made. The common conviction of the bar that the debt must be due was appealed to, the analogies in proceedings at law for the collection of debts, and the construction put upon the old English bankrupt laws were much relied on. Mr. James and Mr. Hilliard, in their commentaries on the statute both fully sustain the position of the appellant. Hil. Bankr. p. 184, says: "A future debt is held no ground for a petition. No action can be commenced upon it, much less can there be a commission of bankruptcy taken out upon it, whereby, as it were, all the property of the bankrupt is seized in execution." James, Bankr. p. 265, says, the clause authorizing debts provable to be the subject of petition is satisfied by making it refer solely to the nature of the debt. That is, it must not be for a tort, or of such a nature as not to be provable. These books, issued soon after the publication of the law, are, in all probability, the source of the professional conviction which has been appealed to by counsel. The reason given for the reading of Mr. James is quite insufficient. It never would have occurred to any lawmaker that courts, by a far-fetched judicial construction, would authorize a petition by parties whose debts were neither provable for a dividend nor discharged by the decree. Such a party has no possible connection with the proceedings, and the clause could not have been inserted for the purpose of excluding him. No other reason has been suggested why this section should not be held to mean what it says, that any creditor who may prove his demand, share in the dividends, and is barred by the decree, may launch the proceedings. Mr. Hilliard seems mainly influenced by the idea that no action can be maintained upon an immature demand, and says much less can a commission issue upon it. This is exceptionally fallacious. It is not an instance where the causes which prohibit action in one case have an increased application in another. So far as these respective qualities are involved in these proceedings there is no analogy between

[1] [Reprinted from 4 N. B. R. 46 (Quarto, 12), by permission.]

these wholly different processes. The one is to collect an overdue debt, to prosecute which before it is due would be as absurd substantially, and in common reason, as it is technically illegal. The other is to arrest a fraud upon a statutory trust; to commence an action in favor of all who are wronged, after its cause is complete, and the consequences of which are common to the mature and the immature demands. Both classes being alike protected by the statute and cut off by the decree, every reason which sustains action as to one must necessarily authorize it in favor of the other. This interpretation is not in the most remote degree at war with the familiar rule relied on by Mr. Hilliard, that you cannot sue the citizen upon a promise which he has not broken, or for a duty which he has not omitted (see Galloway v. Holmes, 1 Doug. 330; Hall v. Chandler, 3 Mich. 531; Cross v. McMaken, 17 Mich. 511; Drake, Attachm. 25–34; 1 Chit. Pl. 299; 20 Me. 287); and the kindred judgments and authors sustaining this familiar rule have no tendency to prove anything beyond it. There is another equally familiar and consistent one, that where property, either by operation of law or by act in pais is in any mode constituted a trust for the security of the acts or the payment of debts, and the custodian of the fund attempts an illegal appropriation, the law in all cases affords an immediate remedy. In these cases the question whether the debt is payable in praesenti or at a future day, however remote, is wholly immaterial. A creditor whose bond is not due may sustain a bill against an administrator dealing wrongfully with the assets. 1 Story, Eq. Jur. § 547. If a trust company should threaten to divert its funds to the destruction of annuities or its long obligations, equity would interfere. See 2 Story, Eq. Jur. § 825, for a list of the "brevia anticipitantia" at law, and sections 826–851 for numerous instances where future interests and demands not due are protected.

The statute makes all the property of a debtor, in case of his insolvency, a trust fund for equal distribution among his creditors. Their agreements for credit have been made in reliance upon the debtor's implied promise that he will so hold it, and the analogies in other departments of the law, so far from being in conflict with, all demand that construction given by the Detroit judge. It is an instance of one holding property which the law devotes to one purpose seeking to divert it to another. The common law, I concede, has irrationally withheld the extension of this principle to all the occasions where its reasons would carry it, and has denied a remedy before judgment to a creditor at large against the funds of his debtor when no trust existed. So impolitic has this narrow doctrine been deemed, that in the absence of a bankrupt law many states have authorized attachments of a fraudulent debtor's property upon demands before their maturity. See Drake, Attachm. cited ante. This provision now to be construed affords a remedy of the same general nature. We shall disregard no principle of policy or general jurisprudence by giving the words of the statute their natural and literal meaning.

The decisions and books referred to in reference to the early English bankrupt law demand a wholly different reading of our own statute from that which Mr. Hilliard and Mr. James suppose they justify. I have examined 14 East, 197; 5 Taunt. 338; 9 East, 498; 1 Mod. 50; 4 East, 438; and 1 Ld. Raym. 724, cited by counsel, and many other like cases, and, so far as they are accessible, the successive English acts under which they were made. A detailed analysis would lead to unwarranted prolixity. It is sufficient to say generally the statutes were so unlike our own as to render these judgments wholly inapplicable to its construction. But the history of English legislation and judicial discussion is by no means unworthy of notice. It shows quite clearly why the provision we are discussing assumed its present form. The earlier acts which will be found cited and construed in the cases referred to, did not authorize a debt not due to be proved at all. It was discharged by the decree, and the creditor was in no wise a party to, or affected by, the proceedings. Of course, under such a law he could not petition. It needed no judicial criticism to determine that. The law was amended so that such claimants might prove their debts, but the statute expressly prohibited their becoming petitioning creditors. It assumed quite clearly they would be such without the proviso, after they had been authorized to make proof, and their claims subjected to a discharge. In a few years afterwards there was still another amendatory act reciting that this inhibitory proviso had been found inconvenient and it was therefore repealed. Demands which were immature were placed on the same footing with those overdue, and all alike were authorized to initiate proceedings. Since 5 Geo. II. c. 30, by successive provisions this policy has been adhered to, of authorizing all creditors whose debts were provable and so discharged under the act, to be petitioners. 24 & 25 Vict. c. 134 (James, Bankr. 265), contains full provisions to this effect. That the person who drafted our law had gone over this history and used the word "provable" in reference to the principle it establishes, there can be no doubt. At no period in England has the anomaly here insisted on been administered. If a creditor there could not petition, it was because he could not prove, and because his debt was not discharged by the decree. Whenever he was subjected to the power of the law he was authorized to launch and aid in working the proceedings under it. It is quite unreasonable to suppose that our statute, passed in the light of such legislation and judicial discussions, using as it does the most appropriate language to embody its principle, intended to

discard it. Our law of 1841 [5 Stat. 440], although far less explicit that the present one, was held by Judge Conklin to authorize a petition by a creditor whose demand was not due. Such I understand was its accepted construction. See Barton v. Tower [Case No. 1,085]. I also agree with the district court that if it was not necessary to aver the demand was due, there was not a fatal variance. The judgment below is affirmed.

LINN (UNITED STATES v.). See Cases Nos. 15,605 and 15,606.

LINQUIST (McLOON v.). See Case No. 8,899.

Case No. 8,376.

LINTHECUM v. JONES.

[4 Cranch, C. C. 572.] [1]

Circuit Court, District of Columbia. March Term, 1835.

EXECUTION—WHEN MAY BE QUASHED.

An execution cannot now be quashed at this term, which is not returnable until the next term.

This was a rule to show cause why a fieri facias, returnable at the next term, should not be quashed, because the judgment was of more than twelve years' standing.

THE COURT did not decide the principal question intended to be raised, being of opinion that the execution should not now be quashed.

Before CRANCH, Chief Judge, and MORSELL and THRUSTON, Circuit Judges.

MORSELL, Circuit Judge, was of the opinion that execution should be quashed.

THRUSTON, Circuit Judge, thought that the court had jurisdiction now to quash the execution, although not returnable until the next term, but that the defendant ought to have an opportunity to plead the statute of limitations.

CRANCH, Chief Judge, was of the opinion that the court now, at this term, has no jurisdiction to quash the execution, which is not returnable until the next term. Motion to quash, overruled.

LINTHICUM v. OFFUTT. See Case No. 3,484.

Case No. 8,377.

LINTHICUM v. REMINGTON.

[5 Cranch, C. C. 546.] [1]

Circuit Court, District of Columbia. March Term, 1839.[2]

EXECUTION SALE — JUDGMENT BY DEFAULT — FRAUDULENT DEED—WITNESS—PRIVILEGED COMMUNICATIONS.

1. A judgment by default at the imparlance term in the county of Washington, is regular, the rule to plead having expired in the preceding vacation.

2. The marshal may amend his return of a fieri facias after the return day, according to the truth of the case, by stating the sale, &c., from his sales-book.

[See note at end of case.]

3. The marshal's sales-book is evidence of the sale.

4. The plaintiff having offered in evidence a deed from Z. M. O. to the defendant to show that plaintiff and defendant both claimed title under the said Z. M. O., and at the same time stating that he intended to show that the deed was fraudulent and void as against the plaintiff, is not thereby precluded from proving the fraud.

5. When evidence has been given on both sides, the court will not instruct the jury that the plaintiff cannot recover upon the evidence offered on his part.

6. The court will not permit counsel to testify as to facts disclosed by his client, upon an application to him as a conveyancer to draw a deed.

7. The grantee of a deed alleged to be fraudulent, is a competent witness in support of the deed, in an action against the person to whom he has conveyed the property, upon receiving from him a release, &c.

Ejectment for part of lot No. 153, in Beatty & Hawkins's addition to Georgetown. The plaintiff [Otho M. Linthicum] claimed under a sale by the marsnal, upon a fieri facias against Z. M. Offutt. The defendant [William Remington] claimed under a deed from the said Z. M. Offutt to James Remington, dated April 18, 1835, and from James Remington to the defendant, dated October 16, 1835. The plaintiff offered in evidence the record and proceedings in three cases and three writs of fieri facias against Offutt, which had not then been returned to the clerk's office, with the indorsement thereon, and the schedule of property upon which they were levied, which were produced by the marshal. And he also offered in evidence the private book of entries, kept by the marshal of his official sales, &c., in which is an entry of the sale of the property for which this suit is brought, made on the 13th of January, 1838, by his clerk, employed in his office, but who was not a deputy-marshal, and offered to prove that the said entry was truly copied from an original memorandum made by the deputy-marshal at the time of sale, which original paper is lost, and that the said entry was made in the said book by the said clerk according to the usage and practice of the said marshal's office. And the plaintiff further offered in evidence a written return of the said writs of fieri facias by the marshal, stating the sale of the property to the plaintiff, which return was not written or made out until after the jury was impanelled in this cause; and the plaintiff prayed the court to authorize the marshal to make the said return. To the admissibility of all which evidence, and to the granting of the said prayer the defendant objected; but THE COURT overruled the said objection, and permitted

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

[2] [Affirmed in 14 Pet. (39 U. S.) 84.]

the said evidence to be given by the plaintiff, and the said return to be made by the marshal. To which the defendant took a bill of exceptions.

R. J. Brent, for defendant, contended that the judgments were erroneous, because they were rendered at the imparlance term, and the defendant had, by the practice of this court (he contended), the whole term to plead in.

But THE COURT (THRUSTON, Circuit Judge, absent) overruled the objection, 1st. Because no error in the judgments can affect the sale under the fieri facias; and secondly, because the rule to plead had expired in the vacation preceding the imparlance term.

Mr. Brent contended that the marshal could not amend his return during the trial; and cited 2 Starkie, 520, pt. 4; Clarke v. Belmear, 1 Gill & J. 444; Barney v. Patterson, 6 Har. & J. 205; Berry v. Griffith, 2 Har. & G. 337.

The counsel for the plaintiff, in opening his case, stated to the jury that the plaintiff claimed title to the premises in question under a sale by the marshal, under a writ of fieri facias at the suit of O. M. Linthicum against Z. M. Offutt; and that the defendant claimed title to the same premises, under a conveyance from the said Offutt to the defendant, which would be proved to be fraudulent and void as against the plaintiff; and the counsel for the defendant having, in his opening of his cause stated to the jury, that the defendant did claim title under the said conveyance from Offutt to Remington, and the plaintiff having offered the evidence aforesaid, now, for the purpose of showing that the said defendant claimed title under Offutt, and preparatory to impeaching the same for fraud, gave in evidence the deed from Offutt to James Remington; and the deed from James Remington to William Remington the defendant, and then offered evidence to prove that the said deeds were fraudulent and void as against the plaintiff; to the admissibility of which evidence the defendant objected, but THE COURT overruled the objection, and the defendant took his bill of exceptions.

The defendant, having given a release to the said James Remington, offered him as a witness to support the validity of the deed from his brother-in-law, Offutt, to him, and from him to his father, the defendant, which were alleged to be fraudulent.

And THE COURT (CRANCH, Chief Judge, doubting) permitted him to be sworn and examined as a witness for the defendant.

Mr. Coxe, for plaintiff, offered to examine Mr. Marbury as to facts stated to him by Offutt when he requested Mr. Marbury to draw a deed for him. Mr. Marbury was an attorney and counsellor of this court, and often drew conveyances; and, having been sworn on the voir dire, said that he considered the communication as having been made to him in his capacity of attorney, counsellor, and conveyancer.

THE COURT refused to permit Mr. Marbury to state the facts which were communicated, and the advice he gave to Offutt.

Mr. Coxe cited Chirac v. Reinicker, 11 Wheat. [24 U. S.] 294.

Verdict for plaintiff.

Judgment affirmed by the supreme court, January, 1840.

[NOTE. Mr. Chief Justice Taney, who delivered the opinion of the supreme court, considered the case principally upon the exception to the special return of the marshal, made after the commencement of the action. That this return did not invalidate the plaintiff's title he considers clear, following the Maryland decisions on this point. The evidence of the marshal's return is necessary as a link in the plaintiff's chain of title. But, says the learned chief justice, "It would seem to follow from the decisions that it cannot be material at what time this evidence is obtained. He cannot recover without it. * * *" But, when it "is obtained, it proves the previous sale by the officer, and, as it is the sale that passes the title, the vendee must take it from the day of the sale." 14 Pet. (39 U. S.) 84.]

LINTHICUM (REMINGTON v.). See Case No. 11,696.

Case No. 8,378.

Ex parte LINTON.

[3 App. Com'r Pat. 351.]

Circuit Court, District of Columbia. July 31, 1860.

PATENTS—INTERFERENCE—MOTION TO RECONSIDER—TIME WITHIN WHICH TO APPEAL—APPEAL DISMISSED—APPEAL FEE.

[1. The entertaining by the commissioner of a motion to reconsider in an interference case, filed after the expiration of the limit of appeal, does not suspend the operation of the order limiting the time to appeal.]

[2. Where an appeal in an interference case is dismissed after consideration of a protest duly filed by the office against entertaining it, because taken after expiration of the time limited, the appeal fee must be refunded.]

[On petition for an appeal by William Linton from the decision of the commissioner of patents rejecting his second claim in specifications of improvement in machinery for making pottery.]

MERRICK, Circuit Judge. Upon an interference declared between the application of William Linton and the patent of William S. Reinert, issued May 9, 1854, for improvements in machinery for making pottery, such proceedings were had that the second clause of the applicant's claim was finally rejected by the commissioner of patents upon the adverse report of the examiner in charge, and thirty days were allowed for taking an appeal by order of the commissioner, dated June 7, 1860. Official notice of this decision and order was given by letter of the next day, June 8th. On July 9th, the applicant filed a petition in the alternative asking a reconsideration and allowance of the claim, and should that be refused the further pe-

riod of one week within which to take his appeal. Both requests were refused, and the refusal communicated in an official letter dated July 12th. On July 16th, notice of an appeal was given to the commissioner, the fee of $25 was deposited with the treasurer of the office, and a petition of appeal presented to the court, who, in ignorance of the facts above recited, assigned July 30th for hearing the case by an official letter to the office dated July 17th. Upon the day assigned the commissioner filed with the court his written protest against entertaining the appeal upon the ground that the applicant had disregarded the limit of appeal fixed by the order of June 7th, and that thereby his right of appeal was gone. The applicant, on the contrary, argues that by entertaining his alternative application of July 9th, for rehearing or extension of time for appeal, the office abandoned the limit of appeal previously assigned.

Whatever force there might be in the suggestion that, by entertaining a motion to reconsider during the period limited for appeal by a preceding order, the office thereby suspended the operation of that order, because the party could not know, pending the application, whether the cause would be reheard and the preceding adverse decision annulled; in which case an appeal would become unnecessary, and that therefore he was in no condition to appeal until after the result of his petition was made known to him, no argument can be drawn from that state of case to sustain the idea that a like effect is wrought by a petition to reconsider filed after the limit of appeal has expired, for in the latter case the party has lost no right nor has he been lulled into security by any delusive hope held out by the office. He stands, then, in the attitude of one addressing himself to the mere grace and favour of the office outside the pale of strict right, and the refusal to extend to him this superadded grace and favour can furnish no pretext for the revival of a right once gone by his own naked default. It is unnecessary to consider in this whether the period limited for an appeal is to be computed from the date of the order or from the date of the notice, for in this case, even taking the latter date as the terminus a quo, and allowing him the still further indulgence of excluding the terminus a quo from the computation of the period of thirty days, still his appeal should have been taken on the 8th day of July, at the farthest.

I am therefore of opinion that no appeal has been taken by the applicant in this case, and that the protest of the office having been rightfully made, I am precluded from considering the case on its merits. It follows from this that the fee of $25 has been improvidently received by the financial clerk of the office, and as the judge is only entitled to compensation in the cases provided by law where an appeal has been taken, and in no other case, he can receive no payment from the office for considering the matter submitted by the communication of the commissioner of patents, and therefore I think the fee of $25 aforesaid should be refunded to the applicant.

Case No. 8,379.

The LION.

[The case reported under above title in 1 Spr. 40, is the same as Case No. 2,786.]

LION, The (UNITED STATES v.). See Case No. 15,607.

Case No. 8,380.

LIPPETT v. HOPKINS et al.

[1 Gall. 454.] [1]

Circuit Court, D. Rhode Island. June Term, 1813.

REAL PROPERTY—EXECUTORY DEVISE—WILLS.

A devise to A. "and if he shall die, without an heir, before he shall arrive at the age of twenty-one years, that then all that is herein to him bequeathed, to be equally divided amongst his brothers and sisters, or their heirs;" A. takes a fee-simple with an executory devise over to his brothers and sisters.

[Cited in Lillibridge v. Adie, Case No. 8,350; Arnold v. Buffum, Id. 554; Abbott v. Essex Co., Id. 11.]

[Cited in Morris v. Potter, 10 R. I. 63.]

Ejectment for a tract of land lying in Scituate, in Rhode Island. The defendants [Timothy Hopkins and others], as to ninety acres, parcel of the premises described in the declaration, pleaded in bar the statute of limitations of Rhode Island, which provides, that twenty years' quiet possession shall "give and make a good and rightful title," &c. And as to the residue of the demanded premises, they disclaimed. They also pleaded the general issue "Not guilty," as to the whole. The plaintiff, in his replication, set out the proviso of the statute, allowing ten years to any remainder-man, &c., after the accruing of his right, and then recited at large the will of Moses Lippett, the material parts of which will be found in the opinion of the court. He then alleged, after averring the death of the testator, &c., that the premises devised (being the same demanded in this action) became vested in John Lippett, as tenant for life, and that the fee-simple vested in Moses Lippett, from whom it descended to him, and that on the death of said John, being more than twenty-one years of age, the remainder vested in him, the plaintiff. To this plea, after oyer of the last will and testament recited in the plaintiff's replication, the defendants demurred generally, and the plaintiff joined in demurrer.

STORY, Circuit Justice. This is an action of ejectment brought to recover a lot of land

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

situate at High Plain so called. The plaintiff claims as heir at law at the common law. The controversy has chiefly turned upon the construction of a devise in the will of Moses Lippett, the grand-father of the plaintiff, and without a particular examination of the pleadings, I shall at present confine myself to that consideration. The case is in short this. The testator made his will on the 20th of June, 1744, which was duly proved and allowed by the court of probate on the 24th of January, 1745. In that will, after the usual introductory words, "as to my worldly estate, &c., I do dispose of the same in manner following:" Imprimis, he gives to his son Moses certain estate, &c., "to him and his heirs forever." Secondly, to his son Jeremiah, &c., "to him and his heirs forever." Thirdly, to his son Christopher, &c., "to him and his heirs forever." Fourthly, to his son Joseph, &c., "to him and his heirs forever." Then comes the clause in question. "Fifthly, I give and bequeath to John, my dearly beloved son. my lot of land lying to the eastward of the great pond in Warwick, together with an addition lot joining thereto, with also my lot of land in Warwick, joining to George Roberts' land, with one half of the Thatch creek joining to said lot, with also one half of my lot of land joining to John Warner's, called Edward Carter's Place, with one half my lot of land at the Long Meadow, so called, in Warwick Neck, with also one half my homestead farm, with one half of all the buildings thereon, (the best room in my dwelling house, wherein I now dwell, excepted), with also one half of my live stock, with also one half of the appurtenances (in every respect) belonging to the tanning business, together with one half of the stock thereof. Further, I give and bequeath to John, my dearly beloved son, the sum of one hundred pounds current money of the old tenor of this colony, with also one feather bed with sufficient furniture, with also a sufficiency of bedding, with bedstead and cord, with also my silver tankard and my great Bible, all to be delivered him by my executrix hereafter named, when he shall arrive to the age of twenty-one years; and if he shall die without an heir before he shall arrive to the age of twenty-one years, that then all that is herein to him bequeathed, to be equally divided amongst his brothers and sisters, or their heirs, to be delivered to them as aforesaid. Further, I give and bequeath to John, my beloved son, my one hundred and eighty acre lot of land to the westward of the seven mile line of Providence, upon High Plain so called, to be delivered to him as aforesaid." John survived the testator and died after arrival at twenty-one years of age. There is a residuary devise of all the real and personal estate undisposed of to the testator's wife, "to her and her heirs freely to be possessed and enjoyed." The question is, what estate John (under whom the defendants claim) took in the lot on High Plain. It is contended by the plaintiff, that John took an estate for life only in any part of the real estate devised to him; and at all events in the land on High Plain. On the other side it is contended, that John took an estate in fee or fee tail, in all the real estate devised to him.

The case has been very well argued on both sides, and I shall now proceed to deliver the opinion, which, on mature deliberation, I have formed.

I will first consider what estate John took in the lands in Warwick, devised in the first clause. The first rule in the construction of a will is, to effectuate the declared intention of the testator, if by law it may prevail. To this rule all others bend. But the intention of the testator must be clear and explicit, for the heir at law is not to be disinherited, unless by express words or manifest intention. Prec. Ch. 381, 439; Cro. Car. 368; 3 Term R. 83; 8 Term R. 579. Upon this ground it is, that if a devise of land be without expressing any particular estate, the devisee takes an estate for life only, unless from the context a greater estate was manifestly intended. Latch, 40; Poll. 541; Cowp. 240, 355, 659, 841; Doug. 759; 7 Term R. 635; 1 Brown, Ch. 489; 5 Term R. 320, 558; 6 Term R. 175; 8 Term R. 64; 2 P. Wms. 335; 6 Term R. 610. It is highly probable, as observed by Lord Mansfield in Loveacres v. Blight, Cowp. 355., that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator; for common people, and even others, who have some knowledge of law, do not distinguish between a bequest of personalty, and a devise of land or real estate. Still this has become an inveterate and settled construction, and cannot be overturned without the most extensive injustice. It grew up, when wills were subjected to many of the niceties of grants according to the course of the common law, and whatever might be our wishes, we must acquiesce in its binding efficacy, if not in its wisdom. Nor is it sufficient for the testator to express a general intention to dispose of all his property, to turn an estate, otherwise for life, to a more enlarged estate. For though general introductory words to this effect may sometimes aid in the construction of doubtful and obscure clauses, yet they are not permitted to supply material defects, or to convert a life estate into a fee. 5 Term R. 13; 6 Term R. 612; 8 Term R. 64; 4 Bos. & P. 335; 2 W. Bl. 889; Cowp. 352, 657; Doug. 759.

Courts of law, however, are solicitous to effectuate the real intention of the testator, when it can be legally inferred from the words of the will. They will therefore bring different clauses in aid of each other, enlarge the sense of some words, and restrain that of others, and combine different devises, in order, if possible, to give an uniform construction to the whole will. and supply the defects of counsel in the last extremity of life. Upon this principle it has been resolved, that if a

devise be made to one without specifying any estate, and in case of an indefinite failure of his issue, a devise over, the first devisee shall take an estate tail, for it is manifest that the testator intended a benefit to the issue, and that the estate should not cease, but on a general failure; and this intention can be effected only by declaring the estate a fee tail in the ancestor. Forth v. Chapman, 1 P. Wms. 664; King v. Rumball, Cro. Jac. 448; Wyld v. Lewis, 1 Atk. 432; Denn v. Slater, 5 Term R. 335; Hope v. Taylor, 1 Burrows, 268; 9 Coke, 127; Moore, 682; 1 Vent. 231; 2 P. Wms. 194; 1 P. Wms. 605; Com. Dig. "Devise," N 5; 3 Mod. 123; 1 Rolle, Abr. 837; 4 Burrows, 2246; Hob. 65; Cro. Jac. 599; Willes, R. 1. And even where the estate to the first devisee has been expressly limited for life, and a devise over upon a like failure of his issue, the same construction has prevailed. Dict. Forth v. Chapman, 1 P. Wms. 667; Target v. Gaunt, Id. 432; Brice v. Smith, Willes, 1. And so, where no estate whatsoever has been directly devised, upon the implication arising from the devise over on the failure of his issue, the devisee has been permitted to take an estate tail. Goodright v. Goodridge, Willes, 369; Walter v. Drew, Comyn, 372. These are cases of an estate tail arising by implication. Nor has a less liberal construction been adopted as to a fee-simple. It is a settled principle, that where an estate is devised to one generally, with a remainder over upon a limited contingency, as upon his dying under twenty-one years of age, the first devisee shall take a fee-simple; for if the intent were to give only a life estate with remainder over, there could be no reason for limiting it to the death under age. This rule was avowed by the learned Saunders in Purefoy v. Rogers, 2 Saund. 388, as his private opinion, and has since been adopted and recognized in a series of decisions. Moore v. Heaseman, 1 Willes, 138; Doa v. Cundall, 9 East, 400; Frogmorton v. Holyday, 3 Burrows, 618; Tomkins v. Tomkins, cited 1 Burrows, 234; Toovey v. Bassett, 10 East, 460; Robinson v. Grey, 9 East, 1; Richardson v. Noyes, 2 Mass. 56.

On the other hand, instances occur, in which the ordinary import of words is restrained, in order to carry into effect the apparent intention of the testator. Where therefore he devises to one and his heirs, and upon an "indefinite failure of his issue," remainder over, the word "heirs" is restrained to heirs of his body, in order to give effect to the remainder over, which otherwise would be too remote and void. Denn v. Shenton, Cowp. 410; Chadock v. Cowley, Cro. Jac. 695; Dict. Brice v. Smith, Willes, 1; Ide v. Ide, 5 Mass. 510; Com. Dig. "Devise," N 5. So if the devise be to one and his heirs, and upon an indefinite failure of heirs, then over to a person, who might be an heir of the first devisee, his estate is restrained to a fee-tail, for he could never be without heirs while the second devisee or his heirs existed; and therefore it is plain, that the testator used the word "heirs," as equivalent to "heirs of the body." Webb v. Hearing, Cro. Jac. 415; Parker v. Thacker, 3 Lev. 70; Goodright v. Goodridge, Willes, 369; Morgan v. Griffiths, Cowp. 234; Nottingham v. Jennings, 1 P. Wms. 23, Willes, 166, note; Brice v. Smith, Willes, 1; Preston v. Funnell, Id. 165; Doe v. Ellis, 9 East, 382. See, to the same purpose, Doe v. Bluck, 6 Taunt. 485, 2 Marsh, 170. But if, in a like case, the devise over were to a stranger, the general meaning of the word "heirs" would prevail, and the estate over, being too remote, would be void as an executory devise. Crumblé v. Jones, Willes, 167, note; Attorney General v. Gill, 2 P. Wms. 369; Tilburgh v. Barbut, 1 Ves. Sr. 89, 3 Atk. 617; Doe v. Ellis, 9 East, 382; s. p., 1 Doug. 264; Amb. 363; 3 Term R. 488; Cro. Jac. 415. So also if the devise be to one and his heirs, and upon a limited contingency, to take effect in his life, as upon his dying under age, then over, the first estate is a fee simple, whether the ultimate devisee be an heir or a stranger; for the second devise would be upon a limited contingency, and good as an executory devise, and therefore it is not necessary to restrain the previous estate in order to effectuate the intention of the testator. The reason therefore of the restraining rule ceasing, the effect ceases also. This was first held in Pells v. Brown, Cro. Jac. 590, which, as Lord Kenyon has emphatically observed, is the Magna Charta of this branch of the law, and has never been departed from. Porter v. Bradley, 3 Term R. 143; Roe v. Jeffery, 7 Term R. 589; Doe v. Wetton, 2 Bos. & P. 324; Goodtitle v. Wood, Willes, 211; Robinson v. Grey, 9 East, 1; Fosdick v. Cornell, 1 Johns. 440; Jackson v. Blanshan, 3 Johns. 292, 6 Johns. 54; Hauer v. Sheetz, 2 Bin. 532; Ray v. Enslin, 2 Mass. 554. Vide 1 Taunt. 173; 5 Mass. 500; Com. Dig. "Devise," N 6. I might add also another class of cases, where a devise over after a fee, in case the devisee should die before he came of age, or without having issue, has been held a good executory devise, and the word "or" construed "and;" so that the second estate would be defeated, either by the first devisee attaining his age, or having issue; and the reason is, that otherwise if the first devisee should die under age, although he had issue living, the estate to him would be defeated, contrary to the manifest intention of the testator. 2 Strange, 1175; 1 Wils. 140; Fairfield v. Morgan, 2 Bos. & P. (N. R.) 38; Eastman v. Baker, 1 Taunt. 174; Doe v. Jessep, 12 East, 288. I have dwelt somewhat largely upon the foregoing classes of cases, because, in my judgment, they embrace all the law applicable to the question before the court, and virtually decide it.

Let us now attend to the wording of the present devise. It is apparent, that the testator did not know the distinction between the bequest of personal and real property; both are given uno flatu. The estate was to be delivered to John, by the executrix, when

he should arrive to the age of twenty-one years, and, according to the authorities, I take it to be clear, that the estate, whatever it was, was completely vested in him, subject to a future devestment upon the happening of the contingency (Doe v. Underdown, Willes, 293); "and if he shall die without an heir, before he shall arrive to the age of twenty-one years, that then all, that is herein to him bequeathed, to be equally divided amongst his brothers and sisters, or their heirs, to be delivered to them as aforesaid." The contingency, on which the estate was to go over, was limited to the period of his minority; it must take effect then, or not at all. Had the devise over been upon an indefinite failure of issue, then, according to the authorities which have been cited, John would have taken an estate tail. Had the estate been limited over upon the contingency of John's not arriving at age, it is clear by the same authorities, and particularly Goodtitle v. Whitby, 1 Burrows, 234; Frogmorton v. Holyday, 3 Burrows, 1618; Doe v. Cundall, 9 East, 400,—he would have had a fee simple. Do the words "without any heir," at all qualify or rebut the general presumption? There is not a single authority within my knowledge, that they would restrain the estate to a life estate, unless the case of Fowler v. Blackwell, 1 Comyn, 352, be considered such. The words there were in effect, "to my son A. after my wife's decease; and if it shall happen, that my son A. should die before he attain the age of twenty-one years, then the said lands shall descend to my son B. and his heirs forever." B. was his heir at law, and it was held by Mr. Justice Eyre, to whom it was referred, that A. took an estate for life only. Although this case has been cited in argument in several cases, I do not find that it is at all relied on by the court; and at most, it is but a single case, by a single judge, against the current of authority. In Tilbury v. Barbut, 3 Atk. 617, where the devise over was upon an indefinite failure, "without any heir," it was held that the first devisee had an estate tail; and in Toovey v. Bassett, 10 East, 460, where the devise over was in case of the death of either of the testator's grandchildren, "under age and without leaving any lawful issue," (a case very much resembling the present) it was held a fee simple. I think, therefore, upon the footing of authority, it must be held that John took either an estate in tail, or in fee, in the lands in Warwick. Upon principle, also, I mean the principle that the testator's intention shall be effectuated, if by law it may, the same conclusion must inevitably result. If the testator designed that John should have a life estate only why did he limit it over, on his dying under twenty-one? Why was it further qualified with so dying "without an heir?" Without any such limitation, it would, upon the death of John, have passed over to the other brothers and sisters, by a simple devise after his death. It is manifest, also, that John was not a disinherited child; all his brothers have a direct fee given. But John was under age, and unmarried, and the testator wished to provide for his issue, if he had any, and to give him the complete control of the estate, if he arrived of age. I am satisfied that we are bound to give effect to all the words of the will, if we can; and I cannot strike out the words "if he shall die without an heir, before he shall arrive at the age of twenty-one years." If not, then, to give them effect, John must either have an estate in tail or in fee. And I have no doubt at all that John's estate was a fee simple. The cases of Webb v. Hearing, Cro. Jac. 415, 1 Roll. 398, 436, and Denn v. Slater, 5 Term R. 335, have been relied on, to prove it an estate tail.

As to the first, the words were, "I bequeath to Francis, my son, my houses in London, after the death of my wife; and if my three daughters, or either of them, do outlive their mother, and Francis, their brother, and his heirs, then they to enjoy the same houses for term of their lives; and the same houses then I give to my sister's sons, &c. they paying," &c. And it was held that Francis took an estate tail; for that "heirs," in this place, meant "heirs of his body;" for the limitation being to his sisters, it is necessarily to be intended, that it was, if he should die without issue of his body, for they are his heirs collateral. It was further held, that the estate of the daughters was not contingent. It is apparent then that this case turned on the distinction, which I have before mentioned, of a devise over after an indefinite failure of issue, (for the word "heirs" was held to mean "issue,") and not on a devise over on a contingency limited to the life of the first devisee, and so is conformable to all the cases. As to the case of Denn v. Slater, 5 Term R. 335, the words were "to my nephew A, but if the aforesaid A should die without heir male, then my will is that my nephew B shall enter upon and enjoy, &c. his heirs or assigns forever." The court held that A took an estate tail; and this decision conformed to Blaxton v. Stone, 3 Mod. 123, and Burley's Case, cited in 1 Vent. 230. It turned upon the intent of the testator, and the distinction which I have already stated. Besides, the words were express "heir male," which were peculiarly applicable to an estate tail. It is true, Lord Kenyon says, "the word 'heirs' has been always construed in that confined sense, where the remainder over was to a collateral heir." But it is evident his lordship was speaking in reference to the case before him, which was of a devise over upon an indefinite failure of heirs, and not upon a limited contingency. If he were to be otherwise understood, the assertion would encounter a series of ancient as well as modern authorities, and even his lordship's own deliberate opinion in Porter v. Bradley, 3 Term R. 143, and Roe v. Jeffery, 7 Term R. 589.

But there is another authority, which, though not cited at the argument, I cannot consistently pass over, from the weight which I cannot but attach to it, from the acknowledged learning and ability of the court who decided it. It is the case of Burkart v. Bucher, 2 Bin. 455. In substance the devise was "to my son A, and if the said A should chance to die without heir or issue, the above said lands must fall into the possession of his brother B." And it was held, that A took an estate in fee tail only. If this decision rested on the ground, that the limitation was to B only upon the indefinite failure of issue; and not upon the failure during the life of B; it is perfectly consistent with all the authorities. But the court did not decide the point either way, and said, that it was quite consistent, supposing that the limitation was confined to the dying without issue in the lifetime of B, that A should take an estate tail. I entertain the most entire respect for the supreme court of Pennsylvania, and should not venture to doubt their opinion, unless upon urgent occasions. But if the intimation were intended to be, that supposing a devise to one, and then over to a collateral heir, on a contingency of dying without issue living at the death of the first devisee, the first devisee would take an estate tail, without further words manifesting such intent, I am not prepared to admit the position without further consideration, and I think my doubt fortified by adjudged cases. Moone v. Heaseman, Willes, 138; Doe v. Cundall, 9 East, 400; Toovey v. Bassett, 10 East, 460; and Robinson v. Grey, 9 East, 1. I do not think, however, that such a construction is fairly to be put upon the words of the court. The remark imports no more, than that a limitation over may be engrafted on an estate tail, as well as an estate in fee, to take effect upon a contingency limited to the death of the first devisee; and of this, there can be no legal doubt. Vide Spalding v. Spalding, Cro. Car. 185.

The cases then, which were supposed to afford an authority to construe the present an estate tail, are clearly distinguishable. But on the other hand, there are numerous cases, which decide that where land is given to A and his heirs, and if he die before arrival at age, then over in fee, A has an estate in fee; and this equally applies, whether the estate over be given to a stranger or to collateral heirs. I have already cited many of these authorities. They all concur; and there can be no necessity to bring them in review. Tomkins v. Tomkins, cited 1 Burrows, 234; Doe v. Cundall, 9 East, 400; Robinson v. Grey, Id. 1; and Toovey v. Bassett, 10 East, 460,—are all very strong to the purpose. In the face of such authorities, with not one single doubt as to the intent of the testator, I cannot venture to declare, that John took less than a fee simple in the lands at Warwick.

The next question is, whether the lot at High Plain was devised to him in the same manner. I have no doubt that the words "to be delivered him as aforesaid," convey to John the same estate, which was devised to him in the other lands. The lands were to be delivered to him by the executrix, upon his attaining twenty-one years of age, and in the same manner. It appears to me, that there is nothing on which to hang a doubt, as to this point. The only possible question would, in another event, have been, whether the words "as aforesaid," refer back so far, as to include the contingent limitation to the brothers and sisters, and their heirs. But as John arrived of age, it is unnecessary to decide that point, though I do not profess to see much difficulty in it. But admitting that John had either an estate in tail, or in fee, it is equally fatal to the plaintiff. I am therefore of opinion, on the special pleadings, that judgment should be for the defendants.

Case No. 8,381.

LIPPINCOTT v. KELLY.

[1 West. Law J. 513.]

Circuit Court, W. D. Pennsylvania. June, 1844.

PATENTS—VALIDITY OF WOODWORTH'S PATENT FOR A PLANING MACHINE.

[It is not enough that some very skillful artisan is able, from the specifications and drawings of a patent, to make and use the machine; these drawings and specifications must be so clear, full, and exact, as to enable persons of ordinary skill in the art to which it pertains to make and use the machine.]

This was an action by William Lippincott, assignee, to recover damages for the infringement of W. Woodworth's patent for planing, tonguing and grooving boards, planks, &c., and for reducing the same to an equal width. This patent had issued December 27, 1828. The patentee died in 1839, and his administrator procured on the 16th November, 1842, an extension of the patent for seven years, as authorized by the act of 1836. The plaintiff shewed the patent, the certificate of extension, the power of attorney, from the administrator to James G. Wilson, to sell, an assignment by Wilson to the plaintiff for Allegheny county, Pa., and evidence to shew infringement by defendant. Defendant gave evidence of the ambiguity of the specification and drawing, and that it was not, as required by the act of congress, so full, clear, and exact, as to enable any person skilled in the art to which it pertains, to make and use the invention, and that the machine used differed from the one described. To giving the patent in evidence, it was objected—that the specification and drawing were void for ambiguity; that they contained no references, on the oath of the inventor; that they did not specify what was claimed; and that the patent had not been re-recorded under the eighth section of

the act of 1837 [5 Stat. 193]. These objections were overruled. The certificate of extension was objected to—that the letters of administration should be shewn, which was done; then, that it was not and did not profess to be a full copy of the record; that it did not contain the decision of the commissioners awarding the extension; and that the right of extension did not apply to administrators. These objections were overruled.

The defendants, owing, as we understood, to the unexpected absence of the person who had served the notice of the matters of defence, were precluded from offering evidence of the invention not being novel, and that it had been, prior to the patent, described in printed publications; but the plaintiff, to rebut the evidence of the ambiguity, as urged and pretended by defendants, having read a deposition referring to a machine somewhat similar, in the tenth volume of the Repertory of Arts, in 1793, the court, on argument, permitted that work, as well as Emmons' patent in 1829, also mentioned in the deposition, to be read by defendants, to shew that the witness was wrong in the description of them, to weaken his credit. The court said they would reserve the point how far the publication could be admitted to shew priority of invention; or that the patent was too broad, as was insisted upon by defendants. This induced the defendant to offer in evidence a disclaimer, by W. W. Woodworth, the administrator, dated 2d January, 1842, which was five days after the fourteen years had expired, and nearly two months after the certificate of extension. The plaintiff also gave evidence to shew that the specification and drawing were sufficiently intelligible. The defendants shewed an assignment of the patent to James Strong for one half of his invention, dated before the patent; an assignment of Emmons of his patent, 16th May, 1829, to Twogood, Halstead & Tyack, and an agreement for a sectional division of the Emmons and Woodworth patent, giving to the assignees of Emmons in part the Southern and Southwestern states; and an assignment, by the plaintiff, of one of Woodworth's machines, in October, 1841.

Biddle & Judson, for plaintiff.
Forward & Dunlap, for defendant.

The defendant's counsel asked the court to charge the jury, that the patent was void for the reason stated, that there was a want of discrimination between the old machine, not claimed, and the new invention; which the court refused to do. The court further charged on the points made by defendant's counsel, that if the jury believed the specification and drawing were not so clear, full, and exact, as to enable one skilled in the art to which it pertains, to make and use such a machine, they should find for the defendants, and say so in their verdict; that such clearness must be a reasonable one; that it was not enough if some very skillful artisan could make and use it, but persons of ordinary skill; that the person so skillful must be able not only to construct but to use it for a useful purpose. That the carriage was not an essential part of the machine. That the mode and structure by which the power was communicated to the operating tool, need not be set forth. That it was not necessary to describe the manner of fastening the plank on the carriage. That the printed publication for want of proof of notice could not be used to show priority of invention. That the patent did sufficiently distinguish the new from the old invention. They refused to charge that there was proof that the patent was too broad.

The counsel for the defendant further requested the court to charge the jury, that the patent did not claim for a combination of the planing, tonguing, and grooving wheels, but for the use of them separately. That this action could not be maintained by the plaintiff alone. THE COURT thought the claim was not for a combination, and that the action lay in the name of the sectional assignee.

THE COURT were inclined to consider the disclaimer as unreasonably delayed under the ninth section of the act of 1837, but left that question to the jury. They inclined also to the opinion that the disclaimer as required by the seventh section, should have not only disclaimed what was not claimed as new, but should also have distinctly set forth what part of the invention was still claimed, as it was manifestly designed to act as a new specification.

Verdict for defendant.

[For other cases involving this patent, see notes to Bicknell v. Todd, Case No. 1,389, and Gibson v. Van Dressar, Id. 5,402.]

LIPPINCOTT (MITCHELL v.). See Case No. 9,665.

LIPPINCOTT (PLAYER v.). See Cases Nos. 11,223 and 11,224.

LIPPINCOTT (RICH v.). See Case No. 11,758.

Case No. 8,382.

In re LIPPMAN.

[3 Ben. 95;[1] 9 Int. Rev. Rec. 1.]

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

INTERNAL REVENUE ACT OF JUNE 30, 1864, § 14—PRODUCTION AND EXAMINATION OF BOOKS—PRIVILEGE OF WITNESS—ATTACHMENT FOR CONTEMPT.

Where a tobacco manufacturer was summoned by an assessor of internal revenue to appear and produce all books of account containing entries relating to his business, and failed to obey the summons, whereupon an attachment was issued by a United States commissioner against

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

him, and he was arrested and committed by the commissioner to the custody of the marshal till he should produce the books, whereupon a writ of habeas corpus was issued in his favor, on the hearing on which he claimed that a criminal proceeding had been commenced against him for making false returns to the assessor and that he could not produce the books or give the evidence without criminating himself: *Held*, that he must bring the books which contained entries relating to his business before the assessor, and must then be asked to exhibit any entry relating to a particular point to be named in the inquiry, and, if he should say that he could not do so without criminating himself, he would be protected from exhibiting it.

[Cited in U. S. v. Hodson, Case No. 15,376; U. S. v. Hughes, Id. 15,417.]

Leopold Lippman was brought up on a habeas corpus, being in the custody of the marshal of the United States for this district, on an order and commitment made by a commissioner of the circuit court of the United States for this district, under the provisions of the 14th section of the internal revenue act of June 30th, 1864 [13 Stat. 226], as subsequently amended. For one of the causes specified in that section the assessor of the proper district summoned the relator, who was a tobacco manufacturer, to appear before him and produce all books of account in his possession, custody or care, containing entries relating to his trade or business during a period of time specified in the summons, and to give testimony respecting his returns made as such tobacco manufacturer. The summons was duly served on the relator, the books referred to in it being described in it with reasonable certainty. He neglected to obey the summons, and did not appear or produce the books referred to. The assessor then applied to the commissioner, under the section, for an attachment against him as for a contempt. The commissioner heard the application, and, satisfactory proof being made to him, issued an attachment to the marshal for the arrest of the relator. The relator was arrested and brought before the commissioner, who heard the case on evidence, and made an order committing the relator to the custody of the marshal, till he should produce before the assessor the books referred to in the summons and give testimony as required. It was alleged that the relator had made false and fraudulent returns to the assessor, and the relator set up that a criminal proceeding had been commenced against him for making such alleged false and fraudulent returns, and that he could not produce the books or give the testimony without criminating himself.

M. V. B. Wilcoxson, for relator.

T. Simons, Asst. Dist. Atty., for the United States.

BLATCHFORD, District Judge. The object of the proceeding authorized by the fourteenth section, and taken in this case, is to furnish the assessor with information from which to make a true return, so as to assess the proper tax. The section, after providing for the proceedings which have been taken in this case, declares that it shall be the duty of the assessor to enter the premises of any person rendering a false return, and to make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of witnesses authorized by the section, and on his own view and information, a proper return and assess the proper tax, and to add one hundred per centum to such tax, in case of a false return having been made. The use of any entries in the books, and of any testimony given, is solely to furnish evidence for making a true return. If there were no entries in any books of account in the possession, custody or care of the relator, relating to the trade or business of the relator during the period named in the summons, the relator is not bound to produce them. But if there are any such entries, he is bound to bring the books. He refuses now to bring the books at all, while he does not deny that they contain such entries. He must, therefore, bring the books. But he is not at once obliged to submit the books or any of them to the inspection of the assessor or of any other person. The entries in question, and not the books, are the things sought for by the section. When the books are brought, the relator must appear with them under the summons to give testimony. He must then be asked whether there are any such entries as the summons specifies. If he says there are, he must then be asked to exhibit any entry or entries relating to a particular point or matter to be named in the inquiry, within the scope of the summons as to subject-matter and time. If he says that he cannot do so without criminating himself, or furnishing thereby a link in a chain of evidence which might criminate him, he is protected from exhibiting such entry or entries. And he is protected in like manner from giving testimony, in reply to any particular question put to him. If there be any entry as to which he does not claim protection, he is entitled, in disclosing such entry, to withhold and conceal all entries as to which he does claim protection. The power of the assessor under the fourteenth section, to make out a proper return on which to assess the tax, and then to add one hundred per cent. to such tax in case a false return has been made, is ample, even in the absence of the books and testimony of the relator; and the withholding of such books and testimony, when an opportunity is offered to the relator to have the benefit of them, will warrant the assessor in making out a return on the best information he can obtain, and in assessing a tax thereon, and will deprive the relator of all ground of complaint as to the amount of the tax. In this view there could be no excuse for stretching the power of the assessor so far as to involve a violation of one of the fundamental principles of justice, that no person shall be compelled to give testimony which may tend

to criminate himself. This may be done by exhibiting or disclosing an entry in a book as well as by testifying orally. The witness must be the judge of the effect of the disclosure or testimony, unless it is manifest that there is no ground for claiming the protection invoked. The relator must be remanded to the custody of the marshal until he attends before the assessor with the books referred to in the summons, and then the examination will proceed before the assessor in the manner herein indicated.

LIPPMAN (YOUNG v.). See Case No. 18,160.

LIPPMANN (EGBERT v.). See Case No. 4,306.

LIQUIDATION, BOARD OF (McCOMB v.). See Case No. 8,707.

Case No. 8,383.

LISBERGER v. GARNETT.

[1 Hughes, 620.] [1]

Circuit Court, E. D. Virginia. Sept. Term, 1877.

BANKRUPTCY — BOND FOR GOODS SEIZED — PETITION TREATED AS BILL — FRAUDULENT ASSIGNMENT—VALIDITY OF PROCEEDINGS AGAINST SURETY ON BOND.

1. A petition against a bankrupt and against his sureties, in a bond for goods seized, who were not otherwise parties to the bankruptcy proceedings, may, if in substance a bill, be remanded to rules, and proceeded in as a bill in chancery on the equity side of the United States district court.

2. A stock of goods of an involuntary bankrupt, charged to have been sold fraudulently, was seized by the marshal under an order of the bankruptcy court. By subsequent order of the same court, the goods were delivered to the purchaser on his giving bond with sufficient surety to answer any order of the court in respect to the transaction.

3. A petition was filed by the assignee, charging that the sale was fraudulent, and praying that it might be set aside and the value of the stock of goods paid to him as assets for distribution, making the purchaser and his sureties parties defendant.

4. This petition was heard finally after the decisions of the supreme court were rendered in Smith v. Mason [14 Wall. (81 U. S.) 419], and Marshall v. Knox [16 Wall. (83 U. S.) 551], and the court ordered that it be dismissed as a petition and remanded to rules as a bill, to be heard after plenary proceedings. On petition to the circuit court for revision of this order, it was by that court affirmed.

5. The petition having matured as a bill, was afterwards heard finally, and a final decree entered, declaring the sale of the stock of goods to have been fraudulent; and requiring the purchaser to pay the value of them as fixed by the decree with interest from the day of the fraudulent sale, to the assignee in bankruptcy. On appeal to the circuit court from this decree, the same was affirmed.

6. It was unnecessary for the circuit court to decide, and therefore it did not decide, whether the original summary proceeding by petition in bankruptcy against the purchaser of the goods and the sureties on his bond given for the possession of them when they were seized, was valid as against those parties.

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

On the 17th day of June, 1870, Storrs Brothers, and Blair & Thaxton, claiming to be creditors of Engle & Son, filed their petition in the district court, alleging the commission of sundry acts of bankruptcy, and praying that said firm be adjudicated bankrupts. The petitioners also alleged that the principal assets of Engle & Son consisted of a stock of goods, which had been sold to one S. Lisberger; that the sale was in fraud of the bankrupt act [of 1867 (14 Stat. 517)], null and void, and it was prayed that an injunction might issue, to restrain Lisberger from disposing of the goods, and that a warrant of seizure might issue to the marshal. The restraining order, and the order for the seizure, were issued and executed on the day the petition was filed, and they were issued and executed without exacting from the petitioners any bond or other security. On the 18th of June, 1870, Lisberger petitioning therefor, it was ordered that the goods be restored to him upon his executing a bond, with security, in the penalty of $8,000, conditioned for the forthcoming of the goods, or the value thereof, upon the order of the court. The bond thus required of Lisberger was given, and the goods were returned to him, his bondsmen being M. Rosenbaum and Waggoner & Harvey. The case remained in this posture until the 12th day of April, 1871, when E. M. Garnett, alleging that he had been substituted, as assignee, in the place of one Brown, filed his petition "In the matter of Storrs Bros. et al. v. Engle & Son, in bankruptcy," in which he alleged that he had been appointed and had accepted the position of assignee of said Engle & Sons, who had been adjudicated bankrupts, and that an assignment of the estate of said bankrupts had been made to him, but that their schedules exhibited no assets whatever, except individual property, furniture, etc., claimed as exempt. It was also charged that the sale to Lisberger was void under the bankrupt act. The petitioner then set forth the seizure of the goods by the marshal, their release upon delivery of the forthcoming bond, and prayed that Lisberger be ordered to deliver up the goods, or pay the value thereof, and in case of non-delivery, to make good any loss on account of sales subsequent to his purchase, and in default of such payment by Lisberger, that he and his sureties on the forthcoming bond be required to pay "the amount therein promised," and if the value should exceed the amount of the bond, then that Lisberger be required to pay such excess in value.

Petitioner finally prayed that Lisberger and his sureties upon the bond might be made defendants, and required to answer

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

the petition on oath, and that such further relief might be granted as is conformable to equity and the nature of the case. On the 6th May, 1871, Lisberger appeared and demurred to the petition, upon the ground, set forth in the demurrer, that the petitioner had no right to proceed against defendant by petition, or any other form of summary proceeding, and that the remedy, if any he had, was by bill in equity or action at law. The demurrer was overruled, and on the 8th of May, Lisberger, still objecting to the jurisdiction, answered, denying the material allegations of the petition. There were several trials of the facts in issue before a jury subsequently to this, but the jury disagreed at each trial. So that upon this state of pleadings the case stood, without further order therein, until the 16th day of June, 1874, when upon the motion of Lisberger, the judge of the district court dismissed the petition for want of jurisdiction with an order for his costs. On the 11th of July, 1874, however, an order was passed in the bankruptcy suit, in which is recited the fact that the court had, on the 16th day of June, 1874, dismissed the petition, and then it is stated that the assignee having, on the 19th of June, 1874, moved for a rehearing of Lisberger's motion to dismiss, which motion to rehear was continued until the 11th of July, and the court being then willing to entertain said motion, with the view of amending the petition in bankruptcy, so that it might be filed at rules and be proceeded in as a bill in chancery, fixed the 16th day of July as the day for such rehearing, and directed that copies of the order should be served on Lisberger and his counsel. On the 8th day of October, 1874, another order was passed, in which, after reciting continuances of the motion to rehear, the order dismissing the petition was set aside, and the petition filed April 12th, 1871, being regarded in substance as a bill in equity, it was ordered so to stand, to be proceeded with as such, and to that end it was directed that the cause be sent to rules, that process issue against the defendants, and that the cause be regularly matured according to law. In March, 1875, there is an entry at rules by the clerk, to the effect that subpoenas had been served on defendants, and there being no appearance or answer, complainant's bill was taken for confessed, and the cause set for hearing at the next term of the court. Meantime, Lisberger had appealed from the order of the district court, of October 8th, 1874, setting aside the dismissal of the petition, etc., to the circuit court in the exercise of its supervisory jurisdiction; which order, upon appeal, was, in all respects, affirmed. On the 7th of March, 1876, Waggoner & Harvey pleaded their discharge in bankruptcy. Lisberger demurred, pleaded the statute of limitations, and answered. Rosenbaum never appeared. In these proceedings the suit was conducted as a suit in equity. On the 10th of May, 1876, a final order or decree was entered. The court, overruling the defence of the statute of limitations, and being of opinion that the sale was fraudulent in law as to the creditors of Engle & Sons, decreed that Lisberger should pay to the plaintiff the sum of $5,618.12, with interest from the 16th of May, 1870.

The following are the principal orders of the district court, which are referred to in the arguments of counsel and in the decision of the chief justice.

Order of the 11th July, 1874: In this cause, the court having on the 16th of June, 1874, at the instance and on the motion of S. Lisberger, entered an order dismissing the petition in bankruptcy of E. M. Garnett, assignee of said Engle & Son, heretofore filed in this cause against said Lisberger and others, for want of jurisdiction in bankruptcy, and the said assignee, E. M. Garnett, having by counsel moved on the 19th of June, 1874, for a rehearing of the said Lisberger's motion to dismiss, and of the aforesaid order made thereon, which motion of the said assignee has been continued until to-day, and the court being willing to entertain the said assignee's motion for a rehearing, with a view to amending the said petition in bankruptcy, so as to make it a bill in chancery, in order that it may be sent to rules, to be proceeded in as a bill in chancery, doth hereby appoint the 16th day of July, instant, at the United States court room at Richmond, at the hour of 10 a. m., for the rehearing aforesaid, and for the hearing of any other motion that may be made by any of the parties to the cause. And it is directed that a copy of the order be served on the said S. Lisberger, and one also be mailed to E. Y. Cannon, Esq., of Richmond, and to L. H. Candler, Esq., of Washington City, counsel in this cause.

Order of 8th October, 1874: In this cause, the pending motion in which, adjourned from the 17th day of July, 1874, to the 8th day of September, instant, has been continued until this day, the court having maturely considered the said matter, is of opinion that a rehearing of the said motion of the said S. Lisberger for a dismissal of the said petition of said E. M. Garnett, assignee of Engle & Son, should be and the same is hereby granted; and the court being satisfied that the said order of the 16th day of June, 1874, entered at the instance of said Lisberger, dismissing said petition, was erroneous in not directing it to be proceeded with as a bill in chancery, doth set aside the same; and, considering that the said petition of said assignee, filed on the 12th day of April, 1871, is in substance a bill in equity, and ought under the circumstances, in furtherance of justice, to be so regarded and treated, the court doth order that the same do stand and be proceeded in as a bill, and for that purpose that the cause be remanded to rules, and process be issued against the de-

fendant, and the cause be regularly matured according to law.

Order of 10th May, 1876: The court having maturely considered this cause upon the papers formerly read, and upon the arguments of counsel, is of the opinion that the concurrent jurisdiction of a court of equity to set aside a conveyance or transfer of property made in fraud of the 35th and 39th sections of the bankrupt act, is not ousted by a like jurisdiction of a court of common law in such cases, doth sustain the jurisdiction of the court in this case, and the court having in the matter of Storrs v. Engle, by a decree entered on the 7th day of October, 1874, ordered that the petition therein filed by the said Edgar M. Garnett, assignee of said Engle & Son, against said Lisberger & Son, on the 12th day of April, 1871, should be considered and treated as a bill filed by the said assignee against the said parties, and the circuit court of the United States for the Eastern district of Virginia, on appeal to its supervisory jurisdiction in bankruptcy, having by a decree entered on the first day of November, 1875, and certified to this court, in all respects affirming the said decree of this court, and ordered and decreed that said petition should be considered and treated as a bill as of the day the said petition was filed, and there being no appeal from the said decree of the said circuit court, the court is of opinion that the matter of said ruling is res adjudicata, and doth proceed to consider and treat the said petition as a bill filed on the said 12th day of April, 1871, and doth overrule the objection of the statute of limitations thereto. And the court, proceeding to dispose of the case on its merits, is of opinion that the transfer on the 16th day of May, 1870, by said Engle & Son, who were retail dealers, of their whole stock of goods in bulk to the said Lisberger at fifty per cent. of their invoice prices, was under the circumstances fraudulent in law, and void as to the creditors of said Engle & Son, the court doth accordingly so declare and decree. And the court, being of opinion from all the evidence in the cause, that the price, to wit, $5,600, alleged to have been paid by S. Lisberger for the stock of goods in the proceedings mentioned is as much as could have been realized therefrom by any other method of sale, doth therefore adjudge, order, and decree that the said S. Lisberger do pay to the plaintiff the said sum of five thousand six hundred and eighteen dollars and fourteen cents, with legal interest thereon from the said 16th day of May, 1870, until paid, and the costs by the plaintiff in this behalf expended, and that execution issue for the same in accordance with the 8th rule of practice of the equity courts of the United States as promulgated by the supreme court.

Messrs. Legh R. Page and E. Y. Cannon, for Lisberger, the appellant.

Messrs. John Howard and Robert Stiles, for Garnett, assignee.

For appellant, it was insisted by Mr. Page: 1st. That the order for the seizure of the goods, claimed by Lisberger, and in his possession, the seizure and the bond exacted of him for their forthcoming, etc., all of which actings and doings were had in the bankruptcy suit against Engle & Son, to which Lisberger was no party, were absolutely null and void. Smith v. Mason, 14 Wall. [81 U. S.] 419; Marshall v. Knox, 16 Wall. [83 U. S.] 555; Marsh v. Armstrong [20 Minn. 81 (Gil. 66)]. The bond thus taken could not be made the foundation of a suit, either by petition, bill in equity, or action at law. Such seems also to have been the opinion of the learned judge of the district court, as he did not decree against either of the sureties on the bond.

2d. Lisberger not being a party to the suit in bankruptcy against Engle & Son, could not be proceeded against as their grantee, except in a plenary suit, either at law or in equity. This proposition is fully sustained by the authorities just cited, and by the case of Wiswall v. Campbell, decided at the last term of the supreme court of the United States, and not yet reported. See 93 U. S. 347. Chief Justice Waite, delivering the opinion of the court in the case last mentioned, says: "The circuit and district courts have concurrent jurisdiction of all suits in law or equity, brought by an assignee in bankruptcy, against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee (Rev. St. § 4979), but such suits, when prosecuted, are no part of the bankruptcy proceeding. They are in aid of such proceeding, but while progressing, they are separate from and independent of it. They are used by the bankrupt court to settle the rights of parties who are not subject to its jurisdiction, and who, therefore, cannot be affected by any judgment or decree that may be made in that cause." The petition here was designed to drag into the suit in bankruptcy a stranger who claimed and possessed personal property adversely to the assignee, and to subject him and his rights to the summary power and jurisdiction of the bankrupt court. In Eyster v. Gaff, 91 U. S. 525, Mr. Justice Miller, speaking for the whole court in regard to such proceeding, said: "This court has steadily set its face against this view."

But it is said, and the learned judge of the district court seems to have entertained the opinion, that the petition of the assignee in the bankruptcy suit might be regarded as substantially a bill in equity. It was certainly not so considered by those who drafted it. It was not separate from, and independent of, the suit in bankruptcy, but was filed, and for years dealt with, as a part of

the bankruptcy proceeding. There was no prayer for process, and none was ever issued. The assignee indorsed on the petition that he had served copies of it upon the parties therein named as defendants, but we know of no law recognizing an assignee in bankruptcy as an official authorized to certify papers filed in the United States courts, or to serve copies of such papers as process to bind parties in judicial proceedings. At the time of these proceedings the bankrupt court of this district was eminently an ambulatory court, and the persons upon whom Mr. Garnett says he served copies of the petition were not informed when or where they were to appear and answer. Those parties were not bound to give heed to such a summons, and none of them did regard it, except Lisberger, who, admonished by the unlawful seizure of his goods at the beginning of the bankruptcy suit against Engle & Son, deemed it prudent to appear and challenge such a method of contesting his rights of property. It is true that when his demurrer was overruled he did answer, but in his answer he still objected to the jurisdiction. If the case set up in the petition, although presented in that questionable shape, had been one of purely equitable cognizance, and the appellant had voluntarily submitted to the jurisdiction, or perhaps if he had not seasonably objected, he might be held bound by the order or decree against him. But no such case is exhibited by the record. The petition was not separate from, or independent of, the bankruptcy, and could as well be treated as an action in trover as a bill in equity, and could as well, if not better, be tried by a jury than by a chancellor, even with the aid of a master. We submit, therefore, that the order of the district judge dismissing the petition and adjudging costs to Lisberger was plainly right, and fully justified by the authorities already referred to.

3d. The order of October 8th, 1874, setting aside the previous order dismissing the petition, with leave to the assignee to file the petition at rules as a bill in equity, and directing process to issue against the persons therein named as defendants, if it can have any legal effect whatever, should be regarded merely as an adjudication, that the dismissal of the petition was without prejudice to the assignee's right to file a bill. There is undoubtedly ground, from the face of the order and the subsequent action of the district judge, for the belief that the court intended that it might be treated as a bill from the date it was filed as a petition, and yet it is manifest, from an inspection of the order, that it was considered by the court that the petitioner had to begin de novo, file the paper in question as a bill, and have process issued and served according to the rules and practice of a court of equity. Those directions, made at the instance of petitioner, were literally followed by him. Writs of subpoena in due form were issued and served, and as to the parties upon whom process had been executed the petition was taken as a bill confessed, and when afterwards they answered, they were required to answer anew, as if the petition were an original pleading, although it was unchanged in form or substance, and was the identical paper that so long had slumbered in the bankruptcy suit against Engle & Son. Why were these steps taken, if the petition in the bankruptcy suit was a bill in equity, and, when taken years after, will the assignee be heard to say that from the beginning he had been a suitor in equity, especially when it was objected at the threshold that his proceeding was unlawful? Parties litigant are not allowed to blow hot and cold after that fashion, and their adversaries, upon every principle of fairness, should be entitled to know at once when, in what forum, and under what system of procedure they are to make defence. If such somersaults are permissible in courts of justice, and the idea is to obtain that the petition was a bill from the date of its filing, then we insist that a court of equity has no power to grant a rehearing except upon petition for that purpose, properly filed, and after due notice to the parties to be affected by the rehearing.

The 88th equity rule prescribes the mode in which a rehearing is to be asked. It is enough to say, without quoting the rule, that no one of its requirements has been gratified in this case. When the order dismissing the petition, at the cost of the assignee, was passed, the defendant was discharged from further attendance at court, and all proceedings had thereafter, in his absence and without his consent, were coram non judice. After that order of dismissal, the next we hear of the case is from the order of July 11th, 1874, in which it is stated that a motion for a rehearing had been made on the 19th of June, 1874, and that the court being then (the 11th day of July) willing to hear such motion, the rehearing thereof was fixed for the 16th day of July. From the order it also appears that it was then, for the first time, considered that Lisberger, or his counsel, were entitled to be heard upon the motion, and it was therein directed that copies of the order should be served on him and his counsel. If the suit were in equity, a motion, as we have seen from the 88th rule, was not the proper proceeding to set aside a final decree, and if it were, at least some record of the motion should have been made at the time, but the record fails to show such entry, and fails also to show that Lisberger or his counsel did have notice. If it be admitted, in accordance with the very truth of the case, that the petition was designed and treated as a part of the bankruptcy suit, both by counsel and the court, it is easily understood how the court could, in a summary manner, set aside its judgments or orders at any time during its pendency, after proper notice. Until the petition was filed at rules,

as a bill in equity, there was not a single step taken in conformity to the rules and practice of a court of equity. They were all had upon the theory that the district court was exercising its ordinary jurisdiction in bankruptcy, and was always open, without regard to terms of court, to hear the assignee.

It has been suggested that the appellant is estopped to question the correctness of the order setting aside the dismissal of the petition, and directing it to be filed as a bill, because, upon appeal to the supervisory jurisdiction of the circuit court, that order was in all respects affirmed. In reply to this view, it would seem sufficient to say, that if the case were in equity, the circuit court had no power to exercise a supervisory jurisdiction in the premises. It could only be removed to the circuit court by a formal and regular appeal. Wiswall v. Campbell, cited supra, and authorities therein referred to, The effect of the order of affirmance was merely to declare that the bankrupt court was right in treating the petition as a suit in equity. Thereupon the district court sanctioned its prosecution as such a suit. It was no more then than an interlocutory order in the cause, subject to a review upon an appeal from the final decree.

4th. If the order setting aside the dismissal of the petition was right and proper, and the petition is to be regarded as a bill from the day it was directed to be filed as such, then we say the assignee's right of action was barred by the limitation of two years prescribed by section 5057, Rev. St. This plea is highly favored in the administration of bankrupt estates. Bailey v. Glover, 21 Wall. [88 U. S.] 342.

5th. It is further submitted that the final order or decree of the district court is erroneous, because there was no ascertainment of the debts of the bankrupts. The adjudication in this case, founded on such imperfect notice to the bankrupts, if valid, undoubtedly establishes their insolvency against all persons, but the fact of their insolvency is not alone sufficient to authorize the decree. For aught that appears to the contrary the amount decreed against Lisberger may be largely in excess of the debts proved, and the amount of debts proved is the measure of the assignee's right of recovery. The surplus belongs to Lisberger, the sale being valid as to Engle & Son, and only void as to their creditors, to the extent of the debts established against them. A review of the decision of the district court, upon the questions of fact, is not asked for by the appellant, as the evidence in the cause is very conflicting.

So much of Mr. Howard's printed argument as related to the two principal questions in the cause is given below:

I. The sole question now before this court, upon the pleadings, is as to the sufficiency of the bill. The district court having, by its order of the 8th of October, 1874, directed the paper filed by Garnett, assignee, on the 12th day of April, 1871, to be considered and treated as a bill in equity, and that order having been affirmed in all respects by the decree of this court of the 1st of November, 1875, and that paper having been accordingly considered, treated, and proceeded upon in the district court as a bill in equity filed as of the day of its date, the sole and simple question before the court upon the pleadings now open for discussion is, whether or not that paper is in substance a good and sufficient bill. All the other questions sought to be raised are clearly matters which belong to the said proceedings of Storrs v. Engle, pending in the district court in bankruptcy, and those proceedings are not now for review or correction at all before this court, sitting as a court of equity on appeal, in a separate and independent case.

This simple statement, if true, eliminates from consideration the great bulk and gravamen of the argument on the other side. And is it not true? There is no dispute that the district court, in the proceedings in bankruptcy, acquired jurisdiction over Engle & Son and their estate, and over the assignee of its own appointment. Whatever defect of process there may have been, if any, Engle & Son answered the petition of the petitioning creditors, Storrs Bros. and others, and upon full hearing and argument the allegations of the petition were found to be true, and they were regularly adjudicated bankrupts; and if there were any irregularities in those proceedings, or in the subsequent proceedings in that case, they were and are nevertheless valid and binding until set aside or reversed by a court of competent jurisdiction; and whether or not Lisberger was in any sense a party to those proceedings, this is as true of the said order of the 8th of October, 1874, as of any other order made in the case. In point of fact he was as much a party to those proceedings as Engle & Son, after the important ex parte order of the 18th June, 1870, by which he obtained, upon his own petition, possession of the goods of Engle & Son. He was represented by counsel, and hotly contested every order in the case touching him, as well the order of the 8th October, 1874, as the rest, and certainly, on his appeal from that order to the supervisory jurisdiction of this court, he was fully heard by counsel.

This court certainly had before it then, sitting as a court of supervisory jurisdiction, all that it is now sought to bring before it again in respect to those proceedings, but with this difference, that then it had jurisdiction to revise and correct what, if anything, was erroneous in the said order of the 8th October, 1874, and the orders preceding it, in effect involved in that order, whereas now it has nothing to do with the matter. The whole question of the jurisdiction of the district court to enter said order was at that

appropriate time fully discussed and considered, and this is the decree of the court: "Upon the hearing of the matter of the said petition, the court is of opinion that the district court was of competent jurisdiction to consider and treat the paper styled a petition filed by the said Edgar M. Garnett, assignee of said Engle & Son, on the 12th day of April, 1871, as a bill in equity filed as of that day, and to direct process thereon as such, and that said district court did not err in so considering and treating the same. And the court doth adjudge, order, and decree that the same be so considered, and that the said petition of the said Lisberger be dismissed with costs." Dated November 1st, 1875.

If this honorable court had jurisdiction to pronounce that decree, the decree itself was final and irreversible, for, having been made in pursuance of its supervisory jurisdiction over proceedings in bankruptcy, there was and is no appeal, and right or wrong, it must stand as the law of the case. See the cases collected in Wiswall v. Campbell, 93 U. S. 347. That it did have such jurisdiction is as clear and as certain as that the district court had acquired jurisdiction in bankruptcy over Engle & Son and their estate, whatever it was, and the assignee of its own appointment. * * * This view disposes of all the alleged irregularities and errors of the district court in the proceedings in bankruptcy, even upon the supposition that Lisberger was not a party thereto; for whether or not he was a party to those proceedings, the court had jurisdiction to do what it did (in point of fact on his own motion), that is to say, refuse to litigate his rights in that case, and to direct that those rights should be litigated in a separate suit, the bill already filed in which it is recognized as a bill in equity for that purpose. If, however, this court, sitting in its supervisory jurisdiction, had no jurisdiction to enter the decree of the 1st of November, 1875, then clearly it must have been because the said paper, filed by the assignee in the district court on the 12th April, 1871, was in contemplation of law a bill in equity from the first, and the case was not properly before this court at that time as an appeal from the equity jurisdiction of the district court, but if that be so, then the said order of the district court of the 8th October, 1874, treating said paper as a bill in equity, was confessedly right ex hypothesi.

So that Lisberger can take his choice: If this court had jurisdiction to render its decree of November 1st, 1875, it was because it was sitting in supervisory jurisdiction, and upon that supposition its decree was final. If this court did not have jurisdiction to render that decree, it was because the said paper was a bill in equity, and no equity appeal was pending before the court. This argument has thus far proceeded upon the hypothesis that Lisberger was not a party to the suit in bankruptcy against Engle & Son. It will now be shown that, in point of law and fact, Lisberger was a party, to all intents and purposes, to that suit, and, therefore, that the district court had full jurisdiction over him in that suit for the purposes of said petition or bill, in whichever or in whatever aspect it may be considered.

1. On the petition and proofs of Storrs Bros. and others, the district court had jurisdiction to enjoin interference with and to seize the property of Engle & Son charged to have been fraudulently transferred to Lisberger, and hold it provisionally until the question of fraud could be determined. See sections 1 and 40 of bankrupt act of 1867 (Rev. St. §§ 4972, 5024). Indeed, unless this were so, the whole object of the law in many cases would easily be defeated by fraudulent transfers of their property by insolvents in contemplation of bankruptcy, and no stronger illustration of the necessity and propriety of such jurisdiction need be imagined than the facts of this case afford. Even a common court of equity would have had such jurisdiction to prevent the consummation of a fraud.

2. This being true, the goods were in custodia legis the moment they were seized, and though the proceedings had been irregular (which was not the fact), they would still have been valid, as the court had express, clear, and full jurisdiction over the subject-matter and the parties.

3. By his petition of the 18th of June, 1870, the day after the seizure, Lisberger voluntarily intervened. He came into court and placed himself upon the record as a claimant of the goods, denied the allegations of the petitioning creditors as to his fraud, and prayed that the goods might be delivered to him upon condition that he would give bond and security for the forthcoming of the goods, or their value, to abide the order of the court. He thus voluntarily became a party to the proceedings, so far certainly as that property was concerned. Even the sureties on his bond became thereby parties, or quasi parties, for the purpose of giving the court summary jurisdiction over them to compel a compliance with their obligations. Thus in Blossom v. Milwaukee & C. R. Co., 1 Wall. [68 U. S.] 656, the court say: "Sureties signing appeal bonds, stay bonds, delivery bonds, and receiptors under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their judgments or recognizances." Now if even the sureties, by signing the bond, became parties, and subjected themselves to the jurisdiction of the court, so that summary judgments might be entered against them, why not their principal also? It was for his benefit that the bond was given, and he is the principal obligor therein, and primarily bound. Nay it

was upon the express condition of his giving the bond that he received the property in its stead, for the bond was but a substitute for the property, and whatever jurisdiction the court had over the property it has over the bond and the obligors therein by summary proceedings or otherwise. That the bond is but a "substitute for the property," is the very language of the supreme court in Inbusch v. Farwell, 1 Black [66 U. S.] 572, where it was so held in the case of property released on attachment—"the bond," says the court, "becomes a substitute for the property released."

But, in point of fact, Lisberger, before giving the bond, had already voluntarily made himself a party to the proceedings, so far as the property was concerned, and subjected himself to the jurisdiction by coming in by petition and denying the allegations of the petitioning creditors in respect to the fraudulent transfer of the property to him, and claiming it as his own, thereby putting in issue, as between the complainants and himself, all questions touching such fraudulent transfer; and, as the court had already rightly acquired full jurisdiction of the property by its lawful seizure, so now, by the voluntary appearance, pleading, and claim of the intervenor, Lisberger, it acquired full jurisdiction over him in respect to the claim he asserted. This is the common course of practice in all judicial proceedings, notably in admiralty and in all other proceedings, or quasi proceedings, in rem, and in none more properly than in proceedings in bankruptcy. In courts of equity the same principle applies and the same practice obtains. Thus, in the above-cited case of Blossom v. Milwaukee & C. R. Co., 1 Wall. [68 U. S.] 656, after the sentence above quoted, the court, in further illustration of the rule that parties, by voluntarily dealing with the court, make themselves parties to the proceedings and become subject to its jurisdiction, proceed to add, "So in the case of a creditor's bill, or other suit, by which a fund is to be distributed to parties, some of whom are not before the court, these are at liberty to come before the master after the decree, and establish their claims to share in the distribution." And if this can be done, as it is done in every-day practice, why cannot any party come in before decree and claim the property or fund as his own? And if in the one case he becomes a party to the proceedings, and subjects himself to the jurisdiction, why not in the other? Everybody knows that nothing is more common than this course of things in all kinds of legal proceedings, except those strictly at common law; and now, by statute in most of the states, similar proceedings by way of interpleader are expressly authorized and regulated in courts of common law.

Now, if a court of admiralty, of equity, or of common law, should turn over property lawfully under its charge to an intervening claimant asserting title thereto, such as a mortgagee or alleged purchaser, without notice of defect of title, upon condition of bond and security to have the property or its value forthcoming to abide the order of the court, would such intervening claimant be heard to say that he was not a party to the proceedings, and not subject to the jurisdiction of the court? Would he be heard to say, after submitting his claim to the court, that the court could not determine that claim, but that of necessity litigation as to that matter must be remitted to another forum and a different suit, and the court in the meantime be left powerless for the protection of the property and of the rights of the parties thereto, at whose suit it was lawfully taken into custody? After having, upon suitable representations, and by submitting to the jurisdiction, obtained possession of the property, and given bond as its substitute, would it not be the coolest effrontery to deny that jurisdiction to enforce the bond? And if the court has jurisdiction to enforce the bond, must it not have jurisdiction to determine the preliminary question whether it ought to be enforced, and thus necessarily all questions touching the true ownership of the property? Otherwise, obviously, the trick of getting possession of the property ousts the jurisdiction, by an appeal to which alone the trick was possible.

The plain and elementary truth is, that any court of competent jurisdiction which lawfully gets possession of property may lawfully hold on to it, or its representative, to answer the ends of justice. And whoever, in court or out of court, interferes with that possession, challenges and subjects himself to the process of the court to compel him to do what is right, by restoration or compensation, and will not be heard to question the title of the court, until by such means or by such order as the court may prescribe, he shall have purged himself of the contempt of intermeddling with its lawful authority and the property under its control. If this were not so, the authority and dignity of courts of justice and the safety of property under their lawful charge would be at the mercy of the fraudulent and the lawless, as it has been in this case.

In this case the property was already under the jurisdiction and within the custody of the court, and so remained after the bond was given as much so as it was before, the bond being its substitute and representative, and the only legal effect of the petition, appearance, and claim of a claimant was to put the claimant and his claim also under the jurisdiction and make them subject to the orders and process of the court, as any other party and claim. In Minnesota Co. v. St. Paul Co., 2 Wall. [69 U. S.] 634, the supreme court say: "It would indeed be very strange if these parties can come into court by petition, and get possession of that which was the subject of litigation, and then when

the wrong they have done by that proceeding is corrected, they shall be permitted to escape by denying that they were parties to the suit. In the case of Blossom v. Milwaukee & C. R. Co., 1 Wall. [68 U. S.] 655, this matter was fully discussed," etc., etc. Cited supra.

It would be a strange and abnormal anomaly, if there was anything in the jurisprudence of the law of bankruptcy, and the jurisdiction conferred upon courts of bankruptcy, so peculiarly engaged in the administration of insolvent estates and the detection and prevention of fraud, and singularly combining in their legal nature and operation the elements and powers of courts of admiralty and courts of equity—to except, exempt, and distinguish such a court from the otherwise universal and fundamental rules, principles, and practice of courts of justice in respect of property lawfully under their charge. Accordingly no such anomaly exists. On the contrary, the reverse has been expressly decided by the supreme court. In Wiswall v. Campbell, 93 U. S. 351, the court, through Mr. Chief Justice Waite, say: "Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause, for the purpose of having his right in the case determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceedings. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences." But if a creditor who only claims a part of the bankrupt's estate, subjects himself to the jurisdiction, why not a petitioner who comes in and claims the whole, demands its allowance, and gets possession of it upon condition of having it or its value forthcoming when required by the court? Did the district court oust its jurisdiction by the very act of best preserving it—by taking bond and security as a substitute for the property?

And after the court, by the adjudication in bankruptcy, had adjudged the transfer by Engle & Son of their whole stock of goods to Lisberger to be fraudulent and void, was it less competent to enforce the bond than it would have been to hold on to the property? And after it had thus determined the transaction to be a fraud upon the creditors, was it powerless to prevent Lisberger from committing a fraud also upon itself by first getting the whole estate of the bankrupts out of its possession, and then denying its right to hold him responsible therefor, although he had solemnly bound himself under hand and seal to respond to its orders? To such a case Smith v. Mason, 14 Wall. [81 U. S.] 419, and Marshall v. Knox, 16 Wall. [83 U. S.] 551, had no application. Those were cases in which persons claiming adverse rights to the assignee were strangers to the proceedings in bankruptcy, and it was sought by summary process on petition to bring them before the court and require them to litigate their rights in the bankrupt suit, and it was held that the court had no jurisdiction for such purpose. But those decisions themselves expressly except cases in which such persons voluntarily appear in the bankrupt suit, and ask its aid, and thereby submit to its jurisdiction.

The case in principle is like that of In re Ulrich [Case No. 14,327], in which it was held by Blatchford, J., that after a stranger had voluntarily appeared in a bankrupt suit, it was too late for him to object to the jurisdiction, having waived the objection by his appearance, which appearance he was not permitted to withdraw, though alleged to have been made under a mistake. Here Lisberger voluntarily appeared, and was already a party when the assignee's petition was filed, and it was too late for him then to object to the litigation of his claim in that suit, in any proper manner the court might adopt. And recent adjudications of the supreme court have now fully established the point that strangers by voluntarily appearing in a bankrupt suit and invoking its aid, become parties thereto, and will not be heard to deny the jurisdiction they have thus set in motion as to themselves, and from which they have sought and obtained advantage. In O'Brien v. Weld, 92 U. S. 83, 84, execution creditors in whose behalf the sheriff had levied execution and held lawful possession of property under process from a state court, issued before the bankruptcy of the debtor-owner, came into the bankrupt suit, by petition after the adjudication of the debtor-owner as bankrupt, and prayed that the terms of the sheriff's sale might be modified, and that the proceeds of sale might be brought into that court, which was accordingly done, and it was held that the intervenors had thereby made themselves parties to the bankrupt suit, and were bound by the proceedings therein. And while recognizing Smith v. Mason [supra], and Marshall v. Knox [supra], the court distinguished those cases from that of a claimant who, of his own motion, comes into a bankrupt suit and gets orders at its hands, and decided that to such a case the principle of those cases did not apply. And, as we have seen, following O'Brien v. Weld [supra], is Wiswall v. Campbell, supra, in which the general principle applicable to every court of competent jurisdiction over a subject-matter of litigation, that any person who seeks its aid submits himself to its power, was fully and clearly recognized and illustrated.

The present, it is submitted, was a stronger case than either of these for the application of this principle. In the exercise of an undoubted jurisdiction, the court had seized the whole stock of trade charged to have been recently transferred by the bankrupts in bulk to Lisberger in fraud of the

bankrupt law and of their creditors, and held it provisionally until the question of fraud could be examined, in order that it might not be made way with or disposed of by Lisberger, who was daily selling off the stock. While the property was thus lawfully in possession of the court, and Lisberger had lawfully been placed under injunction from interfering with it, he voluntarily appeared by counsel, and upon petition filed, and affidavit as to the value of the goods, obtained an order from the court surrendering to him the property upon condition of his giving bond and security for its forthcoming to abide the orders of the court. If, under these circumstances, a solemn obligation to abide the orders of the court did not subject him to its jurisdiction in respect to that property, which had thus been released to him upon that express condition, it is difficult to conceive how any claimant, by intervening and dealing with a court, can become a party to its proceedings, and subject to its dominion. But, if Lisberger was a party to that suit, unquestionably he is bound by the order of the 8th of October, 1874, affirmed on appeal to the supervisory jurisdiction of this court, from which there is no appeal. That order could not have been the subject of appeal to the equity jurisdiction of this court; no such appeal has in form been attempted; what could be done directly will not be permitted to be done indirectly; and therefore the decree of this court of the 1st of November, 1875, stands as the law of this case, and the matter is res adjudicata.

II. If the order of the 8th of October, 1874, was re-examinable by this court, on this appeal, there was no error in it of which Lisberger could complain. Undoubtedly, if the views above presented are well founded, it was perfectly competent for the district court to have determined, in the bankrupt suit, to which Lisberger had thus submitted himself, what were his rights, if any, to the whole estate of the bankrupts which he claimed, and what were the rights of the assignee of the bankrupt in respect thereto. Indeed, as he had thus become a party by his said action and the action of the court on the 18th of June, 1870, when, a few days thereafter, to wit, on the 23d of June, 1870, by the adjudication in bankruptcy, the court decided that the transfer of the said goods to Lisberger was, under the circumstances, fraudulent and void as between Engle & Son and their creditors, in legal effect it necessarily decided also that the transfer was fraudulent and void as between Lisberger and the creditors. . . . Nay, I go further. Without the permission of the court, and, perhaps, also the acquiescence of Lisberger, the assignee would have had no right to litigate Lisberger's claim in a separate suit. No suit certainly could have been brought on the bond until there was breach of the condition; and there could be no breach of the condition until Lisberger had failed to have the property or its value forthcoming upon the order of the court. And as the bond was but a substitute for the property, the principle of Taylor v. Carryl, 20 How. [61 U. S.] 583, applied, and no other jurisdiction could lawfully have interfered with the possession of the court over the subject of litigation, or with its jurisdiction to determine the rights of the parties in respect thereto. And the assignee, who was an officer of the court, was the last person who could have instituted a separate suit to determine those rights elsewhere. And as to Lisberger, it has ever seemed to me in the highest degree questionable whether, if without any suggestion on his part, and without an order from the court, the assignee had originally brought a separate suit in another forum to recover from him the value of these goods, a plea to the jurisdiction would not have availed him, upon the ground that the whole matter was sub judice in the bankrupt suit in which he appeared, and had bound himself, under bond and security, as a substitute for the property to have it or its value forthcoming to abide the order of the court, and that thus he could not be made subject to two different jurisdictions, in two different suits, at the same time, for the same thing—the court first acquiring jurisdiction having the right to hold on to it for the purpose of determining the matter in controversy. And I conceive that if Lisberger had not objected to the jurisdiction of the bankrupt court, and had not required litigation in a separate suit, and thus estopped himself from objecting to such other litigation, it would have been difficult, if not impossible, to answer such a plea in a separate suit in another forum.

Having ever entertained these views, when, upon the succession of his honor, Judge Hughes, to the bench, in 1874, Lisberger's objection to the jurisdiction in the bankrupt suit was renewed, I did not fail fully to present them, together with the authorities above cited, in their support, except O'Brien v. Weld [supra], and Wiswall v. Campbell [supra]; but upon the authority of the supposed ruling cases of Smith v. Mason [supra] and Marshall v. Knox [supra], then unexplained, and, as I venture to think, little understood, as indeed were the sections of the acts of congress under construction (in consequence of which the whole practice in the different district courts had become unsettled and conflicting), his honor, Judge Hughes, felt constrained to sustain the objection, and hence his order of the 16th of June, 1874, dismissing the petition of the assignee for want of jurisdiction. An omitted part of the record would show that an appeal to the supervisory jurisdiction was entered and perfected by the assignee, and that it was subsequently abandoned in accordance with a provision of the bankrupt act allowing such a course to be taken. The jurisdiction for such abandonment is sufficiently indicated in the subse-

quent orders of the court. Being of opinion that the court had no jurisdiction in the bankrupt suit to litigate Lisberger's claim, his honor seeing the nature of the transaction, and the hardship and loss which would fall upon the creditors, if their rights should be pretermitted to forms and technicalities, adopted a course in furtherance of justice which had been recommended by the practice of other courts, and which has now been sustained by the supreme court (Stickney v. Wilt, 23 Wall. [90 U. S.] 150) in treating and considering the petition of the assignee as in substance a bill in equity, and following a suggestion in one of the cases, directed process to issue upon it accordingly as a bill.

. . .

I thought that course to be unnecessary, because I thought the court had full jurisdiction to litigate the claim in the bankrupt suit. But in my judgment, while that was true, the court was not compelled, under the circumstances, to exercise that jurisdiction, and if Lisberger insisted upon separate litigation, it was entirely competent to the court to grant it. It had jurisdiction of the subject-matter and of the parties, and it was, as I thought, simply a question of practice, a matter of convenience and discretion, whether it should allow the claims to be litigated in that suit, or be more formally litigated in another and independent suit. It chose the latter course, and of its own suggestion. In legal substance, the so-called petition of the 12th of April, 1871, contained all the essential elements of a bill in equity, as will be shown, and by its order of the 8th of October, 1874, the district court merely, in effect, determined that instead of being mixed up with that suit, it should be disconnected with it and be formally proceeded in as a separate case. It eliminated the case from the bankrupt suit. That was, in my view, the whole substance and legal effect of the order. Its practical effect, though it led to delays, was eminently just. Instead of appealing, when his demurrer to the petition was overruled by Judge Underwood, and then have had the question of jurisdiction definitely decided by the appellate court, Lisberger had pleaded over, and filed an elaborate answer, and upon issues joined, had several times gone to the jury upon the facts. There could, therefore, operate no surprise or injury to him in remitting the controversy for settlement to a separate suit upon the petition considered as a bill presenting the same issues, in the same words. The court at last granted his prayer. That was all. But if he wanted a separate suit, he must take it upon such terms as would not operate a fraud upon others. The separate suit, in legal effect, had already been brought. It had been interposed in the bankrupt suit, and the court, instead of hearing the two suits together, had separated them, each to stand as of the date of its origin.

In directing the petition to be considered and treated as a bill, the court simply recognized the petition as a bill. It did not direct it to be converted or changed into a bill. It required no change to make it become what, in reality, it already was, in substance and effect. Nor did the court direct it to be filed. It had already been filed—filed under the order and with the approval of the court, indorsed in the handwriting of the judge, on the 12th of April, 1871. Had it been necessary, indeed, such is the large jurisdiction and liberal practice in amending, moulding, and controlling pleadings, in furtherance of justice and the prevention of injustice, exercised by all courts, and especially by all courts administering justice upon equitable principles and under the flexible forms of equity procedure, the district court might well have ordered the petition to be reformed and converted into a bill by suitable amendments of form.

But no amendment of form, much less of substance, was, in the judgment of the court, required here, and none was made. On the contrary, the court adopted and considered the petition as a bill, perfect in all essential respects, as was done in Stickney v. Wilt, 23 Wall. [90 U. S.] 150.

Sitting in bankruptcy, in the bankrupt suit, with all the analogous powers and jurisdiction certainly of a court of equity, in that suit, over the parties thereto, and having also express and special equity jurisdiction, ancillary and supplementary to that jurisdiction, it would indeed be strange if the district court had not jurisdiction to determine whether a paper filed in it by one of its officers, by its own order, and with its own approval, was or was not a bill in equity, and should be treated as such. That was the question decided by the order of October, 1874, affirmed by this court by its decree of the 1st of November, 1875. If there was error in the order, it was error of which the assignee might have complained, but of which Lisberger certainly had no ground to complain. It gave him what he all along demanded—a separate suit. He was duly served with process, appeared by counsel, pleaded to and answered the bill, took testimony, and was fully and fairly heard. He has himself thus treated the petition as a bill, and has now appealed to this court from the decree rendered upon it as a bill, and if it be not a bill, this court has no jurisdiction, on appeal in equity, to hear his appeal.

WAITE, Circuit Justice. On the 16th of May, 1870, Engle & Son, merchants, doing business at Richmond as retailers, sold their entire stock of goods to Lisberger. On the 17th June, following, Storrs Bros. and certain other creditors of Engle & Son commenced proceedings in bankruptcy against them in the district court for this district, and upon filing the petition obtained an order of court directing a seizure by the marshal of the goods sold, which were then in the possession

of Lisberger at the store formerly occupied by Engle & Son. In obedience to this order the marshal took the goods into his possession, and thereupon Lisberger at once filed his petition in the bankrupt court, asking that they might be restored to him upon his giving bond with security, conditioned for the forthcoming of the goods or the value thereof, to abide such further order as might be made in the premises.

The prayer of this petition was granted June 18th, and on the same day Lisberger, with the defendants, Rosenbaum, Waggoner, and Harvey as his sureties, executed the required bond in the penal sum of eight thousand dollars, and received the goods from the marshal. June 23d Engle & Son were adjudicated bankrupts, and in due time one Brown was appointed assignee. He instituted some proceedings against Lisberger to set aside the sale and recover the goods or their value, but his conduct in the premises not being satisfactory to the creditors, he was removed by order of the court, and Garnett, the present complainant, appointed in his place, April 4th, 1871. On the 12th of April, Garnett filed in the district court a petition entitled Storrs Bros. et als. v. Engle & Son, in bankruptcy, and addressed to Hon. J. C. Underwood, district judge, setting forth the proceedings in bankruptcy, his appointment as assignee, the sale to Lisberger, with the necessary averments to show that it was in fraud of the bankrupt law, the seizure of the goods by the marshal, and their subsequent restoration to Lisberger upon the execution of his bond, and concluding as follows: "Your petitioner therefore alleges the said sale, transfer, or conveyance to the said Lisberger to have been fraudulent under the bankrupt law, . . . null and void, and that the said stock or its value are assets in his hands for the purpose of discharging the indebtedness of Engle & Son, and he prays that the said Lisberger be ordered to deliver up the said property or to pay the value thereof at the time of the conveyance to your petitioner, and in case of the delivery of the goods to make good the loss which has accrued by reason of sales subsequent to said fraudulent transfer or conveyance, and in default of said payment or delivery by the said Lisberger, that he and his sureties in the above-mentioned delivery bond, be required to pay the amount therein promised, but in this event your petitioner prays that the said Lisberger himself be required to pay in addition to the amount fixed in said bond, whatever additional value your petitioner shall be able to prove said stock of goods to have been worth at the time of said transfer to Lisberger, inasmuch as the penalty of said bond was fixed by the court upon ex parte affidavit, at a sum as your petitioner really thinks far below the actual value of the stock. Your petitioner finally prays that said S. Lisberger, M. Rosenbaum, J. J. Waggoner, and Wm. G. Harvey be made parties defendant to this petition, and be required to answer the same on oath, and that such other and further relief be granted as is conformable to equity and the nature of his case." Copies of this petition were served on each of the persons named as defendants, and they appeared and demurred, alleging for cause "that the petitioner has no right to proceed against the defendants by petition or any other form of summary proceeding, and that the remedy of said petitioner, if any he have, is by bill in equity or by action at law in the district and circuit courts."

This demurrer was overruled by Judge Underwood, then the district judge, May 6th and, May 8th, Lisberger, not waiving the demurrer, filed an answer denying all the allegations as to the fraudulent character of the sale under the bankrupt law. The case was several times tried by Judge Underwood with a jury, but upon every trial the jury disagreed. After the death of that judge and the appointment of Judge Hughes as his successor, a motion was made by Lisberger to dismiss the petition for want of jurisdiction, which was granted June 16th, for the reason that the matter in issue was not triable under a petition in the bankruptcy suit; but June 19th the assignee filed a petition for a rehearing of the motion. July 11th the court "being willing to entertain the motion of the assignee with a view to amending the said petition in bankruptcy so as to make it a bill in chancery, in order that it may be sent to rules to be proceeded in as a bill in chancery," appointed July 16th for the hearing, and directed the service of a copy of the order thus made upon Lisberger and the counsel in the case. October 8th, 1874, a rehearing was granted, and "the court being satisfied that the said order of the 16th of June, 1874, entered at the instance of said Lisberger, dismissing said petition, was erroneous in not directing it to be proceeded with as a bill in chancery, doth set aside the same, and, considering that the said petition of said assignee, filed on the 12th of April, 1871, is in substance a bill in equity, and ought, under the circumstances, in furtherance of justice, to be so regarded and treated, the court doth order that the same do stand and be proceeded in as a bill, and for that purpose that the cause be remanded to rules, and process be issued against the defendants and the cause regularly matured according to law."

Under this order, subpoena was issued January 7th and served on the defendants, Lisberger and Rosenbaum, January 11th, 1875. No new service was made upon the other defendants. At the March rules, 1875, an order that the bill be taken pro confesso in default of appearance and answer, was duly entered in the order book. November 1st, 1875, the order of the district court under date of October, 1874, was affirmed by this court upon a petition for review, filed by Lisberger under the supervisory jurisdiction. March 7th, 1876, Harvey and Waggoner, two of the defendants, appeared, and by leave of the court filed

an answer setting up a discharge in bankruptcy subsequent to their execution of the delivery bond. To this a general replication was filed by the assignee. On the same day Lisberger appeared by counsel and, on leave, filed a paper in the cause, which is styled a demurrer, plea, and answer. In this paper it is insisted by way of demurrer, "that the petition does not present such a case as entitles the complainant to relief in equity;" and by way of plea, "the limitation [two years] prescribed by section 5056 of the bankrupt act." Then, without waiver of his demurrer or plea, he answers denying all the allegations in the petition of fraud in the sale. For this purpose he adopted his answer, filed May 8th, 1871, previous to the order transferring the cause to the equity side of the court. He denied his liability upon the bond for want of consideration, and insisted that all proceedings in the cause since June 17th, 1874, were irregular and without authority of law.

The complainant joined in the demurrer, and replied generally to the answer proper and to the answer in the nature of a plea. Depositions were taken, and, May 10th, 1876, after hearing, the district court overruled the demurrer and plea, and, upon the merits, entered a decree avoiding the sale and directing the payment of $5,618^{14}/_{100}$, the ascertained value of the goods, with interest from May 16th, 1870, by Lisberger to the assignee. No mention is made of the bond in the decree, and no order was made in respect to any of the defendants except Lisberger. Both parties have appealed from this decree.

I am entirely satisfied, after a careful examination of the evidence, that the sale to Lisberger was void under the bankrupt law. Indeed, the counsel for the defendants, in their arguments here, have not seriously contended to the contrary. It is unnecessary, therefore, to consider the case at length in that aspect. The real controversy is as to the defence of the statute of limitations; and that depends entirely upon the time when the suit was commenced. If this was April 10th, 1871, when the petition was filed, the defence fails. If, however, it was January 11th, 1875, when the subpoena was served on Lisberger and Rosenbaum, or even as early as October 8th, 1874, when the order was made setting the cause down for hearing upon the equity side of the court, the statute does operate as a bar.

The pleading filed in the district court April 12th, 1871, was in an appropriate form for a petition for relief under the summary jurisdiction of the court sitting in bankruptcy. It was entitled as of the principal suit in bankruptcy, and was addressed to the district judge generally, without specifying the particular jurisdiction invoked. It was, however, equally good, in substance, as a bill in equity. It needed no amendments to make it available under the order of October 8th, 1874, for it contained a full statement of the cause of action and a sufficient prayer for complete relief in equity. Although for a time the court acted upon the petition as if addressed to its jurisdiction while sitting in bankruptcy, and the complainant insisted that this was the correct practice, upon further consideration it was decided that the case was one to be determined only as a suit in equity, under the special jurisdiction for that purpose conferred by the bankruptcy law. Accordingly, it was assigned for hearing in that branch of the court. No new process was necessary, for the parties were already in court by their appearance under the notice already served. The question decided did not relate to the commencement of a new suit, but to the mode of procedure in one that had been already commenced. In Stickney v. Wilt, 23 Wall. [90 U. S.] 150, decided by the supreme court in November, 1874, just after the order of October 8th, 1874, was made in this case, the petition was in all matters of form the same as this. It was entitled as of the bankrupt suit, was addressed generally to the judge of the district court, and had no prayer for subpoena.

The district court having directed the sale of certain property by the assignee, free from all incumbrance set up by Wilt, he filed in the circuit court a petition for review under its supervisory jurisdiction. The circuit court, after hearing, reversed the order of the district court, sent the cause back with instructions to allow the claim of Wilt and proceed accordingly. From this action of the circuit court an appeal was taken to the supreme court, where it was decided that notwithstanding the form of the petition filed in the district court, it contained all the essential elements of a bill in equity, and as the subject-matter of the action was one cognizable only by the district court, under that provision of the bankrupt law which gave it jurisdiction of suits at law and in equity in respect to the property of the bankrupt, that court must be considered, in the absence of anything expressly appearing to the contrary, to have acted under that jurisdiction when it granted the relief complained of. For this reason it was held that the remedy of Wilt was by appeal to the circuit court, and not by petition for review under its supervisory jurisdiction, and that the action taken by the circuit court was irregular and of no effect, because of the want of power in the court to proceed in that manner with such a case. As, however, what the court did was under an assumed supervisory jurisdiction, the supreme court did not dismiss the appeal, but sent the cause back with instructions to the circuit court to dismiss the petition for review for want of jurisdiction, and suggesting to the district court the propriety of entertaining a bill of review in equity for the purpose of correcting any errors that might be found in the decree as originally entered there.

As it seems to me, that case is decisive of

this. There, as the suit was one properly cognizable in equity only, the supreme court presumed it was heard and determined as such. Here the court at first proceeded summarily with the cause, treating it as a part of the principal suit in bankruptcy; but before it was finally disposed of, corrected the supposed error and set the matter down for hearing as a suit in equity. Thus was expressed what might have been implied under the ruling in Stickney v. Wilt [supra]. It is not necessary to inquire whether the court was correct when it decided that it could not take jurisdiction of the case upon a petition filed under the suit in bankruptcy. It is sufficient for all the purposes of this appeal that such was the decision, and that it was made at the instance of the defendant, Lisberger, himself. Certainly power to proceed in that way did not divest the court of its jurisdiction in equity; and if it did proceed in equity Lisberger cannot complain, because it was at his instance that this power of the bankrupt court was not employed.

It is, however, contended that the case was finally disposed of and the defendants discharged from further attendance when the order of dismissal was entered on the 16th of June. That order was avowedly made in the bankrupt suit. The motion was entered in that suit by Lisberger to dismiss the case from that jurisdiction. Any order made in the progress of such a suit could be vacated or modified by the bankrupt court upon proper showing at any time before the suit was finally disposed of, provided rights had not become vested under it which would be disturbed by the change. The supreme court has so decided in Sandusky v. First Nat. Bank, 23 Wall. [90 U. S.] 293. Here, no such rights had intervened, and the bankrupt court, upon application duly made, and after notice, vacated the order as one improvidently entered. This left the case in the district court to be proceeded with in such manner as might be proper. Lisberger certainly made himself a party to the bankrupt suit for all purposes connected with his motion, and was consequently amenable to any process that might be necessary to correct errors in the action which he in that way secured for his own benefit. I conclude, therefore, that the defence of the statute of limitations cannot be sustained, and that the case was properly in the district court for adjudication, as a suit in equity, when the decree was rendered.

One further suggestion only, made by the defendants against an affirmance of the decree, remains to be considered. It is claimed that before there can be a recovery against the defendants, the amount of debts owing by the bankrupt must be ascertained. This I do not consider necessary. The schedules which are filed as evidence show an indebtedness far in excess of the value of the goods. This certainly makes a prima facie case for recovery. The presumption is that all debts will be proved if there are assets for distribution. But, be that as it may, as the sale is void under the bankrupt law, and some debts have been proven, the assignee is entitled to his decree, leaving the defendant to make good his claim, if any he has, to any surplus that may remain after the debts are satisfied. It follows that the decree must be affirmed under the appeal of Lisberger.

The complainant has, however, appealed, and insists that the value of the goods was greater than was found by the district court. The evidence upon this branch of the case is quite unsatisfactory. It consists almost exclusively of the estimates of witnesses which are to my mind very unreliable. If the case had not been so long pending I would send it to a master, but it is very doubtful whether at this late day any more satisfactory testimony could be obtained than that which is now here. There is nothing to show what the general character of the stock was, whether new or shopworn; but when the order for its restoration to Lisberger was made, the goods were in the possession of the marshal, and subject to the inspection of all parties interested. At that time a bond with a penalty of eight thousand dollars was considered sufficient to protect the creditors against loss. Under these circumstances I am inclined to concur in the opinion of the district judge, and to adopt the valuation fixed for the purpose of the sale as the amount of the recovery.

As it seems to be conceded that the goods cannot be restored to the assignee, let a decree be prepared finding the sale to Lisberger void under the bankrupt law, and ordering him to pay the assignee $5,618^{14}/_{100}$, with interest from May 16th, 1870, as the value of the goods in lieu of their delivery; and, in default, that execution issue as at law. As to the other defendants, the bill is dismissed without prejudice to the right of the complainant to proceed against them at law upon the bond in case it shall become necessary. Lisberger to pay all costs below and here.

[See Cases Nos. 12,053, 13,493, and 13,494.]

Case No. 8,384.

In re LISSBERGER.

[The case reported under above title, in 18 N. B. R. 230, is the same as Case No. 6,632a.]

LISSBERGER (HOLMES v.). See Case No. 6,632a.

Case No. 8,385.

In re LITCHFIELD.

[7 Ben. 259; [1] 9 N. B. R. 506.]

District Court, S. D. New York. April 14, 1874.

DEATH OF BANKRUPT—ISSUING OF WARRANT.

1. An order of adjudication in a proceeding in involuntary bankruptcy was entered on November 3d, 1873. On the 27th of November the bankrupt died, and on the 27th of December following the warrant was actually issued: *Held*, that the court had not lost jurisdiction of the proceedings.

2. Under the twelfth section of the bankruptcy act [of 1867 (14 Stat. 522)] the words "issuing of the warrant" must be taken to be synonymous with the words "entering of the order of adjudication."

[In the matter of Elisha C. Litchfield, a bankrupt.]

Anderson & Man, for creditor.

Brown, Hall & Vanderpoel, for assignee.

BLATCHFORD, District Judge. This is a proceeding in involuntary bankruptcy. The order of adjudication was entered on the 3d of November, 1873. The bankrupt died on the 27th of November, 1873. The warrant was physically issued on the 27th of December, 1873, after the death of the bankrupt. A creditor objects to further proceedings in the matter by this court, on the ground that this court lost jurisdiction of the matter by the death of the bankrupt. The objection is founded on the language of section 12 of the act: "If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived." This provision is found among those which relate to voluntary bankruptcy. Section 11, which relates to voluntary bankruptcy, provides, that the filing of a voluntary petition shall be an act of bankruptcy, and the petitioner shall be adjudged a bankrupt, and a warrant shall forthwith be issued. The 42d section, which relates to involuntary bankruptcy, provides, that the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant, and that the proceedings for the taking possession, assignment and distribution of the property of the debtor shall be similar to those before provided for in the act in regard to voluntary petitions.

It is contended, that the 12th section implies, that, if the debtor dies before the issuing of the warrant, the proceedings cannot be continued; and that the warrant is not issued, within the meaning of the section or of the act, until it is physically issued, or, in other words, that, when it is physically issued, it cannot be considered as having been issued before it was physically issued.

The 38th section provides, that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by a creditor against a debtor, upon which an order shall be issued adjudicating the debtor a bankrupt, shall be deemed and taken to be the commencement of proceedings in bankruptcy under the act. In re Patterson [Case No. 10,815]. By section 14, the assignment to the assignee, and his title thereunder, relates back to the commencement of the proceedings in bankruptcy. In the present case, there having been an adjudication entered before the death of the bankrupt, the title of the assignee relates back to the time the petition was filed, and the title the bankrupt then had to his property is absolutely vested in the assignee, unless the death of the bankrupt has had the effect to prevent the vesting of such title in the assignee.

I do not think that the bankrupt died before the issuing of the warrant, in the sense of the 12th section. The warrant is required to be issued forthwith. It is, in judgment of law, issued simultaneously with the entry of the order of adjudication. Whenever it is physically issued it relates back, for the purposes of the 12th section, to the entry of the order of adjudication. The entry of that order causes the entire proceedings and the title of the assignee to relate back to the filing of the petition, and there is no indication in the act of any intention that the death of the bankrupt after the entry of that order shall dissolve all the proceedings, if the physical preparation and issuing of the warrant shall happen to be delayed until after such death. Where the 12th section speaks of the issuing of the warrant, it contemplates its issue, in a voluntary case, simultaneously with the entry of an order of adjudication; and the same intent exists in regard to an involuntary case. The 12th section must be read as if the words "issuing of the warrant" were "entering of the order of adjudication." There is no difference in the two forms of expression.

[This case was subsequently heard upon the claim for services of counsel in the prosecution of suit in interest of bankrupt. Case No. 8,386.]

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

Case No. 8,386.

In re LITCHFIELD.

[18 N. B. R. 347; 26 Pittsb. Leg. J. 76.] [1]

District Court, S. D. New York. Sept. 19, 1878.

BANKRUPTCY—LITIGATION AT TIME OF BANKRUPTCY—SUBSTITUTION OF ASSIGNEE—WITHDRAWAL—COUNSEL FEES—COSTS.

In 1868, a suit was commenced by one T. against C. and others for the joint benefit of the bankrupt and one W., who had agreed to share in the results of the litigation and bear its expenses in equal proportions. A judgment was recovered in favor of T., from which an appeal

[1] [Reprinted from 18 N. B. R. 347, by permission. 26 Pittsb. Leg. J. 76, contains only a partial report.]

was taken about the time the proceedings in bankruptcy were commenced. The assignee in bankruptcy was substituted in place of the bankrupt, who was a defendant in the suit, and contributed to the payment of counsel fees and expenses until he gave notice that he would pay no more expenses. Afterwards, under an order of the court, the assignee was permitted to withdraw and assign all his interest in the litigation to W. The judgment was reversed by the general term, and a new trial ordered, and the court of appeals affirmed the judgment of the general term. The counsel having, after the termination of the suit, presented a claim against the assignee for their services before as well as after his substitution, *held*, that they were only entitled to payment for their services and disbursements after the assignee stipulated to be substituted, and that W., by taking the assignment of the assignee's interest, assumed all its burdens, and has no equity to demand reimbursement from the assignee.

[In the matter of Elisha C. Litchfield, a bankrupt. The case was previously heard upon the question as to what effect the death of the bankrupt, occurring between adjudication and warrant issued, had upon the proceedings. Case No. 8,385.]

W. S. Palmer and Jos. P. Whittemore, for petitioners.

W. Howard Wait, for assignee.

CHOATE, District Judge. This is a motion to confirm the report of the register in the matter of a claim against the estate of the bankrupt for the services and disbursements of counsel and attorneys, rendered and incurred in a litigation carried on by the bankrupt before his bankruptcy, and afterwards by the assignee, who was sub stituted as a party in his place. The suit was commenced in 1868 by one Ten Eyck against one Craig and others; but it was in fact carried on for the joint benefit of the bankrupt and one Whittemore, under an agreement between the bankrupt and Whittemore that they should share in the results of the litigation and bear its expenses in equal proportions. The counsel who now make this claim were retained with knowledge of this agreement. Prior to the commencement of the bankruptcy proceedings a judgment was recovered favorable to the bankrupt and Whittemore. From the judgment thus obtained an appeal was taken to the general term of the supreme court of New York, in which the action was pending, and about the same time, October, 1873, these proceedings in bankruptcy were commenced by creditors' petition.

Pending the appeal, the assignee in bankruptcy was, by order of the court and on his own application, substituted as a party in place of the bankrupt, who was a party defendant in the suit. From that time until he gave notice that he would pay no more expenses, the assignee contributed to the payment of counsel fees and expenses as called for by counsel, and afterwards, under an order of this court, the assignee was permitted to withdraw from the litigation and assign all his interest in the subject of it to Whittemore. The general term reversed the judgment, and ordered a new trial, and on appeal to the court of appeals the judgment of the general term was affirmed, and the result of the litigation is, that Whittemore recovers nothing, and is liable for one thousand and forty-two dollars, costs. After the termination of the suit, the counsel presented their claim against the assignee, asking to be paid their charges for services and disbursements prior to the substitution of the assignee as a party to the litigation, as well as those subsequent to that date.

The matter was referred to the register, who has disallowed the claim, except as to services rendered and disbursements incurred after the assignee stipulated to be substituted as a party to the suit, and the question is as to the correctness of this ruling. It is insisted that the assignee by electing to carry on the litigation, and by becoming a party to it, took the place of the bankrupt, and thereby became entitled to all the resulting benefits and charged with all the burdens with which his predecessor was charged, and that he became a partner with Whittemore in the adventure, and liable, as between himself and Whittemore, for all the existing obligations, which, under the agreement between him and the bankrupt, were then chargeable upon the bankrupt. It is also insisted that the claim of counsel for services in a suit is a single and indivisible claim not apportionable, unless by agreement or special circumstances among several persons who successively and by assignment or substitution sustain the relation of clients to the counsel, and therefore that the new client becomes at once and necessarily charged with all the obligations to the counsel which rested upon predecessor at the time of substitution. I have examined carefully the briefs of counsel and the cases cited in support of this claim, and do not think they sustain the position taken.

This is not a question whether attorneys have a lien on the proceeds of litigation for their services and disbursements at all stages of the suit, whatever may have been the changes of parties. Many of the cases cited are cases as to the liability of a new or substituted party to costs accrued during all stages of the suit as between party and party. I do not see that these cases have any analogy to the present. Costs must be chargeable against a party, and the party at the time the judgment for costs is recovered is necessarily chargeable with them, if anybody is. There is no reason why the party recovering costs should lose them because the other party has been changed by substitution. But the claim of counsel for compensation rests wholly in contract, express or implied, and is like in its character, as between party and party, the claim for costs. The liability to costs, as between party and party, is artificial and statutory,

partly punitive and partly compensatory, and based on various reasons of public policy, and not on contract at all.

The claim of these petitioners must depend either on the principle that their claim for their entire service is indivisible, and therefore necessarily became chargeable against the assignee as an entirety on his substitution, thus releasing the bankrupt; or, if the claim is in its nature divisible, the claim can only be sustained on an agreement, to be implied from the circumstances, that the assignee would assume and pay these prior expenses of the bankrupt. There was no express agreement of the assignee to pay them. The case chiefly relied on as establishing the rule contended for, that the entire charge for services of counsel in a litigation is a single and indivisible cause of action, is the case of Harris v. Osborn, 2 Cr. & M. Exch. 629, in which case it was held that an attorney's claim for his costs as against his client during the entire course of a suit constitute a single claim or cause of action, within the meaning of the statute of limitations, so that no part of it is barred if the last item is within the term within which an action lies. That case and the cases on which it is based do not hold that such a claim for costs even is not, under any circumstances, unapportionable. They recognize the right of the attorney to protect himself by giving notice that he will not proceed unless the necessary funds are provided, and, in case of a failure in providing means, to terminate the relation and sue for his costs already accrued. It holds that, for reasons based on the peculiar relation between client and attorney, the attorney cannot sue before the end of the litigation without a prior demand and refusal or neglect to furnish funds. The authority of that case need not be questioned. It relates only to liabilities to costs between attorney and client, as regulated by statute and practice in England; and, notwithstanding that authority, counsel may well be held to have a valid and complete claim for services rendered at the close of each well-defined and distinct stage of a litigation, as in the present case at the termination of the suit by judgment in the special term, by the termination of the litigation in the general term, and again in the court of appeals. It may well be doubted whether these are not to be regarded as three distinct suits, a question not touched by the authorities cited.

But, independently of this question, the cases cited are not sufficient to show that counsel may maintain from time to time an action for services rendered in the cause, or at least may not, by their own act and at their election, after a demand, sever the unity of the service, and claim payment for the services already rendered. Such is believed to be the view of the rights of counsel as against the clients, usually accepted and acted on without question by both parties in this country, and such seems to be a reasonable view of the relation between them, and one analogous to other cases of continuous services rendered. It may well be that, if nothing is done to sever the continuity of the service, the entire series of claims will constitute a single cause of action, so far as the statute of limitations is concerned.

It is not necessary, however, to go so far as in this present case, because claims that are single and unapportionable under ordinary circumstances are apportioned by the law when equity so requires, and bankruptcy is one of the events the intervention of which effects such an apportionment by act of the law. And it cannot be doubted that, upon the bankruptcy of Litchfield, the counsel who had served him up to that time had the right to prove against his estate for their services and disbursements up to the time of the filing of the petition, and to receive ratably, with other creditors, a dividend out of the estate. Such has been the constant practice in such cases, and, so far as I have observed, it has never been questioned.

The situation, then, of the counsel at the time of the bankruptcy and the appointment of the assignee was this: The counsel were creditors for the amount already earned and expended, with the same rights as other creditors. If the assignee elected to go on with the suit, which he could do or not, as he chose, and which the counsel could not in any way compel him to do, he would, of course, become liable to pay, like any other person, a reasonable compensation for all services rendered to him. He could also choose his own counsel, and change his attorney at will, subject to the necessity of discharging any lien on necessary papers in his attorney's hands.

No court has yet denied the general right of the suitor to change his attorney, where there was no agreement other than that to be implied from a general retainer. What ground is there, then, for implying, from the mere fact that the assignee employs the same counsel to go on with the litigation, a promise on his part to pay in full out of the estate in his hands this prior claim, for which the counsel have before such new employment only a right to share in the estate as a creditor? If he had chosen to employ other counsel, it could not be contended that they would be entitled to anything more than a quantum meruit for their services thereafter rendered. And I can see no principle of equity or ground of reason upon which, by reason of his employing the same counsel, they should become entitled to anything more. But it is still insisted that, even if the counsel cannot of their own right maintain this claim, Whittemore may maintain his right to have the assignee pay one-half of all these charges, on the ground that, under the agreement between Whittemore and the bankrupt, they were partners in the adventure, and that the assignee, by

assuming the place of Litchfield, became, as it were, a purchaser of a partner's interest, and so liable to Whittemore to discharge one-half of all accrued charges, as that was the condition on which the bankrupt held an interest in the claim; that the assignee necessarily succeeded to the same interest, and held it on the same condition. If there is anything in this claim, it is rendered wholly nugatory by the fact that since the assignee thus succeeded to the position of the bankrupt he has, with the consent of Whittemore, reassigned all his interest in the contract to Whittemore; and if the claim is well founded as to the effect of the assignment to the assignee, and thus assuming the position of the bankrupt under the contract, the like effect must follow the reassignment to Whittemore. In assuming all the benefits he has assumed all its burdens likewise, and therefore has now no equity to demand reimbursement from the assignee. The point was correctly ruled by the register. Report confirmed.

Case No. 8,387.

LITCHFIELD v. JOHNSON et al.

[4 Dill. 551.] [1]

Circuit Court, D. Iowa. 1877.

OCCUPYING CLAIMANT — COMPENSATION FOR IMPROVEMENTS—"COLOR OF TITLE"—GOOD FAITH.

1. Settlers on what are known as the Des Moines river lands, in Iowa, may be entitled to the benefits given by the statute to occupying claimants when they have made valuable improvements on lands of which they are afterwards adjudged not to be the rightful owners.

[Cited in Vance v. Burlington & M. R. Co., 12 Neb. 300, 11 N. W. 339.]

2. The "occupying claimants" statute of Iowa, as to "color of title" and "good faith," construed.

On April 24th, 1874, [Edwin C.] Litchfield commenced an action of ejectment against the defendants [Olaf Johnson and Lewis Johnson] for the south half of the south-east quarter of section 9, township 86, range 26, and at the May term, 1874, recovered judgment. Thereupon the defendants, under the statutes of Iowa, filed their petition as occupying claimants (Revision, § 2264; Code, § 1976), claiming to be allowed for improvements made by them on the land, under color of title, and in good faith. Issue was taken on this petition, and the case thus made was referred, by consent, to John N. Rogers, Esq., as referee, who, after hearing the evidence, found the following conclusions of fact and of law:

Conclusions of Fact: The defendants entered upon and took possession of the land in question in the fall of the year 1866, having no claim or color of title thereto, but under the belief that said land was the property of the United States, and open to pre-emption, and with the intent to pre-empt the same, or to enter it under the homestead act, and they have ever since continued in such possession, holding adversely to all parties except the United States. Under the belief aforesaid, they made improvements on said land, of which the present value is three hundred and seventy-five dollars ($375). All of said improvements, excepting fifty dollars in value thereof, were made before the expiration of five years from the time when said defendants took possession of said land, and before they had acquired color of title thereto. Defendants have never acquired any color of title to said land otherwise than by virtue of their occupancy thereof for five years. The value of said land, aside from said improvements, is six hundred and eighty dollars ($680). The value of the rents and profits of said land, aside from the improvements, during the time of defendants' occupancy thereof, is the sum of twenty-five dollars ($25).

Conclusions of Law: (1) Defendants had color of title to said land from the expiration of five years from the time when they entered on the same, and up to the beginning of this action, by virtue of their five years' occupancy thereof. (2) The improvements were made by them in good faith. (3) The defendants are entitled to be allowed the value of their improvements as provided by the statute, including those made before they acquired color of title. This appears to me to be a very doubtful point or principle, and I am induced to hold thereon as above stated, chiefly because it is stated by counsel for defendants to have been so held by his honor, the circuit judge, in the case of Lancaster v. Crouse [Case No. 8,038], in this court, and because, on examination of the papers in that case, including the instructions to the jury given and refused, it appears probable that such a view was then taken by the court, although it does not appear with entire clearness. (4) If the court should agree with me in the point last mentioned, then defendants are entitled to a judgment, ascertaining the rights of the parties, in conformity to the provisions of sections 1979–1981 of the Code of Iowa, on the basis of the findings hereinbefore contained, as to the value of the land, of the improvements, and of the rents and profits; that is, the amount to be paid defendants for their improvements should be fixed at three hundred and fifty dollars, being the present value of the improvements, less the value of the rents and profits of the land, as improved during its occupancy by defendants. But if the court should be of opinion that defendants are not entitled to be allowed for improvements made before they acquired color of title, then the judgment should provide for payment to defendants of only twenty-five dollars on account of their improvements. (5) As nothing is provided by the statute in respect to

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

a judgment for costs in favor of either party on such proceedings, I am of the opinion that each party must pay his own costs. The plaintiff in the main action (Litchfield) excepted to this report, on the ground, first, that the evidence did not establish that the improvements were made in good faith; and for the reason, second, that the claimants cannot be allowed for improvements made during the first five years of their occupancy, but only for those made after the expiration of five years from the time they entered on the premises, and prior to the commencement of this action. On these exceptions the case is now before the court.

Wright, Gatch & Wright, for plaintiff.

Duncombe, O'Connell, & Springer, for occupying claimants.

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

DILLON, Circuit Judge. The amount involved in this particular case is small, but the case itself is important, as the principles of law which apply to it are decisive of a large number of like causes pending in the court.

1. The referee has found, as a fact, that the defendants, in the fall of 1866, entered on the land, the same being then vacant, under the belief that it was the property of the United States, open to pre-emption, with the intent to pre-empt it or enter it under the homestead act, and have ever since continued in possession, holding adversely to all parties except the United States. This finding of fact is sustained by the proofs, and supports the legal conclusion that the improvements were made "in good faith," within the meaning of the occupying claimant statute of this state. The extent of the Des Moines river grant had, it is well known, been the subject of conflicting decisions on the part of the executive branch of the government, previous to the December term, 1866, of the supreme court, when the case of Wolcott v. Des Moines Co., 5 Wall [72 U. S.] 681, was decided (which was after the defendant took possession of the land, and in respect of which the defendant, a foreigner, almost unacquainted with our language, testifies he knew nothing), and it was not until the December term, 1869, that the case of Wells v. Riley [Case No. 17,404], was determined, in which it was first held that the permission of the local land officers to occupants to prove possession and improvements, and to make entry of these Des Moines river lands under the pre-emption laws, was unauthorized and void. There is nothing in the history of this grant, whether legislative, executive, or judicial, which makes it impossible, or even improbable, that settlers upon these lands, prior, at least, to the final decision of Wells v. Riley [supra], might not be such in good faith as respects the title held by the plaintiff. Wells v. Riley [supra].

2. But the principal question in the case is, whether, conceding the "good faith" of the claimants, they are entitled to be allowed for all valuable improvements made prior to the beginning of the ejectment suit, or only those made prior to that time, and after the expiration of five years from the time of entering on the land. The language of the statute giving the right of compensation to the claimant in this form, is, "where an occupant of land has color of title thereto, and in good faith has made any valuable improvement thereon, and is afterwards found not to be the rightful owner," he shall be entitled to pay, in the manner provided, for such improvements. It is insisted by the plaintiff, that to entitle the occupant to compensation for his improvements, "it must appear that they were made in good faith, and under color of title; in other words, color of title must concur, co-exist, with good faith at the time of making the improvements." Hence, as in this case color of title depends upon five years possession (Revision 1860, § 2269), no improvements made during the five years, though made in good faith, can be considered, while for all that were made after the lapse of the five years, compensation may be allowed. The language of the statute above quoted is not free from ambiguity. The words used might be made to bear the construction contended for by the plaintiff. I have carefully considered the reasons for that construction, which were so ably urged by the plaintiff's counsel at the bar, and enforced with additional illustrations and learning in his printed argument, without being convinced that it is the necessary or true meaning of the statute. An equally natural meaning of the words used, is that the "color of title" must exist before and at the time when the suit of the rightful owner is brought against the occupant, in which case the occupant may be compensated for any valuable improvements made thereon in good faith, the statute prescribing no limitation as to the time when they were made. These remedial statutes are entitled to a fair and even liberal construction (Longworth v. Wolfington, 6 Ohio, 10); and the view we adopt harmonizes with the evident policy of the legislature, as shown by the express provisions made by the legislature of Iowa to extend to the settlers "on any of the lands known as the Des Moines river lands" the rights given by the occupying claimant statute (Revision 1873, §§ 1984, 1987).

We do not place our judgment upon the legislation last mentioned, since the improvements in this case were largely made before that time, although this legislation preceded, by several years, the suit brought to recover possession. It is by no means clear that the equities of an occupant who in good faith has made improvements during a period when the real owner was negligent in asserting his rights, may not be provided for

by retrospective legislation, but it is not necessary to enter upon the consideration of that question, as, in my judgment, the claimant's case is embraced in the provisions of the general statute. Revision, § 2264; Code, § 1976; Society for Propagation of Gospel v. Pawlet, 4 Pet. [29 U. S.] 480; Albee v. May [Case No. 134]; Green v. Biddle, 8 Wheat. [21 U. S.] 381. The exceptions to the report of the referee are disallowed, and judgment will be entered in conformity therewith. Judgment accordingly.

Mr. Justice MILLER, to whom the record and arguments in this cause were submitted, expressed his concurrence in the foregoing opinion.

LITCHFIELD (NUNAN v.). See Case No. 10,378.

Case No. 8,388.

LITCHFIELD v. REGISTER et al.

[1 Woolw. 299.] [1]

Circuit Court, D. Iowa. Oct Term, 1868.[2]

PRE-EMPTION — PARTIES IN EQUITY — LAND OFFICERS—AS SOLE DEFENDANTS —IMPOSSIBILITY OF BRINGING THEM IN—INJUNCTION RETAINED—EXECUTIVE OFFICERS — JUDGMENT OF LAND OFFICERS—TITLE IN THIRD PARTY—CONVENIENCE.

1. Settlers upon the public lands, under the pre-emption and homestead laws, have an inchoate right, which they should be permitted to perfect into a legal title.

2. The register and receiver of the land office have no personal interest in the public lands, or in lands claimed to be such.

3. An injunction bill against such officers as the sole defendants, to restrain them from permitting settlers on lands treated by the land department as public lands, entering them under the pre-emption laws, when such settlers are not before the court, is fatally defective for want of parties.

4. Parties whose interests in the subject matter of the suit, and in the relief sought, are so bound up with those of the other parties that their legal presence in the proceeding is absolutely necessary, must be brought before the court, or it will refuse to entertain the suit.

[Cited in Alexander v. Horner, Case No. 169.]

5. It is no answer to such an objection that it is impossible to bring such parties before the court.

6. Nor will the court retain an injunction once allowed to enable the plaintiff to bring them in, when it is apparent that he cannot do so.

7. The register and receiver are mere agents of the interior department, to carry out its orders.

8. The court will not interfere by injunction with executive officers in the exercise of political or discretionary power.

9. In acting upon a claim to pre-empt a tract of land, the land officers exercise a judicial discretion.

10. And it seems that this is true even when a third party has a good title to the land to which the claim is made.

11. In the cases in which the action of these officers has been examined and revised by the courts, jurisdiction has not been assumed until after the land department has ceased to act upon the matter.

12. This case is not within the principle of cases of injunction restraining road and other commissioners, and other bodies, from taking property not in pursuance of the authority of the law.

13. The argument from convenience applied.

This was a bill in equity for an injunction. Of the many facts alleged in the pleadings, but few need here be stated in order to an understanding of the questions determined by the court.

On the 8th of August, 1846, congress granted to Iowa, to aid it in improving the navigation of the Des Moines river, from its mouth to Raccoon fork, alternate sections of the public lands, in a strip five miles wide on each side of the river (9 Stat. 77). The Des Moines rises north of the north boundary of the state, and flows across its whole width south-easterly, and empties into the Mississippi at its extreme south-east corner. The Raccoon fork branches off from it at a point near the middle of the state. Shortly after the passage of this act, the state accepted the grant, and its officers selected the sections designated by odd numbers, lying along the whole course of the river through the state. But soon afterwards the commissioner of the general land office raised the question whether the grant extended above the Raccoon fork. Many conflicting decisions of this question were from time to time made by different officers of the land department. They are stated in Dubuque & P. R. Co. v. Litchfield, 23 How. [64 U. S.] 66, and in Wolcott v. Des Moines Nav. & R. Co., 5 Wall. [72 U. S.] 681. In 1854, the Des Moines Navigation and Railroad Company entered into an engagement with the state to carry forward the work of the projected improvement, and in consideration thereof, received from the state the lands which its officers had selected—as well those above, as those below the Raccoon fork. This company conveyed a very large portion of these lands to this plaintiff. On the 12th day of July, 1862 [12 Stat. 543], congress passed another act extending the grant over the disputed region above the fork, which validated the selection previously made by the state, and questioned in the land department. The title thus acquired by, or confirmed to, the state, inured to the benefit of its mediate grantee, the plaintiff, who seems thereby to have taken a good title. The lands here in question are a large number of sections, and parts of sections, distributed along a line of great extent, and lie above the fork, within the Fort Dodge land district, of which the defendant Richards was register, and the defendant Pomeroy was receiver of public moneys. These officers, acting under direction of their superiors in the land department at Washington, continued to treat these lands as government property, and, as such, subject

[1] [Reported by James M. Woolworth, Esq., and here reprinted by permission.]

[2] [Affirmed in 9 Wall. (76 U. S.) 575.]

to be sold and otherwise disposed of under the different laws regulating such matters. And, accordingly, many persons had settled upon, and many were settling upon, many different tracts of these lands, under the pre-emption and homestead laws, filing in the land office the papers required by these laws to make known their claims, making proof before the officers of the facts entitling them to purchase, and receiving, upon effecting such purchases, the usual patent certificates as evidences of their title. At the same time, still other parties were, in the ordinary course of the business of private entries, purchasing other tracts of these lands from these officers as agents of the government. Portions of these lands were timber lands, and the persons thus acquiring a claim of title thereto, and getting into possession thereof, were cutting it down and otherwise committing waste. At the same time, they were so numerous, that litigations with each would be very expensive and vexatious to the plaintiff. The object of the bill was to enjoin these officers from receiving any papers from parties claiming any of these lands under the pre-emption and homestead laws, any proofs of the rights under those laws of other parties to purchase tracts claimed by them, and any money from parties asking to make such purchases, and from executing to any such parties any evidences of title, and also from adjudicating upon any claims of these parties to make entries or purchases of these lands as public lands. The defendants answered, that they, by their character, and by their relations to the subject matter in question, and to the parties really interested, could not be thus proceeded against. A temporary injunction was allowed at the May term of the court by Mr. District Judge Love.

Another bill was filed by the same plaintiff against Goodwin, register, and Clark, receiver of public moneys at the land office, at Des Moines, containing the same general averments as to lands within their land district. In this bill the plaintiff's title is alleged to be by a mortgage to him as trustee made by the Des Moines Navigation and Railroad Company. On this bill, Mr. Justice Miller, in vacation, allowed a temporary injunction ex parte, the defendants not appearing at the time appointed for the hearing of the application to resist it, but with leave to move to dissolve. The defendants now move to dissolve these injunctions, and to dismiss the bill against the officers at Fort Dodge for want of equity.

Mr. Witherow and Mr. Parsons, in support of the motions.

Mr. Rankin, Mr. Finch, Mr. Ellwood, and Mr. Nourse, contra.

MILLER, Circuit Justice. When the application was made to me in the vacation for a temporary injunction, I had strong doubts, on reading the bill, whether it presented a case for judicial action. I accordingly appointed a day for hearing the application, sufficiently distant to enable counsel to prepare for the discussion, and expressed my desire that the question involved should be fully argued. But it seems that when the day for hearing had arrived, the defendants had received no authority to employ counsel, and therefore they were not represented.

As the mischiefs which the complainant sought to prevent by the injunction were great and imminent, and as a similar order had a few weeks before been granted in open court, I concluded to allow the temporary writ without hearing an argument from the plaintiff, which could only be ex parte. But I appended to the order a statement that it was made subject to the right, at any time, to move before me for its dissolution. I also expressed my readiness to hear such motion at any time, and my doubts as to the plaintiff's right to the injunction.

Being aware of the large amount of property involved in the question, of the number of persons interested in it, and of the public excitement on the subject, I have since given it some thought, and that reflection, and the arguments made here, have tended to strengthen my first impression. I am now quite satisfied that the bill cannot be sustained, for want of any equitable jurisdiction to grant the relief sought.

The grounds of objection to the bill are two: 1. The want of proper parties defendant, to wit, the individuals who it is alleged are asserting their right to enter these lands by pre-emption or otherwise. 2. The parties who are before the court are acting as officers of one of the executive departments of the government, in the discharge of functions which are not ministerial, but which involve the exercise of judgment and discretion.

1. This bill clearly shows upon its face that its purpose is to prevent the assertion of claims to these lands by persons who are not before the court, and whose interests are not represented by those who are. These are persons, some of whom have settled upon the land, and now claim that in virtue of their residence thereon, they have, under the pre-emption and homestead laws of congress, acquired a right in the tracts settled upon by them, and that when they shall have done such things as those laws require, they may perfect this right and receive the legal title; while others seek to enter tracts of the land at private sale, making payment therefor either in land warrants or in money. In regard to the first of these classes of persons, if their claim be just; they already have an inchoate right growing out of their residence and improvements, and this right is entitled to the protection of the courts, while the action here sought would effectually prevent their taking such steps as these laws require in order that this inchoate right may become perfected in a legal title which could be asserted in a court of justice. This is by

far the most numerous class of persons sought to be affected by the injunction here asked for; it is against them that it is in effect directed.

The land officers are but nominal defendants in the bill. They have no pecuniary interest, and they assert on their personal behalf no title or claim to the lands which are the subject of controversy. It is matter of entire indifference to them whether these lands belong now to plaintiff or to the government; whether they shall finally vest in the plaintiff, or in the parties claiming pre-emption rights.

It is, therefore, too clear for argument that the bill seeks, by the operation of the injunction upon parties having no interest in the subject matter of the suit, to destroy or effectually prevent the assertion of the rights of other parties who are not now before the court.

This question of parties has repeatedly received the consideration of the supreme court of the United States. It has uniformly been held that in such cases the court will not proceed. In Barney v. Baltimore City, 6 Wall. [73 U. S.] 280, all the authorities are reviewed, and the relation of parties to suits in chancery are arranged into three classes. One of these classes is thus described: "And there is a third class whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot possibly proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591; Mallow v. Hinde, 12 Wheat. [25 U. S.] 194; Shields v. Barrow, 17 How. [58 U. S.] 130; Northern I. R. Co. v. Michigan Cent. R. Co., 15 How. [56 U. S.] 233; Barney v. Baltimore City, 6 Wall. [73 U. S.] 280.

And in Shields v. Barrow [supra] this class is described as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." The applicability of these principles to the case before us is too obvious to require comment.

In answer to this it is urged, as a sufficient reason for the court proceeding without having these parties before it, that in the nature of things it is impossible for the plaintiff to know who will assert a claim to these lands, until they present themselves before the land officers for the purpose, and as they will at once receive from the officers the patent certificates, it will then be too late to enjoin them. The fact alleged of the impossibility of discovering who these claimants are, or will be, may be admitted, but the inference that therefore the court can, in their absence, proceed to foreclose their rights, is not sound.

It is also urged, that the injunction should be permitted to remain until the plaintiff can learn who these claimants are, and make them defendants. This would be a mere trifling with justice. There is no reason to suppose that the plaintiff can ever learn all of those who intend to claim the right of locating these lands. In fact, the bill alleges the fact that such parties are too numerous to sue at law as one ground for appealing to the equitable jurisdiction of the court. In respect of parties, the bill is fatally defective, with no capability of amendment; and no offer to amend is made.

2. The extent to which the courts will interfere with officers in the executive departments of the government, in the exercise of their ordinary duties, presents a question which has never been fully and clearly answered, although it has more than once received the consideration of the supreme court of the United States.

That the register and receiver of the land office are to be considered, in reference to the matter before us, as the mere agents of the department of the interior, is, I think, very clear. In offering these lands for sale and pre-emption, they are acting under positive instructions received from that department. Should they venture to exercise a judgment of their own, in opposition to those instructions, they would probably be removed or suspended from office, and the purpose of the department be carried out by other persons appointed in their places.

The cases in the supreme court, in which the question here presented has been most fully considered, are those of Marbury v. Madison, 1 Cranch [5 U. S.] 137; Kendall v. U. S., 12 Pet. [37 U. S.] 608; and State of Mississippi v. Johnson, 4 Wall. [71 U. S.] 475. It is true that the earlier cases are applications for mandamus, but in the last case, which was an application for injunction, the chief justice very truly remarks "that this court is unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion." In the two former cases, the court decided that the head of an executive department could be compelled by a writ of mandamus to perform duties which were merely ministerial, and which involved the exercise of no political or discretionary power. In the latter case, it was held that the court would not issue an injunction to such officers, in any case when those officers were exercising political or discretionary power, and, by implication it is held, that only in the case of merely ministerial duties will they be interfered with by injunction or mandamus. What are ministerial duties in this connection is thus defined by the court in that case: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a depart-

ment by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." And he gives the duties required in the case of Marbury v. Madison and Kendall v. U. S. [supra], as illustrations; in the first of which, the duty was the mere manual delivery of a commission as justice of the peace to the relator, and in the other, the allowance of a credit of a definite sum on the account of the relator with the treasury department of the United States.

The duties of the register and receiver, in acting upon claims to pre-emption of lands, are not of this character. They have first to determine whether the land which is the subject of the claim belongs to the government, and is not already taken up under some superior claim, and then whether the party claiming has made the requisite improvement, and has shown the required residence on the land. All these questions are to be investigated in a manner which requires the exercise of judicial judgment and discretion, and are the very reverse of ministerial, as defined by the court in the case just cited.

In answer to this view of the subject, it is strongly urged that, in the case before us, the bill shows that the lands in question are not within the control of the land officer, because the government has parted with its title; that they are no longer subjects on which the department has any right to act at all; and that, for that reason, the officers are totally without authority for these proceedings. I must confess that this argument seems to be entitled to some consideration, and I do not feel sure that it is not a sound one. But on the best consideration that I am now able to give it, I do not think it is.

The lands in question are undoubtedly within the territorial limits over which the jurisdiction of those officers extends. In every case where an application is made for pre-emption, the question must necessarily arise, and be decided by those officers, Is the land claimed by the applicant subject to entry? Has it been already appropriated, by prior valid entry, or in any other mode? And though it is claimed that in the present case the appropriation has been made by act of congress, and this bill shows a prima facie title in plaintiff to these lands, I do not see but it is still the duty of the land office to decide that question with the best light it may have, whenever it is raised by a person applying to enter them as unappropriated public lands. If this be so, then, according to the principle supposed to be established by the cases cited, the courts should not interfere with the exercise of that judgment in the matter while it is under their consideration.

Reference has been made in the argument to the cases in which the supreme court has examined into the manner in which these officers have acted, and have decreed that the person to whom they had issued the patent should convey to the person to whom they have refused it.

These cases are numerous, and depend on the principle that by some means, such as fraud, mistake, or want of authority in the land office, one person has obtained a legal title which equitably belonged to another.

But this jurisdiction has only been exercised after the land department had ceased to exercise any authority in the matter, and in no manner sought to restrain or direct them while in the exercise of their proper duties.

Neither are the cases in point in which injunctions have been granted to restrain road commissioners, street commissioners, railroad companies, and similar bodies, from so exercising their powers as to invade, without authority of law, the private rights of individuals.

These bodies belong to no particular department, and exercise no special executive functions. They are the creatures of law; and when they seek to transcend the limits of their authority, are as much subject to judicial control as private persons are. If we look to the consequences likely to ensue from the establishment of such a precedent as the granting of this injunction, we shall see additional reason for hesitation in doing so.

We are all familiar with the fact that interests of great value are involved in the questions which are every day in contest before the land department, and that these are often supposed to depend upon the ascertainment of the legal rights of the contestants. Now, if the courts can, while these matters are pending before the officers of that department, issue a mandamus at the instance of every person asserting a legal right which they refuse to recognize, or enjoin them at the instance of every person who believes they are invading his legal rights, in a manner which leaves him no other remedy, the result of that principle will be that in some mode or other all the contested business arising in the course of the sale of the public lands, and delivery of patents for them, will be drawn from the officers to whom the law has confided these matters into the courts of justice, and these courts will find themselves converted into superintendents of the land offices of the country.

In McIntire v. Wood, 7 Cranch [11 U. S.] 504, the supreme court decided, in a case the converse of this, that the circuit court of the United States had no authority to issue a writ of mandamus to the registers of the land office to compel them to issue certificates of pre-emption, when that officer refused to do so, under the idea that the right was already vested in another; and the decision was based upon the ground that no such authority was vested by law in the circuit courts. This case was affirmed by the

same court in McClung v. Silliman, 6 Wheat. [19 U. S.] 598, where it was also held that the state court had no such power over the register. These cases have never been overruled; and if the right to interfere by mandamus and by injunction with these executive officers depends on the same general principle as asserted in State of Mississippi v. Johnson, 4 Wall. [71 U. S.] 475, they are directly in the way of the relief here sought.

The motions to dissolve the injunctions are granted, and the motion to dismiss the bill for want of equity is also granted.

Motions to dissolve injunction, and motion to dismiss the bill against the land officers of the Fort Dodge district for want of equity, sustained.

Affirmed by supreme court, December term, 1869, 9 Wall. [76 U. S.] 575. Compare Frisbie v. Whitney (decided by United States supreme court, December term, 1869) Id. 187.

See Gaines v. Thompson, 7 Wall. [74 U. S.] 347.

[NOTE. The opinion of the supreme court was delivered by Mr. Justice Miller, who said: "The principle had been so repeatedly decided in this court, that the judiciary cannot interfere either by mandamus or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here." The determination of what lands are open to pre-emption, what are sold, what granted by act of congress, constitutes a part of the duty of respondents, and this the learned justice considers clearly the exercise of a judicial function. He considers the bill fatally defective for another reason,—want of proper parties, viz. those seeking to pre-empt the lands, who are the real parties in interest.]

LITHERBERRY (SPRAGUE v.). See Case No. 13,251.

Case No. 8,389.

LITLE v. OTT.

[3 Cranch, C. C. 416.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

REAL PROPERTY—EQUITABLE ESTATE—GROUND RENT.

1. W. B., a lessee for ninety-nine years, renewable forever, at a certain rent, of a house and lot in Georgetown, D. C., sold to G. M., by deed of bargain and sale, the demised premises, together with other lots and lands, in which he had a fee-simple estate, "to have and to hold the aforesaid lots or parcels of land, to the said G. M., his heirs, executors, administrators, or assigns, forever," with general warranty of "the said lots or parcels of land;" *held*, that G. M. acquired the legal estate in the term for years only, although the said W. B. had then an equitable title to the reversion; and that nothing passed by the marshal's sale under a fi. fa. against G. M. but the term for years; and that the subsequent sale of the reversion by W. B. to P. B. K., and a conveyance to him from the original lessor, were valid, and transferred the reversion to P. B. K.

2. A legal term for years does not merge in an equitable title to the reversion.

Bill of interpleader, by John Litle against John Ott's heirs and the heirs of P. B. Key, both of whom claimed the ground-rent from the plaintiff, who was the tenant in possession, under a lease from the administratrix of John Ott. John Ott's title was under the marshal's sale in June, 1804, upon a fi. fa. against George Magruder, whose title was by a deed of bargain and sale to him from William Bailey, on the 1st of June, 1798, purporting, in consideration of £3,000, to convey "one house and lot in Georgetown, at the corner of High and Falls street, the half square opposite to where Colonel William Deakins formerly lived in the aforesaid town; also a tract of land on the west side of the eastern branch, &c., containing 206 acres, more or less; to have and to hold the aforesaid lots or parcels of land unto the said George Magruder, his heirs, executors, administrators, or assigns, forever;" with general warranty to the said G. M., his heirs and assigns, forever. When W. Bailey made this deed, the only legal estate which he had was the leasehold estate for ninety-nine years, subject to a ground rent, upon a lease to him made by John and Lucy Addison, December 9, 1783; but he had purchased the reversion of Charles Lowndes, who had purchased it of Anthony Addison, who had purchased it of John and Lucy Addison, in whom the legal estate still remained. After the deed from W. Bailey to George Magruder, to wit, on the 24th of October, 1798, he, W. Bailey, sold the reversion to P. B. Key, to whom it was legally transferred by Anthony Addison on the 23d of January, 1800, to whom it had been legally conveyed by John and Lucy Addison, the original lessors, upon the 6th of September, 1799; so that Mr. Key obtained the legal estate in the reversion, without its passing through W. Bailey, and without notice, as it was alleged, of any claim by George Magruder to the reversion, or any part of it. The principal question in the case was, whether John Ott died seized of an estate in fee, or only possessed a leasehold estate in a house and lot at the southwest corner of Water and Falls streets in Georgetown, being part of the original lot No. 47, in that town.

Mr. Marbury and Mr. Key, for Mr. Key's heirs, contended that nothing passed to George Magruder by the deed of W. Bailey, but the legal estate which Bailey then had, which was only a leasehold estate; that the term did not merge in the equitable title to the reversion; and that Mr. Bailey did not intend to sell the reversion of the house and lot; for although the habendum is to G. M. and his heirs, yet it is also to his executors and administrators, which are wholly inapplicable to an estate in fee, and the word

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

"heirs," is satisfied by application to the other property, conveyed in the same deed, and in which Mr. Bailey had the fee-simple estate. It would have been a fraud in him to sell the reversion to Mr. Key after having sold it to G. M. That Mr. Key had obtained the legal title to the reversion without its passing through Mr. Bailey, and without notice of any claim to it by G. M., they cited 3 Prest. Conv. 7, 25, 28, 566, 569; 1 Cruise, Dig. 509, 515; and Willoughby v. Willoughby, 1 Term R. 770.

R. S. Coxe, for Ott's heirs. Mr. Bailey had the equitable reversion in fee; and although the term did not legally merge in the equitable title to the reversion, yet the term is attendant upon the inheritance to protect the equitable reversion from intermediate incumbrances. The deed of Bailey to G. M. was an assignment of Bailey's equitable as well as legal estate. Mr. Coxe cited Sugd. Vend. 131; Philips v. Clarkson, 3 Yeates, 124; and Phillips v. Bonsall, 2 Bin. 138.

CRANCH, Chief Judge, after stating fully the facts of the case, and the argument to show that the ground-rents sold by Mr. Bailey to Mr. Key included the ground rent of the lot sold to George Magruder, delivered the opinion of the court. Mr. Bailey's deed to George Magruder passed only the legal estate in the term for years which Mr. Bailey possessed. It could not, contrary to his will, transfer any equitable right which he possessed; so that Mr. Magruder, in consequence of that deed acquired no right to call upon Mr. Key to convey to him the reversion in fee, even if he had received notice of that deed, of which there is no evidence; so that he stood in the predicament of a purchaser of a legal estate without notice of an equitable incumbrance, if any existed. It is true that the words of the deed are sufficient to carry the fee if Mr. Bailey had been competent to convey a fee; but as he was not, they can only be used as evidence of his intention to convey a fee. But he used also other words which are not usual nor necessary in conveying a fee; and which are appropriate to the conveyance of a chattel interest only; namely, "executors and administrators." The expressions are: "To have and to hold the said lots or parcels of land, unto the said George Magruder, his heirs, executors, administrators, or assigns, forever." The property conveyed by that deed consisted not only of the lot in question, but of "the half square opposite to where Col. William Deakins formerly lived," "and a tract of land on the west side of the eastern branch," &c., containing 206 acres; so that the word "heirs," was necessary to the conveyance of the whole estate in part of the property, and may have been intended to be confined to that part of the property to the conveyance of which it was necessary, and the words, "executors and administrators," may be considered as appropriated to the chattel interest. The use of the word "heirs," therefore, is not conclusive evidence of the intention, nor is there any other evidence that it was the belief or understanding of Mr. Magruder at the time of the contract, that he was purchasing the fee-simple; and we have seen clearly, from the contract and conduct of Mr. Bailey, that such was not his intention or understanding. We think, therefore, that Mr. Magruder had no equity which he could set up against Mr. Key's legal estate in the ground-rents. It is certain that the reversion in fee did not pass to Mr. Magruder, and Dr. Ott could not, at the marshal's sale under a fieri facias against Mr. Magruder, acquire any thing more than Mr. Magruder's legal title, such as it was. He could acquire only the legal estate in the term for years.

It was contended in argument, that when the tenant for years obtained an equitable title to the reversion in fee, the term merged in the equitable reversion. But merger is the legal effect of the coincidence of legal rights only. There is no instance of the merger of a legal title in an equitable, so as to extinguish the legal title. The cases cited by Preston, in his treatise upon the doctrine of Merger, in pages 7, 25, 28, 566, 569, are decisive upon this point. The dicta cited from Philips v. Clarkson, 3 Yeates, 124, and 2 Bin. 138, are loose, and rather inaccurate admissions by the court; and it is evident that the court was not contemplating the distinction between the coincidence of a legal with a superior legal estate, and that of a legal with an equitable estate. The reference which the judge makes is evidently to the common legal doctrine of merger. Mr. Key and his heirs seem to have been in the uninterrupted seizin of the reversion and the ground-rent, from January, 1800, to the year 1825, when this dispute originated; so that they are protected by limitation of time as well as by an actual legal title. We are therefore of opinion, that the title of the late John Ott, the ancestor of the defendants, Mary C. Beatty and John W. Ott, was a chattel interest,—a term for years, and not a fee-simple,—and that the reversion in fee is in the defendants, the heirs of the late P. B. Key, and that the right to the term of years is in the administrator de bonis non of the said John Ott. Decree accordingly.

LITLE (UNITED STATES v.). See Case No. 15,608.

LITTELL (BEARDSLEY v.). See Case No. 1,185.

LITTELL (KEROSENE LAMP CO. v.). See Case No. 7,723.

LITTELL (KEROSENE LAMP HEATER Co. v.). See Case No. 7,724.

Case No. 8,390.

In re LITTLE.

[2 Ben. 186; [1] 1 N. B. R. 341 (Quarto, 74); 15 Pittsb. Leg. J. 268.]

District Court, S. D. New York. March 4, 1868.

BANKRUPTCY—COPARTNERSHIP—AMENDMENT.

Where a bankrupt filed his petition, in which there was no allusion to the fact that he was a member of a firm, although the schedule showed debts contracted by him as member of a firm, and that there were credits due to said firm, and he was adjudicated a bankrupt, and an assignee was duly chosen by the creditors, and the bankrupt then presented a petition to the register stating that he was a member of a firm, and asking leave to amend his petition and schedules so as to allow the other member of the firm to be joined with him, so that he might be discharged from the debts of the firm, which the register refused: *Held*, that the register should have granted his petition. The bankrupt had prayed to be discharged from all his debts, and could not be discharged from the debts of the firm until the partner was brought in.

[Cited in Re Winkens, Case No. 17,875; Re Heller, Id. 6,339; Re Stevens, Id. 13,393. Approved in Hudgins v. Lane, Id. 6,827. Cited in Wilkins v. Davis, Id. 17,664; Crompton v. Conkling, Id. 3,407; Re Webb, Id. 17,317; Re Griffith, Id. 5,820; Re Henry, Id. 6,370; Re Brick, 4 Fed. 806; Re Johnston, 17 Fed. 72.]

[Quoted in Corey v. Perry, 67 Me. 143.]

The bankrupt, William H. Little, in this case, filed his petition on December 10th, 1867, and was adjudged a bankrupt, and on February 8th, 1868, at the first meeting of creditors, an assignee was appointed, and the assignment executed. The petition made no allusion to a copartnership, but, in the schedules attached to the petition, it appeared that debts had been contracted by him in a firm name, and that there were credits due to the firm. On February 25th, 1868, the bankrupt presented to the register a petition, stating that he had filed his petition as a member of a firm, but had omitted to include his partner Dana, and praying for leave to amend his petition and schedules so as to permit his partner to be joined with him in his final order of discharge, adjudging him discharged from the debts of the firm. The register denied the request of the petitioner, and certified the question to the court.

[2] By the Register:

[I, James F. Dwight, the register in charge of this entitled matter, do hereby certify that in the course of the proceedings herein, the following question arose pertinent to the proceedings. Facts: On the 10th of December, 1867, William H. Little, of the city of Elizabeth, New Jersey, carrying on business at No. 24 Church street, New York City, filed his petition for adjudication in bankruptcy and discharge from his debts, in this court. He was duly adjudged a bankrupt, and on the 6th day of February, 1868, at the first meeting of creditors duly held, an assignee was chosen by the creditors, and subsequently the register executed the usual deed of assignment to the assignee. The petition of the bankrupt made no allusion to a copartnership or copartnership debts; but in the schedules attached thereto, it appeared that debts had been contracted jointly with one Charles H. Dana, in the firm name of "Little & Dana," and that there were credits due to said firm of "Little & Dana." On the 25th of February, the said bankrupt, William H. Little, filed a sworn petition with the register, of which the following is a copy: "Title. The petition of William H. Little respectfully states and shows: That on the 10th day of December, 1867, your petitioner filed with the clerk of this court his petition in bankruptcy as a member of the firm of 'Little & Dana,' a firm composed of your petitioner and Charles H. Dana. That in said petition he omitted to include the name of his said partner, Charles H. Dana, and now petitions and asks that an order may be made and entered herein, permitting your said petitioner to amend his petition and schedules in such manner as will permit his said partner to be joined with him in the final orders of discharge which may be granted by this court, adjudging him discharged from the debts and liabilities of said firm of Little & Dana. William H. Little." On this petition, attorneys for the bankrupt moved that the register grant an order in accordance with the prayer of the bankrupt, which motion being denied, the bankrupt, through his attorneys, prays that the question may be certified to the judge for his decision as to whether the register erred in refusing to grant the order prayed for; which prayer is granted in accordance with the rules in practice, and this certificate is made in conformity thereto. In my opinion the prayer of the petitioner cannot be granted. No allusion to a partner or a copartnership was made in the original petition. Section 36 of the law [of 1867 (14 Stat. 536)], and rule 18 of the supreme court, indicate the manner in which copartners may be drawn into proceedings in bankruptcy, and I do not see how, at this stage of the proceedings, and in this manner, Charles H. Dana can be included in the matter of William H. Little's bankruptcy,—which certificate and opinion is respectfully submitted, this 29th day of February, 1868.] [2]

BLATCHFORD, District Judge. I think that the register erred in denying the motion of the bankrupt, which was, that he be permitted to amend his petition and schedules in such manner as will permit his copartner to be joined with him in the proceedings in regard to the bankruptcy of the firm. The petition, which I have examined, is an individual petition, setting forth only one

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

[2] [From 1 N. B. R. 341 (Quarto, 74).]

[2] [From 1 N. B. R. 341 (Quarto, 74).]

schedule of debts and one inventory of assets, both of which are stated in the petition to be the individual debts and assets of the petitioner. But the schedule of debts shows that a large portion of the debts consists of debts of a copartnership, of which the petitioner was a member, and the inventory of assets shows that part of the assets consists of credits due to said copartnership. Under these circumstances, as the petitioner prays to be discharged from all his debts provable under the act, and some of the debts set forth in the schedule annexed to his petition are debts of the said firm, the petition is one to have the firm declared bankrupt on the petition of one of its partners, within the provisions of section thirty-six of the act, and of general order No. 18. As Dana did not join in the petition of Little, he ought to have been brought in, by proper proceedings, under general order No. 18, before an adjudication of bankruptcy was made on the petition of Little. The defect is now sought to be remedied by Little. His petition requires to be amended, and his schedules require to be amended. He asks to be allowed to amend them so as to join Dana with him in the proceedings. Dana can be so joined, either by joining voluntarily in the petition of Little, or by being brought in, on notice, under general order No. 18. When he is so brought in he can be discharged from his debts, including the debts of the firm; and, until Dana is so brought in, Little cannot be discharged from the debts of the firm, because the theory and intent of section thirty-six of the act, and of general orders Nos. 16 and 18, are that the creditors of a firm shall be required to meet but once, and in one bankruptcy forum, all questions in regard to the bankruptcy of the firm, and in regard to their debts against the firm, and in regard to the administration in bankruptcy of the assets of the firm.

Section twenty-six provides, that the bankrupt shall "be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts," and general order No. 33 prescribes regulations in regard to the amendment of schedules. General order No. 7 provides, that "the court may allow amendments to be made in the petition and schedules, upon the application of the petitioner, upon proper cause shown, at any time prior to the discharge of the bankrupt." General order No. 7 confers on the register the power of ordering amendments of any proceedings. The case was, therefore, a proper one for the register to allow the bankrupt to amend his petition and schedules, for the purpose set forth in his application to amend. The clerk will certify this decision to the register, James F. Dwight, Esq.

[Upon a subsequent hearing, the application of the bankrupt for discharge was refused for want of jurisdiction. It being shown that the bankrupt was a resident and doing business, not in the district, but in New Jersey. Case No. 8,391.]

Case No. 8,391.

In re LITTLE.

[3 Ben. 25;[1] 2 N. B. R. 294 (Quarto, 97); 1 Chi. Leg. News, 123.]

District Court, S. D. New York. Nov. 27, 1868.

BANKRUPTCY—JURISDICTION—CARRYING ON BUSINESS.

Where a bankrupt, who filed his petition in the Southern district of New York, in December, 1867, was a member of a firm engaged in manufacturing cloths in New Jersey, which failed in October, 1866, and, for six months before the filing of the petition, he had resided in New Jersey, but had a desk in the office of his son in New York City, where he received and wrote letters, and kept books and papers, and was engaged in closing up the affairs of the concern, but did no other business and had no other place of business: *Held*, that his petition was not properly filed in this district, and this court had no jurisdiction to grant a discharge.

[Cited in Fogarty v. Gerrity, Case No. 4,895; Re Penn, Id. 10,926; Re Ives, Id. 7,115; Re Groome, 1 Fed. 467; Allen v. Thompson, 10 Fed. 124.]

[See In re Belcher, Case No. 1,237.]

The discharge of [William H. Little] the bankrupt, in this case, was opposed by a creditor, who specified as one of the grounds of his opposition, that the bankrupt did not reside or carry on business, for the six months next immediately preceding the time of the filing of the petition for his discharge, in the Southern district of New York. The petition, which was a voluntary one, was filed on the 10th of December, 1867, and described the bankrupt as "of the city of Elizabeth, in the county of Union, and state of New Jersey," and stated that "he has had a place of business, and carried on business, as a dealer in cloths, for six months next immediately preceding the filing of this petition, at 24 Church street, in the city of New York," within the Southern district of New York. The proofs in the case showed that the bankrupt was a member of the firm of Little & Dana,[2] which had a manufactory of cloths in New Jersey; that the insolvency of that firm became known in October, 1866; that the assets of the firm, when it failed, consisted of woolen goods and machinery, the machinery being in New Jersey; that the woolen goods were and continued to be in the hands of agents in New York and Philadelphia, the agents in New York being Collins, Atwater & Whitney; that neither the bankrupt nor his firm kept any books of account after July, 1867; that the firm never kept any porter, clerk, or employee in the city of New York; that the firm were manu-

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

[2] [Charles H. Dana, the partner, was made a party to the proceedings on application of the bankrupt William H. Little. Case No. 8,390.]

facturers, and never called themselves merchants, and had a factory and an office in New Jersey; that, for the six months next immediately preceding the filing of the petition, the firm had desk room in the office of a firm of which the son of the bankrupt was a member, at No. 24 Church street, New York, and received letters by mail, addressed to them there, and wrote letters from there; that neither the bankrupt nor his firm had any other office or place of business; that their books and papers were at the office. at No. 24 Church street; that a tin sign, with the words "Little & Dana," was attached to the door of that office; that the firm ceased manufacturing on the 1st of May, 1867; that the business the bankrupt was engaged in at No. 24 Church street, from the 1st of May, 1867, was settling up the business of the firm, and receiving and writing letters; that no rent was paid for the desk-room or the use of the office; and that the bankrupt resided in New Jersey.

Davis, Doolittle & Wyman, for bankrupt.
Sterne Chittenden, for creditor.

BLATCHFORD, District Judge. It is required by the eleventh section of the bankruptcy act [of 1867 (14 Stat. 521)], that the voluntary petition of a bankrupt shall be addressed to the judge of, and filed in, the judicial district in which the bankrupt has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months. In the present case, the bankrupt resided in New Jersey, and he did not, in the sense of the act, carry on business in New York during any part of the six months. His firm were manufacturers of woolen goods in New Jersey, not merchants. They failed in October, 1866. They made no goods after May 1st, 1867. Their goods were not in their own hands for sale, but were in the hands of agents. They kept no books of account for more than four months before the filing of the petition. They did not have any porter, clerk, or employee in New York, but only an office, in which to write and receive letters and keep books and papers, the use of which office was furnished to them as a gratuity. The fact that the bankrupt had no office or place of business elsewhere than in New York, and that he was in the habit of coming to New York to write and receive his letters there, and to settle up his old business there, at an office where he kept up on a sign the name of his firm, does not make out a carrying on of business in New York, within the sense of the act. The whole effort on the part of bankrupt in the testimony appears to have been to show that the only place of business or office he had was in New York, and that he did not carry on business elsewhere than in New York, and then to insist that it follows that he carried on business in New York. This is a departure from the statute and from what the bankrupt understood to be necessary when he swore to his petition. In that he swears that he has "carried on business, as a dealer in cloths, for six months next immediately preceding the filing of this petition, at 24 Church street, in the city of New York." Now, whatever else the testimony shows, it proves that this allegation in the petition is wholly untrue. Not only did he not carry on business as a dealer in cloths, for the six months, at No. 24 Church street, but he did not carry on business at all in New York during the six months, in the sense of the act. He ought to have filed his petition in New Jersey. The discharge is refused for want of jurisdiction in this court to grant it.

Case No. 8,392.

In re LITTLE.

[19 N. B. R. 234;[1] 2 N. J. Law J. 211.]

District Court, D. New Jersey. May 31, 1879.

BANKRUPTCY—EXAMINATION—HOW WAIVED BY CREDITORS.

It is the right of even a small minority of the creditors present at a composition meeting to insist upon the opportunity for an examination of the bankrupt before a vote is taken; but such right is waived by moving for a vote before such examination has been had.

On exceptions to recording resolution for composition.

Mr. Regensburger, for bankrupt.
Mr. Meyers and Mr. Colton, for creditors.

NIXON, District Judge. The objections to recording the resolution on the ground that the bankrupt had not been examined came too late. An opportunity for his examination is doubtless the right of all creditors, but it is a right which may be waived, and the register's report of the proceedings of the last meeting shows a legal waiver. It appears by that report that the attorney for the bankrupt was desirous of an adjournment owing to the necessary absence of the bankrupt, who has been subpoenaed to attend as a witness in a case pending before a United States commissioner in the city of New York, the reason assigned for such adjournment being that some of the creditors might desire the examination of the bankrupt before voting upon the resolution.

The opposing creditors then refused to assent to an adjournment, and the register declined to grant it, but acceded to the request of the counsel of the bankrupt for a recess of one hour. On the creditors re-assembling at the end of the recess, Mr. Reeve, attorney in fact of the great body of the bankrupt's creditors, moved: "That Mr. Little be excused from attendance at the meeting because of his engagement before the U. S. commis-

[1] [Reprinted from 19 N. B. R. 234, by permission.]

sioner under the subpoena referred to, and because the creditors do not care to have him examined." It has not appeared that any vote was taken upon the resolution, nor that any objections were made to it, but the register proceeds to say that Mr. Regensburger presents on the debtor's behalf a statement of assets and debts. The proposal is then read, the resolution passed, and the vote is taken thereon. * * * The register rules that after a vote the resolutions have been passed by a majority in number and three-fourths in value of the creditors present at the first meeting. The register then asks if any objections to the resolutions or other objections for certification to the judge are desired to be made by any person present.

Mr. Colton, attorney for some of the creditors, states that if he has any objections he will make the same to the court on the hearing. The register says that if any objections are to be made, they should now be presented to the register, and ruled upon by him before being submitted to the judge. Mr. Meyers presents two objections in writing on behalf of James Patton, an opposing creditor, to wit: (1) To the taking of any vote of creditors until the examination of the bankrupt is had and concluded. (2) To the proceeding of the meeting, on the ground that the bankrupt is not present, and has shown no excuse for such absence.

The provisions of the section in regard to composition proceedings are that "the debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting, some one in his behalf shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due." Under such provisions, it was undoubtedly the right of even a small minority of the creditors to insist upon the opportunity for an examination of the bankrupt before a vote was taken, and this court has uniformly respected the right of the minority in this respect. I must assume, however, that the register has correctly reported the proceedings, and it appears from them that the parties who now oppose the recording of the resolutions because the bankrupt has not been examined, are the same parties that opposed the adjournment, and insisted upon a vote upon the resolutions in the face of the bankrupt's offer to come on the next day to offer himself for an examination. The court cannot permit such experimenting. They made their election to act upon the resolutions, knowing that no examination had been had, and it is now too late to object on that ground.

No other objections have been exhibited, and, no satisfactory reason appearing to the contrary, it is ordered that the resolutions be recorded.

Case No. 8,393.

LITTLE v. ALEXANDER.

[1 Hughes, 177.] [1]

Circuit Court, W. D. North Carolina. Dec. Term, 1874.[2]

BANKRUPTCY—FRAUDULENT PREFERENCE — JUDGMENT BY DEFAULT—STAY LAWS.

1. Where doubt arises whether a transaction is bona fide or not under sections 5128 and 5129 of the Revised Statutes of the United States (section 35 of the bankruptcy act), a United States circuit court in which a bill is filed to set aside such a transaction may, in its discretion, refer the question of bona fides to a jury in a case where an involuntary petition in bankruptcy has been filed, and the bankrupt has not had the privilege of a jury.

2. For the circuit court as a court of equity has full jurisdiction over a bill brought to set aside a transaction impeached as fraudulent under the 35th section, to declare the same void, and to enjoin the parties from taking or pursuing proceedings in other courts, touching the same transaction, as well perpetually as temporarily.

[This was a bill by William P. Little, assignee, against T. L. Alexander, to set aside an alleged fraudulent transaction.]

On the 1st day of January, 1869, John R. Alexander was largely indebted to various creditors, and had not property sufficient to pay his debts, and these facts were known to himself and the defendant, T. L. Alexander. John R. Alexander was justly indebted to the defendant, and gave his promissory note, executed on the 1st of January, 1869, in renewal of former bona fide notes which evidenced such indebtedness. An action at law was commenced on the renewed note on the 16th day of March, 1869, in the superior court for Mecklenburg county; "judgment for the want of an answer" was entered at spring term, 1869, of said court; this judgment was duly docketed on the 19th day of May, 1869; an execution on the same was issued on the 17th of June, and was levied on the lands of John R. Alexander on the 14th day of August, 1869; and this defendant was about to enforce a sale of said land when a writ of injunction in this cause was granted. Some of the other creditors of John R. Alexander had commenced actions upon their debts and failed to obtain judgment at said spring term, because a defence was put in by Alexander, which, according to the course and practice of the court, delayed a trial of such causes. John R. Alexander was duly adjudged a bankrupt in the district court of Cape Fear, upon a petition filed by creditors on the 1st of September, 1869, within a period of four months after the judgment of T. L. Alexander was obtained and docketed.

DICK, District Judge. The renewal of the note on the 1st of January, 1869, was a bona fide transaction, and in no way gave a preference to T. L. Alexander over other cred-

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

[2] [Reversed in 21 Wall. (88 U. S.) 500.]

itors, which can be regarded as fraudulent at common law, by the laws of this state, or under the bankrupt act [of 1867 (14 Stat. 517)]. The statute of this state (usually called the stay law) in relation to debts contracted previous to the 1st day of May, 1865, was unconstitutional, and was so declared by the supreme court of this state at January term, 1869, in the case of Jacobs v. Smallwood, 63 N. C. 112. All creditors of J. R. Alexander, whether they hold old or new notes, had like remedies in law, and were entitled to stand upon equal footing in the court at spring term, 1869; and if any legal rights were denied a creditor by the ruling of a judge, he has no just cause to complain of another creditor who obtained an honest advantage by pursuing the lawful course and practice of the court.

An insolvent person merely allowing a judgment to be taken for the want of an answer, by which one creditor obtained a preference over other creditors, is not an act of bankruptcy under the statute, and the judgment is not per se fraudulent and void. The omission to plead must be voluntary and with intent to defraud the general creditors, by giving a preference to a particular creditor, and these facts are to be proved by direct testimony, or they may be inferred from the circumstances attending the transaction. If the circumstances under which the judgment by default was allowed by the debtor were sufficient to constitute an act of bankruptcy, then the creditor who received such judgment or was benefited thereby, within a period of four months before proceedings in bankruptcy were filed, knew, or had reasonable cause to believe, that the debtor subsequently declared a bankrupt was insolvent, and that such judgment was allowed by the debtor in fraud of the bankrupt act, then such judgment in contemplation of a court of bankruptcy is void, and the assignee is entitled to such relief in the circuit or district courts of the United States against the judgment as will enable him properly to administer the assets of the bankrupt.

In the case before us the intent of preference and all collusion is positively denied in the answer and depositions by both parties to the judgment, and there is no direct evidence sustaining contrary averments, and both of said parties are proved to be men of good credit and character. The facts that the relation of father and son existed between said parties, that the son obtained judgment by default when other creditors of the father were prevented at the same term of the court from obtaining judgment because pleadings for that purpose were entered, and other incidental circumstances mentioned in the evidence filed in the cause, have a strong tendency to show that the allegations of fraud and collusion made by the plaintiff are well founded.

It is, however, insisted by defendant that the judgment was obtained according to the course and practice of the court; that it is not fraudulent at common law, or under any of the laws of this state, and such transaction is not essentially immoral or dishonest; that the bankrupt law, in refusing to allow a person declared to be a preferred creditor any portion of the assets of the bankrupt, is highly penal and ought to be strictly construed, and in a case like the one before us there should be no intendments but those which are fully sustained by the evidence, or which arise from strong legal inference. This conflict of inferences arising out of the evidence, renders it proper that the controverted questions of fact should be determined by a jury. It is therefore ordered that proper issues should be prepared by the counsel of the plaintiff presenting the questions of fact as above indicated and be submitted to a jury at the next term of this court, to be heard and determined upon the pleadings and proofs filed in this cause.

Various questions of law were presented in the argument which can now be determined, so that the case may be placed in a condition to be finally disposed of at the next term when the verdict of the jury is rendered on the issues submitted. The counsel of the defendant insists, "that the court, being restrained by the process act of 1793 [1 Stat. 333], cannot grant the relief to stay proceedings in the state court." To determine this question we must briefly consider the nature and extent of the equitable jurisdiction of this court. The circuit courts of the United States are created and invested with jurisdiction by acts of congress, and in all cases to which the judicial power of the United Stats may extend that jurisdiction both in law and equity may be made superior and exclusive. In a certain class of cases the jurisdiction of these courts is made concurrent with the jurisdiction of the state courts. The federal and state courts are separate and independent tribunals, and in all cases where they may exercise concurrent jurisdiction they carefully avoid a conflict by uniformly observing the well-settled rule that the court that first takes possession of the controversy, or the property in dispute, must be allowed to dispose of it finally without interference or interruption from the co-ordinate court. In all cases where the jurisdiction of the federal courts is made original and exclusive, it is also necessarily superior, and all actions of state courts upon such questions are regarded as nullities by the federal courts.

How far this judicial power of the United States may be extended under the constitution is always a question for the legislative wisdom and discretion of congress, in enacting a statute on the subject, and the constitutionality of such statute, when questioned, can only be determined by the judicial department of the general government. The United States circuit courts within the limits of their authority as prescribed by statute,

are invested with such equitable jurisdiction as is usually exercised by a court of chancery; and in all cases coming within their cognizance, where equitable elements are involved, may restrain persons within their jurisdiction from proceeding in any of the courts of law of the United States, or in any foreign court; so that they may adjust and determine all equities between the litigant parties. This injunctive relief against proceedings in another court is not affected by any prohibition directed to such court, but by process restraining the plaintiff personally from taking further steps. The writ of injunction in no way affects or interferes with the action of the court in which the proceedings are pending; it assumes no superiority over such court, or denies its jurisdiction. 2 Story, Eq. Jur. § 875; Adams, Eq. 195.

If the act of March 2d, 1793, had never been passed, a circuit court of the United States, in exercising its equitable jurisdiction as other courts of chancery, would hardly have issued a writ of injunction directed to a state court. It may be, that said act was intended to prevent a writ of injunction from being issued to a party to prohibit him from carrying on proceedings in a state court; but certainly such statutory restraint can only apply where the state court has full and concurrent jurisdiction with the federal court of the parties and subject-matter in dispute. The original and exclusive jurisdiction of the United States courts would amount to but little, if they had no power to maintain, secure, and enforce it by proper process against persons who seek to evade, or who openly disregard and defy their authority.

The constitution invests congress with the authority to establish uniform bankrupt laws; and where that authority is exercised, the act of congress supersedes all state legislation on the subject, and all rights and liabilities subsequently arising under such bankrupt act can only be heard, adjusted, and determined in the courts of the United States, unless otherwise provided in such act. A national bankrupt law is a supreme law of the land, and the courts of this state are as much bound to observe its provisions as if it had been enacted by our state legislature. Under the bankrupt act, proceedings in bankruptcy must be commenced in the United States district courts, and such courts have full and complete jurisdiction, both in law and in equity, over all matters relating to the settlements of the estates of bankrupts, and for such purposes do not need the active assistance of any other court.

Congress, however, in its wisdom has seen proper to confer upon circuit courts, concurrent jurisdiction with the district courts of the same district in certain cases where the title of property of the bankrupt is in dispute, or the claim of the assignee to the assets is denied, embarassed, or resisted; and where liens and priorities are to be ascertained, adjusted, and enforced, by the methods usually resorted to by courts of chancery. After consulting many of the adjudged cases referred to by counsel, making a fair and reasonable construction of the statute, and keeping in view the purposes for which the bankrupt system was established, we are well satisfied that this court, in the exercise of its equitable jurisdiction, can declare void any transfer of the property of a bankrupt which is fraudulent under the bankrupt act, and may, by writ of injunction, restrain any party to such fraud from attempting in any manner to carry out the fraudulent transaction.

The subject of controversy in this case comes fully within the jurisdiction of this court. A docketed judgment under the laws of this state is a security for money, and has the force and effect upon the land of the judgment debtor of a mortgage after the time of redemption has passed (Perry v. Morris, 65 N. C. 221), and comes within the meaning of the 35th section of the bankrupt act. If the jury at the next term, in passing upon the issues directed to be submitted, shall find such a state of facts as will authorize us to pronounce the judgment in question in this case fraudulent and void, we shall not hesitate to issue a writ of injunction to protect the rights of bona fide creditors, and prevent guilty parties from deriving any benefit from a fraudulent transaction.

The objection to the plaintiff's bill for the want of proper parties cannot be sustained. It appears that the plaintiff, as assignee, offered the land in question for sale, and after consultation with the creditors of the bankrupt, and for the purpose of securing a fair price for said land, requested Robert D. Whitley to bid at the sale for the benefit of the creditors. At the sale the said Whitley was declared to be the last and highest bidder, but no conveyance has been made to him. He was merely an agent, and has no personal interest in the matter. The general rule in a court of equity upon this question is, persons must be made parties to a suit, who are interested in the subject-matter in dispute, whose rights may be affected by the proposed decree, or whose concurrence is necessary to a complete arrangement. Adams, Eq. 3, 12. A person who merely acts as the agent of another in purchasing at a sale the property in dispute, has no interest in the subject, and is not a necessary party. In such a case all difficulty may be avoided by the agent filing a written renunciation of all interest in the suit before a final decree is made. Daniell, Ch. Prac. 191; Ayers v. Wright, 8 Ired. Eq. 229. The injunction in this case is continued until the case is heard upon the verdict of the jury on the issues directed to be submitted.

[NOTE. This case was taken by appeal of the assignee to the supreme court. Mr. Justice Miller delivered the opinion of the court, in which

he said: "The circuit court in this case submitted the question of fraudulent preference to a jury, but with the opinion of that court in the case, as found in the record, the jury was probably misled as to the law. At all events, in such issues from chancery submitted to the jury their verdict is not conclusive, and we think the intent to secure a preference in this case by means of this judgment, both on the part of the bankrupt and the judgment creditor, so clear, that we feel bound to reverse the decree and to remand the case with instructions to enter a decree in favor of plaintiff, that the judgment of T. L. Alexander is void as against the assignee, and is no lien on the property of the bankrupt in the hands of his assignee." 21 Wall. (88 U. S.) 500.]

LITTLE (BANGS v.). See Case No. 839.

LITTLE (BLUNT v.). See Case No. 1,578.

Case No. 8,394.

LITTLE et al. v. GOULD et al.

[2 Blatchf. 165.] [1]

Circuit Court, N. D. New York. Feb. 27, 1851.

COPYRIGHT—COURT REPORTS — CONSTITUTION AND ACTS OF NEW YORK—"NOTES"—STATE REPORTER.

1. The provision of the 22d section of the 6th article of the constitution of the state of New York, adopted in 1846, that all "judicial decisions shall be free for publication by any person," is not repugnant to the constitution and laws of the United States.

2. Nor is the 2d section of the act of the legislature of the state of New York, passed April 9th, 1850 (Laws 1850, c. 245), which provides that "the copyright of any notes or references made by the state reporter" to any of the reports of the decisions of the court of appeals "shall be vested in the secretary of state for the benefit of the people" of the state, inconsistent with the said provision of the constitution of the state of New York.

[Cited in note to Gould v. Banks, 53 Conn. 415, 2 Atl. 886.]

3. The various acts passed in relation to the publication of the reports of the court of appeals of the state of New York.

4. The word "notes" in the said act of 1850, comprises the summary of the points decided by the court which immediately follows the title of the suit in each case reported, and the footnotes in the volume of reports, and the statement of the arguments of counsel.

[Cited in Banks v. Manchester, 23 Fed. 145; Banks v. West Pub. Co., 27 Fed. 61.]

5. The abstracts of the pleadings and the statements of facts, which form the basis of the decisions reported, are neither "notes" nor "references."

6. The "notes and references" intended by the act do not embrace such original notes and references as the reporter may see fit, of his own accord, to superadd to what would otherwise be, in themselves, complete reports of the cases reported by him.

7. As to what is covered by the word "references" in the act, quere.

8. In pursuance of law, the state reporter, the secretary of state and the comptroller of the state of New-York, contracted with L. that he should, during the term of five years, publish the decisions of the court of appeals, and have the exclusive benefit of the copyright to be taken out in behalf of the state, of the notes and references and other matter furnished by the state reporter connected with such decisions, which contract was therein declared to be an assignment and transfer to L. of the copyright of the matter so published. The contract was made after the passage of said act of 1850. The reporter was a salaried officer, appointed by the state authorities, under laws which declared that he should have no pecuniary interest in his reports, but that they should be published by contract, and that it should not be lawful for the reporter, or any other person within the state, "to secure or obtain any copyright for said reports of judicial decisions," but that the same might be published by any person. After said contract was made, the reporter prepared a volume of said reports, and the necessary steps to obtain a copyright for it under the acts of congress were taken in the name of the secretary of state of the state of New-York, in trust for said state. This volume was, during the five years, printed and published by L. under his contract. Subsequently, and during the five years, G. reprinted and published the volume: *Held*, on a motion by L. for a provisional injunction, that he was entitled to such an injunction restraining G. from publishing or selling any copies of the reports of cases argued and determined in said court, already published or to be thereafter published by L. in pursuance of his contract, containing any of the head-notes or summary statements of points decided, or any foot-notes, copied or taken or colorably altered from any book so published by L.

[Cited in Yuengling v. Schile, 12 Fed. 100; West Pub. Co. v. Lawyer's Co-operative Pub. Co., 64 Fed. 364.]

[Cited in Nash v. Lathrop, 142 Mass. 39, 6 N. E. 563.]

9. Considerations stated, in regard to the granting of provisional injunctions.

This was a motion for a provisional injunction, founded upon a bill and affidavits. The plaintiffs [Edwin C. Little and Oliver Scovill] claimed the exclusive right to print, publish and sell a book entitled "Reports of Cases Argued and Determined in the Court of Appeals of the State of New-York, with Notes and References and an Index, by George F. Comstock, Counsellor at Law, Vol. III." They alleged that this right had been violated by the defendants [Anthony Gould and others], and prayed an injunction to restrain its further infringement. The bill set forth that, in pursuance of an act of the legislature of the state of New York, passed May 12, 1847 (Laws 1847, p. 342, c. 280, § 73), Mr. Comstock was duly appointed reporter of the decisions of the court of appeals, under the official denomination of "State Reporter," and that he immediately entered upon the execution of his office; that, on the 1st day of September, 1850, he prepared the volume in question, the contents whereof were summarily described in the bill; that, by the laws of the state of New York, the state reporter was constituted a public officer, and was entitled to a salary in full compensation for his services as such reporter; that the original manuscript matter composed and written by him in virtue of his appointment, became the property of the people of the state of New York, and

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

that they were the legal assigns of Mr. Comstock of all such original manuscript; that, by the laws of the state of New York, the reports prepared by the state reporter were required to be published under his supervision, by contract to be entered into by him, in conjunction with the secretary of state and the comptroller of the state of New York, with such person as should agree to publish and sell the reports on the most advantageous terms to the public, and at a price not exceeding three dollars for a volume of five hundred pages, and to furnish to the secretary of state sixty-four copies of each volume of the reports, bound in leather; that, in pursuance of such law, on the 29th day of April, 1850, a contract was entered into by Mr. Comstock, state reporter, Christopher Morgan, secretary of state, and Washington Hunt, comptroller, with the plaintiffs, whereby it was agreed that the plaintiffs should, during the next ensuing five years, publish the decisions of the court of appeals, and have the exclusive benefit of the copyright to be taken out in behalf of the state, "of the notes and references and other matter furnished by the reporter connected with said decisions," which contract was therein declared to be "an assignment and transfer of the copyright of the matters so published" to the plaintiffs; and that the plaintiffs agreed to publish such decisions in the manner and on the terms required by law and specified in the contract, and to deliver the number of copies required by law, and ten additional copies to the reporter, for exchanges, and that they would at all times keep the work on sale at a price not exceeding two dollars and fifty cents per copy. The plaintiffs further averred that, by an act of the legislature of the state of New-York, passed April 9th, 1850, it was provided that the copyright of any notes and references made by the state reporter to the reports of the judicial decisions of the court of appeals should be vested in the secretary of state, for the benefit of the people of the state; that, on the 20th day of November, 1850, a printed copy of the title of the book in question was deposited in the office of the clerk of the district court of the United States, according to law; that the plaintiffs, by virtue of their contract with the state, were vested with the sole rig... to publish the original matter composed by Mr. Comstock and contained in the volume in question, and were entitled by law to be protected in the enjoyment of that right; that, on the 21st day of November, 1850, and in pursuance of their contract, the plaintiffs printed and published the work, and caused to be inserted and printed, on the proper page of each copy thereof, the words, "Entered, according to act of congress, in the year 1850, by Christopher Morgan, secretary of state, in trust for the state of New-York, in the clerk's office of the district court of the United States for the Northern district of New-York;" that, within three months from such publication, they delivered a copy thereof severally to the clerk of the district court, the librarian of the Smithsonian Institute and the librarian of the congress library; and that they had at all times kept, and still had on sale, a sufficient number of copies of the work for the use of the public, at the stipulated contract price; and that, with full knowledge of the facts set forth in the bill, and without the consent of the plaintiffs, the defendants had caused the work to be printed and published, and had sold many copies, and had on hand many copies thereof.

Accompanying the bill was an affidavit made by one of the plaintiffs, verifying an original letter thereto annexed, bearing date October 16th, 1850, and addressed to the governor and secretary of state of the state of New York, by the defendants, in which they avowed that they had commenced the printing, and were about to publish an edition of the work in question, describing it by its full title. The letter concluded as follows: "This notice is given, to the end that you may resort to any legal measures for the purpose of restraining our action, which you may be advised to take; and, in case you omit so to do forthwith upon the receipt of this notice, we will give the same in evidence on any motion you may subsequently make for an injunction or other process against us."

No formal answer had been put into the bill, but an affidavit sworn to by William Gould, one of the defendants, was read in opposition to the motion, in which it was stated that, after the sending of their letter to the governor and secretary of state, they proceeded with their enterprise therein mentioned, and prosecuted the same in the city of Albany, where the plaintiffs and the state officers also resided, without being notified by either of any objection to the further prosecution of their undertaking; that the defendants were abundantly able to pay many times the amount of any damages which could lawfully be awarded against them for the supposed injury complained of by the plaintiffs; that their books would furnish the ready means of ascertaining the number of copies of Comstock's Reports which they might sell; that the sale of their edition would be almost entirely defeated, and irreparable injury would be done to them, should an injunction be now allowed, while no damage not susceptible of ascertainment and compensation would accrue to the plaintiffs from the denial of an injunction; that they were advised by their counsel and believed they should be able to show that Mr. Comstock was not lawfully appointed state reporter, and that the people of the state of New York did not become his assigns; that the plaintiffs were not the legal assigns of the copyright of the book in question; that only a single number of the

volume described in the bill had yet been published by the plaintiffs; that Christopher Morgan, secretary of state, was not the author or the legal assign of the author of the work; that the defendants had acted in the premises in good faith, under the belief that they had the constitutional, legal and equitable right to do what they had done; and that, as they were advised by their counsel and believed, they had a good and substantial defence on the merits to all the matters contained in the bill.

John C. Spencer, Nicholas Hill, Jr., and John K. Porter, for plaintiffs.

Azor Taber and Otis Allen, for defendants.

CONKLING, District Judge. To maintain the denial by the defendants of the plaintiffs' title, their counsel rely mainly upon a provision contained in the constitution of the state of New-York.

By the constitution and laws of the United States, authors are invested with the exclusive right and liberty, for a limited period, of printing, re-printing, publishing and vending their books; and this right is extended to their executors, administrators and assigns. The right is held to belong to the reporters of judicial decisions in common with other authors, to the extent of their authorship in the composition of their works. It does not comprise the written opinions of the judges, because of these the reporter is not the author, and it has been said by the supreme court of the United States that the judges of that court cannot confer on the reporter of its decisions any copyright in the written opinions delivered by them.

Under this well-known state of the law of the land, as declared in the constitution and statutes of the United States, and by the authoritative interpretations they had received, the people of the state of New-York saw fit, in 1846, by the 22d section of the 6th article of the constitution adopted in that year, to ordain as follows: "The legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person." According to the interpretation given by the counsel for the defendants to the second member of this section, its direct and sole design was, so far as judicial decisions are concerned, to secure to all persons the right to do precisely what the court is now called upon to restrain the defendants from doing—the right to re-print and sell, ad libitum, any volume of reports published in pursuance of any law of the state enacted in obedience to the injunction contained in the first branch of this section. The counsel insist, therefore, that the act of April 9th, 1850, mentioned in the bill of complaint, purporting, to a limited extent, to invest the secretary of state, for the benefit of the people of the state, with the copyright of reports to be prepared by the state reporter, is unconstitutional and void.

One of the answers given to this objection is, that the expression "judicial decisions," occurring in the last member of this section of the constitution, does not admit of being restricted to the sense thus ascribed to it; but that the provision embraces, by its very terms, "all" judicial decisions, whether required by law to be published or not, and would extend, therefore, to the reports which have been, and are likely to continue to be, published, of the decisions of other courts of the state of New York, as well as to the reports now in controversy. And it is rightly argued that, if this is the true construction, and if it is true, also, that the absolute common right intended to be secured was that of re-printing reports prepared and published by others, it would follow that this provision of the constitution of the state of New York is repugnant to the constitution and laws of the United States, and, therefore, void; for, it is undeniable that a state cannot in any form interfere in this respect with the rights of private persons. For this reason, unless this interpretation of the language of the state constitution is unavoidable, it ought to be rejected; and, after carefully considering the ingenious argument of the counsel for the defendants, designed to show that the judicial decisions referred to in the last member of the section under consideration, are such only as shall be designated by the legislature for publication in obedience to the first part of the section, I am of opinion that this proposition cannot be maintained. It is inconsistent with the phraseology actually used, and with the omission of words which, if such an interpretation had been intended, would naturally have been employed. The words "all judicial decisions" must be held to mean what they naturally import—not all such judicial decisions only as the legislature should direct to be published, which is what they do not import. It follows, then, that if the license designed to be secured to all persons, extends to the re-printing of all reports prepared and published by others, notwithstanding a copyright may be asserted therein by the author, this provision is obnoxious to the objection that it transcends the limits of state authority, and is, consequently, invalid. It is necessary, therefore, as already observed, to seek for it some other interpretation which, while consistent with the language of the provision, and with its spirit, so far as that can be discerned, shall be consistent also with the constitution and laws of the United States; and, in my judgment, there is no serious difficulty in finding such an interpretation, although it may be no easy task to discover the precise nature of the evil against which the provision was designed to guard.

On looking into the proceedings of the convention, I observe that this section was pro-

posed by a member, after the adoption, on the same day, of a resolution to arrest all further debate on the article relating to the judiciary, and, having been decided by the president to fall within the scope of this resolution, the vote upon it was taken immediately, without explanation or debate, and it was adopted by a majority of twenty-seven. Its language is mandatory, and it is addressed to the legislature. It directs: (1.) That provision shall be made by law for the speedy publication of all statute laws, and of such judicial decisions as the legislature may deem expedient; and (2.) that all laws and judicial decisions shall be free for publication by any person. This last direction is obviously intended to promote and extend the design of the first. This design was expressed in the section as originally proposed and adopted, by the addition, to what now stands as the first sentence, of the words, "so as to render the same easy of acquisition by the people;" and then followed, separated only by a semi-colon, the words which now stand as the second sentence. The words just quoted were expunged in the process of final revision, doubtless because they were seen to be wholly unnecessary, the object being too apparent to require elucidation, and a period was substituted for the semi-colon. I have narrated the history of this section, not because it appears to me to shed much light upon the question under consideration, but because it is relied on by the counsel for the defendants to support the interpretation on which they insist. A deliberate review of their argument on this point has failed to convince me of its soundness. The just view of the subject appears to me to be this. The first part of the section having peremptorily enjoined the speedy publication of the more authoritative and important judicial decisions of which it most concerned the public to be speedily apprised, the rest was left to private enterprise; but, lest some impediment should be thrown in the way, (not by the claim on the part of the author to copyright, which was beyond the power of the convention,) but by the legislature or the courts, or in some other way not easily divined, it was, by the second part of the section, ordained that no such restriction should be imposed, and it was made the duty of the legislature, if necessary, to see that this should not be done. In other words, it was declared, not that when one person had performed the labor of preparing, and incurred the expense of printing from manuscript, a volume of reports, any other person should be at liberty, in spite of the author or his assignee, to intercept and appropriate, or destroy, the just rewards of the enterprise, by rapaciously seizing upon the book and re-printing it, but that the right to engage in such original enterprises should remain common to all. Assuming this, as I feel warranted in doing, to be the just interpretation of this constitutional provision, I dismiss it from further consideration.

But it is further objected by the counsel for the defendants, that, conceding the validity of the act of April 9th, 1850, in virtue of which the copyright of the book in question is claimed by the plaintiffs, still the defendants are not chargeable with any infringement of this right, because, as they argue, the book does not contain any thing which can properly be denominated "notes or references," to which alone a copyright in behalf of the people of the state of New-York is asserted by the act. The answer given to this objection by the learned counsel for the plaintiffs is, that the prohibition contained in this act against the securing or taking by any person of a copyright for the reports of cases decided by the court of appeals, with the exception therein mentioned, is in conflict with the provisions of the constitution and laws of the United States securing, absolutely, to authors and their assignees, the exclusive right to the fruits of their intellectual labors. But to this it may be replied, that Mr. Comstock having consented to accept and hold his office, and to prepare the book in question for the press, under a law of the state expressly declaring that he should have no pecuniary interest in the work, and that no copyright should be taken therefor, except to a limited extent by the secretary of state, for the benefit of the people of the state, must be considered as having surrendered his rights as author, and was incompetent to confer them on another; or, it may be said—which, however, would be little else than the assertion of the same principle in a different form—that the rights and disabilities of his office being prescribed by law, are to be regarded as conditions of the tenure by which it was held, which were binding upon him, and which a court of justice ought not to aid him in violating. But it is to be further observed, that the enjoyment of the right in question is by law made to depend, except in the case of an unpublished manuscript, upon the condition of taking certain steps demonstrative of the author's intention to insist upon his rights in this respect, and adapted to convey notice to all others of such intention, and that, if he omits this precaution, he is to be deemed to have abandoned his claim to protection. Now, in the present case, the author has not complied with this condition. It is said, indeed, that Mr. Morgan is the assignee of the rights of the author, and, as such, has taken the required measures for their security. But Mr. Morgan acted, throughout, in a fiduciary and representative character, as the agent of the people of the state of New York, and in execution of a trust imposed upon him by law. And it thence follows, I think, that he could not in that character acquire, and that he was therefore incompetent to convey to the plaintiffs, any rights cognizable in a judicial tribunal, except those of which, according to the terms of the laws under which he acted,

he was to become the recipient. To this extent, however, it may be assumed, as I do not understand it to be denied, that he might lawfully act, and that his acts ought to be held valid and effectual by this court, provided the laws under which he acted are, as I hold them to be, not inconsistent with the constitution of the state of New York. It becomes necessary, therefore, in the next place, to ascertain the limits of the authority vested in the secretary of state, in trust for the people, by the act of April 9th, 1850; and, for this purpose, before proceeding to notice more particularly the provisions of this act, I propose to advert to some antecedent enactments relating to the subject.

At the session of the legislature next after the adoption of the constitution, an act was passed providing for the appointment, by the governor and lieutenant-governor, of a reporter of the decisions of the court of appeals, to be denominated "State Reporter," who should hold his office for three years, unless sooner removed by the concurrent vote of both branches of the legislature. This act (Act May 12, 1847, c. 280, §§ 73, 74) contains the following enactment: "The reporter shall have no pecuniary interest in such reports, but they shall be published by the secretary of state, under the supervision of the reporter, by contract to be entered into, pursuant to the provisions of the act, entitled 'An act in relation to the public printing,' passed March 5, 1846. Such contract shall be made with the person who, in addition to furnishing the said secretary sixty-four copies of each volume of said reports, bound in leather, as soon as may be after the same is prepared, shall agree to publish and to sell them at the lowest price by the number and volume, according to the pages therein contained; such reports shall be published in numbers every second month. And the reporter shall prepare for each volume such digests and tables of contents as are usually prepared for similar reports. If the reporter shall neglect to discharge his duty faithfully, it shall be the duty of the said court to report that fact to the legislature, to the end that he may be removed from office. The reporter shall not practise as an attorney, counsellor or solicitor in any court." Of the copies to be delivered to the secretary of state, the act requires one copy to be by him delivered to the clerk of each county of the state. It was under this act that Mr. Comstock, as alleged in the bill, was on the 27th day of December, 1847, appointed state reporter. By another act, passed on the same day, the salary of this officer had been fixed at the sum of $2,000 [Laws N. Y. 1847, p. 312].

By an amendatory act passed April 11th, 1848, the mode of appointing the state reporter was changed by the association of the attorney-general with the governor and lieutenant-governor for that purpose, and it was again enacted that the reporter should "have no pecuniary interest" in the reports to be prepared by him as such reporter, but that the same should "be published under the supervision of the reporter, by contract to be entered into by the reporter, secretary of state and comptroller, with the person or persons who, in addition to furnishing the said secretary of state with sixty-four copies of each volume, shall agree to publish and sell the said reports on terms the most advantageous to the public, and at a rate not exceeding the price of three dollars for a volume of five hundred pages, regard being had to the proper execution of the work." The 3d section of this act is as follows: "§ 3. It shall not be lawful for the reporter, or any other person within this state, to secure or obtain any copyright for said reports, notes or references, but the same may be published by any persons." It may not be amiss here also to recite the remaining provisions of this act. They are contained in the 4th section, and are as follows: "As often as the reporter shall have prepared for publication sufficient of the said reports, with notes and references, to constitute two hundred and fifty pages of the usual size of law reports, he shall cause the same to be published in pamphlet form, with such headings as will appear in the bound volumes, and shall furnish a copy thereof to each county clerk's office at the expense of the state, and keep the same on sale at contract prices for all persons who may want to purchase; such printing to be done by the person who shall contract to publish the reports under this act, at and in proportion to the prices stipulated in his contract." Act April 11, 1848, c. 224.

The only remaining enactments which it is necessary to notice, are contained in an act to amend that last cited, the third section of which is thereby declared to be amended so as to read as follows: "§ 3. It shall not be lawful for the reporter, or any other person within this state, to secure or obtain any copyright for said reports of the judicial decisions of the court of appeals, but the same may be published by any person." The act further provides: "§ 2. The copyright of any notes or references made by the state reporter to any of said reports shall be vested in the secretary of state, for the benefit of the people of this state." Act April 9, 1850, c. 245.

Now, the question is whether, according to the proper construction of the words, "any notes or references made by the state reporter to any of said reports," contained in the last mentioned act, these words comprise any, and, if so, what portion or portions of the volume in controversy. The counsel for the defendants strenuously insist they are referable exclusively to such original notes or references as the state reporter might see fit, of his own accord, to superadd to what would otherwise be in themselves complete reports of the cases by him reported; and the example of the late Mr. Justice Cowen, while reporter to the supreme court of the state of

New-York, to whom the profession were so much indebted for the learned essays with which his great industry and love of jurisprudence impelled him to accompany his reports, is adduced as an example.

The words "notes or references," as we have seen, first occur in the act of April 11, 1848, c. 224. By the 3d section of that act, the state reporter and all other persons are expressly forbidden "to secure or obtain any copyright for said reports, notes or references;" and the 4th section directs the immediate publication of the reports, from time to time, as often as "the said reports, with notes and references," shall be sufficient to make two hundred and fifty pages. Now, it is to be observed, that the words in question, in the sense in which they are understood by the counsel for the defendants, import nothing that has ever been supposed to pertain to the business of reporting judicial decisions, and nothing, therefore, which a reporter has ever done except at his own option merely. It is what few reporters have in fact done to any considerable extent, and what others have altogether omitted. There is nothing in either of the statutes relative to the subject, expressive of any design to exact this kind of labor of the reporter, and nothing in any other part of them indicative of any expectation that he would engage in it. It was what the state reporter might, perhaps, lawfully do, to a moderate extent, if he should see fit, but what he certainly was at liberty to omit at his pleasure, and what it could not therefore reasonably be assumed he was likely to undertake. It was what, if he should perform it, would be the fruits of his extraordinary labor, and that to the pecuniary profits of which, therefore, he would in justice be exclusively entitled. Without stopping, then, to inquire whether the legislature had the power, is it probable that it entertained the design to deprive him of the reward due to his enterprise and learning? And, having done this by the prohibition contained in the 3d section of the act, is it probable that it would have been assumed, as it seems to have been done in the next succeeding section, that the reporter would nevertheless gratuitously accompany his reports with such notes or references? I am of opinion that these questions must be answered in the negative; and, unless the words in question are to receive a different interpretation in the act of April 9th, 1850, which, to the extent of its provisions, must govern the rights of the plaintiffs, so far as they depend on state legislation, it follows that the rights with which the act invests the secretary of state, are not restricted to the narrow limits insisted on by the counsel for the defendants. The two acts being in pari materia, the presumption is strong that the words "notes or references" were not designed to be used in different senses. But, in truth, the interpretation which they appear to me, as I have already stated, to require in the act of 1848, is fortified, in its application to them, in the act of 1850. This act declares, that the copyright of any notes or references made, &c., shall be vested in the secretary of state, for the benefit of the people. Now, bearing in mind the nature of the notes or references of which the words of the act are supposed by the defendants' counsel to be descriptive, and the improbability that the reporter would even take the trouble to make them at all, is it to be imagined that the legislature thought it worth while, to say nothing of the injustice of doing so, solemnly to claim them as the property of the state? I think not; and it follows, therefore, that these words were intended to designate some portion or portions of the reports, constituting an essential ingredient of their integral composition, and which the state reporter, as such, was therefore bound to supply. The next question, then, is—what part or parts of the reports are to be considered as comprised by these words? And herein lies the chief difficulty of determining their true interpretation.

The word "note" has many significations. Among the fifteen definitions given of it by Webster, the greatest lexicographer of the English language that has yet appeared, the twelfth is this: "Annotation; commentary; as the notes in Scott's Bible; to write notes on Homer." This is the definition insisted on by the defendants' counsel, but which, for the reasons already assigned, I hold to be inadmissible. The third definition given by Dr. Webster is this: "A short remark; a passage or explanation in the margin of a book;" and his fourth definition is this: "A minute, memorandum or short writing, intended to assist the memory." These are all the definitions which it is pertinent to notice, and the two last mentioned furnish, in my opinion, the proper guide in determining the scope of the word "note" in the statute. That it comprises the summary of the points decided by the court, which immediately follows the title of the suit in each case reported, and the foot-notes, in the volume in question, is indubitable. Does it embrace, also, the arguments of counsel? The process by which this portion of the report of a case is prepared, is well known. The arguments are unwritten, and addressed to the court ore tenus, and a minute or memorandum, or short writing, intended to assist the memory of the reporter, is made by him at the time, from which he constructs the arguments which ultimately appear as one of the constituent elements of his report. I am of opinion, therefore, that they ought to be adjudged to fall within the scope of the expression, "any notes made by the reporter." The only remaining portions of the matter contained in the book in question, (which I understand to be, in fact, the first part of volume 3 of Comstock's Reports, this being all that I have seen, and all that the

defendants in their affidavit admit to have been published,) that are susceptible of being made the subject of copyright, even independently of the state law, are the abstracts of the pleadings and statements of facts, which form the basis of the decisions reported. These can, in no proper sense, be denominated "notes," nor am I able to perceive that they fall under the denomination of "references." If the book contains anything embraced by this latter word, it is the table of contents, entitled "cases reported," which consists of the titles of the suits comprised in the book, with references to the several particular pages where the cases are to be severally found. This constitutes but a very inconsiderable portion of the work; and, as it would be inapplicable to a reprint, unless its pages corresponded exactly with those of the original, I presume it has not been appropriated by the defendants, though I have not seen their book.

It appearing, from this review of the course of state legislation, that a copyright in the work in dispute was reserved to the people of the state, and the authority to secure it for their benefit vested in Mr. Morgan, the next question for consideration is, whether, in virtue of the contract with the plaintiffs, set forth in their bill of complaint, they obtained such a title to the subject of the controversy as is requisite to enable them to maintain their suit.

In some of the English cases to which I am referred, it is said that, to entitle a plaintiff to an injunction, in a case of this nature, he must establish a valid legal title to the copyright. Undoubtedly, when he relies upon a legal title, he is bound to set it forth, and it must appear to be at least primâ facie valid. But, it has also been held, that there are cases in which an equitable title is sufficient to entitle its possessor to protection in this form. In the present case, an agreement has been entered into between the plaintiffs and certain officers of the state, designated by law for that purpose, the author of the work in question and the secretary of state being of the number, by which it is stipulated that, upon the terms therein mentioned, the plaintiffs shall have the exclusive right to the publication of the decisions of the court of appeals, and to the benefit of the copyright to be taken out in behalf of the state therefor, during the period of five years. By an act of the legislature then recently passed, it was declared that the copyright of certain specified portions of the reports of such decisions should be vested in the secretary of state, for the benefit of the people of the state. With respect to the particular manner in which this right should be made advantageous to the people, the act was not explicit. This was left, therefore, measurably, to the discretion of the secretary. He and his associates were, however, expressly required by law to see that the reports were speedily published and exposed to sale at a price not exceeding three dollars per volume. Perhaps they would have been authorized to contract for their publication and sale at that price, on condition that the publisher would pay a certain sum to the state for the privilege, provided a suitable person could have been found willing to become a party to such a contract. But they saw fit, and in strict accordance with the policy adopted by the legislature, of providing a sufficient supply of the reports at moderate prices, so to use the copyright as to make it conducive to that end, by offering to confer the emoluments arising therefrom, for a portion of the period during which it was to continue, on the publisher who would agree to furnish the required supply of the reports at the lowest prices. The plaintiffs having, as it is to be presumed, offered the most favorable terms, the contract was made with them, they stipulating to publish and sell the reports at the very low rate of two dollars and fifty cents for a volume of five hundred pages.

It is objected, that this contract was entered into before the book in controversy was prepared for the press. But, from the nature of the case, this could not have been otherwise without incurring delays subversive of the policy of the laws under which the agents of the state were acting. It seems clear, therefore, without pursuing the subject further, that these gentlemen, in entering into this contract, acted in strict accordance with the laws of the state, and that the plaintiffs are justly entitled to all the benefits arising from it which the state could confer. If it is not valid and effectual to the extent contended for by the plaintiffs, it is altogether nugatory, and the plaintiffs must seek redress, not from a judicial tribunal, for the violation of their copyright, but from the state, for the breach of its plighted faith. It is true they are not the assignees of the entire privilege reserved by the state, of asserting a copyright to the volumes of the reports to be prepared by the state reporter, as they shall be successively issued from the press, through all future time; but, to the beneficial interest in the copyright of the volumes to be published during the stipulated term of five years, it was designed to give them a perfect title. So far as this could be done by the supreme authority of the state, it has been done; and I am not aware of any grounds on which I should be warranted in deciding that it has not been done effectually. If it has not been, it must be because the subject is not in its nature susceptible of municipal regulation. But, in the compact between the state and the state reporter, by which the latter relinquishes and the former assumes the copyright in the reports, I can discern nothing inconsistent with the constitution and laws of the United States. It may be regarded as an assignment by operation of law. Can it be successfully contended,

that the exclusive right guaranteed by the laws of the Union has in this instance become extinct? If not, it must have vested in the state, and passed temporarily to the plaintiffs, who alone, at the present time, are competent to enforce it. Assuming this to be so, I think it follows that the plaintiffs have shown themselves to be in possession of a title to the work in question, of which this court is bound to take cognizance. Indeed, there is no want of precedent in our own courts on this point, if it were necessary to invoke it. Thus, in the case of Folsom v. Marsh [Case No. 4,901], which was a bill in equity to restrain the infringement of Dr. Sparks' copyright in the writings of Washington, the interest claimed by the plaintiffs was described in the bill to consist in their having "assumed a part of the risk and responsibility of publishing the said work;" and the suit was maintained, and a perpetual injunction awarded.

Under this view of the substantial merits of the controversy, it remains only to determine whether an injunction ought to be withheld for the reasons so earnestly addressed by the learned counsel for the defendants to the discretion of the court. It certainly must be conceded that the case involves questions by no means entirely free from obscurity and doubt; and if, as the counsel seem to suppose, this ingredient of itself always constitutes a conclusive objection to the grant of a provisional injunction to restrain an alleged piracy of a copyright, the only duty which would remain to me, after making this concession, would be the simple denial of the motion. But it is for the express purpose of resolving doubts with respect to the rights and responsibilities of parties, that courts are instituted; and, even on a motion of this nature, it is not every kind or degree of doubt that will absolve a judge from the responsibility of deciding questions presented for his consideration, much less from the labor of investigation and reflection. It must, at least, be a serious doubt, which remains after the faithful application of his faculties to its solution. If it were otherwise, this form of redress would be illusory. Doubts affecting a plaintiff's title may arise either from uncertainty with respect to the facts, or with respect to the law on which the title depends. In the present case, I do not understand that there is any dispute concerning the facts—certainly none respecting which there is any probability, not to say possibility, that any conflicting evidence could be adduced. There is nothing, therefore, which it would be proper to submit to the decision of a jury. The questions on which the rights of the parties depend are questions of law, arising mainly out of certain provisions contained in the constitution and statutes of the state of New York, and these questions the court is bound, at some stage of the controversy, to decide. But it is objected that they are new, never having been settled by acquiescence, or by the adjudication of any court. An injunction in a case of this kind, it is said, has never been granted in England without a trial at law; and it is broadly intimated that to do it in this case would be iniquitous. It would, it is argued, be to prejudge the case, to decide it, and to award execution before trial. These are grave objections, and, if well founded, certainly ought to be held to be decisive. But it is because these questions have never before been judicially determined, that they are now before this court for decision; and, with respect to the practice of English courts of chancery, of sending pure questions of law to be settled in a suit at law, the adoption of this practice by the circuit courts of the United States would, for obvious reasons, be an absurdity. As to the assertion that, to allow an injunction now, would be to decide the cause without a trial, it is proper to remind the counsel that the case has already been elaborately argued; and it is easy to see that its legal features are not likely to be essentially changed by the substitution of a formal answer for the affidavit of one of the defendants. The parties, therefore, have already had a trial of the only kind they ever can have while the question is not, as it would be on a final hearing, whether the defendants should be perpetually enjoined, but whether this shall be done temporarily, leaving them at liberty, if they see fit, to re-argue the case on a final hearing.

If any additional reasons were wanting why I should not hold myself at liberty fastidiously to decline the responsibility of giving effect to the conclusions at which I have, however doubtingly, arrived, by granting an injunction, such reasons might easily be found in the demerits of the defendants. There can be no injustice in assuming that they have acted with full knowledge of all the facts detailed in the bill of complaint. Their extraordinary letter, already mentioned, shows this. They are chargeable, therefore, not only with a wilful and apparently very discreditable encroachment upon the rights of the plaintiffs, but with openly arraying themselves against the supreme authority of the state. There may possibly be circumstances, growing out of a spirit of rivalry between the parties, affording some palliation for conduct apparently so unjust and audacious; but of this I know nothing, and it may at least be safely assumed that they can furnish no shadow of justification to the defendants.

I am of opinion, therefore, that the plaintiffs are entitled to an injunction, restraining the defendants, their agents, servants and workmen, until the further order of the court, from further printing, publishing, selling, or otherwise disposing of any copy or copies of the reports of cases argued and determined in the court of appeals of the state of New-York, already published or to

be hereafter published by the plaintiffs in pursuance of their contract with the state set forth in their bill, containing any of the head-notes or summary statements of points decided, or any arguments of counsel, or any foot-notes, copied, taken or colorably altered from any book so published by the plaintiffs.

[A subsequent motion, after answer, to dissolve the provisional injunction was denied. Case No. 8,395.]

Case No. 8,395.

LITTLE et al. v. GOULD et al.

[2 Blatchf. 362.] [1]

Circuit Court, N. D. New York. April 2, 1852.

COPYRIGHT—COURT DECISIONS — STATE REPORTER —NOTES AND REFERENCES—ASSIGNMENT OF COPYRIGHT.

1. The state reporter, Mr. Comstock, by whom the third volume of Comstock's Reports of Cases Argued and Determined in the Court of Appeals of the State of New-York was prepared, was the author of that volume, within the copyright act of February 3, 1831 (4 Stat. 436).

2. Under the acts of the legislature of New-York of April 11, 1848, and April 9, 1850, in relation to the reports of the decisions of the court of appeals, the interest of the reporter in said third volume, as an author, passed to the secretary of state, in trust for the benefit of the state, and it was competent for that officer to take out a copyright for the volume under said act of February 3, 1831.

[Cited in Lawrence v. Dana, Case No. 8,136; Hanson v. Jaccard Jewelry Co., 32 Fed. 203.]

3. The words, "any notes or references," in the act of April 9, 1850, embrace the head-notes and marginal-notes of the reporter, together with the arguments of counsel and the cases cited therein.

[Cited in Banks v. Manchester, 23 Fed. 145.]

4. Where, under said acts of the legislature of New-York, a contract was entered into by the state officers with A., to publish the volumes which should be prepared by the reporter, and the contract declared that it was intended to operate as an assignment of the copyright: *Held*, that A. was, as assignee of the copyright, entitled to a remedy by injunction for its infringement.

[Cited in Yuengling v. Schile, 12 Fed. 106.]

5. A.'s right was not affected by the provision in the 22d section of the 6th article of the constitution of New York, that all "judicial decisions shall be free for publication by any person."

[Bill in equity by Edwin C. Little and Oliver Scovill against Anthony Gould and others.] This was a motion, after answer, to dissolve the provisional injunction granted in this case [Case No. 8,394].

NELSON, Circuit Justice. This is a motion to dissolve an injunction heretofore issued against the defendants, restraining them from publishing or selling the third volume of Comstock's Reports of Cases Argued and Determined in the Court of Appeals of the State of New York. The plaintiffs claim to be the proprietors of the copyright of this work, as assignees of the state, and, as such, to be entitled to the exclusive privilege of printing, publishing and vending the same. The injunction was originally granted on this ground, and the same is now urged against the motion to dissolve it, which is made after the coming in of the answer.

The act of congress passed February 3, 1831 (4 Stat. 436), confers the proprietorship of a book upon any citizen of the United States, or resident therein, who shall be its author, and who shall have complied with the requisites of the act, and upon the executors, administrators or legal assigns of such person. This act was passed in pursuance of the eighth clause of the eighth section of the first article of the constitution of the United States, which declares that congress shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The simple question, therefore, upon this motion is, whether or not the plaintiffs have made out a title to the copyright of the volume in question, as assignees of the same. If they have, the injunction should be retained; otherwise, not.

That Mr. Comstock, the reporter, is the author of the book, within the meaning of the act of congress, is a matter not to be controverted. It was conceded throughout the case of Wheaton v. Peters, 8 Pet. [33 U. S.] 591, that Mr. Wheaton was entitled to the copyright of his Reports, as author; and the only question was, whether he had secured the right by a compliance with the requisites of the statute. A majority of the court, entertaining doubts upon this question, as the facts appeared before them in the record, remanded the cause, with directions to the court below to inquire whether or not these pre-requisites, as determined in that case, had been complied with. The only exception to this view was in respect to that part of the work which embraced the written opinions of the judges. They were regarded as having become the property of the public, and, therefore, as not the subject of a copyright.

The copyright of the work in question was taken out not by Mr. Comstock, the author, but by Christopher Morgan, secretary of the state, claiming to have become the assignee of the author, in trust for the state. A printed copy of the title was deposited in the office of the clerk of the district court, on the 20th of November, 1850, in pursuance of the act of congress; and, within three months after the publication of the book, copies were deposited with the clerk, with the librarian of the Smithsonian Institute, and with the librarian of the congress library.

By an act of the legislature of the state of New-York, passed April 11, 1848 (Laws 1848, c. 224, p. 335), amending a previous act on the subject, it was provided, among other things, that the reporter of the decisions of the court of appeals should have no pecuniary

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

interest in the reports, and that the same should be published under his supervision, by contract to be entered into by the reporter, the secretary of state and the comptroller, with the person or persons who, in addition to furnishing the secretary of state with sixty-four copies of each volume, should agree to publish and sell the same to the public at a price not exceeding three dollars per volume. This act also provided (section 3) that it should not be lawful for the reporter or any other person within the state to obtain a copyright for the said reports, notes or references, but that the same might be published by any persons. By an act passed April 9, 1850 (Laws 1850, c. 245, p. 479), this section was amended so as to read as follows: "It shall not be lawful for the reporter, or any other person within this state, to secure or obtain any copyright for said reports of the judicial decisions of the court of appeals, but the same may be published by any person;" and the following section was added: "The copyright of any notes or references made by the state reporter to any of said reports shall be vested in the secretary of state, for the benefit of the people of this state." The reporter was made a state-officer, with an annual salary as a compensation for his services.

On the 20th of April, 1850, the reporter, the secretary of state and the comptroller, in pursuance of the act of the legislature, already referred to, entered into a contract with the plaintiffs for the publication of the reports for the term of five years, and also for the exclusive benefit to them of the copyright of the same to be taken out on behalf of the state, and the said contract was declared to be intended to operate as an assignment and transfer of the copyright. In pursuance of this agreement, and since the taking out of the copyright of the work by the secretary of state, the plaintiffs have entered upon the printing and publication of the volume of reports in question, have published the same, and have put copies of it on sale at a price not exceeding two dollars and fifty cents each.

Upon this state of the case, I am of opinion that the interest of the reporter in this third volume of his reports, as an author, passed to the secretary of state, in trust for the benefit of the state, and that it was competent for that officer to take out the copyright in pursuance of the provisions of the act of congress of 1831, securing to the state the exclusive right of proprietorship in the work. The reporter must be deemed to have accepted the terms and conditions of the acts of the legislature of April 11, 1848, and April 9, 1850, the effect of which was to vest the interest in the state, he receiving a compensation for his labors by way of annual salary.

It has been argued, by the counsel for the defendants, that the copyright in this case is void, on the ground that no authority is given by the act of congress of 1831 for taking out the copyright in the name of a trustee, for the benefit of another. But, it may be answered, that there is nothing in the act forbidding it. The party to whom the assignment is made, whether for the benefit of another or not, holds the legal interest in the work, as assignee of the author, and comes, therefore, within the very words of the law entitling him to the copyright. Whether a third person has an equitable interest in the work, derived from the author or from the legal assignment, is a question between those parties, in respect to which I do not see that the public interest or policy is at all concerned. The courts will take care of those equitable interests. The legal assignee of the author is competent to take out the copyright, and the secretary of state must be regarded as standing in this position, under the act of the legislature of April 9, 1850.

It has also been argued, that the act of 1850 did not vest in the secretary of state the right of the author of the Reports to its fullest extent, but only his interest in any notes and references made by him to the reports, thereby excluding the reports themselves, as understood in the ordinary acceptation of that term, with head-notes and arguments of counsel. There is certainly much force in this argument, and, in my judgment, it presents the only real difficulty in the case. But, on looking at the course of the legislation of the state on this subject, (there have been three acts passed in relation to it,) I have come to the conclusion that the phrase "any notes or references," in the connection in which it is found, may be fairly construed as embracing the head-notes and marginal notes of the reporter, together with the arguments of counsel and the cases cited therein.

The third section of the act of April 11, 1848, prohibited the reporter, or any other person within the state, from obtaining a copyright of the reports, notes or references, and declared that the same might be published by any person. This provision was absurd enough in connection with the system prescribed in the same act for the publication of the reports, which made it the duty of certain public officers to contract for the printing and publishing with the person who, in addition to furnishing the state with sixty-four copies of each volume, would agree to sell the volumes most advantageously to the public, and at a rate not exceeding the price of three dollars per volume. The idea of obtaining such a contract from a person to whom the benefit of a copyright was denied, is at least remarkable, for the third section covered the whole ground. Any person could republish the volume, with all the notes and references, as soon as it came from the hands of the reporter.

The act of April 9, 1850, was designed to correct this oversight. That prohibits a copyright for the reports of the judicial decisions of the courts of appeal, and allows the same to be published by any person. But it vests the copyright of any notes or references made by the reporter to said reports, in the secre-

tary of state, for the benefit of the people of the state, thus securing to the state the labors of the reporter, which he might otherwise have secured to himself under the copyright act, as the author.

To construe the amendment made by the act of 1850 as simply securing a copyright for any annotations or foot-notes the reporter might choose to make, in the course of reporting the decisions, such as are common in the nine volumes of the reports of the supreme court of this state by the late learned and laborious Judge Cowen, and nothing more, would leave the act of 1850, in respect to the system of reporting, with very little if any advantage over that of 1848. For, whether there would be annotations or foot-notes by the reporter, accompanying the volumes, or not, would depend not upon any obligation or duty on his part, but upon his mere discretion or convenience. Besides, these notes are incidental matters, and, although frequently valuable, constitute no part of the reports of the decisions of the courts. Hence, securing the copyright of them to the state would have been of trifling importance, by way of enabling the public officers to contract for the printing and publication of the volumes of reports agreeably to the terms and requirements of the statute.

The legislature of 1850 saw the error into which that of 1848 fell in attempting to provide for a cheap publication of the reports, and designed to correct it, and have accomplished their purpose, if the view I have taken of the act of 1850 is well founded. But, if the counsel for the defendants is right in his construction, they have utterly failed to accomplish it, and have left the system of reporting as impracticable and absurd as they found it. For, according to that construction, the whole amount of the amendment or alteration is to enable the public officers to secure to the publishers the exclusive right to the annotations or foot-notes, if any, made by the reporter, leaving the volumes of reports, with the head-notes, arguments of counsel, &c., free to a re-publication by any person. I do not think that the language used in the act, although it is obscure and not well chosen to express the intent of the legislature, necessarily leads to such a construction. If not, such a construction should certainly not be admitted.

I have not deemed it necessary to look particularly into the true construction of the provision of the constitution of this state to which reference has been made. Article 6, § 22. The right of the plaintiffs rests exclusively upon the act of congress, which confers a copyright upon authors, and also upon their assignees, who have complied with its provisions. The right is derived under this act, and is not at all dependent upon or affected by the provision of the state constitution. If the plaintiffs are the assignees of the volume in question, by title derived from the author, they have a right to the protection of this court, and no provision of the state constitution can deprive them of it. If they are not such assignees, then the act of congress has no application to this case, and, consequently, this court has no jurisdiction of this case. For, whatever may be the right of the respective parties under the constitution and laws of the state, this court has nothing to do with them. The questions on which such rights depend belong to the state tribunal and depend upon state laws. This court does not interfere with them, unless in cases of jurisdiction on account of the citizenship of the parties; and then it administers the laws of the state. I am free to say, however, that, in my judgment, the provision of the state constitution was not designed to confer upon any person the right to republish the reports of judicial decisions, whether published under the authority of the state or by individuals, but was designed to secure the right to report and publish the decisions of the courts, to all persons who might choose to undertake the business, unembarrassed by any exclusive monopoly in consequence of state legislation.

The interest of the plaintiffs in the copyright, as derived under the contract with the state officers, whether regarded as a legal or as an equitable interest in the same, is sufficient to entitle them to the remedy claimed.

There are some other questions raised in the case which would deserve a consideration, if this were an original application for an injunction. As the injunction has already been granted, and this motion is to dissolve it, I have deemed it best to confine my opinion to the legal rights involved in the case. The motion to dissolve the injunction must, therefore, be denied.

LITTLE (HALL v.). See Case No. 5,939.

LITTLE (McDONALD v.). See Case No. 8,760.

LITTLE (PARK v.). See Case No. 10,715.

LITTLE (PATRIOTIC BANK v.). See Case No. 10,809.

LITTLE (SMITH v.). See Case No. 13,072.

Case No. 8,396.

LITTLE v. UNITED STATES.

[Hoff. Land Cas. 325.] [1]

District Court, N. D. California. Dec. Term, 1857.

MEXICAN LAND GRANT — GENERAL TITLE — TO WHOM ISSUED—OCCUPATION AND CULTIVATION.

The claim must be rejected, because the proof fails to establish that Josefa Martinez, the assignor of claimant, was one of those in whose favor the so-called general title issued, or that she occupied or cultivated the land claimed.

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[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

Claim [by Milton Little] for five leagues of land in Yolo county, rejected by the board, and appealed by the claimant.

Thornton & Williams and Albert Packard, for appellant.

P. Della Torre, U. S. Atty., and Peyton & Duer, for appellee.

HOFFMAN, District Judge. The claim in this case is under the general title of Micheltorena. This title is as follows: "The supreme departmental government not being able to extend, one by one, the respective titles to all the citizens who have petitioned for lands, with a favorable information from Don Augustus Sutter, captain and judge in charge of the jurisdiction of New Helvetia and Sacramento, I, in the name of the Mexican nation, by these letters confer upon them and their families the lands described in their applications and maps, to all and each of them, who has solicited and obtained favorable information from said Señor Sutter, up to this day, so that no one can dispute their titles. Señor Sutter will give them a copy of this in furtherance of a formal title, with which they will present themselves to this government, to extend the same title in the proper form, and upon corresponding sealed paper; and to establish this in all time I give this document, which will be recognized and acknowledged by all the authorities, civil and military, of the Mexican nation, in this and the other departments. Duly authenticated with the seal of the government and the military seal, in Monterey, this twenty-second of December, 1844. (Signed) Micheltorena." The claimants have produced in evidence a petition and accompanying map, addressed to Governor Micheltorena, and soliciting five leagues of land on the borders of the Sacramento, immediately opposite to the establishment of Señor Sutter. The petition is dated Monterey, April 1st, 1844. On the margin of this petition is an order of reference to the secretary of dispatch. On the back of the document is indorsed an order signed by Manuel Jimeno, directing the petition to be referred to Señor Sutter for information as to its contents, and that it be directed afterwards to the Alcalde of San José, "that he may say what occurs to him." This order, as well as that by the governor in the margin of the petition, is dated March 29th, 1844. Beneath the order of Jimeno is written the "informe" of Sutter, which merely states that the land solicited is unoccupied. This certificate is dated April 15th, 1844. The claimants have also produced in evidence a copy of the general title, with a certificate of Sutter annexed to it, stating it to be a copy delivered to Josefa Martinez "for the ends convenient." This certificate is dated April 7th, 1845. Upon these documents the claimants rely to establish that Josefa Martinez was one of the class in whose favor the general title issued, and that she availed herself of the right therein conferred to obtain a copy of the title certified by Sutter.

The first objection urged on the part of the United States is, that this copy was not furnished as stated in Sutter's certificate; but that the latter has been recently given and antedated. Much testimony has been taken by the United States in support of this allegation. A great part of it, however, is wholly inadmissible. In examining the depositions I shall confine my attention to those parts of them which, by the rules of law, are admissible in evidence The copy of the general title, with Sutter's certificate annexed, is produced by one Charles Brown. This witness states that in August or September of 1848, Robert T. Ridley, who claimed to be owner of the land with Milton Little, the present claimant, placed in his hands the papers produced by him as collateral security, for moneys advanced to Ridley by the witness, and that they have remained in his possession ever since. The loan to Ridley the witness admits to have been repaid to him in 1849, but he retained the papers in his possession because Ridley did not ask him to redeliver them. On his cross-examination, the witness gives an account of a trip to Sacramento, to see General Sutter, and of his leaving the papers with A. Bartol, by whom they were subsequently returned to him. It is contended by the United States that the object of this trip was to procure the signature of Sutter to the certificate, and that that object was subsequently effected by Bartol, with whom the papers were left for the purpose. Brown states that in a conversation with A. Packard, counsel for claimant, in his office, about two or three months before the taking of his deposition, he mentioned that he had some papers relating to the land. That Packard asked him for them, and he brought them to him. That shortly afterwards he went to Sacramento on business of his own, and also to ask of General Sutter if the signature was genuine. The account given by the witness of the object of this trip, and his own reasons for making it, are by no means satisfactory. When first interrogated as to the other business he had in Sacramento, he refused to answer, but subsequently stated that his business was with Bartol; that he had no previous appointment with him; that he did not know whether he would find him there or not; that they had had some previous conversation about horses, and he went up to see about selling them. When asked as to his reasons for taking such an interest in ascertaining the genuineness of the paper, he replied, that it was only such an interest as he would feel in the affairs of any friend. That he heard through Mr. Bellamy that his friend Mr. Bassham was interested in the claim. That he did not mention to Bel-

lamy that he had the papers, nor was he requested by Bassham to go up to Sacramento. That he had never spoken to the latter on the subject previous to his trip to Sacramento; and that neither Bassham nor any one else had ever spoken to him on the subject of his going to Sacramento before he went. That no person paid him for the trip or offered to do so, nor did any one know he was going. That he never asked any one acquainted with Sutter's signature whether it was genuine or not; that he never asked Sutter himself whether he had signed it, although he had frequently met him since the papers were in his possession; that he has had no reason recently to doubt the genuineness of the signature, and has never doubted it.

These statements of Brown bear strong marks of improbability. It is difficult to believe, from his own account, that his sole motive in seeking General Sutter was to ask if his signature was genuine. That fact could readily have been ascertained by inquiry of any one of the many persons acquainted with it; and the witness himself states that he never doubted it. If he took so deep an interest in the affairs of his friend Bassham, it is strange that he never spoke to him on the subject of the papers, and that he never even mentioned to Bellamy or to Packard his intention to take this disinterested excursion to Sacramento, to ascertain a fact which he admits he never doubted. That his sole object in going to Sacramento was to see Sutter is, I think, evident. He arrived in the middle of the night, and slept on board the steamboat, and he came back by the return boat at two p. m. of the day on which he arrived. That he did not meet Bartol by appointment is admitted by himself, and testified to by Bartol; and the latter is unable to recollect that any conversation took place between them on that day relating to a sale of horses. But the testimony of Bartol discloses unmistakably the real object of Brown's visit to Sutter. This witness states that about seven o'clock on the morning of Brown's arrival he met him in front of the hotel. That in walking up J street they perceived General Sutter in a drinking saloon, in a state of intoxication. Such being his condition, nothing was said about business, although Brown may have expressed his annoyance at the circumstance. That he and Brown were together during the day, and about an hour previous to the departure of the steamer, Brown asked him to write a letter to General Sutter, being unable to do so himself on account of a felon on his finger. He took Brown to the stage office, where the letter was written by one of the agents. Brown then inquired when he (the witness) was going to Marysville, saying that he had important business in San Francisco, and that if he (witness) would hire a team at Marysville and find Sutter when he was sober, he would pay his expenses, at the same time handing him a package containing the letter which had just been written and a document in Spanish. The witness was wholly unable to read the document, but Brown said to him that it was for a tract of land on the other side of the river.

After delivering the package, Brown left Sacramento in the steamer, and about ten days afterwards, the witness being at Marysville, drove out to Hock farm, the residence of Sutter, to see him. Finding him at home, he delivered to him the package and the letter of Brown. General Sutter examined the paper and retired to another room, and after an absence of from five to fifteen minutes he returned and handed the papers back to the witness. When he first presented them to Sutter, he (witness) observed to him that "he was only carrying out the wishes of an old friend, Mr. Charles Brown, by bringing down those papers to him," (Sutter) and Sutter replied, either then or when he returned the papers to the witness, that it afforded him pleasure to render assistance to an old soldier; that "he knew that man," (mentioning some Spanish name) and that "a grant had been given him for certain lands." After receiving the papers from General Sutter, the witness retained them in his possession until he returned them to Brown, about the end of March or first of April. When the papers were delivered, Brown inquired what had been the witness' expenses, to which the latter replied "nothing." The witness does not recollect whether Brown expressed any satisfaction at the reception of the papers. That the paper delivered to Bartol and by him returned to Brown is the same as that now produced by the latter, is positively stated by Brown himself, the claimant's witness. He omits all mention, however, of the letter addressed to Sutter, which accompanied it, but states that he told Bartol to see Sutter and ascertain whether "it was all right."

Upon a careful consideration of the account of the transaction given by these two witnesses, I have been unable to entertain a doubt as to its true character. The extreme improbability of Brown's story has already been alluded to. It is inconceivable that he should have felt so much solicitude to ascertain the genuineness of a signature which was unsuspected by himself, as not only to go to Sacramento for the purpose, but to be willing to pay the expenses of a messenger to Sutter to make the inquiry. If his instructions to Bartol were such as he states, the latter failed to accomplish the objects of his journey; for it does not appear that any inquiry whatever was made by Bartol, at his interview with Sutter, as to the genuineness of the signature, nor did Sutter say a word on the subject. If the only business of Brown or of Bartol with Sutter was to ask him if the signature was his, it would be most natural that Sutter

should have looked at the document and communicated the result of his inspection to Bartol. On the contrary, he reads the letter of Brown and retires to another room, from whence after a short absence he reappears and expresses his pleasure at being able to serve an old soldier and friend. The nature of the service he was rendering is sufficiently clear. It must have been something more than the acknowledgment of a signature of his own. To obtain that, no appeal to ancient friendship could have been necessary, and as the only paper returned by Sutter to Bartol was that which Bartol had just handed to him, Brown, when he received it from Bartol, must have been as unsatisfied as to its genuineness as when he first sought General Sutter to ascertain, as he says, a fact which he also states he never doubted. Bartol, it is true, does not swear that he saw Sutter write the certificate; nor does he admit that he knew the contents of Brown's letter to Sutter. He even states that he had then no idea what Sutter was to do with the paper; nor did he inquire of Brown, as he supposed the letter to Sutter explained all. But even this version of the story is inconsistent with Brown's declaration that he told Bartol to ask Sutter if the paper was "all right;" and whether or not we suppose Bartol to have been aware of the nature of the service expected from Sutter, it is clear that it was something different from answering a simple inquiry whether a signature purporting to be his was genuine. It seems to me that all the circumstances of the transaction point as unmistakably to its true nature as if it had been positively sworn to by witnesses who had seen Sutter in the act of writing the certificate. But there are other considerations which tend to confirm this view. The document in question is produced for the first time by Brown, a witness examined in this court April 3d, 1857, more than four years after the claim was presented to the board. Up to that time no one seems to have known or suspected its existence. Even Bellamy, who testifies that at the request of Josefa Martinez and her husband, and under an agreement with them, he had the petition drawn up, that he presented it to Micheltorena and afterwards to Sutter, and that he took possession of the land under his agreement with Josefa Martinez, does not pretend that any copy of the general title was obtained, or was certified to by Sutter. The mode in which Brown accounts for its possession by him, and its long suppression, is highly improbable. For it can hardly be supposed that if it was placed by Ridley in his hands as security for a loan, it would not have been returned when the loan was paid. The only person to whom Brown states he showed or even mentioned the document, before his trip to Sacramento, is Albert Packard; and he has not been examined. Nor has Sutter's testimony been taken, although his interests and his feelings would naturally have led him to seek and to insist upon an opportunity of denying and refuting so injurious an accusation. The copy of the general title produced by Brown is sworn by Mr. Bidwell to be in his handwriting. The witness is wholly unable to recollect having made it, and states that he had forgotten every thing about it until it was shown to him on the stand. He recognizes, however, the handwriting, and thinks it must have been delivered to Sutter, for whom he made a considerable number of copies of the general title.

It is evident that the fact of this copy being in Bidwell's handwriting does not bear upon the point in dispute—viz., as to whether the copy was delivered and the certificate attached at the date of the latter. That many copies of the original title may have been prepared by Sutter's direction, in order that they might be delivered when applied for, is probable. I think the testimony which has been reviewed leads us irresistibly to the conclusion that one of these copies having by some means come into the possession of Brown, a certificate of Sutter was attached to it at the time it was presented to Sutter by Bartol. But the testimony of Samuel C. Heaton removes any doubts which might otherwise have been entertained on this point. This witness swears that he accompanied Bartol on his visit to Sutter; that Bartol and Sutter had a little conversation concerning a paper that the former wished Sutter to sign; that Sutter objected but finally consented, took the paper, left the room and returned with the paper. If there was any doubt as to the identity of the paper, the evidence of this witness on that point might be open to criticism. But Bartol and Brown himself admit that the paper given by Brown to Bartol and by the latter presented to Sutter, is the paper now produced. The only question is—Was the object of Bartol's interview to ascertain the genuineness of the signature or to obtain an antedated signature? The testimony of Heaton has merely served to confirm me in a conclusion to which I would independently of it have irresistibly been led. Discarding, then, the copy of the general title and the certificate of Sutter, as affording no evidence of the claimant's title, the only documentary evidence which remains is the petition with the marginal order, the order of reference signed by Jimeno, and the "informe" signed by Sutter. I do not understand that the genuineness of Micheltorena's or Jimeno's signature is disputed. There is, however, a discrepancy in the dates of the several documents for which I have been unable to account. The petition of Josefa Martinez (which it may be remarked is not signed by her) is dated April 1st, 1844. The marginal order of Micheltorena and the order of reference signed Jimeno are both dated March 29th, 1844—three days before the petition

purports to have been written. I have endeavored in vain to conjecture some satisfactory explanation of this circumstance. It might have been supposed that Josefa Martinez, being an ignorant or careless person, had, when drawing the petition, mistaken the date; but Bellamy, the principal witness for the claimant, testifies that the petition and map were drawn up under his direction by Francisco Arce, and that he (the witness) then presented them to the governor, who wrote the marginal order in his presence. Arce was a person of intelligence and consideration, and at one time filled an office under the government. It is singular that both Arce and Bellamy should have fallen into this mistake, or else, if the petition be correctly dated, that the governor and the secretary should have both accidentally antedated the orders signed by them. But, assuming the petition to have been drawn and the orders of reference to have been made as appears on the documents, it is also necessary to bring the petitioner within the class of persons referred to in the general title, to show that previous to the issuing of that document a favorable report of Sutter had been obtained.

The whole case on the part of the claimant fails, unless it satisfactorily appears that the favorable report of Sutter was made at the time it bears date. The evidence on this point consists of the testimony of George W. Bellamy, and the presumption arising from the date affixed to the report, with proof of the genuineness of the signature. But Bellamy, though he swears that General Sutter signed the report in his presence, does not state when it was signed. He adds that "he thinks, though he is not certain, that Mr. Bidwell or Major Reading wrote the body of the report for General Sutter, and then Sutter signed it." The body of the report is admitted to be in the handwriting of Sutter himself. This mistake, which may have arisen from mere inaccuracy of memory, would not of itself justify any inferences unfavorable to the witness. It is proper to notice it, however, among other circumstances to be considered hereafter, upon a just appreciation of which his credibility must depend. As the principal, if not the only evidence with regard to the occupation of the land is that given by Bellamy, the testimony on that subject may now be examined. Bellamy testifies that after Sutter had signed his report, he (witness) returned the paper to Micheltorena, and upon his assurance that the grant would be issued, took possession of the land under an agreement with Josefa Martinez and her husband. That Sutter put him in possession; and that he placed cattle on it, and having borrowed tools from Sutter, made a corral upon it. That afterwards he and Matthews were about to drive some cattle upon it from the Salinas plains, but were prevented by Larkin, to whom Matthews was indebted. That the revolution which soon after broke out prevented them from getting more cattle; and that he then authorized Robert Ridley, who was living at General Sutter's, to take possession of the rancho, take care of the cattle and establish a ferry, which he did. That Ridley remained on the rancho a little less than a year, when he died. He (Bellamy) then authorized George McDougal to take possession of the property and cattle, which McDougal did, and remained there until 1848 when he left.

To disprove these statements the United States have called a large number of witnesses. Samuel Kyburz testifies that he resided at or near Sacramento from October, 1846, until 1848. That in the summer of 1848, one McDowell settled upon the land opposite the city, and within about a mile of a place which the witness had, by the advice of Sutter, selected for himself. That McDowell was the first person who settled on that side of the river within four or five miles of Sutter's "Embarcadero." He built a house about fifty rods from the bank of the river, and a brush fence to keep his mules in. He had his family with him, who still live there. On being asked whether Bellamy ever built a corral and put cattle on the land, the witness replies that he never saw or heard that he or any person ever did so before McDowell; that he never saw any signs of a settlement previous to McDowell's, nor heard of any. On his cross-examination he states that, as to the years 1844 and 1845, he cannot speak positively from his own knowledge, although he is satisfied in his own mind on the subject, but that from 1846 he is sure no one occupied the land, and there were no cattle on it to his knowledge, except stray cattle. He adds that at that time the settlers on that side of the river were not numerous—being only two within thirty miles—viz., Swat and Hardy; and that Sutter assisted McDowell to make his settlement, and directed the witness to send two ox-teams to haul logs for the house, etc.

Daniel Leahy testifies that he resided at Sutter's fort from October, 1845, until April, 1847. That Juan de Swat had a settlement on the opposite side of the river, near what is now called Washington City. That he was frequently at Swat's place up to the spring of 1846. That there was no other settlement at that time in that vicinity. That he never saw a corral there; if there had been one, he could not have helped seeing it; there might have been some cattle on the plains—he never saw them near the river. That the first settlement after Swat's was made by McDowell. He never heard of any claim or settlement by Matthews, Bellamy, Ridley or George McDougal.

David T. Bird testifies that he came to California in 1844, and has resided here ever since, and has been acquainted with the land claimed in this suit ever since his arrival. In 1844 he was residing on Cache

creek, about twenty miles above Sutter's fort, and he traveled over this tract on his way to the fort, and returned the next day. He passed through or over the tract during the year 1844 five times, which he remembers distinctly, and perhaps oftener. After the Micheltorena war and about May 1st, 1845, he returned to Sutter's fort, and continued there in Sutter's employment until 1846, and between these dates was on the tract ten or twelve times. The witness then states that during all this time there was no settlement or improvement upon the land, except those of Swat, about eight miles below. That he thinks he can assert positively that if there had been a corral on the land, he would have seen it. He further states that McDowell was the first person who settled on the land within eight miles of where Washington now stands. That he knew Bellamy; but that he never to his (witness') knowledge built a corral or put cattle on the land; and that neither Ridley or McDougal ever, to his knowledge, lived there. That the Indian who attended to the ferry, established as the witness understood by General Sutter, lived on the Sacramento side of the river, and transported passengers in a canoe, and this mode of crossing continued until 1848. The witness adds that he has frequently hunted deer and trapped on the tract of land in controversy.

William Gordon testifies that he settled on Cache creek in 1842, about twenty-five miles up the river from Washington, and has lived there ever since. That he is acquainted with the settlements on the river opposite Sacramento and for twenty miles up and down. The first settler was Swat, who settled where Washington now is. The next was Knight, who settled about twenty-five or thirty miles above the site of the present town of Washington; and the next was Hardy, who settled in 1845, about eight miles below Knight's place. That there was no other settlement within thirty miles of Washington until 1847, when McDowell made a settlement under some agreement with Swat, as witness was informed. That he never knew of any settlements made by Matthews, Bellamy, Ridley or McDougal, between the years 1842 and 1847, and if there had been any he should have seen them. That he heard several times during that time of Matthews and Bellamy coming to look for land, but never heard of any settlement or claim.

Margaret Taylor, who is the widow of James McDowell, testifies that in May, 1847, her former husband settled on the land at the place where Washington now is, under an agreement with Swat. That Sutter was present when the agreement was made, and assisted McDowell to build his house by furnishing a team to draw logs, etc., and that at the time of this settlement there was no improvement whatever in that vicinity, on the west bank of the Sacramento; and her husband continued to reside in the same place until his death in 1849.

Gilbert A. Grant testifies that he resided in 1849 and 1850 on the west bank of the Sacramento, and acted as agent for Sutter, and had opportunities of learning what lands were reputed to have been granted. That he never heard of any grant having been made below Hardy's place, and that he heard of such a claim for the first time about a month before his deposition was taken.

Marcos Vaca testifies that he has lived about fifteen miles from Sutter's fort since 1843. That a trail led from his rancho to the Embarcadero of Sutter's fort, and that he frequently visited McDowell's house and the Embarcadero. That McDowell made his settlement in 1847, and that up to that time there were no buildings or improvements whatever near the Embarcadero, nor does he remember any on or near the road from his rancho to the Embarcadero. He further states that he never heard of any grant or claim concerning the land near the Embarcadero before 1847.

George T. Wyman testifies that he resided at Sutter's fort from 1841 to 1848, and was engaged in hunting and taking care of stock for Captain Sutter. That from 1844 to 1847 he has been on the land adjacent to the Embarcadero so often that it is impossible to state the number of times. That McDowell was the first person who settled or made any improvements on the land. That he has known Bellamy since the day he arrived, and that during the years 1844, 1845 and 1846 he neither built a corral or put cattle on the tract in question; that if he had done so, he (witness) would surely have known it. That in 1846 there was no corral on the north side of the trail to Vaca's ranch (as stated by Major Snyder, hereafter alluded to). That he saw Bellamy frequently, and that from 1846 to 1849 he never heard him set up any claim for the land in question, or say that he had built a corral or placed cattle upon it. He did not however see Bellamy oftener than once a month during the period referred to.

Willard Buzzle testifies that he resided at Sutter's fort from 1841 until 1843; that he returned in 1844 and remained there until 1847. That he was on the tract in controversy a great many times—on an average, once a month. That McDowell was the first person who settled or made any improvement near the present site of Washington, and this was in May or June of 1847. That Bellamy did not, to his knowledge, build a corral or place cattle on the land, between the years 1844 and 1847. That he saw him frequently, being an old acquaintance, and never heard him set up any claim to the land. That there was no corral near the river, as testified by Major Snyder, except a brush corral which he (witness) helped to build for the purpose of catching horses after crossing. This was built in

1844, and in the fall of that year it was fitted up again, as many horses were brought up. That Bellamy did not assist and was not present when it was made or repaired. It was burnt in 1846, after which another was erected for the same purpose.

Nathan Coombs testifies that from 1843 to 1847 he resided on Cache creek, about twenty-five miles from Sutter's fort. That he was frequently at the fort, and that on his way he passed over the tract in controversy. That the first person who made any settlement upon it was McDowell, whom he saw there in 1849. That he acted as guide for Major Snyder in the fall of 1846, from Sonoma to Sutter's fort. That on their way they passed along the trail from Vaca's rancho to the Embarcadero; but that there was no corral on the spot spoken of by Snyder, that he (witness) can recollect. That he has known Bellamy since 1843, and from that year until 1845 met him frequently; and that up to the summer of 1848 he knows positively that Bellamy did not take possession of the tract, build a corral, or place cattle upon it. That a corral was built of brush near the Embarcadero, which was used by various persons when crossing their stock; and that he never heard of the claim of Bellamy and Matthews until within a few weeks.

To the foregoing testimony on the part of the United States may be added that of John Bidwell and Samuel J. Hensley, witnesses on behalf of the claimant. These witnesses state that McDowell was the first person who settled or made any improvements opposite Sacramento city, at the place now called Washington. On the part of the claimant, the only witnesses who corroborate the testimony of Bellamy are Major J. R. Snyder and Joseph Swanson. Major Snyder testifies that in the fall of 1846 he saw a corral on the land opposite Sutter's Embarcadero, and about one hundred and fifty or two hundred yards back from the river. It was about fifteen or twenty yards to the north of the trail commonly traveled in going from Sutter's fort to Sonoma. He was accompanied at the time by Coombs as guide. The corral was readily seen from the trail. It had in it some horses, which the witness supposed to belong to some trappers who were camping on the river. He afterwards passed along the same trail, about July, 1848, when he again observed a corral near the same place, but whether the same one or not he cannot state. He did not observe, however, on either occasion, the house of McDowell. The witness also states that when he crossed the river in 1846 there was no regular ferry. There were Indians who crossed people over.

Joseph Swanson testifies that he passed over the tract in 1844. There was then a corral there, about one hundred to three hundred yards from the river, a little above the Embarcadero. He is unable to state its size or mode of construction, except that its shape was square or oblong.

From the foregoing abstract of the testimony with regard to the occupation of the land, it is apparent that in every particular, except one, Bellamy's statements are not only not corroborated, but disproved. It is impossible to believe, under the evidence, that Bellamy was put into possession of the land by Sutter; that he placed cattle upon it; that Ridley took possession of it and established a ferry across the river, or that McDougal took possession and remained there until 1848, as stated by Bellamy. Circumstances such as these could not have been unknown to the numerous witnesses who resided in the immediate vicinity. To suppose them to have occurred we must, on the faith of Bellamy's unsupported declarations, attribute to them misstatements which it is difficult to believe not to have been willful.

On one point, Bellamy's evidence is in a slight degree corroborated by the testimony of Major Snyder and Swanson. But these witnesses only testify to the existence of a corral, the object of which is explained by other witnesses, and with the construction of which Bellamy was wholly unconnected. I think that the preponderance of testimony is clearly and decisively against the truth of the statements of Bellamy. It is urged that his testimony is inadmissible on the ground of interest. Whatever force there might have been in that objection, it was not made in season. He was examined and cross-examined without objection. In estimating his credibility however, it ought not to be lost sight of. Bellamy's character has since been impeached by the testimony of several witnesses, and sustained by that of some others of great respectability. If the proofs were more nicely balanced, an inquiry into his general character might be necessary. But where the preponderance of evidence is decisive, the result of such an inquiry could have but little weight. If then we reject the testimony of Bellamy with regard to the occupation of the rancho as untrue, his statement that Sutter signed his report in his presence cannot be received without extreme distrust. We have seen that Bellamy states the body of that report to have been written by Mr. Bidwell or Major Reading. This statement is admitted to be a mistake.

We have also seen that one document at least in this case was written by General Sutter, long since the conquest, and antedated. This fact is of itself sufficient to impair, if not wholly destroy the presumption that might otherwise arise, that the report of Sutter was made at the time it bears date. This presumption and the testimony of Bellamy constitute the only evidence on the part of the claimant to show the time when the report of Sutter was made. No other witness is produced by whom the

petition and report of Sutter were seen prior to 1850. The claimant himself, at the time of filing his petition to the board, seems to have been ignorant of the nature of his title, for he speaks of it in general terms as a grant by Micheltorena to Josefa Martinez, and states that "he has been unable to obtain possession of the said grant, but that Josefa Martinez withholds it from him." Certainly, he does not here refer to the general title, which is the only grant exhibited in this case. That the papers now presented were in existence in 1850, may be admitted. That fact is proved by Bassham and by Mr. Schleiden, who translated them at that time.

But the point to be established is, that Sutter had made a favorable report previously to the date of the general title. The existence of such a report in 1850 no more proves this essential fact, than its existence and production to this court in 1856. Mr. Bassham, the friend of Bellamy, who produces these papers, swears that he received them from Josefa Martinez, or Matthews, her husband, in 1850; and that one of them stated that the papers, together with the grant, had been on deposit with some friend, but that the grant was lost—whether before or after the papers were returned, the witness does not remember. It is to be observed that the witness does not state that the papers are now in the same condition as when received by him. I do not attach much importance, however, to this circumstance, as the inquiry might have been accidentally omitted. But his statement with regard to what Josefa Martinez or her husband told him respecting the grant, deserves more attention. They could hardly have referred to a copy of the general title, for we have already seen that the copy now produced, with the certificate of Sutter, has been recently obtained. If they referred to a grant directly to Josefa Martinez, such as the claimant evidently supposed to exist when he presented his petition to the board, it is clear that they did not claim under the general title of Micheltorena —which is now set up as their original title. I have referred to these alleged declarations because they were put in evidence by the claimant, and because they seem to show that neither Bassham when he obtained the papers, nor Josefa Martinez when she delivered them, had any idea of asserting any rights founded on a petition, a favorable informe of Sutter, and the general title of Micheltorena.

According to Bellamy's account, the petition, after Sutter's report was obtained, was returned to Micheltorena. It is not explained how or when it subsequently passed into the hands of the petitioner. Bellamy also states that upon receiving Micheltorena's assurance that the grant would be issued, he was put into possession by General Sutter. This statement is scarcely credible for several reasons: 1st. The order of Jimeno directed a reference to the Alcalde of San José, as well as to Sutter. It does not appear why a compliance with that order was dispensed with. The report of Sutter merely certifies the land to be vacant. Information would naturally be desired by the governor as to the qualifications of the petitioner, etc., as required by the regulations of 1828. 2d. If Bellamy means to say that he was put into possession by Sutter immediately after the return of the petition to Micheltorena, then Sutter acted wholly without authority, for not only no grant had been issued, but the informes required had not been obtained. If he means to say that he was put in possession after the general title had been issued, it is extraordinary that neither he nor the grantee or her husband applied to Sutter for a copy of the general title. That he did not, may be clearly inferred from his silence on the point. That the copy now produced has been recently prepared, has already been shown. 3d. The land in question was not within Sutter's jurisdiction, but belonged to that of the Alcalde of Sonoma. It is highly improbable that Sutter would have attempted to exercise such a function as that of putting a grantee in possession of land beyond the limits of his own jurisdiction. 4th. If these facts had occurred, Sutter would certainly have remembered them. He has not been examined. On this point, as well as on that relating to the time when he wrote the report, the omission to examine him on the part of the claimant is a pregnant circumstance against him.

After a most careful consideration, I have come to the conclusion that the testimony of Bellamy is not worthy of credit. The alleged occupation of the rancho by him, and the building of the corral, are disproved by such a mass of testimony as to leave no room for doubt on the subject. His statement that Ridley first, and afterwards McDougal, took possession of and remained on the rancho until 1848, and that the former established a ferry, is disproved by the testimony of every other witness examined on the subject—including those produced by the claimant. No one of them ever saw or heard of these persons living on the land, nor was their house or other trace of occupation observed by any one—the corral seen by Major Snyder being shown not to have been built by them, or to have been used for purposes connected with the settlement of the tract. Under all these circumstances, the testimony of Bellamy with regard to the time when Sutter signed his report cannot be regarded as sufficient evidence of the fact; especially, when the testimony of Sutter himself is withheld. The proof, then, of the date of this report is thus found to consist solely in the facts that the instrument has a date attached to it, and that it existed in 1850. But the presumption arising from the date that it was executed on that day, at all times weak, and indulged only in the absence

of suspicious circumstances, is destroyed when we find in the same case a similar paper, executed by the same party, clearly antedated; and where the party who might have testified as to the time when he executed it is within reach, but is not examined. If these observations be just, the claimant has entirely failed to establish by evidence that can be deemed satisfactory the essential fact, that at the date of the general title Josefa Martinez was one of those who had previously solicited lands, and obtained a favorable report from Sutter. But the claimant's counsel rely with apparent confidence on the testimony of Bidwell and Larkin, with reference to the map made by the former.

Mr. Bidwell testifies that, by the request of Governor Micheltorena, he made, in the fall of 1844, a map of the Sacramento valley. This map is not produced, but another is shown to the witness, which he recognizes as a copy of the original "in its general features." On this map the tract claimed in this case is laid down, and marked "Rancho de Bellamy." When cross-examined, the witness states that he is unable to say from what source he derived the information according to which he made his map. "That he does not remember to have seen the papers of Bellamy before they were shown him in court; that it was a matter of general notoriety that Bellamy was trying to get a grant of land there."

Thomas O. Larkin testifies that his impression is that Bidwell made two maps from memory in Monterey. One he gave to the witness, the other to Micheltorena. The former continued in his possession until it was produced before the board in evidence, and it has since remained on file in the surveyor general's office. A traced copy of this map is exhibited.

I have not been able to attribute to this testimony the force assigned to it by the counsel. Assuming that the map produced is an exact copy of that made by Bidwell in 1844, it merely shows that at that time he supposed this tract to be "the Rancho de Bellamy." Had he made the same statement orally or by letter, it would hardly be received as proof that Bellamy had obtained a grant for it. But the maker of the map is himself produced and disclaims all knowledge on the subject. That he did not derive his information on the subject from the archives is evident, for the archives contain no information respecting it. That he did not see the original documents is clear from his own admission, and from the fact that the application was made by, and the title, if any, was in favor of Josefa Martinez, and not of Bellamy. He himself sufficiently accounts for the designation of this tract on the map as the "Rancho de Bellamy," by his statement that "it was notorious that Bellamy was trying to get a grant for it." It was in all probability this fact which led him to mark the land on his map as Bellamy's rancho. The map may perhaps be regarded as proof that at that time Bellamy, or Josefa Martinez and her husband, with whom he was interested, were petitioning for the land; and I do not understand that fact to be questioned. But it does not prove that they ever received a grant, or that Sutter's favorable report had been obtained before the general title issued. To the unsworn declaration of Bidwell, as expressed by the map, that this tract was the rancho of Bellamy, may not unfairly be opposed the declarations of Sutter, made subsequently, that the land was vacant and ungranted, and his advice and assistance to McDowell to settle on it as such; as also the statement of Grant and other witnesses, who swore that they never heard of his claim.

On the whole, I consider that the claimant has failed to establish by satisfactory proofs that his assignor was one of the class in whose favor the general title issued, and that on this ground the claim should be rejected. But if this were less clear, I am of opinion that the neglect to occupy, or to render to the former government any of the considerations upon which the grant was made, if at all, establishes as a matter of fact and of law that she had abandoned all claim to the land before the change of sovereignty. That she never settled upon it, inhabited it, nor ever built a corral upon it, nor did any one else in her behalf, has been shown. That all the neighbors, including Sutter himself, regarded it as vacant up to the time of McDowell's settlement, is abundantly proved; and the omission to obtain a copy of the general title indicates that the claim was probably abandoned as worthless, if it does not justify the inference to which the failure of proofs has conducted us, that she was not one of the class in whose favor it issued. In examining this case, I have sought to confine myself to the proofs which I consider legally admissible. Upon a full consideration, I am of opinion that the claim ought not to be confirmed.

LITTLE (UNITED STATES v.). See Cases Nos. 15,609 and 15,610.

LITTLE (YATES v.). See Case No. 18,128.

Case No. 8,397.

The LITTLE ANN.

[1 Paine, 40.] [1]

Circuit Court, D. New York. Sept. Term, 1810.[2]

ADMIRALTY JURISDICTION—PRIZE CASE—SEIZURE IN ANOTHER DISTRICT.

The jurisdiction of the district courts derived from that clause in the judiciary act [1 Stat. 73] declaring that they shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures un-

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

[2] [Reversing Case No. 15,611.]

der laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts; and of all seizures on land or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States," does not extend to cases of libel for seizures made in another district from that where the proceedings are instituted. But the district court of the district where the seizure is made, has exclusive jurisdiction.

[Cited in The Washington, Case No. 17,222; U. S. v. The Reindeer, Id. 16,144.]

This was an appeal from a sentence of condemnation in the district court of the Southern district of New-York. [Case No. 15,611.]

The libel stated that Stephen Decatur, commander of the frigate Chesapeake, on the 13th day of August, 1808, seized the brig Little Ann and cargo on the high seas as forfeited to the United States. That on the 11th of August, while the Little Ann was lying at Bristol, Rhode Island, and bound for a foreign port, her cargo was laden on board in the night, without any license or permit, and without inspection, and was afterwards exported from the United States to the high seas against the act laying an embargo and the supplementary and additional acts.

William D'Wolf and Henry D'Wolf, the claimants, plead, that they were citizens of the state of Rhode Island, and owned the said vessel and cargo at the time of her seizure, and that she was seized within ten miles of the shore of Point Judith, within the jurisdiction of the district court for the district of Rhode Island; and that Newport, and not New-York, was the nearest port to the place of seizure. Wherefore they insisted that the alleged offence was subject to the jurisdiction of the district court of Rhode Island, and not of New-York. To this plea the libellants demurred.

C. D. Colden, J. O. Hoffman, and C. J. Bogert, for appellants.

N. Sanford, D. A., for respondent.

LIVINGSTON, Circuit Justice. Without entering into the merits of this prosecution, or looking at the proofs, the court is desired preliminarily to say whether the proceedings below were not coram non judice, and whether the sentence on that account should not be reversed. It appears on the pleadings, and is at present so to be taken, that this seizure, which was for a violation of the embargo laws, was made within the district of Rhode Island, and that the res was afterwards brought within this district, where it was proceeded against and condemned. From this statement it is clear, that it is not necessary to inquire whether a libel may not in some cases be filed without a previous seizure, because a seizure is here stated, which it is admitted was neither within this district, nor on the high seas. The court has therefore forced upon its consideration how far such a seizure sanctioned the jurisdiction which was assumed.

In ascertaining what portion of the general powers delegated by the constitution of the United States to the federal judiciary, is to be exercised by any one of the inferior courts, recourse must be had to the laws creating the tribunal, and designating its jurisdiction. On this point the embargo laws throw no light. All they do is to declare the offences, and to refer the different cases of forfeiture, &c. to the courts of competent jurisdiction. To settle this competency in a given case we must look at the act establishing the judicial courts of the United States. The powers of the district courts are defined by the 9th section of this law. They have, among other powers, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas. They have also exclusive original cognizance of all seizures on land, or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States."

The appellants contend that to confer jurisdiction in a case of seizure of this kind, it must be made within the judicial district in which the court taking cognizance of it is held. This construction is not only the most obvious and natural, but is in conformity with the spirit which appears to pervade the whole judicial system of the United States. It should therefore prevail, unless controlled by other very explicit and unequivocal provisions of the judiciary act. It was certainly fit and desirable thus to limit the jurisdiction of the district court, in order to prevent the oppression, expense, and delay, which would be inevitable, if the party seizing were at liberty to carry the property to any part of the United States, however remote, to which caprice, or a less pardonable motive might prompt him; and it is only on the appellant's interpretation that this salutary end will not be defeated. But as it is often unsafe to construe an act by what may be deemed its spirit, about which different opinions may be entertained, the court thinks proper to add, that it does not perceive that any other fair meaning can be assigned to the letter of the one now under consideration. The terms used not only vest cognizance in all civil causes of admiralty and maritime jurisdiction, but also in all cases of seizures made as above-mentioned. The term "including," which has been so much and so ingeniously relied on, as only classing such seizures with civil causes of admiralty and maritime jurisdiction, while it admits and has received from the supreme court that signification, is not necessarily to be taken in that sense alone. It not only thus classes these seizures, and thereby shuts

out a trial by jury, but it has also an accumulative meaning, and extends the jurisdiction of these courts to cases of such seizures. If it had only given to these courts the cognizance of civil causes of admiralty and maritime jurisdiction, prosecutions for forfeitures would not have been comprehended in such grant, which ex vi termini is confined to causes arising ex contractu, or to controversies between individuals, where the proceedings are in rem, such as suits or libels for seamen's wages, or bottomry bonds and the like.

But the clause extending its cognizance to all suits for penalties and forfeitures is supposed to be so comprehensive as to leave no doubt of the jurisdiction which has been exercised in this case. If there had been no previous designation of the powers of these courts in relation to forfeitures under the laws of the United States, the interpretation put on this part of the act would not be so violent. But as in the construction of a particular section of the law, every part of it should be brought into view, the court cannot, without overlooking and annulling some of the most valuable provisions of this act, accede to the correctness of this opinion. After the enumeration which had already been made of the various branches of jurisdiction allotted to these courts, it is not thought that the suits here spoken of apply at all to prosecutions in rem in case of seizure, which had been distinctly and previously provided for, but solely to personal suits for penalties of bonds, or for pecuniary penalties and forfeitures attaching on the violation of some law, which may well be deemed transitory, and to follow the person. Suit is defined to be "the following of a person," and is not only not technically, but not even in common parlance, applied to seizures or proceedings in rem. It would be, to say the least, a form of speech liable to considerable criticism, to speak of a suit's being brought against a vessel, or a bale of goods. A person is sued, but things are libelled. If then jurisdiction in case of a seizure, such as that of the Little Ann, be not drawn from that part of the first clause which has been cited from the 9th section of the judiciary act, which is comprehended under the word "including," it is not easy to say whence it comes, or how it could have been supported in this case, even if the seizure had taken place within this district; for without this provision a proceeding like the present could not have been considered as a civil cause of admiralty and maritime jurisdiction, and would therefore have been a casus omissus, unless it could have been comprised under the general jurisdiction of suits for penalties and forfeitures, which could not have been done without giving to these expressions a meaning which perhaps was never before annexed to them, and which therefore was probably not in the contemplation of the legislature.

But if there be room for serious doubt, the understanding of a law should be such as is most reasonable, and which in practice will work the smallest mischief. This in the present case will be attained by confining the jurisdiction of the district courts in cases of seizures, to such as are made within their respective districts, unless they take place on the high seas, which being within no particular district, may generally without much inconvenience be acted on in one court as well as in another. This court therefore thinks that the district court erred in holding jurisdiction of this cause, and that its sentence must for that reason be reversed.

LITTLE ANN, The (UNITED STATES v.). See Case No. 15,611.

LITTLE CHARLES, The (UNITED STATES v.). See Cases Nos. 15,612 and 15,613.

Case No. 8,398.

In re LITTLEFIELD.

[1 Lowell, 331;[1] 3 N. B. R. 57 (Quarto, 13); 2 Am. Law T. 122; 1 Am. Law T. Rep. Bankr. 164.]

District Court, D. Massachusetts. June, 1869.

BANKRUPTCY—DISCHARGE OF BANKRUPT — NOTICE OF ASSIGNEE'S APPOINTMENT—EXAMINATION OF BANKRUPT—REFUSAL TO BE EXAMINED—CASH-BOOK.

1. It is not essential to the debtor's discharge, that the assignee should give due notice of his appointment.

[Cited in Coombs v. Persons Unknown, 82 Me. 326, 19 Atl. 827.]

2. Nor that the second and third general meetings of his creditors should be held at the expiration of three months and six months respectively, from the date of the adjudication.

[Cited in Re Clark, Case No. 2,808.]

3. If a creditor wishes to examine the bankrupt, he must procure an appointment from the register of a time and place for the examination. It is not the bankrupt's duty to see to the appointment, but to be ready to attend on due notice.

4. Whether if a debtor attends and refuses to be examined, there is any remedy excepting by motion to commit, quaere?

5. It is necessary to the discharge of a bankrupt trader, that he should have kept a cash-book subsequently to the passage of the bankrupt act [of 1867 (14 Stat. 517)].

[Cited in Re Bellis, Case No. 1,275; Re Archenbrown, Id. 505; Re Frey, 9 Fed. 379; Re Graves, 24 Fed. 551.]

[In the matter of Hiram Littlefield, a bankrupt.]

C. Lamson, for objecting creditors.

J. C. Perkins, for bankrupt.

LOWELL, District Judge. The first objection taken to the discharge of this bankrupt is that the notice of the appointment of his assignees was not published in the mode pointed out by section 14 of the act [14 Stat.

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

522]. It seems that instead of being published once a week, for three successive weeks, this notice was, in one of the newspapers, published three times in the course of two weeks. This is not a ground for refusing the discharge. It has been decided that the bankrupt is bound to see that the proceedings are regular, and if they are not so, he cannot have his discharge. But the courts that have made this law, without much aid from the statute, must construe it reasonably. The bankrupt ought not to be held responsible for all the shortcomings of his assignee, over whom the statute gives him no control. If the latter had neglected his duty in accounting for assets, or in recording his assignment, or in any other matter which relates only to the proper discharge of his trust, and not to the essential validity of the proceedings, that is a matter which the creditors and the courts can take care of. Where there is any failure of jurisdiction, as where, by mistake, the case had been conducted by the wrong register, I have refused the discharge. So, probably, as matter of practice, the meetings must be duly warned, and held before the discharge can be granted, because the act intends that the creditors should have due and full opportunity to meet and consult before the proceedings are closed. This is fairly to be inferred from the whole scope of the act. But I am not able to see that the publication by the assignee of his appointment is essential to the regularity of the proceedings. It is directory to the assignee, and not intended so much for creditors as for persons owing debts to or otherwise having business with the estate. Creditors whose names may be omitted from the schedule are cared for in the provision for publishing notice of the warrant and of the meetings.

The next two specifications are, that the second and third meetings were not held immediately upon the expiration of three months and six months, respectively, after the adjudication was made; and that the omission was not without the fault of the assignee. The language of the statute on this head is certainly somewhat peculiar. The meetings are to be held at the expiration of three months and six months, or earlier if practicable; and "if by accident, mistake, or other cause, and without fault on the part of the assignee, either or both the second and third meetings should not be held within the times limited, the court may, upon the motion of an interested party, order such meetings, with like effect as to the validity of the proceedings, as if the meeting had been duly held." It is impossible to understand all the provisions of the bankrupt act without recollecting that it was borrowed in large part from the well-matured systems of Massachusetts and of England; and that, in adopting it, some discrepancies have crept in. Now, by the law of Massachusetts, it was at one time essential that the second meeting should be held not more than three months after the date of the warrant, and it was only at that meeting that the insolvent could take the prescribed oath or obtain his certificate. Afterwards, the oath was to be taken at that meeting, and the certificate was to be granted at the third meeting, which, too, was to be held within a given time after the appointment of the assignee. It consequently sometimes happened that the debtor lost his right to discharge, by the neglect of his assignee to call those meetings in season, [for there was no power to call them afterwards nor to do the necessary acts at any other meetings.][2] This law was afterwards modified in some respects, and in 1854 the legislature passed an act, which is now incorporated in the general statutes of the state (chapter 118, § 73) precisely like the above-cited provision of the bankrupt act, excepting that it is general, and not confined to cases of "accident and mistake." A comparison of its language with that of the bankrupt law shows clearly that the latter was copied from it. By the bankrupt act, however, there was no necessity for any such clause; because it is not essential that the second and third meetings should be held at any particular time, but only that they should be held at the expiration of three months and six months; and unless this means on the very day that the months run out, there is no day on which it can be said that it is too late to hold these meetings, unless possibly it may be said that the second meeting should be called before the end of six months. Nor does the bankrupt law require that the necessary oath should be taken, or the discharge be granted, at one of these meetings, or that their being held at any particular time should be in any way essential to the validity of the proceedings. So that, although it is the duty of the assignee to call the meetings at the expiration of the time mentioned,—and he may be required to do so, and may be held responsible for any neglect,—yet neither the debtor's discharge nor any thing else touching the regularity of the proceedings depends upon their being held on the days that these months respectively expire. And if they are not held, any creditor, or the debtor, may call upon the court to require them to be held, though it may have been the fault of the assignee that they were not sooner called. Else it would be in the power of the assignee to take advantage of his own neglect, and to defer indefinitely the accounting which the law requires of him at those meetings. But if all this is wrong, yet, the meetings in this case having been called by order of court, it must be presumed that good cause was shown for their being called when they were.

The next specification is that the debtor refused to submit himself to examination as required by the act. The fact is that the debtor was summoned before the register to be examined, and made some objections which were referred to the court, and over-

[2] [From 1 Am. Law T. Rep. Bankr. 164.]

ruled; and the creditor, who is the same now objecting, never pressed for a further hearing. He now takes the position that it was the debtor's duty to notify him when and where the examination would be proceeded with. This is a mistake. It was for the creditor to examine the debtor, if he desired to do so; and to see that due appointments were made with the register for that purpose, and to give the other party notice of them. The debtor's duty was performed when he was ready to be examined upon due notice; and the evidence shows that this debtor was ready. Whether if a bankrupt being present at a legal hearing, refuses to be examined, without good cause, there is any remedy except by motion to commit, I need not now decide.

The only other specification which the evidence makes important is the ninth, that the bankrupt did not, after the passage of the act and before filing his petition, keep proper books of account. It seems that the debtor was engaged in a variety of schemes, none of which was successful. Among other things, he kept a wharf, where he sold wood and coal. His books of this business were kept by a skilful clerk, but there was, during the last part of the time, no cash account whatever, and this by the bankrupt's own act. I regret to be obliged to decide that for this omission the bankrupt must be held to come within the penalty of the statute. A cash account is necessary to an understanding of a trader's business, and it has been decided by two courts that the want of it is fatal under this act. The specification is very general, and I thought at first that it might be held insufficient; but, upon the hearing, I could not see that any injustice would be done by admitting the evidence. If the objection were that certain entries were wanting, or that there were irregularities in the mode of keeping proper books, they ought to be pointed out in the specifications; but where the objection is that a cash account, which all traders should keep, is wholly wanting, it seems to me that the general specification is enough. Besides, an amendment in so simple a matter ought not to be denied. Discharge refused.

On an application to the circuit court for the exercise of its supervisory power, the bankrupt represented that he could now prove that he had kept a cash-book. That court refused to interfere on such a ground, but intimated that this court might do so; and on a rehearing here the discharge was granted.

[NOTE. In re Bellamy [Case No. 1,267], would seem to require a more strict proof of conformity and regard the jurisdiction of the court to grant the discharge as dependent upon the exact conformity of the proceedings to every requirement of the act, and places the responsibility therefor upon the bankrupt. The case of the text is regarded as more in conformity to the true construction of the act. See Bump, Bankr. (6th Ed.) 242].[3]

[3] [From 3 N. B. R. 57.]

Case No. 8,399.

In re LITTLEFIELD.

[1 MacA. Pat. Cas. 574.]

Circuit Court, District of Columbia. June, 1858.

COMMISSIONER OF PATENTS—DECISIONS OF PREDECESSORS—NOVELTY AND INVENTION—RAILROAD SWITCH.

[1. The commissioner *held* to have properly refused to disturb the decision of his predecessor, upon vague and loose affidavits filed long after the rejection of the claim.]

[2. A claim for an automatic railroad switch operated by an eccentric *held* to be entirely destitute of novelty and invention.]

[This was an appeal by A. S. Littlefield from a decision of the commissioner of patents refusing to grant him a patent for an automatic switch for railroads.]

J. J. Greenough, for appellant.

MERRICK, Circuit Judge. The undersigned has carefully examined the claim of the applicant, and has considered the decision of the commissioner, as well as the reasons of appeal filed by the applicant, and his said argument by J. J. Greenough, solicitor, in his behalf. The claim is one so entirely destitute of novelty that it is deemed altogether unnecessary to pass in detailed review the reasons for its rejection which have been assigned by the commissioner of patents. They are entirely satisfactory to my mind, and depending upon such plain and well-settled principles of the patent law [5 Stat. 117], that no analysis could make them more intelligible or cogent. The affidavits which have been filed in the case, for the purpose of meeting the objections taken by the commissioner and to bring the case within the rule that although a change be small, yet when it produces consequences and results of the greatest practical utility, the change and its consequences, taken together, furnish evidence of sufficient invention to support a patent, will be found on inspection to be undeserving the consequence endeavored to be attached to them in the argument. What are they? First, two unsworn certificates of the president and six directors of the Connecticut and Passumpsic River Railroad, dated, one July 11th, 1854, the other on July 31st, 1854, certifying that the parties had several times on a summer's day seen a passenger engine run over the switch, and that they were pleased with the precision and certainty of its operation. The next is also an unsworn certificate of one Charles F. Thomas, mechanical engineer of Taunton and New Bedford Railroad, dated October 28th, 1854, who also states that he saw the switch operated several times as if by magic. These certificates need no other remark than that they manifestly apply to the rejected application of Littlefield of August 9th, 1854, which was rejected by the office in October, 1854, in which he claimed to operate his switch with a toggle joint, and not the

eccentric now claimed. The next certificate is dated in October, 1855, from Amos Burnham, road-master of the New Bedford and Taunton Branch Railroad. This is the same road mentioned in the preceding certificate of Charles F. Thomas, and there is nothing to show that it does not refer to the same toggle-joint switch; and if it meant the arrangement now in question it would seem natural that it should have pointed to the change or improvement, and especially as it was sent to the office in the same parcel as the preceding; and it was manifestly designed that the office should consider them all as pointed to the same invention, they not being filed there until February, 1857, for the purpose of influencing a decision upon an application to which the other three certainly had no reference. This circumstance of suspicion, derived from the company in which it is found, would be enough to discredit the paper were it, from the nature of the facts set forth, otherwise entitled to any weight. With regard to the two affidavits filed in March, 1858, long after the rejection of the claim by the office, they are vague and altogether inconclusive of any material fact. They were very properly considered inadmissible by the present commissioner, and furnishing no ground to disturb the decision of his predecessor. If upon such loose matter any solemn determination could be disturbed, nothing would ever be considered settled, nor could any reliance be placed by the public upon the action of the patent office. I feel no disposition to give encouragement to parties to agitate cases upon such flimsy pretexts, and have therefore taken occasion to give these several papers more extended consideration than they deserve. Upon the whole case, I am of opinion there is no error in the decisions of the office; and accordingly I certify to the Honorable Joseph Holt, commissioner of patents, that the judgment rejecting the application of A. S. Littlefield is affirmed, and a patent to him refused.

Case No. 8,400.

LITTLEFIELD v. DELAWARE & H. CANAL CO.

[3 Cliff. 371; [1] 4 N. B. R. 257 (Quarto, 77).]

Circuit Court, D. Massachusetts. May Term, 1871.

BANKRUPTCY — REVISION AFTER FINAL DECREE — SUFFICIENCY OF PETITION FOR REVIEW.

1. Under section 2 of the bankrupt act [of 1867 (14 Stat. 517)], which provides that "the circuit court within and for the district where the proceedings shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act," a petition for a revision of the decree of the district court refusing a discharge, may be entertained, although such decree was a final one, and no proceedings were actually pending in the district court when the petition for revision was made.

2. The word "pending" does not mean that the circuit court can take jurisdiction of a petition for revision only while proceedings are actually pending, and before a final decree, in the district court.

3. Discharge by a final decree was refused an alleged bankrupt in the district court, May 12, and his petition for revision was filed in the circuit court, June 30 following. *Held*, there was no ground, in the absence of a rule limiting the time in which such petitions should be filed, to deprive the petitioner of a rehearing on account of delay.

[Cited in Sweatt v. Boston H. & E. R. Co., Case No. 13,684; First Nat. Bank v. Cooper, 20 Wall. (87 U. S.) 177; Re Murray, Case No. 9,953; Re Beck, 31 Fed. 555.]

4. An allegation, in a petition to the circuit court under section 2 of the bankrupt act, for revision, that he has conformed to the provisions of the act and is aggrieved because the prayer of his petition for discharge was refused, is not sufficient.

[Cited in Re Masterson, Case No. 9,268.]

5. The petition for revision must state in what the error consists, whether it be of law or fact; and the nature of the alleged error should be distinctly stated for the information of the appellate court and as notice to the opposite party.

[Cited in Re Sutherland, Case No. 13,636; Re Masterson, Id. 9,268; Coggeshall v. Potter, Id. 2,955; Re South Boston Iron Co., Id. 13,183.]

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

This was a petition by [Hiram Littlefield] an alleged bankrupt for revision of a final decree of the district court refusing him a discharge from his debts under his original application.

J. C. Perkins, for petitioner.

Caleb Lamson, for respondents.

Before CLIFFORD, Circuit Justice, and SHEPLEY, Circuit Judge.

CLIFFORD, Circuit Justice. Leave to amend the petition was asked and granted in this case before the parties were heard upon the issues involved in the pleadings. As amended the allegations of the petition are, that the petitioner has conformed in all respects to the provisions of the bankrupt act, and that he, the petitioner, verily believes that he is entitled to a certificate of discharge from all his debts provable under that act, and that he is aggrieved by the refusal of the district court to grant him such a discharge. Therefore he prays that he may have a hearing in this court upon the matter of his discharge, and that the decision of the district court refusing the same may be reviewed and reversed, and that a discharge may be granted to him pursuant to his petition. Order of notice was granted on the petition for review filed in this court, and on the return day named in the order the creditors named in the petition appeared and demurred to the petition, showing the following causes of demurrer:—

1. That the petitioner has not prayed for any relief. 2. That he has not specified what

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

further proceedings, if any, are desired in his case. 3. That he does not allege that there was, at the time he filed his petition in this court, any matter pending in the district court to which his petition could apply. 4. That the rights of the respondents as creditors to hold and dispose of their claims, and maintain an action at law on the same against the petitioner, had, before he filed his petition in this court, vested in them under and by virtue of the decision and judgment of the district court, that he was not entitled to a discharge from his debts. 5. That the petitioner was guilty of unreasonable delay in filing his petition. 6. That the circuit court has no jurisdiction of the petition to revise the decision and judgment of the district court refusing to grant to the petitioner a certificate of discharge from his debts under the bankrupt act.

Remarks in respect to the first and second causes of demurrer are unnecessary, as they are obviated by the amendment filed by leave of court, which prays that he may be decreed by the court to have a full discharge from all his debts provable under the bankrupt act, and that a certificate thereof may be granted to him as therein provided.

Evidently there is no merit in the third cause of demurrer, as there could not be any ground of complaint before the decision of the district court was rendered. Had the petition been filed before the decision was rendered, the decisive answer to it would have been that it was premature, and if it cannot be filed afterward, then the provision is nugatory, which cannot be admitted. By section 2 of the bankrupt act it is enacted "that the circuit court within and for the district where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act."

Reliance is placed upon the word "pending" as giving support to the proposition that it is only while the proceedings are actually pending in the district court, that the circuit court can take jurisdiction of a petition like the one under consideration. Interlocutory orders, it is conceded, may be revised, but the argument is, that a final decree terminates the appellate jurisdiction of the circuit court, as the matter from that moment ceases to be pending in the district court. Matters involved in a final hearing can only be disposed of by final decree, and if they cannot be revised after they have been disposed of in the district court, then they cannot be revised at all, as it is clear that the orders and decrees of a subordinate court cannot be revised before they are made. Manifestly the construction assumed by the respondent is one which cannot be sustained, as it would defeat the obvious intention of congress, which was to subject every ruling order and decree of the district court in such cases to the re-examination and revision of the circuit court, nor is it necessary to adopt that view in order to give full effect to every word of the section. Jurisdiction is conferred upon the circuit court within the district where the proceedings shall be pending, but the meaning of congress in employing that language was to describe the particular circuit court in which the jurisdiction should be exercised, and not the state of the matters to be revised, as it is clearly the intention of congress that all such matters should be subject to revision in the circuit court, whether interlocutory or final. Revision must be sought in the circuit court of the district where the proceeding took place which the petitioner asks to have revised, but he is not deprived of a remedy, because the decree is in its nature final. In re Reed [Case No. 11,638]; Ruddick v. Billings [Id. 12,110].

The power of congress to pass the bankrupt act is not questioned, and it is equally clear that congress may create a special tribunal to execute it, or may confer that jurisdiction upon the district and circuit courts created by the judiciary act. Decrees of the district courts are final in the constitutional sense, although they are rendered under an act of congress which makes them subject to revision by the circuit court, and consequently the right of such revision is not inconsistent with the interest which the opposite party acquires in the decree. Rendered, as the decree is, subject to legal revision in the circuit court, no party acquires or can acquire any interest in the decree to defeat the right of such revision. Argument upon this topic is unnecessary, as the final judgments and decrees of every subordinate court are rendered subject to re-examination and revisal upon due proceedings in the court of paramount jurisdiction.

Unreasonable delay in filing the petition for revision is the next objection. Authority to apply for such a revision is conferred by the act of congress, and it prescribes no limitation as to the time within which the application must be made. Rules and regulations were adopted by the supreme court, but they do not prescribe any such limitation, nor has any such been adopted by this court. The discharge was decreed on the 12th of May, 1869, and the petition was filed on the 30th of June in the same year. Special injury is neither alleged nor proved, and the court is of the opinion, in view of all the circumstances, that the petition ought not to be rejected because it was not filed at an earlier day. Until some rule is adopted upon the subject, the court will not deprive the petitioner of a hearing on that ground unless the delay is manifestly unreasonable or has operated to the prejudice of the respondent.

Want of jurisdiction is the remaining objection alleged as a cause of demurrer; but the point is without merit, as the jurisdiction is conferred in language too plain to be misunderstood.

Neither of the alleged causes of demurrer, therefore, can be sustained; but the petition,

upon another ground, is clearly insufficient. Objections available under a general demurrer are still open to the respondent, as every special demurrer is also a general demurrer, and it is a universal rule that a demurrer, whether special or general, admits only what is well pleaded. All that the petitioner alleges is that he has conformed in all respects to the provisions of the bankrupt act, and that he verily believes that he is entitled to a discharge from his debts. Based upon those allegations, he states that he is aggrieved by the refusal of the district court to grant him a certificate to that effect. Appeals in equity suits and in causes of admiralty and maritime jurisdiction vacate the respective decrees in the subordinate courts, and remove the whole record in the court of paramount jurisdiction; but nothing of the kind is done in a proceeding by petition under the second section of the bankrupt act. An allegation merely that a party has conformed to the provisions of the bankrupt act, and that he is aggrieved because the prayer of his petition has been refused, is not sufficient. Nor is the allegation by a petitioner that he is aggrieved sufficient unless it be also alleged in what the error consists, whether of law or fact; and the nature of the error should be distinctly stated for information of the appellate court and as a matter of notice to the opposite party. Appellate courts, even in appeals, proceed upon the ground that the decree in the subordinate court was correct, and the burden to show error is upon the appellant. [The Baltimore, 8 Wall. (75 U. S.) 378.] [2] Matters of fact as well as matters of law may doubtless be revised in the circuit court, but it was not the intention of congress in this form of proceeding, to give a party a second trial merely as such, but to secure to him an appellate tribunal for the re-examination and revision of rulings, orders, and decrees of the district courts, and for the reversal of the same in case they are found to be erroneous. Demurrer sustained.

LITTLEFIELD (ORR v.). See Case No. 10,590.

LITTLEFIELD (PERRY v.). See Cases Nos. 11,007 and 11,008.

Case No. 8,401.

The LITTLE GIANT.

[2 Biss. 23; 4 Alb. Law J. 50.] [1]

Circuit Court, N. D. Illinois. July Term, 1868.

COLLISION—CROWDED THOROUGHFARE—SPEED.

A tug is in fault which, in a crowded thoroughfare, like the Chicago river, proceeds at the rate of over five miles an hour.

Appeal from decree of district court in favor of James McNamara and others, owners of the schooner Lizzie Throop, and against the tugs Little Giant and Wm. L. Ewing, for damages caused by a collision in the Chicago river.

Reynolds & Phelps, for libellants.

Rae & Mitchell, for respondents.

DAVIS, Circuit Justice. This is a case of collision on the Chicago river, and the question presented on appeal is, whether the Little Giant was in fault, as both tugs were condemned by the district court and the Ewing did not appeal. The Little Giant was conveying up the river in daylight the schooner Lizzie Throop, and had passed through Rush street bridge, and in attempting to pass through the north draw of State street bridge, collided with the tug Ewing, and, in backing, injured the tow. The libel was filed against both tugs for this injury. The Little Giant was in fault, because the rate of speed at which she was proceeding, at least five miles an hour, some witnesses say six, was not careful navigation in a crowded thoroughfare like the Chicago river. If these officers had been mindful of their duty and proceeded slowly, the accident would not have occurred. It was reckless conduct on their part to take the north draw when a propeller was in the way, and if they had been watchful and careful they could have seen the Ewing coming down. Although the evidence in this case is conflicting, as is usual in cases of the kind, on no theory which can properly be taken of it, can the Little Giant be freed from fault. The decree of the district court is affirmed, with interest.

Case No. 8,402.

LITTLE GUNNELL CO. v. KIMBER et al.

[Morr. Min. Rights (4th Ed.) 65; 1 Morr. Min. Rep. 536.]

Circuit Court, D. Colorado. 1878.

MINES AND MINING—CLAIMS LOCATED BEFORE 1872—RELOCATIONS.

[1. Under the act of 1872 (17 Stat. 91) and its amendments, claimants of mines located before that date were required to do work of the value of $10 for each 100 feet, before January 1, 1875; and a failure therein operated as an abandonment, and rendered the claim subject to relocation by others, unless the original owner was then in possession, and had resumed work thereon.]

[2. The work required to be done before January 1, 1875, must have been done by the claimant or his agent, and work done by strangers could not inure to his benefit by reason of any purchase of such labor made by him after commencing suit to recover the claim.]

[3. Under the Colorado statute (Act 1874, § 16), a relocator may sink the original discovery shaft 10 feet deeper, or he may run a tunnel, an adit, a level, a drift, or any other kind of opening, provided it is a new one; but it is insufficient to run a tunnel into the claim from an old shaft upon an adjoining claim.]

[This was an action of ejectment brought by the Little Gunnell Gold Mining Company

[2] [From 4 N. B. R. 257 (Quarto, 77).]

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Alb. Law J. 50, contains only a partial report.]

against Kimber and others to recover possession of mining claims.]

L. C. Rockwell, for plaintiff.

G. B. Reed and Willard Teller, for defendants.

HALLETT, District Judge. This is an action of ejectment to recover the possession of claims Nos. 6 and 7, west from Discovery, in the Gunnell lode. Evidence has been introduced to prove that certain parties were in possession of one of the claims, and certain other parties were in possession of the other claims at different times since 1860, and that these parties conveyed to others who conveyed to plaintiff. I have not examined the conveyances which were put in evidence before you to see if they formed a perfect chain of title. That matter is for your consideration, and you will determine it on the evidence. If persons were in possession, working the claims, and they conveyed to others, who afterwards conveyed to plaintiff, so that plaintiff acquired whatever right such persons had, then, as the evidence stands in this case, the plaintiff is entitled to recover. Under the act of congress of 1872, claimants of mines located before the passage of that act were required to do work of the value of $10 annually for each 100 feet of the claims held by them. This act was twice amended, extending the time within which the first work could be done until Jan. 1, 1875. As these mines were located earlier than 1872, plaintiff, claiming to be the owner of them, was required to do work on them, of the value of twenty dollars, at least, before Jan. 1, 1875.

It is not pretended that the plaintiff did such work before Jan. 1, 1875, and the failure in that respect was such an abandonment of the claims, as authorized any one to go on the property and relocate it. In respect to that matter defendant's counsel have asked me to say, and it is quite correct to say, that if you find from the evidence that no work was done by the plaintiff on the property in controversy during the year 1874, then that such property on the 1st day of January, A. D. 1875, was abandoned and forfeited, and subject to the occupation and relocation on said 1st day of January, 1875, and that any person, a citizen of the United States, over the age of 21 years, had a legal right to enter into and occupy the same, on the said 1st day of January, A. D. 1875, unless the plaintiff was at that time in the possession and occupancy of the property, and had resumed work thereon. And so also it should be said that the work done under the statute must have been done by the plaintiff acting through its agents, and not by another whose right was purchased by plaintiff. On that point I give the instruction of defendants as asked, which is as follows:

The court instructed the jury that any work done upon the property in controversy during the year 1874, by Miller, Lynn and Gray, on their own account, and not at the instance of plaintiff, cannot inure to the benefit of plaintiff by virtue of any payment for or pretended purchase of such labor made by plaintiff after the commencement of this action. The failure to work the claims was not an absolute forfeiture of plaintiff's right to the property, if it had such right, prior to January 1, 1875, because the statute provides that an original locator or claimant may resume work at any time after failure to perform the work and before the claim has been relocated. Although this work may not have been done within the time fixed by law, the original locator or claimant may resume work, and thus regain his first estate, at any time before another has taken possession of the property with intent to relocate it.

It is the entry of a new claimant, with intent to relocate the property, and not mere lapse of time, that determines the right of the original claimant; and the new claimant must proceed with diligence under the statute in order to hold the property. Sixty days is allowed by law for sinking the original discovery shaft ten feet deep, or making a new opening to the crevice of some kind. If there is a discovery shaft on the claim, he may go into that and sink it ten feet deeper; but where, as in this case, there is no such shaft on the claim, he must make a new opening to the crevice ten feet or more in depth. He may run a tunnel, an adit, a level, a drift, or any other kind of opening, provided it is a new one. That is the proper construction of the 16th section of the act of the legislature of 1874 [Laws Colo. 189], which plainly declares that in relocating a claim the original discovery shaft shall be sunk ten feet deeper, or a new shaft shall be sunk.

In the case now submitted to you, the defendants went into a shaft on adjoining property, and ran a drift in the direction of the property in controversy prior to January 1, 1875. Perhaps they arrived at or near the claims in dispute about January 1, 1875, and went on with their drift through those claims during that month. This we hold is not sufficient to make a valid location under section 16 of the act of 1874. That act, as before stated, requires a new opening or shaft, when the old discovery shaft is not used, and this work was not of that character. Defendants had a right to perfect their location at any time within the ninety days given them by statute, and probably at any time before plaintiff should re-enter the property with intent to resume work, but they must have done everything required by statute, such as posting notice, fixing boundaries, sinking shaft or opening to the crevice, and everything necessary in order to secure against plaintiff's re-entry. Unless they did so, plaintiff had the right to re-enter, and upon doing the annual work required by law, it would become re-invested with its first estate. The entry of defendants on January 1, 1875, was legal and proper, but if they failed to per-

fect their location within ninety days, by sinking a shaft, erecting a location stake at such shaft, and recording the claim, as the statute requires, as against the plaintiff, their possession was wrongful from the time of entry. They have not been able to show that they complied with the law in respect to relocating the claims, and if plaintiff had good title prior to January 1, 1875, as before explained to you, and resumed work on the claims soon thereafter, and did work of the value of twenty dollars or more, you should find for the plaintiff. But you must believe from the evidence that the plaintiff did do such work, and that it had such title in order to return a verdict of that kind.

The jury returned a verdict for the plaintiff, on which judgment was entered.

LITTLEJOHN (CORNELL v.). See Case No. 3,238.

LITTLEJOHN, The (HART v.). See Case No. 6,153.

LITTLE RIVER COUNTY (KINSEY v.). See Case No. 7,829.

LITTLE ROCK (GILCHRIST v.). See Case No. 5,421.

LITTLE ROCK (MERCHANTS' NAT. BANK v.). See Case No. 9,445.

LITTLE ROCK & FT. S. R. CO. (STEACY v.). See Case No. 13,329.

Case No. 8,403.

The LIVELY.

[1 Gall. 315.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1812.

PRIZE—ILLEGAL CAPTURE—MEASURE OF DAMAGES—FREIGHT—CLAIM BY AGENTS—HEARING BY COMMISSIONERS OF EX PARTE EVIDENCE.

1. Captors have a right to carry their prizes to a proper and convenient port for adjudication, and are not controllable by the revenue officers. If they proceed irregularly, it is at the peril of damages. Case of illegal capture. What is the proper measure of damages in such case. When freight is a proper item of damage.

[Cited in U. S. v. The Nuestra Senora de Regla, 108 U. S. 103, 2 Sup. Ct. 293. Cited in brief in The Revere. Case No. 11,716.]

[Cited in brief in Dennis v. Maxwell, 92 Mass. 140.]

See The Nemesis, Edw. Adm. 51; The Speculation, 2, C. Rob. Adm. 293.]

2. Where, after an illegal capture, the vessel and cargo have been wholly lost, the prime cost and interest is the measure of damages. Freight not a proper item, where the voyage has not been lost by the capture. Supposed loss of profits no proper item of damage in a case of illegal capture.

[Cited in Pacific Ins. Co. v. Conard, Case No. 10,647; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (47 U. S.) 432; The Ocean Queen, Case No. 10,410; The Mary J. Vaughan, Id. 9,217; The Aleppo, Id. 158; Dyer v. National Steam Nav. Co., Id. 4,225; Guibert v. The George Bell, 3 Fed. 585; The City of New York, 23 Fed. 619; Howard v. Stillwell & Bierce Manuf'g Co., 139 U. S. 199, 11 Sup. Ct. 503; Cincinnati S. L. Gas Illuminating Co. v. Western S. L. Co., 152 U. S. 200, 14 Sup. Ct. 525.]

[Cited in Coweta Falls Manuf'g Co. v. Rogers, 19 Ga. 416; Griffin v. Colver, 16 N. Y. 492. Cited in brief in Laurent v. Vaughn, 30 Vt. 93; Spring v. Haskell, 86 Mass. 112. Cited in Western Union Tel. Co. v. Graham, 1 Colo. 241; True v. International Tel. Co., 60 Me. 25; Western Gravel-Road Co. v. Cox, 39 Ind. 264.]

3. Where it is referred to commissioners to state the amount of damages in a case of illegal capture, the report should be special, and state the items of the allowances in detail.

4. Claims in prize causes should be made by the parties themselves, if within the jurisdiction, and not by mere agents. The captors have a right to the answers of claimants on oath.

[Cited in Re Stover, Case No. 13,507.]

5. If captors wantonly injure the captured crew, the prize court will award damages for personal ill-usage.

[Cited in Mendell v. The Martin White, Case No. 9,419.]

6. Where an injury is alleged to the cargo after it came to the possession of the captors, it should be ascertained under the direction of the prize court, by a survey and appraisement or sale.

7. Commissioners appointed to state damages should not hear ex parte evidence without notice to the other party.

The privateer Jefferson, commanded by Capt. Downie, on the 3d day of August, 1812, at a short distance from Machias river, captured the schooner Lively and cargo as prize, carried them into Machias, and from thence to Salem, where she arrived on the 12th of the same month. No proceedings having been had, the claimants on the 24th of the same month filed a libel for restitution in the district court, upon which a monition to proceed to adjudication issued against the captors, who in consequence thereof, on the 28th of August, libelled the property as prize; and, at a hearing in the district court upon the claims interposed, a decree of restitution passed without objection; and on the 1st of September, 1812, the district court also pronounced for damages to the claimants, and a reference was made to commissioners to ascertain and assess the amount. A report was accordingly made, which upon exceptions taken by the captors, was recommitted, and a new report was made, which, with the exception of the item of $76, was finally confirmed by the court, and decreed accordingly. The report was as follows:

To William Mooney, Owner of the Schooner.

Freight of the vessel to Eastport....	$161 00
Amount of sundry articles taken from the vessel as by Capt. Downie's confession and certificate.....	76 86
Demurrage, 38 days, at $5.....	190 00
Men's wages and Mooney's time.....	100 00
Sundry expenses of Mr. Mooney.....	67 50
	$595 36

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

To Albigence Hayward and William Mooney, as Owners of the Cargo.	
For the loss of profits which would have accrued, had the vessel proceeded to her destination.....	$624 00
Add for detention of property and other considerations	76 00
	$700 00
Assessors' fees going to Salem, and three meetings in Boston.....	$60 00
Coach hire and travelling expenses....	16 08
	$76 08

In the whole amounting to $1,371.44. To this sum the district court added for personal indignities and abuse,

To William Mooney.....	$100 00
To Albigence Hayward.....	50 00
	$150 00

And the final decree awarded to Wm. Mooney $695.36, and to Albigence Hayward $674, in the whole amounting to $1369.36. From this decree the libellant interposed an appeal to this court. The vessel and cargo, however, were by consent restored. No examinations in preparatory had been taken. The whole crew left the prize at Machias, not choosing, for some irregularity or impropriety, to remain on board. The cause therefore came on to be heard upon the ship's papers, and upon affidavits taken by the parties.

From the ship's papers and other evidence it appeared that the schooner was purchased at the marshal's sale in Boston, on the 21st of July, 1812, by the claimant, William Mooney, for the sum of $115; and on the 30th of the same month was enrolled and licensed in his name at the custom-house in Boston for the coasting trade. Her cargo, consisting of meal, corn, flour, pork, crackers, ship-bread, vinegar, tea and gin, of the invoice value of $1052.12, was shipped by Hayward and consigned to Mooney, and by the papers destined for Eastport. On the 30th of July, 1812, the schooner, with her cargo on board, received a clearance at the custom-house, and sailed from Boston on a voyage to Eastport, having a crew consisting of Mr. Cole as master, Mr. Mooney as supercargo, and one seaman. The reasons assigned by Capt. Downie for the capture were, that the schooner was not truly described in her enrollment and license, being described as having a square stern, whereas she had a pink stern, and from some other appearances on the face of the papers he suspected them to be forged. Another reason assigned was, that, when hailed, the master answered that he was bound to Machias, and afterwards said he was bound for Eastport. Another reason, which seems to have been relied on, was the conduct of the schooner, which Capt. Downie thought indicated a design to trade with the enemy. On the arrival at Machias, the ship's papers were pronounced to be genuine and regular by the collector at that port, and the collector advised the vessel to be given up, but Capt. Downie refused, and sent her to Salem. It seemed now admitted that the stern of the vessel was neither square nor pink, but of a form between them, and she had been enrolled for several years by the same description.

Pitman, Cummings & Sprague, for captors.

C. Jackson, for claimants.

STORY, Circuit Justice. It has been contended upon the facts in this case, that there was probable cause of capture. But I am perfectly satisfied that there was no such cause; and if there had been any foundation for the pretences set up by the commander of the privateer, it was completely removed by the suggestions of the collector at Machias. It is certainly true, that the collector does not seem to have understood his own particular duty in all respects; for he seems to have interfered with a view to compel a restoration of the property, or at least a forcible detention of it at Machias. I know of no authority confided to a collector for this purpose. Courts of law are the proper tribunals to award restitution, and captors of prizes have a right to carry their prizes to a proper and convenient port for adjudication, and are not controllable by the revenue officers. If the captors proceed irregularly or improperly, they do it at their peril, and are answerable in damages. Still, however, it was easy for Capt. Downie to ascertain the genuineness of the ship's papers at Machias; and if that was done, there seemed to be no reasonable color for further detention. I must therefore pronounce this a case of damages.

In considering, however, the proper measure of damages, I am not aware that there ever has been allowed any vindictive compensation, unless where the misconduct has been very gross, and left destitute of all apology. It will be recollected on the present occasion, that the occurrence was soon after the commencement of the war, and that from long habits of peace, a good deal of indulgence ought to be allowed to the errors and misconceptions which grow out of a state of things so novel and embarrassing. Both captors and captured, at the breaking out of hostilities, labor under great misapprehensions as to their relative rights and duties, and if I were to exact rigid propriety from the one in all cases, I should be bound to apply it to the other. But short as has been the existence of the war, the experience of the courts of the United States has abundantly shown, that the general rules of practice must be applied in the first instance, with some laxity to claimants, as well as to captors, otherwise serious injuries might arise. We have found it necessary to yield to irregularities at the commencement, which would not be endured at a subsequent period, of the war. Nor am I stating principles at all peculiar to our tribunals. Whoever examines the proceedings

of foreign prize courts, will find what great indulgence is allowed to errors, and even improprieties of captors, where they do not appear to have acted with malignity and cruelty. Indeed it has been a subject of public complaint, that the practice has assumed such extraordinary latitude.

It seems that Capt. Downie received information of this as a suspected vessel, and if we credit the account given by his witnesses, her conduct was such as indicated an intention of going to and trading with the enemy. She was found at the extremity of the United States, and in the immediate neighborhood of the enemy's possessions. Two English frigates appear to have been at about five miles distance; and the same witnesses testify, that the schooner, as she was steering, would have probably fallen into their hands. Capt. Downie's suspicions were probably thus inflamed, and trifles light as air were, under these circumstances, strong confirmations of an unlawful or fraudulent destination. It cannot be disguised, for the records of this court show it, that illegal traffic with the British possessions in that quarter, has not been infrequent. I trust and hope, that there have been no citizens of the United States, who, since the war, would disgrace themselves and their country by an intercourse, which is dangerous to the public safety, and fraught with the most alarming penalties. There seems, however, in reality to have been no sufficient reason to suspect that such was the intention of the Lively. I most assuredly acquit her of any such illegality.

So far then as the taking possession of the schooner would have been a ground for damages, if she had been released at Machias, I should have thought, that it was too minute for public animadversion. But the bringing her to Salem, and instituting prize proceedings, was without justifiable cause. The damages then ought to be equal to the real injury sustained; and unless there have been personal indignities (which I shall by and by consider) the damages ought to go no further.

This leads me to consider the damages awarded in the report of the commissioners, and to which serious objections have been urged by the counsel for the captors. I entertain entire respect for the very intelligent gentlemen, who made that report; and although I shall have occasion to comment on the principles of that report, I shall do it without intending the slightest doubt of their good judgment. A preliminary objection has been taken to the report for the want of sufficient specification. And I think the objection well founded. It is the duty of the commissioners to make their report as specific as the nature of the thing will admit, so that not only the result, but the detail of their judgment may be before the court. All general statements and general sums, instead of items and apportionments, are discountenanced by the court. The manner of calculating the freight ought to have been given. Was it a calculation on the tonnage of the vessel? It ought then to have stated the tonnage and the allowance per ton. Was it estimated on the cargo? The freight per barrel, &c. ought to have been stated. The wages ought to have been specified in the same manner, and the number of the crew, the rate per day or per month. As to expenses, they ought also to have been specified, so as to enable the court to decide whether they were proper to be allowed or not. I will add too, that if profits be a fair item, they should have been presented in detail, with the proper deductions, so that if there were errors, they might lie open to the observation of the parties and of the court. In the present case it was peculiarly necessary, for it is almost incredible, that between ports of the same state, in any honest and fair trade, the enormous profit of upwards of sixty per cent. should have been made on a cargo of provisions, in a voyage of four days. A cargo too, which, with some few exceptions, is the common produce of every part of the state.

I confess that I was struck with the unusual amount which was assessed as damages,—an amount, which exceeds the whole value of the schooner and cargo as presented on the papers. The whole value is but $1167.12, and the damages awarded are $1295.36. It has indeed been suggested, that the vessel was increased to a value equal to $500 after her purchase; but there is no evidence of the fact; and admitting it to be true, the extent of the damages is not materially affected by that consideration. If the whole vessel and cargo had been lost, it might have been proper to enter into a liberal allowance. But here they are restored, and there is not a tittle of evidence, to show that either of them sustained any injury in the hands of the captors. The voyage was not lost. There was no unlivery of the cargo, and the capacity of performing it still remained. Yet the sum given in damages seems to have proceeded upon the ground, that the voyage was lost, though it might have been performed at farthest in a week. These considerations have attracted my notice, and as the same principle, which governs this decision, must govern others of a similar nature, I have bestowed much reflection on the question of damages; I have also searched the authorities with some diligence, and in no case, that has fallen under my notice, have such extraordinary damages been allowed, where the property was not finally lost, or had not become incapable of subsequent transportation under the circumstances.

In cases where the vessel and cargo have been captured, and afterwards lost to the owner, the supreme court of the United States have confined themselves to the prime value thereof and interest thereon to the judgment; although in these cases they adjudged, that there was no probable cause of capture. Murray v. The Charming Betsey, 2 Cranch

[6 U. S.] 64; Maley v. Shattuck, 3 Cranch [7 U. S.] 458. And a rule substantially the same was adopted in a case marked with great impropriety,—Del Col. v. Arnold, 3 Dall. [3 U. S.] 333,—and in a case of gross illegality, and in which the courts were disposed to animadvert with considerable severity, they confined the damages to demurrage and interest on the principal of the captured property. Talbot v. Jansen, 3 Dall. [3 U. S.] 133.

In cases of a similar character, I should certainly feel myself bound to adhere to these decisions. Nor does the rule of foreign courts on restitution seem materially to vary. Where the property has been sold, and no account of sales has been rendered, the value is estimated at the prime cost and ten per cent. profit; where an account of sales is rendered, that in general is made the measure of the decree. The Lucy, 3 C. Rob. Adm. 208; The Narcissus, 4 C. Rob. Adm. 20. I do not mean to suggest, that other rules may not be occasionally resorted to in flagrant cases, but in the opinions intimated by the court, there is not a more liberal usage alluded to. The first object is to repair the actual damage and loss, and the next to punish aggravated misconduct. Although the argument did not object to the nature of the items, but chiefly to the undue measure allowed, I feel myself obliged, upon general principles, to declare my disapprobation of some of them. And first, as to the freight; there can be no doubt that freight is a proper item of allowance, where the voyage has been lost, or the cargo been unlivered. But upon what ground can the owner in this case claim it? His vessel has been restored with the cargo on board, and in a situation capable of performing the voyage. If it be not performed, it is his own fault or choice; but in neither case could he have a right to complain of a loss, which he could avoid sustaining. Suppose this vessel had been bound to an European port, had been captured, carried into a neutral port, and there released by consent, would it be contended, that the master might, without necessity, return home and throw the loss of freight upon the captors? Suppose a voyage from Europe to New York, and the vessel be captured and sent into Boston, and, after proceedings there, restored, will it be pretended that he might abandon the voyage without good cause, and charge the freight to the captors? Unless he could, I do not think that he could in the present case. Indeed, this is a still stronger case, for the voyage is between ports of the same state, and it might be completed in four days. Nor can it be said, that the allowance of freight is on account of the detention, for that is considered in another item, that of demurrage.

Another item, that "for seamen's wages and Mooney's time," might be proper under circumstances, but it may be included in the demurrage, which is a compensation in lieu of freight, and usually covers the expenditures of the ship. And if the wages of the seamen during the voyage, and not during the detention, were intended (as I presume they were) in this item, it is inadmissible on the same ground as the freight.

The expenses of Mr. Mooney are next allowed; but as these expenses are not specified, I know not what they are. They may or may not be correct in principle; but having been objected to, I shall not allow them without a specification.

But the most important item, that of loss of profits, deserves a more exact consideration. I should have been glad to have seen an authority approving of such an allowance under circumstances like the present. How have these profits been lost? The voyage was not broken up, nor incapable of being pursued. I am not aware of a single authority in the higher courts of admiralty, in which supposed profits have formed an item of damage in cases of restitution. In Maley v. Shattuck, 3 Cranch [7 U. S.] 458, it appears that an allowance for loss of profits was refused, and the refusal was a subject of complaint by the owner. In Talbot v. Jansen, 3 Dall. [3 U. S.] 133, it was not allowed. In Le Caux v. Eden, 2 Doug. 594, 596, there is a report of commissioners, which among other items includes one "for loss of part, and damage done to the rest of the cargo, and the diminution in the produce by the loss of the market." Whether this report was accepted or not, and if accepted, what was the amount allowed, is not stated. Nor are the facts so stated that any conclusion as to the principles, on which the report was framed, can be ascertained. It might be, that the usual allowance of ten per cent. for profit, as in cases of pre-emption and sales abroad, was awarded. I have not been able to trace in later reports a single instance, where loss of profits has been allowed. In The Corier Maratime, 1 C. Rob. Adm. 287, the circumstances of which approached near to the present, the captors, after bringing the vessel into port, did not proceed to adjudication, and a monition at the instance of the claimants issued to compel proceedings, and the captors afterwards consented to restitution. The court allowed demurrage for the time of detention, and nothing more. In the Zee Star, 4 C. Rob. Adm. 71, and the St. Juan Baptista, 5 C. Rob. Adm. 33, under circumstances unfavorable to the captors, a similar rule was adopted. I do not undertake to say, that these cases are not distinguishable from the present; I cite them only to show, that the mere absence of justifiable cause of capture, or the improper conduct of captors, is not usually followed by compensation for supposed loss of profits, when the voyage is not lost.

Independent however of all authority, I am satisfied upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The sub-

ject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets, to an exactness in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage, and the season of arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjecture, and not upon facts. Such a rule, therefore, has been rejected by courts of law in ordinary cases, and instead of deciding upon the gains or losses of parties in particular cases, an uniform interest has been applied, as the measure of damages for the detention of property. The rule is also subject to this further objection, that it is inapplicable to a great class of cases, or if applied, would work a manifest wrong. If a vessel were bound to a bad market, and were captured without justifiable cause, would it be endured, that the captors should shelter themselves from responsibility, by alleging that the owner sustained no loss, because his property was saved from a ruinous market? I cannot believe that such a pretence would be allowed. It would encourage the most injurious speculations on the chances of a condemnation. It may be said, that as to a wrongdoer, every thing is to be presumed against, and nothing for him. But I cannot admit, that a rule in a court of justice ought to be adopted, which would always work one way; and if deliberate wrongs be done, which call for redress, this court can apply a direct compensation without resorting to such an uncertain measure. Besides, it will be recollected, that it is not the wrong-doer alone who becomes responsible. The innocent owner, who has done no wrong, who has confided in the good conduct of his master, must often and indeed usually be the party, upon whom the whole severity of the loss will fall. It would be peculiarly unjust to involve him in the effect of irregularities, in which he took no part, by a regulation, from which he could, under no circumstances, derive a benefit. It would also operate a discouragement upon the public service. So long as public ships or private ships are armed with the warlike commissions of the government, it is the duty of courts of justice to grant due indulgence to the nature of the service, and not to punish every irregularity with penalties amounting to a prohibition of captures. The argument against the adoption of the rule, founded upon the public inconvenience, cannot be forgotten by this court, or any other court looking solely to its duty. With the policy or impolicy of the war we have nothing to do; and while we guard the citizen from unjustifiable seizures, we ought not to overlook the consideration, that officers are often called to decide under great embarrassments, and that their habits of life will not always guard them from mistakes of legal rights. Public ships, as well as private ships, must be governed by the same principles; and if an erroneous capture were to be followed by a compensation of all the possible profits of the voyage, no person in the service could be safe. This leads me to another objection against the rule; that it confounds all degrees of irregularity, and punishes innocent misapprehension with all the effects of wanton outrage. If the rule is to apply, it must be general. The damage sustained by the owner, as to loss of profits, will be the same, whether the capture be through mere mistake or obstinate malice; and to attempt a discrimination as to the cases will be often illusory, and sometimes injurious.

Upon the whole I am well satisfied, that the profits, upon the supposition of a prosperous termination of the voyage, ought not in any case to constitute an item of damage. In case of a total loss, the invoice price and interest, as adopted by the supreme court, is a fair and reasonable compensation. In cases of sales, if the amount be less than the invoice price, the same rule may prevail; if more, then perhaps the increased price, under circumstances, ought to be for the owner's benefit. The Lucy, 3 C. Rob. Adm. 208; The Narcissus, 4 C. Rob. Adm. 20. If no account of sales can be obtained, then perhaps the 10 per cent. upon the invoice, as in cases of pre-emption, is a fair addition. But where the property is restored uninjured, and in a situation not to lose the voyage, indemnity for the delay is obtained by demurrage for the vessel, and interest upon the invoice value of the cargo. Cases may arise, which may require a different regulation; and without pretending to anticipate them, I shall endeavor to guide myself by general principles, which may save the embarrassment of nice distinctions, and circumscribe the bounds of discretion. After these remarks, it is hardly necessary to say, that I shall not adopt the report of the commissioners. If circumstances would permit, I should probably send back the report to the same or to other commissioners; but as the cause is not of great magnitude, and a delay, with perhaps new objections to a new report, would be inconvenient to all parties, I shall proceed to pronounce upon the cause without further investigation. I shall allow demurrage, including therein wages and expenses of the ship from the time of capture until she could return to the place of capture. As the value of the cargo is small, and the interest on it will not be great, I shall allow 10 per cent. interest during the same time. As the owners must have been put to some expenses, I shall allow a sum for that charge.

The account then will stand thus:

To William Mooney, as Ship Owner.

Demurrage 38 days, at $5 per day....	190 00
Articles taken from the vessel.....	76 86
	$266 86

To William Mooney and Albigence Hayward, Owners of the Cargo.

Interest on invoice price of cargo $1052 at 10 per cent. for 38 days.....	10 95
Expenses and charges.....	50 00
Fees of commissioners.....	76 08
	$137 03

But now it is for the first time suggested, that actual damage was sustained by the cargo, and certainly, late as it comes in the cause, as it is confirmed by the declarations of the commissioners, I shall suspend a final decree, until I have heard the evidence, which may be adduced by the parties.

Having thus disposed of this part of the cause, I now proceed to consider the allowances made by the district court for personal indignity and abuse to the captured. There can be no doubt of the jurisdiction of this court to punish every indignity offered to those, who, by the fortunes of war, fall into the possession of our armed ships. It would be disgraceful to the character of the country to suffer a practice to exist, which, setting at defiance the rules of civilized warfare, should consummate a triumph over an enemy by personal indignities, or modes of restraint unnecessary for the general safety. Much less ought such conduct to be tolerated towards neutrals or citizens of our own country. And where the case should be clearly made out, accompanied with undeserved suffering or malicious injury, the court could never hesitate to pronounce for exemplary damages. In the present case the injury is alleged to have been done to Mr. Mooney; and, short as was its duration, if it had stood merely upon the evidence produced in the district court, I should not have hesitated to affirm its decree. But new evidence has been adduced, and, upon a careful examination, I am not satisfied, that both parties were not equally to blame. The whole testimony on the part of Mr. Mooney comes from Capt. Cole, who has discovered no inconsiderable zeal, and obviously testifies under a very strong bias. I am sorry to add, that he does not seem willing to state the whole facts, which attended the transactions, and that it is only upon cross interrogatories, that a reluctant confession is drawn from him, that warm words passed between Capt. Downie and Mr. Mooney at the time of hand-cuffing. I observe also, that though he states at large the challenge of Capt. Downie, he drops altogether any account of the provocation that led to it. If witnesses expect to receive credit in courts of justice, they must be ready to declare the whole truth. Partial, inflamed statements are entitled to little weight; and if material circumstances are omitted, it is no harshness to allow less credit to what is declared. Mr. Cole's testimony is encountered by two witnesses on the part of the captors. They relate facts, which he has omitted, and contradict him in several particulars. They show very improper conduct on the part of Mr. Mooney; and provocations, which change the coloring given to the cause. It cannot be expected by persons, who are captured, whether illegally or legally, that they are permitted to act as they please; that they have the right to use intemperate language, and provoke insult, and then are to receive a compensation. When a vessel is captured as prize, the papers belong exclusively to the captors; and the other party is bound to submit, and await a regular adjudication in the tribunals of his country. If he suffer wrong, he will there receive his redress by adequate damages; and it never can be the interest of captors to trample upon his rights. They will be taught to respect them by the power of the law. Now, if I believe the evidence on the part of the captors, Mr. Mooney was greatly to blame, and deserves no personal remuneration. But admitting that the case stands in doubt, it is a sufficient ground to deny damages. I am strongly impressed with the belief, that Mr. Mooney, claiming as an American citizen, did not willingly submit his vessel to be captured as a prize, and that a mutual recrimination produced the improper conduct, which has been alleged. Both parties were in blame; and I shall therefore leave them without any recompense. As to the allowance of fifty dollars to Mr. Hayward, I do not find, by any testimony in the case, that he was on board the vessel at any time during the voyage. He could not therefore be a personal sufferer, and of course is not entitled to any damages. I presume the allowance in the district court was founded upon some misapprehension of the counsel as to that fact.

This cause afterwards came on to be heard a second time upon additional evidence, as to the deterioration of the cargo. The respective counsel submitted their arguments in writing, which were as follows:

Mr. Pitman, for respondents.

(1) The commissioners exceeded their authority in ordering a sale without the consent and knowledge of the captors. (2) The sale was made without due notice to "all concerned;" if the captors were considered as concerned, they had no opportunity to attend the sale; the notice was published in the morning, the sale took place at 12 o'clock. (3) The father of the claimant, A. Hayward, should not have been the auctioneer. (4) The advertisement stated untruly that all the cargo was "partially damaged;" the auctioneer, in his affidavit, states only that the flour, corn, meal, and bread were partially damaged; the advertisement was therefore calculated in its nature to keep back purchasers and injure the sale. (5) When the respondents took their vessel and cargo agreeably to the order for restoration, the vessel and cargo were out of the custody of the law, and not subject to the order of the commissioners deriving their authority

from the court. (6) If the captors were interested in the cargo as pretended, they should have been apprised of the same, that they might have kept somebody on board to attend to their interest, and to have seen the vessel properly navigated from Salem to Boston. (7) It does not appear why the cargo was carried to Boston for the purpose of selling the same, or that the captors consented to the same, and why the cargo was not sold in Salem where the captors lived, and who had the greatest interest in the sale, if they were to make good all deficiencies in price from the invoice. (8) The commissioners had no right to require that the cargo should be carried to Boston for sale. (9) No account of sales is rendered by the auctioneer, so that it is impossible to compare the sales with the invoice, and thereby to determine what articles might have been affected by the market, and what by deterioration. (10) It does not appear that the cargo of the Lively sustained any damage after the capture, there being no evidence to show but that the cargo was in as good a state when it was delivered to the claimant in Salem as when it was captured; the nature of the damage sustained by the cargo is not stated; the captors had no right to break bulk to examine the cargo at the time of capture. (11) The conclusion, arising from a sale of articles at auction differing in price from the purchase at private sale (that is, the invoice in this case), is not by the logic of a merchant or a lawyer, that the articles thus sold are deteriorated in quality because they are so in price, and such a sale ought to include nobody but those, who are consenting and are privy to it, or unless it has been effected by the due course of law. It is conceived that the affidavits of the commissioners cannot now be brought in to explain their report in other respects, particularly after they were called upon in the district court for a specification of the principles upon which they made it, which they then offered, but which was not specific, and from which we appealed.

Mr. Jackson, in reply.

The commissioners did not order a sale. They examined the cargo so far as either party desired, and found it damaged; but instead of conjecturing what was the amount of damage, they suggested the method of selling at auction in Boston, to ascertain the amount, and proposed to postpone their report, and be governed in this particular by the result of such sale. Neither party objecting, it was so sold, and their report made accordingly. (For this I refer to the affidavits of Messrs. Codman and Chapman.) The sale was advertised on the day before, as well as on the day of the sale. (Mr. Hayward's affidavit.) If the cargo was thought to be somewhat damaged, it might attract purchasers, from the expectation of buying cheap; and Mr. Hayward, being father of one of the claimants, would (if influenced at all) be induced to get the highest price possible; as he could not then know whether the claimants would ever receive any thing more than the proceeds of that sale. And from Mr. Chapman's and Hayward's affidavits, there was a large number of respectable people at the sale, which was conducted fairly. The vessel was safely navigated from Salem to Boston at the expense of the claimants. One of the commissioners was present at the sale, and they were all satisfied with the account of sales at the time, when the transaction was recent, and any error easily detected; and they, as well as the auctioneer, state the difference between the actual proceeds, and the price of such articles if sound. The vessel had been out of port three days when captured, and was detained about five weeks in the worst season of the year, before the sale. I refer to the former examination of the cause in court, and to the affidavits of Codman, Chapman, and Hayward, for any further answers that may be necessary to Mr. Pitman's argument hereto annexed.

STORY, Circuit Justice. The cause has now been again argued upon the supplementary affidavits, as to the question of damages on account of injuries sustained by the cargo. This second examination has abundantly satisfied me of the danger of allowing any irregularity in prize proceedings, and of the importance of an accurate knowledge on the part of commissioners of the boundaries of their duty. No inconsiderable embarrassment has been thrown upon the court by the want of exactness in these particulars. In cases of restitution with damages in prize proceedings, if in order to ascertain the damages an inspection or a sale of the cargo be, in the judgment of the commissioners or the parties, necessary for the furtherance of justice, application should be made to the court for an order of unlivery and appraisement, or for a sale, as the case may require. Where an unlivery and appraisement is sought, it is the usual practice for each party to name one, and the court to appoint the third commissioner. Notice of the execution of such commission should be given to both parties, that they may attend, if they see cause, and the commissioners should not allow any evidence to be given behind the back of either party, which they have not an opportunity to repel. If on the other hand a sale be advised, it should be made by the proper officers, acting under the eyes, and at the instance of the court. In this way the parties will have an opportunity to attend the sale, and the time and place may be directed by the court, as public convenience may require. Under such proceedings no surprise or undue advantage can take place. If the appraisement be too low in the judgment of either party, the right to elect a purchase on the part of the captors, and to elect a sale on the part of the cap-

tured, may under circumstances be allowed, as in cases where the voyage is completely broken up and abandoned; and at all events the decisions and proceedings of the commissioners are subject to all legal objections, when they pass in review before the court. The property or its proceeds still remain in the custody of the prize court, and may be disposed of as law and justice shall require. The report of the commissioners may, if necessary, be rejected or remoulded, and a legal decision obtained in all difficulties. But if a decree of restitution be passed, and actually executed before an appraisement or sale is had, the property is no longer within the control of the court, and in many instances it will be impracticable to administer complete relief.

The present case is not exempted from these difficulties. No legal appraisement was had. A partial survey and unlivery was made, and after the property was restored, it was conveyed to Boston, and under the recommendation of the commissioners, without any application to the court or direct assent of the parties, was sold at public auction; and this sale was the basis, on which the commissioners proceeded to estimate the damages. The commissioners also heard ex parte evidence without notice to the other party, and by such means ascertained the profits of the intended voyage. There can be no doubt, that the commissioners acted with good faith, but under a total misapprehension of their duty; and independent of every other consideration, these circumstances would have been sufficient to induce me to open the report, if I had not already upon other grounds laid it aside.

It appears from the affidavit of the auctioneer, (who is the father of one of the claimants) that the nett sales amounted to $724, and that in his opinion, the damage to the goods was at least 25 per cent. One of the commissioners also states, that he attended the sale, and it was conducted with perfect fairness. I do not doubt the fact. But the captors have required, and have not received any account of the sales; and the nature of their testimony in defence required that it should have been produced. Without meaning to make any suggestion against the auctioneer, I cannot but think the remark justifiable, that he was not an indifferent person, and ought not to have superintended the sale. But a more important objection is taken to it by the captors, supported by affidavit, that they never assented to the sale, or had notice of it, or acquiesced in its propriety. They contend also, that if it had been proper, Salem and not Boston should have been the place. I am satisfied, that the captors are not bound by the sale, under the circumstance of a want of assent and notice. And although it is still evidence to be submitted to the court, it cannot avail even as a strong presumption of the real value, especially as no account of sales is produced. The presumption (such as it is) arising from the sale is encountered by strong affidavits of the captors, that the deterioration and injury of the goods was slight and inconsiderable, and that though two thirds of the cargo was taken out, but a small portion was found in an unsound state.

It is very difficult and perhaps impracticable to reconcile the whole testimony in the cause, and I am not prepared to say, that the weight on either side so far preponderates, as to entitle it to unquestionable credit. The auctioneer declares the estimated injury at least 25 per cent. The captors make it quite inconsiderable. I am not sure therefore, that in any event the evidence enables me to do complete justice to the parties. If however I err in this respect, it is some consolation that the error is involuntary, and has resulted from irregularities, over which I have had no control. On the whole I shall steer a middle course, and allow for the deterioration of the cargo 20 per cent. on the invoice value. The supplementary evidence on this second hearing has completely satisfied my mind that the voyage might have been pursued, and was abandoned without necessity. I retain therefore the opinion, which was expressed at the former hearing, on the other parts of the cause. As no appeal was interposed respecting the item of $76, which was rejected by the district court, and I am entirely satisfied with that decision, I shall lay the item out of the case. The account then, as finally rectified, gives to William Mooney, as ship owner, $266.86, and to William Mooney and Albigence Hayward, as owners of the cargo, (including the damages at 20 per cent. on the invoice value) $352.43, amounting in the whole to $619.29.

I affirm the decree of the district court, as to the restitution of the schooner and cargo, and reverse it as to the damages allowed by that court; and I do award that the claimants recover their damages against the captors for the illegal capture, viz. Mr. William Mooney, as ship owner, the sum of $266.86, and William Mooney and Albigence Hayward, as owners of the cargo, the sum of $352.43, with costs. I observe that the claim for the cargo has been given in by Mooney in behalf of himself and Hayward, though both are inhabitants of Boston. This is irregular. Where the parties are within the jurisdiction, they should claim in person. When they are in a foreign country, a claim by an agent is admissible. In all cases where it is practicable, the captors have a right to the personal answer on the oath of the respective claimants.

Case No. 8,404.

In re LIVERMORE.

[5 Law Rep. 370.]

District Court, S. D. New York. Aug., 1842.

PRACTICE—UNNECESSARY DELAY—NEGLIGENCE.

In bankruptcy.

Mr. Livermore, pro se.

A. Benedict, for the creditors.

THE COURT, after a detailed opinion upon the points in contestation in this case, stated that the rules of the court were designed to prevent unnecessary delays in causes, and that strict diligence would be enforced in supporting opposition to petitioners, and accordingly the creditor must take an order on the docket for hearing within two days on points of law, and if his objections are to matters of fact, instanter on filing them, for a reference to a commissioner. The execution of the reference will only be suspended to abide the decision on the questions of law when those present a bar to the petition. An omission to take the appropriate step within a reasonable time will be deemed a waiver of the objections.

THE COURT decided that objections filed against a decree of bankruptcy cannot, without an express order at the time, be continued and employed against the application for a discharge. The opposition in the latter case, resting upon distinct principles, must be made at the time indicated by the notice and rules, and in the appropriate manner. That accordingly the course pursued by the creditors was irregular and would be nugatory had the bankrupt proceeded correctly and with diligence. But having been guilty of laches himself, and now applying to the favor of the court to rectify his omissions, it was ordered that the creditors have leave to show cause, the day after to-morrow, why he should not be permitted to take his amendments nunc pro tunc, and enter his final decree.

LIVERPOOL & L. & G. INS. CO. (AKIN v.). See Case No. 121.

Case No. 8,405.

The LIVERPOOL HERO.

[2 Gall. 184.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1814.

CUSTOMS DUTIES—PRIZE—SHARE OF CAPTURING CREW.

Prize goods, brought in by ships of war of the United States, are liable to the payment of duties, as to the moiety belonging to the officers and crew of the capturing ship; but no duties are payable on the moiety belonging to the United States; but the whole of that moiety belongs to the navy pension fund.

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

The property in controversy in this case [The Liverpool Hero, and cargo, Simpson, master], having been condemned in the district court, as enemy's property, and good and lawful prize to the United States' frigate Chesapeake, Samuel Evans, Esq., commander, and decreed to be distributed, one moiety to the United States, and the other to the officers and crew of said frigate, according to law, after deducting the duties, due on the importation thereof into the United States, an appeal was interposed by Commodore Decatur, who, as flag officer, was entitled to one twentieth part of one moiety of the proceeds, from so much of the decree as ordered a deduction of duties. The following were assigned as the reasons of appeal: (1) "That goods captured from an enemy, and brought into the United States, by a public armed ship of the United States, are not made subject to duties by law." (2) "That the officers and crew of a public armed ship of the United States are entitled, in all cases, to at least one half of the proceeds of the prizes, which they captured and have condemned; which by the decree appealed from is not given to the said officers and crew of said frigate." In order to explain some parts of the argument, it may be proper to remark, that the goods, to which the question related were removed from the prize, in consequence of her leaky condition, and were brought into port on board of the frigate.

Selfridge, for appellant.

It is only in consequence of the express provisions of the constitution and laws of the United States, that duties are in any case payable on the importation of merchandise. Without these it would be the right of every individual to import goods, free from any tax or charge to the government. It follows, that no duties can be claimed, when the importation is made under circumstances, and in a manner, clearly not contemplated by the law. There are many provisions in the law regulating the collection of duties,—4 Laws [Folwell's Ed.] 305; 1 Story's Laws, 573 [1 Stat. 627],—which prove, that public armed ships were not intended to be subject to its operation. By section 62, bonds are required to be given to the United States, for securing the duties. Can the United States give bond to themselves? By section 50, permits are to be given before goods are landed. If they should be landed without permit from a public ship, against whom would the information lie? By section 53, an inspector may be put on board of every vessel on her arrival. Can this apply to public ships? Endless would be the absurdities and embarrassments, to which such a con-

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

struction would lead. It is, therefore, evident, that duties were intended to be imposed on those goods only, which are imported in the regular course of trade. It is equally clear, from the law regulating the navy, that prize goods, captured by public ships, were not considered to be subject to duties. By this act, prizes of equal or superior force are to become, upon condemnation, the sole property of the captors. They would not become their sole property, if duties are to be paid. By the same act, when the prize is of inferior force, it is to be divided equally between the United States and the captors. Is it not absurd, to call that an equal division, by which the United States take first one half as duties, and then one half of the residue? There are many other considerations, which support this view of the law: (1) The goods, when captured, belong until condemnation to the United States, who cannot secure or pay duties to themselves. (2) The effect of such a requisition would be, that captors, instead of bringing in, would destroy every prize, by which means the calamities of war would be increased, and the United States would be deprived of their moiety. (3) It was not intended to add to the revenue by the proceeds of prizes, but, on the contrary, the moiety accruing to the United States is appropriated to form a fund for the encouragement of merit and relief of disabled seamen. 5 Laws [Smith's Ed.] 108, 123; 1 Story's Laws, 761, 768 [2 Stat. 45, 51]. (4) By this means privateers would be encouraged at the expense of the navy, which could not be the intention of congress. In remitting the double duties to privateers, the intention probably was to prefer them to merchant vessels; but the navy would be favored more than either. If, however, goods captured by public ships are, notwithstanding these reasons, held to be subject to duties, it is submitted with confidence, that duties are to be charged upon the moiety only.

Blake, Dist. Atty., for the United States.

My official duty compels me, in this case, to a course entirely different from that, which my feelings would suggest. I should rejoice, if the laws were such, as to exempt from duties prizes made by the navy. But I am apprehensive, that it is otherwise, and that the legislature only can afford relief. The misfortune seems to be, that the revenue laws are calculated for a state of peace, and cannot, without amendment, be made to suit with the exigencies of war. The act, by which duties are imposed, has not been adverted to by the counsel for the appellant. He has confined his remarks to the act regulating the collection of duties. By the first act,—1 Laws [Folwell's Ed.] 248; 1 Story's Laws, 159 [1 Stat. 180],—all goods imported into the United States are made subject to duties, unless specially excepted. It is true, that all the regulations for enforcing the payment of duties appear to relate to common and ordinary importations only, and to be inapplicable to public ships. The reason is obvious. It was not anticipated, that goods would ever be imported in a public armed ship. But the late acts of congress show that prize goods are not supposed to be excepted from the revenue laws. By a statute recently passed, the double duties on prize goods were remitted, and in the law concerning letters of marque, &c.,—11 Laws [Weightman's Ed.] 238, c. 107, § 13, S. A.; 2 Story's Laws, 1261 [2 Stat. 759],—owners and commanders of privateers are made subject to the same penalties and forfeitures for a violation of the revenue laws, as attach to merchant vessels in the like cases. No real difficulty exists, as to the manner of entering the goods and securing the duties. All this may be done by the prize master. It is admitted, that such a regulation, as that the captain shall be subject to a penalty, if he does not make report, cannot, without absurdity, be extended to public ships. But it does not, by any means, follow, that because some parts of the law are necessarily confined to merchant vessels, all its other parts are to be construed with the same restriction. The transhipment of the goods from the prize to the frigate was an irregularity, to be excused only by the necessity of the case. No exemption can be claimed on this ground, but the cause must stand upon the same footing, as if the goods had arrived on board of the Liverpool Hero, in the custody of a prize master.

STORY, Circuit Justice. The single question is, whether prize goods imported into the United States by a national ship, under the commission and authority of the United States, are liable to the payment of duties? It is very correctly argued, that no duties are payable on goods imported into the United States, unless expressly provided for by statute. By the act of the 10th of August, 1790, c. 39, 1 Laws [Folwell's Ed.] 248 [1 Stat. 180], certain duties are laid upon all merchandise not therein excepted, which shall be brought into the United States from any foreign port or place; and by the act of the 1st of July, 1812, c. 112 (11 Laws [Weightman's Ed.] 260), one hundred per centum is added to the then permanent duties. It is very clear, that goods belonging to the United States, and imported on their own account, in their own ships, are not within the purview of either of these statutes. Independent of the general doctrine, that the sovereign is not restrained by a statute, unless named in it, it is impossible to contend, that either these acts, or the acts made to enforce the collection of duties,—March 2, 1799, c. 128; 4 Laws [Folwell's Ed.] 305 [1 Stat. 627],—can in common sense apply to the United States. It would be absurd to suppose, that the United States should pay duties to themselves; much more that they

should give bond to themselves for duties, or for drawback, or should incur the forfeiture of their own goods by landing them without a permit.

By the general law of prize, all captures, made by the public armed ships of a nation, belong to the sovereign. By the prize law of the United States, after condemnation as prize, a moiety of the proceeds is distributed among the officers and crew, if the captured vessel be of inferior force, and the whole, if of equal or superior force, to the capturing ship. Feb. 23, 1800, c. 33; 5 Laws [Smith's Ed.] 108, c. 33 [2 Stat. 45]. Still, however, the whole property is proceeded against in behalf of the United States, and no title vests in the captors, except to a distributive share of the proceeds after condemnation. Until such final adjudication, the captors have no interest, which the court can properly notice for any purpose whatsoever. The condemnation is, in terms, a condemnation to the United States; but it enures for the benefit of the captors, and is distributed according to the provisions of law. The Elsebe, 5 C. Rob. Adm. 173. It follows from these considerations, that prize goods imported into the United States in public ships, under the authority of the United States, are to be deemed an importation by the United States, and not by the captors. None of the rules, therefore, that apply to the ordinary importations of merchants, could govern in such a case.

If the present case, therefore, stood upon the general principles of law, I should have no difficulty in acceding to the argument of the appellant, that these prize goods were not liable to the payment of duties. But it seems to me, that the present case is directly within the purview of a statute, which was not adverted to by the counsel on either side at the argument. I allude to the prize act of the 26th of June, 1812, c. 107. 11 Laws [Weightman's Ed.] 238, c. 107 [2 Stat. 759]. That act (section 14), after exempting all prize goods captured from the enemy by private armed vessels, or by the vessels of war and revenue of the United States, from the operation of the non-importation acts, declares, that all such goods, when imported into the United States, shall pay the same duties, to be secured and collected in the same manner, and under the same regulations, as the like goods, if imported in vessels of the United States, from any foreign port or place, in the ordinary course of trade, are or may at the time be liable to pay. However incongruous, and I had almost said impracticable, it may be, to transfer the ordinary regulations of the revenue to prize causes, the intention of the legislature to make prize goods, imported in public ships, liable to duties, is sufficiently apparent in this language. I pretend not to solve, though I can readily foresee, the great difficulties, presented by this novel provision. Admitting that duties are payable on such prize goods; by whom are they to be secured, and in what manner, and under what regulations? These questions are sufficiently embarrassing, but connected with another, viz. whether the whole goods are to pay duties, or the moiety belonging to the United States is to be exempted, they involve the mind in singular perplexity. If the payment of duties had been confined to that portion of such prize goods, which vests in the officers and crew, it might be possible to construe the act, as authorizing the security of the duties by them. But as to the portion belonging to the United States, it is difficult, as I have already stated, to conceive how the United States can either pay or secure the duties to themselves. It is further to be considered, that this portion is pledged by the United States, as a fund for the payment of pensions to the navy, and that a construction, which would render it liable to the deduction of duties, would greatly diminish the amount devoted to this most meritorious purpose. I do not think, therefore, such a construction ought lightly to be admitted.

My opinion accordingly is, though I confess it is not unattended with difficulties, that duties are, in no event, to be deducted from the moiety belonging to the United States, but the same is wholly to accrue to the navy fund, and that the other moiety, belonging to the officers and crew, is subject to duties. I shall direct the decree of the district court to be conformed to this opinion.

"If goods are taken as lawful prize upon the sea, and imported or brought into an English port, these prize goods shall pay customs inward; and accordingly it hath been resolved." Hale on the Customs; Harg. Law Tracts, 214; Id. 224.

LIVERPOOL, L. & G. INS. CO. (THOMPSON v.). See Case No. 13,966.

Case No. 8,406.

The LIVERPOOL PACKET.

[1 Gall. 513.] [1]

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

PRIZE—CONCEALMENT AND FALSIFICATION OF PAPERS—TRADE WITH NEUTRAL PORT—PROBABLE CAUSE FOR CAPTURE.

1. On the original hearing, if the character and origin of the captured property be in question, the court should order a survey and report.

[Cited in The Palo Alto, Case No. 10,700.]

2. In cases of fraudulent concealment and falsification of papers, further proof is not allowed to the party.

[Cited in brief in The Revere, Case No. 11,716.]

3. If a claim be founded in illegal conduct, it must be rejected, and if such illegality be a cause of municipal forfeiture, and not jure belli, the property will be condemned to the United States.

4. A trade to a neutral port is not illegal, although the public enemy derive benefit thereby, unless such trade be carried on in connection with, or subservient to hostile interests and policy.

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

5. In what cases further proof allowed to captors.

6. The captors are not liable to damages, where there is probable cause of capture. What constitutes such probable cause.

[Cited in Williams v. Delano, 155 Mass. 14, 28 N. E. 1,123.]

See The Rover [Case No. 12,091.]

7. A voyage by a vessel from an enemy port with a cargo on board, without the license of our government, is of itself a probable cause for the capture of the vessel and cargo.

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

In admiralty.

Sprague & Pitman, for captors.

Mr. Prescott, for Nickels, Smith, and Hall & Thatcher.

Mr. Dexter, for John C. Jones.

STORY, Circuit Justice. The ship Liverpool Packet and cargo were captured a few miles without half-way rock in Boston Bay, on the 20th of July, 1813, by the privateer Castigator, Stephen G. Clark, commander. From the papers on board, and the preparatory evidence, it appears, that the ship sailed from Charleston, S. C., in the last spring, with a cargo of rice, bound for Lisbon, at which port she arrived and safely delivered her cargo. At Lisbon a return cargo was taken on board, principally on freight, consisting of about 407 moys of salt, 150 frails of raisins, 100 boxes of lemons, and 61 bales of dry goods, and 7 cases of cambrics. The ship sailed with said cargo from Lisbon about the 2d of June, 1813, bound for Boston, and about four days afterwards was boarded by the British sloop of war Andromeda, and after a short detention was permitted to proceed on the voyage, on the ground, as the master alleges, of having on board a certificate of landing his outward cargo of rice in Lisbon, and he alleges that he knows of no other ground. About twenty-two days afterwards, the ship was boarded by the British frigate Dover, and captured as prize. Eight of the ship's crew were taken out, and a prize crew consisting of a lieutenant and fourteen men, twelve of whom were soldiers, were put on board, and the ship ordered for Halifax, at which place, the ship in company with the frigate arrived, on or about the 7th of July, 1813. The ship and cargo were there libelled as prize, but afterwards given up to the master upon payment of the expenses, to defray which, the master states, that he disposed of the lemons to ships of war lying in the harbor. The master further alleges, that the same certificate of the dischage of the outward cargo was the occasion of his release at Halifax; and the certificate now appears among the papers in the cause. He expressly denies having had at any time during the voyage, any British license on board, and in this assertion he is confirmed by the other witnesses examined in preparatory. The ship sailed from Halifax on the 15th of July, and was proceeding direct for Boston, at the time of the capture. The ship, the salt, and part of the raisins, are claimed by Mr. Samuel Smith, and the residue of the raisins are claimed by the master [Samuel Nickels]. They are both American citizens domiciliated in Boston. The cambrics are claimed by Mr. John C. Jones, consignee thereof, as the property of Antonio Joze Vieina, a Portuguese merchant resident at Lisbon, and as being of French manufacture. The sixty-one bales of dry goods are claimed by Messrs. Hall & Thatcher, consignees thereof, as the property of Sebastian de Lavraondo, a Spanish merchant resident at Cadiz, and as being of Spanish manufacture. The papers on board comport with the property as claimed. The certificate, above alluded to, is signed by a Mr. J. H. T. Sampayo, a Portuguese merchant resident at Lisbon, to whom the outward cargo appears to have been consigned, either by the owners or by the supercargo of the ship, and his certificate is verified by the American consul at Lisbon.

The district court, on the hearing, decreed a restoration of the ship and property as claimed, and damages against the captors, for the injury sustained by the landing of the cargo in Salem instead of Boston. From this decree the captors appealed, as to the claims of Messrs. [Samuel] Smith and [Samuel] Nickels in the whole, but as to the claims of Messrs. Jones, and Hall & Thatcher, in respect only to the damages. It seems, that in the district court an application was made to have a survey of the cargo, upon an allegation that the dry goods were of British manufacture. This application was at first acceded to, but not finally acted upon, so as to obtain a satisfactory result; the learned judge of that court being of opinion, as he states in his decree, that as the property of the goods was proved to be as claimed, it was not proper or admissible to institute the further inquiry prayed for into the fabric, on a suggestion that they were of British manufacture, especially as it could not render the property liable to condemnation as prize (to the captors,) if the suggestion should be verified; and further, that an allowance of such an application would be a departure from the approved rules of practice in prize proceedings. This opinion of the learned judge has been much commented on in the course of the argument, as having deprived the captors of some of the rights, which, but for a subsequent delivery of the property, they would have had before this and the highest appellate court. I feel myself, therefore, called upon in some sort to notice the point, although as the property is no longer in the custody of the court, the opinion, which I have formed, may not be of much avail to the parties. In entering on this discussion, I beg to be understood, as entertaining the highest respect for the opinions of the district court, and if the result of my inquiries differs from that pronounced in its decree, it ought to induce me to entertain some diffidence, as to the correctness of my

own judgment. I feel, however, that I have no right to withhold an opinion, which the occasion requires me to declare. I most entirely accede to the doctrine laid down in The Sarah, 3 C. Rob. Adm. 330, that the prize court ought not in general to admit extrinsic evidence to affect the parties with illegality, unless there appear in the original evidence something, which lays a suggestion for prosecuting the inquiry further, because "if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof, that would be introduced in order to support arbitrary suggestions." I accede also to the doctrine, that the evidence to acquit or condemn must come from the ship and the preparatory depositions. But I consider it perfectly clear, that the nature and character of the property before the court constitutes a part, and often an essential part of the original evidence. It is literally evidence drawn from the ship itself, and carries with it, in many instances, a certainty, which no papers can ever give. Suppose the ship's papers and the examinations should all negative the existence of contraband on board, and yet it should be made manifest, that contraband goods were concealed, and formed a considerable portion of the cargo; could the court, with any consistency, refuse to order a survey, and strip the mask from fraud and perjury? Suppose the cargo purported to be salt, or some other merchandize of inconsiderable value, and it should be suggested upon strong grounds, that beneath a slight covering of salt was a bulk of English goods of extraordinary value, would the court allow the mere formal papers to overrule evidence so pregnant with concealed hostile interests? Suppose the cargo on board of a neutral ship purported to be the manufacture of the neutral country, and destined for neutral use, will it be contended that a prize court must shut its eyes against the real character of the cargo, when the slightest inspection would prove it entirely hostile?

I think but one answer could be given to these questions, that if the court, under such circumstances, should refuse an unlivery and inspection, it would subject itself to become an instrument of the most manifest injustice. Nor let it be said, that I put strong cases, because they are precisely those, in which a prize court would ordinarily be requested to grant an inspection. Such an inquiry would be useful only in cases of pregnant suspicion, or apparent concealment. It has been suggested, that however proper such an inquiry might be, where the property should be suspected of a hostile character, or if neutral, where the property should be infected with the taint of contraband, or other offence against the laws of war, it ought not to be allowed, where the effect of the inquiry could not extend beyond the mere proof of a municipal forfeiture. But is it certain, that no further effect would arise? Suppose, in the present case, (and I mean only a supposition, and not any imputation upon the parties) the inquiry had been made, and the cambrics and dry goods, upon examination, had turned out to be clearly of British manufacture, with all the undisguised marks of recent fabric, I ask if it would not have thrown a cloud of suspicion over every part of the cause? Whether it would not have falsified the papers? Whether it would not, connected with the other circumstances, fairly have raised a pregnant suspicion of concealed enemy interests? Whether, at all events, it would not have compelled the parties to relieve the cause by further proof? And yet by the known practice of the court, in cases of fraudulent concealment or falsification of papers, the party would not be entitled to the benefit of further proof, for that is an indulgence granted only to honest mistake and unintentional error. The Juffrouw Anna, 1 C. Rob. Adm. 125; The Welvaart, Id. 122; The Eenrom, 2 C. Rob. Adm. 1. If the parties then could not have obtained the benefit of further proof, the consequence would have been, that their claims must have been rejected, and the property, for want of proof of neutrality, condemned as enemies' property. This is the ordinary result, where the original evidence is doubtful, and the parties are not permitted to introduce new explanations. But allowing that the condemnation would not, upon such a result, have been to the captors, still I think such an inquiry would be of material consequence to them. In the first place, it perfectly protects them from all questions of damages, because the claims of the parties being rejected for a violation of municipal law, they have no standing in court, and consequently cannot moot any questions, as to damages or costs. The Walsingham Packet, 2 C. Rob. Adm. 77. In the next place, I should presume, that as against the United States, the captors would be entitled to their expenses, for as between them, it is not only a case of probable cause, but of actual condemnation. It would be difficult, I should imagine, to contend that those, through whose instrumentality the United States had enforced their rights, were yet so in delicto, as to forfeit their expenses in enforcing those rights. Further, it is to be considered, that the captors seize at their own peril. They have a right to examine and search the cargo, and are not bound by the mere documentary evidence. This may be mere fabrication, but the cargo itself cannot deceive. How then are the court to know, whether there was probable cause to seize, if the law allows the captors to judge by examining the evidence of the cargo itself, and the court shuts its eyes against it? It cannot be, that the law should authorize the captors to judge of the probable ground of seizure by one test, and yet authorize the court to decide on the same question by another. On the whole,

therefore, upon principle, I hold that the prize property not only may be, but necessarily is, a part of the evidence in every prize cause upon the original hearing.

How then stands the point, considered upon the footing of usage? It is certainly not necessary to show, that in cases of concealed contraband, an inspection of the cargo is a usual practice. It seemed conceded at the argument, that, independent of such examination, it would be very difficult, if not impossible, to detect such imposition. Concealed contraband is, as we all know, a ground of condemnation. The Richmond, 5 C. Rob. Adm. 325. And if a practice so essential to justice needed proof, I think it may fairly be inferred from The Richmond, ubi supra, and The Jonge Margaretha, 1 C. Rob. Adm. 189, and The Oster Risoer, 4 C. Rob. Adm. 199. That no decisions are found to this particular point, must result from its being taken as the common usage of the court. From the same cases, and also from the known rule, that false papers, under circumstances, affect the property with condemnation, it must be taken to be a usual practice to examine the cargo, where the description of them in the papers is entirely untrue, as to its nature or quality; for it is by such an examination only, that the court can ordinarily arrive at the knowledge of the fact. In The Oster Risoer, the packages were described as linen, and turned out to be sail cloth, and the master denied any knowledge of the contents of the packages. How did the court ascertain the real contents? Certainly by an examination of the packages after unlivery. The case of The Carl Walter, Id. 207, is decisive to show, that the court will go into the inquiry, as to the national origin of the property, when it becomes material to the cause. In that case, the court suffered the captors to prove by ex parte affidavits that hides, described in the papers as Portuguese hides, were in fact Spanish hides, and the decision ultimately rested upon that fact. Surely, if the court would hear ex parte evidence of the origin, it would not refuse the testimony of sworn surveyors appointed by itself. It is in vain to distinguish that case, by suggesting that doubts grew out of the preparatory examination of the master. The court do not put it upon that ground, and denied further proof to the claimants. I do not however think it material to consider, whether the court proceeded upon the ground of doubts in the original evidence or not; for the case and also that of The Potrimpos (cited in 4 C. Rob. Adm. 213), will still prove, that the origin of the property will in proper cases be ascertained by the court, by an examination, notwithstanding the formal description in the papers. On the whole, I infer from the occasional, though scattered lights, reflected from adjudged cases, and the impracticability of otherwise applying some known rules of the law of war, that the practice must be conformable to the principle, that I have above stated; viz. that the property, subjected to the prize jurisdiction, is itself in the first instance a part of the necessary evidence in the cause, upon which acquittal or condemnation must go, and that the court will, upon laying a proper foundation, direct a survey, in order to ascertain its nature and character. In some cases, it would be otherwise impossible to decide. If there be no persons or papers on board the ship, and she is found a mere derelict, the nature and quality of the cargo may afford the only means of ascertaining the question of enemy property, or not. The general course of prize proceedings is evidently modelled upon the ancient regulations of the prize courts of France; and it is extremely clear from these regulations in the commentaries of Valin, that the cargo itself is considered one of the criteria, by which to decide the question of prize or no prize. See Ordon. Lewis, 14; Des Prises, arts. 22, 25, 26; and Valin des Prises, 187, 200, 201, etc. I have taken up more time, than I originally intended, in considering this point, but my apology will be found in its extreme importance, and in the deference, which I feel for a different opinion supported by the district judge.

I proceed now to the question, as to the right of Messrs. Smith & Nickels to have the property claimed by them restored, according to the decree of the district court. There is no question made, as to the claims of Messrs. Jones, and Hall & Thatcher, and therefore I dismiss them from all consideration. It is clear, from all the evidence, that the property belongs to Messrs. Smith & Nickels, as claimed. But it is said by the captors, that notwithstanding this, it is subject to condemnation, because the voyage must have been performed under the protection of a British license; and upon any other supposition it is impossible to account for the exemption of this vessel from British condemnation. I do not think, that, under the circumstances, so pregnant a suspicion would arise of subserviency to British interests, as the captors suppose. We all know, that soon after the war, with a view to facilitate the supply of the British armies in Spain and Portugal, licenses were granted by the British government, to protect from capture cargoes destined to those countries. It has been decided by this court in the case of the Julia, Luce master, that the acceptance and use of such license, on the part of an American citizen, constituted such an avowed adoption of the policy of the enemy, as stamped the property engaged in the traffic with all the penal taints of the hostile character. I look back upon that decision without regret, and, after much subsequent reflection, cannot doubt, that it has a perfect foundation in the principles of public law. To the many authorities there stated; I might have added the pointed lan-

guage of Sir W. Scott, in The Jonge Pieter, 4 C. Rob. Adm. 79, that "without the license of the government, no communication, direct or indirect, can be carried on with the enemy," and the rule strongly illustrative of the principle, which is acknowledged as early as the Year Books (per Brian, J., 19 Edw. IV. 6, cited Thel. Dig. lib. 1, c. 6, § 21), and has received sanction down to the present times (13 Ves. 71; 6 Taunt. 237, 1 Marsh. 558), that every contract and engagement made with the enemy, pending war, is utterly void. But to return; it is well known, that long before the decision of The Julia [8 Cranch (12 U. S.) 181], doubts had existed, as to the legality of such licenses, doubts which must have soon become known to the enemy, and as the policy of maintaining the supply continued the same, it is not extraordinary that the British government should give every encouragement to such shipments, as its necessities required, by prohibiting its cruisers from the capture of vessels, which were engaged in this trade. Under such circumstances, it is not incredible, that a mere certificate of the landing of the outward cargo at Lisbon, signed by a person in whom they had confidence, a person (as the captors allege) acting as a British commissary, should exempt the vessel and cargo from capture on the return voyage. I do not assert, that any such general exemption has been authorized by any orders of the British government; but when the master and crew directly and positively deny any British license to have been used during the voyage, I cannot feel at liberty to set aside their testimony, upon mere suspicions arising from facts, which admit of a fair interpretation in their favor.

But it is said, that the case affords strong presumptions, that the outward cargo was shipped on British account, or at least for British use, and therefore subject to condemnation; and the captors have asked for leave to show, by further proof, that Mr. Sampayo, in whose hands the cargo was placed at Lisbon, is a commissary of the British government, as well as a general merchant there. I admit that, if it were true that the outward cargo had gone on British account, for British use, all the consequences would ensue, for which the captors contend. I do not, however, see the facts in the same light as the argument supposes. There is no evidence in the papers of British connexion. The cargo was consigned to the supercargo, and by him put into the hands of Mr. Sampayo, for sale; and it is admitted, that Mr. Sampayo is a resident Portuguese merchant. The case does not rest here. The whole preparatory examinations disavow any British connexion; and the very circumstance of the capture by the Dover, does, in no small degree, fortify the presumption, that there was no such connexion. The sale of the lemons, at Halifax, is sworn to have been involuntary, to pay expenses, and the value is too trifling to raise a serious doubt of the fact. Where then is the evidence of enemy connexions? It is drawn exclusively from the existence of the certificate of the landing of the cargo, which, it is said, operates virtually as a license. For myself, I cannot see any very noxious quality in that certificate. Suppose it was known at Lisbon, (and the fact must undoubtedly have been believed, or the present cargo would not have been shipped), that the British government would not molest American vessels returning with cargoes, if they could prove, that they had landed outward cargoes of provisions at Lisbon. Would there be any thing illegal in taking such certificate from a respectable merchant, sanctioned by the American consul? I profess, that I do not perceive the illegality. If the certificate were false in point of statement, I suppose that such an attempt to deceive the enemy cruisers would not have been deemed unjustifiable; why should its truth render it more so? The argument seems to suppose, that if the British government had, by a general order, exempted all American vessels from capture, bound to Lisbon with provisions, that the merely sailing on such a voyage would constitute an illegal subservience to the enemy; and could not be distinguished from the case of sailing with a special British license. The same argument was used in The Julia [supra] for the opposite purpose, namely, to show that both proceedings were legal and innocent; and the answer given in that case I am still disposed to consider, as sufficient to establish the fallacy of the reasoning: "There is all the difference between the cases, that there is between an active personal co-operation in the measures of the enemy, and the merely accidental aid afforded by the pursuit of a fair and legitimate commerce." The trade to Lisbon, on neutral or domestic account, is a commerce authorized by the laws of the United States, and growing out of that amity, which subsists with the Portuguese government. Provisions may be lawfully exported and sold there; and if, thereby, the British interests are aided, or the British policy enforced, it is a mere incidental effect, which no more infects the transactions with hostility, than the trade of a Portuguese merchant with the United Sates would constitute a violation of his neutrality, merely by adding to the revenue of the country. If the mere chance, that a trade may assist the resources, or aid the enterprises of an enemy, through indirect channels, were a sufficient proof of hostile attachment and interest, I know not how, in the present state of the world, any neutral commerce could exist. While, therefore, the trade is by the laws left open to the citizens of the United States, it cannot acquire an illegal character, unless it be carried on expressly for British account, or

shipped under British contract, or destined for British use, or voluntarily incorporated into British service by licenses, which give the immunity of British navigation. In other words, where the trade is carried on bona fide on neutral or domestic account, for general sale in a neutral market, the voyage is not contaminated, although the enemy obtain his supplies from the general stock of that market. If there be any public inconvenience from allowing such a trade, it is a subject for legislative and not for judicial interference.

The court has been asked to admit the captors to further proof, as to the character of Mr. Sampayo, and to show that he acts as commissary to the British troops in Portugal. It is well known, that the prize court is studious to preserve simplicity in its proceedings, and rarely admits the captors to the benefit of further proof, except in cases of strong suspicion. Cases of invocation of papers from other causes are indeed an admitted exception, but in general there must be a foundation laid, in the original evidence, to support the call of further proof. In the present case, it appears that Mr. Sampayo is a Portuguese merchant, resident at Lisbon. His character, as such, is vouched by the American consul, who, I am bound to believe, would not voluntarily practice any imposition upon his country, much less lend his countenance to any illegal traffic with its enemy. I do not think, therefore, that there is in the original evidence, or in the circumstances of the voyage, any foundation laid for a dispensation of the general rule. But even admitting the facts offered to be proved, I am not aware, that they furnish any legal ground for condemnation. It was certainly lawful, and perhaps highly meritorious in Mr. Sampayo, to act as an English commissary; and so long as he continued to act as a Portuguese merchant, and resided in Lisbon, I do not perceive how he would thereby lose his neutral character. No authority has been produced to show, that the mere transaction of business by a neutral merchant, for an enemy government, annihilates his neutral character. It may, under circumstances, afford a presumption of concealed enemy interests in property shipped by such merchant with a destination to the enemy country; but I should have been glad to have seen, in a distinct authority, a principle so broad and comprehensive, as that supposed in the argument. The cases, in which it has been held, that if a neutral be engaged in enemy navigation, it does not thereby subject all his trade from the neutral country on neutral voyages to the enemy character (The Vriendschap, 4 C. Rob. Adm. 166), do, I think, look pretty strongly the other way. And so, if a neutral has a house of trade in the enemy country, as well as in the neutral country, the property in the neutral house is not involved in the principles, that subject that of the enemy house to condemnation. The Portland, 3 C. Rob. Adm. 41. Then how stands the case as to American citizens? They have a legal right to trade with the neutral country, and of course with merchants domiciled there. If, in their own transactions, they do not violate the character, which they hold as American citizens, I do not perceive what it can avail, that the persons with whom they traffic, may be engaged in other business of a hostile character. To be sure, they are prohibited from contracting directly and indirectly with the enemy or for the enemy use; but if they make a bona fide sale to neutral merchants, on their own account, it is difficult to imagine how they can be affected by any ulterior destination of the property. The facts offered to be proved in this case are not, in my judgment, sufficient to found a decree of condemnation, even if proved, because an essential ingredient would still be wanting, viz. a voluntary incorporation into the contracts and policy of the enemy. I over-rule, therefore, the application for further proof, and shall decree restoration of the property of Messrs. Smith & Nickels.

The remaining question is, whether the claimants are entitled to damages? And this depends entirely upon the consideration, whether there was probable cause for the capture: for if there was probable cause, there can be no doubt that the captors had a right to elect the port of destination, provided it was a convenient port. Was there then probable cause for the capture? On this point I confess that I feel no doubt. The ship, at the time of capture, was coming from an enemy port with a large and valuable cargo on board. The papers submitted to the captors for inspection, so far as respected the cargo, were three naked bills of lading; papers of themselves of no great authority in the prize court. No invoices and no letters of advice accompanied them. These were, I will not say, studiously, but certainly effectually kept out of sight. The papers respecting the great mass of property contained in Messrs. Hall & Thatcher's claim were in the hands of a passenger, and never came to the knowledge of the court or the captors, until after the preparatory examinations were had. They were delivered to the consignees, and after having been fully examined by them, were submitted for inspection. That this suppression was, on the part of the passenger, involuntary, seems somewhat difficult to prove; because, being addressed to the consignees of a considerable part of the cargo, he could hardly doubt that they were material to the voyage. I do not find, however, that he denies all knowledge of the contents; and he puts his excuse upon another ground, viz. the belief that he was under no obligation to deliver up the packet to the captors. The letters and invoices addressed to Mr. Smith come under the same consideration. They were not delivered to the captors, and were not submitted to the court, until fully examined by Mr. Smith, and therefore were very properly not admitted to be read at the hearing.

It is a salutary rule of the prize court, to which I shall always endeavor rigidly to adhere, that papers, in order to be allowed as evidence at the hearing, should be delivered up at least at the time of the preparatory examinations, and in an unmutilated and unsuspicious state. Under such circumstances, I think that it would not have been an extraordinary measure, to have required further proofs of property on the part of the claimants. There is another circumstance entitled to consideration. At the time of the capture, no clearance of the cargo at Lisbon sanctioned by the public authorities, was on board. The only paper, that has a color of evidence, is a certificate of the American consul, that the master had regularly entered and cleared his vessel with "a cargo of salt, green and dry fruit, and bales of merchandize" on board, at the port of Lisbon. It is certainly unusual for vessels not to have regular clearances from the proper officers, at their ports of departure; and I cannot perceive, how an American consul can be a proper certifying officer of such a fact. Looking then to the fact, that there were no invoices, no letters of advice, no regular clearance from Lisbon, and a direct voyage from an enemy's port, I think it would be difficult to say, that there were not very powerful reasons for suspicion of illegal traffic. But I do not mean to rest the case on these circumstances. There is a more broad and elementary principle, which embraces and decides this point, and that is, that every voyage from an enemy port, especially with a cargo on board, and without the license of the government, carries with it a presumption of illegal traffic and hostile interests, from which nothing but the most explicit proofs by the claimants can relieve the cause. The papers found on board do not, in such cases, carry with them the usual semblance of verity, for they are soiled by having passed through the enemy's hands, and by being by him deemed sufficient to exempt from capture. Nor are the captors obliged to rest satisfied with the explanation of the persons found on board. It would be idle to suppose, that if the traffic were illegal, some plausible story would not be given out to explain appearances. The presumption of illegal traffic arising, the captors have a right to bring the property in, and subject the whole to the adjudication of a competent tribunal. I should have been glad to have seen a single authority, where a ship was coming from an enemy's port, without a license from its government, and damages or costs had been adjudged against the captors. No such case has been produced, and I think myself warranted, after some investigation, in asserting, that no such case does exist. On the contrary, in cases where trade has been carried on with the enemy under license, and a capture and restoration have taken place, the captor's expenses have been allowed, where there seemed a color for their conduct. The Beurse Van Koningsberg, 2 C. Rob. Adm. 169; The Hendrick, 1 Act. 322: These were cases, in which the license was not disclosed, and of course the presumption of illegal traffic was left in full force. In The St. Antonius, Id. 113, the license was on board, and the circumstances of a contravention of it were not very significant; and the high court of admiralty decreed restoration, but refused damages, although the cargo was by the detention almost wholly lost. The claimants appealed for damages to the lords commissioners, who confirmed the decree appealed from, and condemned the claimants in the costs of appeal. This is certainly a strong case, and shows that lighter suspicions exonerate the captors, where the trade is with an enemy, than are supposed to regulate the judgment of the court in ordinary transactions.

In the case at bar, there was not only the ordinary presumption, but actual proof, of traffic with the enemy. One hundred boxes of lemons of the cargo were deficient, and were accounted for only by the suggestion, that they were sold to defray expenses at Halifax. It was alleged further, that the ship was libelled and afterwards released. What was the evidence of either of these facts? There was not a scrap of paper, or a document, to prove either the one or the other. They rested upon the mere naked assertions of the captured crew. Certainly, a prudent master ought to have procured some certificate of the facts from our public agent at that port, or at least have obtained from the admiralty copies of the proceedings there. I do not say, that these deficiencies would furnish grounds of condemnation, but they throw over the cause an accumulation of doubt, that might perhaps have required the indulgence of further proof. However, I put the case upon the more general ground, which I have above stated, that the coming from an enemy port, without a license, is a good probable cause to exempt the captors from damages, because it affords a presumption of illegal traffic or hostile interests. So strong indeed is the principle, that it has been held, that where a vessel has been captured and carried into the port of its enemy, a strong presumption is laid, that the right of the former proprietor has in fact been legally devested, in a regular and effective manner, and subjected to a legal condemnation; so that such former proprietor cannot assert a title to the property, unless by assuming the burthen of contrary proof. The Countess of Lauderdale, 4 C. Rob. Adm. 283.

I have come to the decision of this cause with some reluctance, because a possible contingent right may have been supposed to exist against a surety to the bond, given by the privateer, with which surety I am connected by affinity. Although I am well satisfied, that the bond never could, under any circumstances, be applied in aid of this case, as its terms do not embrace it, yet I should have been glad to have been spared an investigation, which involves so many important

principles. No other course, however, was left to me, and as the parties consented to my sitting in the cause, I have pronounced the best judgment which, on deliberation, I have been able to form. I feel some consolation, that the captors, if dissatisfied, have a right to appeal to the supreme court, who can award them, from its superior knowledge, complete justice, where I have failed. I decree restoration of the property of Messrs. Smith & Nickels, as claimed; reverse the decree of the district court, as to damages to any of the claimants; and order that the captors recover their costs in the premises.

Case No. 8,407.

The LIVERPOOL PACKET.

[2 Spr. 37.] [1]

District Court, D. Massachusetts. August Term, 1861.

SALVAGE—COUNSEL FEES—RECOMMITMENT TO REFEREE—CERTAINTY OF AWARD.

1. Counsel fees cannot be allowed as part of the taxable costs, beyond the amount mentioned in Act Cong. 1853, c. 80 [10 Stat. 161].

[Cited in The Baltimore v. Rowland, 8 Wall. (75 U. S.) 392; Goodyear v. Sawyer, 17 Fed. 12.]

2. In salvage cases, counsel fees are sometimes considered by the court in estimating the amount of salvage to be given.

3. An award of a referee will not be recommitted, because the counsel for the libellants omitted to call the attention of the referee to a matter which might have influenced the referee if his attention had been called to it, to increase the amount of salvage.

4. An award, made in pursuance of a rule of court directing a referee to determine the amount due and the question of costs, is sufficiently certain if it states the amount due, and that the libellants are entitled to costs, without stating the amount of the costs.

Several suits were brought by different sets of salvors against the ship Liverpool Packet for important salvage services rendered the vessel while lying at anchor dismasted, among the Nantucket Shoals. The claimants admitted that salvage was due; and, by agreement of parties, the several suits were referred, under a rule of court, to William Dehon, Esq., to determine the amount due, and the question of costs. It was also agreed that there should be no appeal from his award. On the filing of the award in this court, the libellants moved that counsel fees be allowed as part of the taxable costs, and that, if this motion should be refused, the case should be recommitted to Mr. Dehon, to pass upon the question of allowing counsel fees as part of the salvage expenses. It was also urged, that the award was not certain, as it did not fix the amount of the costs. A note was read from Mr. Dehon, stating that, in estimating the amount of salvage, he had not taken the question of counsel fees into consideration; and it was admitted that the question was not raised at the hearing before him.

G. T. Curtis, C. P. Curtis, Jr., and D. Thaxter, for libellants, cited to the point that counsel fees are allowed as a part of the costs in salvage cases, The Apollon, 9 Wheat. [22 U. S.] 362, and the records of the court in The Henry Ewbank [Case No. 7,376]; The Nathaniel Hooper [Id. 10,032].

John Lathrop, for claimants, to the point that the court had no power to allow counsel fees to be taxed as costs, cited Act 1853, c. 80 (10 Stat. 161); and, on the question of the power of the court to recommit the award, Richardson v. Lanning, 2 Dutch. [26 N. J. Law] 130; Veghte v. Hoagland, 2 Stockt. Ch. [10 N. J. Eq.] 45; Long v. Rhodes, 36 Me. 108; Wightman v. Pettis, 29 Pa. St., 283; Jones v. Boston Mill Corp., 6 Pick. 148; Fairchild v. Adams, 11 Cush. 549; Burchell v. Marsh, 17 How. [58 U. S.] 344, 349.

S. Bartlett, D. Thaxter, G. T. & C. P. Curtis, Jr., and Scudder & Randall, for the several libellants at the hearing before the referee.

F. C. Loring and John Lathrop, for claimants.

SPRAGUE, District Judge. It is not the practice in this district, in salvage cases, to allow counsel fees as a part of the taxable costs. In the case of The Henry Ewbank [supra], and in that of The Nathaniel Hooper [supra], an agreement of counsel is on file that costs should be so awarded. These cases, therefore, are not of authority on this point. The statute of 1853 also determines what the taxable costs shall be. I have, however, frequently, in fixing the amount of salvage, included, as part of the expenses necessarily incurred by the salvors, all money paid out by them, and a reasonable amount for counsel fees. The question of the amount of the salvage is, however, in this case, discretionary with the referee; and I cannot pass upon the question whether this is a proper case for giving them. The right of appeal to me is taken away by the agreement. As to recommitting the award, I have no doubt that the court has discretionary power over awards, either to set them aside, or to recommit them; but the court will interfere with an award with great reluctance. The principal grounds for so doing are those pointed out by the counsel for the claimants; viz., fraud, collusion, or mistake. In the present case, the principal point urged is that the counsel for the libellants omitted, at the hearing, to call the referee's attention to a matter, which matter, if his attention had been directed to it, might have influenced him to increase the amount of salvage. To recommit the case on this ground, would, in my judgment, exceed the discretionary power of the court. As to the ground that the

[1] [Reported by John Lathrop, Esq., and here reprinted by permission.]

award is not certain because it does not fix the amount of the costs, it is sufficient to say that it states the amount of salvage and the witness fees, and that the libellants are entitled to the costs of court. This is sufficiently certain, for the amount of costs can be ascertained by the clerk in the usual manner.

LIVERSE (HYDE v.). See Case No. 6,972.

Case No. 8,408.

LIVE-STOCK DEALERS' & BUTCHERS' ASS'N v. CRESCENT CITY LIVE-STOCK LANDING & SLAUGHTER-HOUSE CO. et al.

[1 Abb. U. S. 388; 3 Chi. Leg. News, 17; 13 Int. Rev. Rec. 20; 5 Am. Law Rev. 171; 1 Woods, 21.] [1]

Circuit Court, D. Louisiana. June 10, 11, 1870.

MONOPOLIES — EFFECT OF "CIVIL RIGHTS" ACT — ENJOINING STATE COURT.

1. Section 1 of the fourteenth amendment to the constitution applies to whites as well as colored people, as citizens of the United States; and is intended to protect them in their privileges and immunities as such, against the action, as well of their own state, as of other states in which they may happen to be.

[Cited in Baker v. State, 54 Wis. 371, 12 N. W. 12.]

[See note at end of case.]

2. These privileges and immunities do not consist merely in being placed on an equality with others; but embrace all the fundamental rights of a citizen of the United States as such.

[Cited in Railroad Tax Cases, 13 Fed. 773.]

3. One of these fundamental rights is the right to pursue any lawful employment in a lawful manner; or, in other words, the right to choose one's own pursuit, subject only to constitutional regulations and restrictions.

[Cited in Slaughterhouse Cases, 16 Wall. (83 U. S.) 106.]

[Cited in Re Jacobs, 98 N. Y. 107; Eastman v. State, 109 Ind. 279, 10 N. E. 97; State v. Goodwill, 33 W. Va. 182, 10 S. E. 285; McCullough v. Brown (S. C.) 19 S. E. 469.]

[See note at end of case.]

4. An exclusive privilege, granted to a few individuals, incorporated into a body politic, and to their successors, for twenty-five years, to have cattle landings, stock yards, and slaughter houses for several miles in extent in and around the city of New Orleans, with a prohibition to all other persons from having any such establishments in said district, is a restriction which violates the fundamental rights of other citizens willing to conform to all police regulations adopted for the public comfort and safety; and a legislative act granting such an exclusive privilege is a violation of the fourteenth amendment and void.

5. Such a law cannot be sustained under the right of the legislature to pass license laws and police regulations, and to grant exclusive rights for the exercise of public franchises. It allows certain privileged persons to pursue an ordinary employment, and prohibits others from so doing; and thus goes to establish one of those monopolies which are contrary to the spirit of a free government.

6. If, however, the state courts sustain such a law, and attempt to enforce it, the circuit court cannot issue an injunction to stay proceedings, being prohibited by the act of 1793 [1 Stat. 333], and congress having passed no law to carry the fourteenth amendment into full effect. The remedy is to carry the suit to the highest state court, and then bring a writ of error to the supreme court of the United States.

[Cited in Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541.]

7. By the civil rights bill, however, which, as far as it goes, covers the same grounds as the fourteenth amendment, the circuit court may take cognizance of a case like the present, and grant an injunction; except as to staying proceedings already commenced in a state court.

[Cited in Louisiana State Lottery Co. v. Fitzpatrick, Case No. 8,541; M. Schandler Bottling Co. v. Welch, 42 Fed. 565.]

Motion for an injunction, upon bill and answer.

The bill in this cause was filed by the Live Stock Dealers' and Butchers' Association, and others, complainants, against the Crescent City Live Stock Landing & Slaughter House Company, and the Board of Metropolitan Police of New Orleans, as defendants. The general object of the bill was to restrain the defendants from taking proceedings to suppress the business of the complainants, in slaughtering animals and selling meat. The defendants claimed the right to prosecute such proceedings, under a statute of Louisiana conferring the exclusive right to prosecute such business in New Orleans upon the Crescent City Company.

J. A. Campbell, for the motion.

W. H. Hunt and C. Roselius, opposed.

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

BRADLEY, Circuit Justice. The complainants, who are engaged in the live stock landing and slaughter house business, pray for an injunction against the defendants, commanding them to suspend all proceedings against the complainants under and by virtue of an act of the legislature of Louisiana of March 8, 1869 [Acts La. 170], giving to the corporation, defendants, the exclusive right to erect and have live stock landings and slaughter houses in and about New Orleans, which act the complainants allege to be in violation of the civil rights bill, passed April 9, 1866 [14 Stat. 27], and the first section of the fourteenth amendment to the constitution of the United States; also, that the complainants may be protected in their rights to perform whatever may be lawful and proper in their behalf for any citizen of the state to do, including the defendants; and their right to slaughter, land, keep, maintain, and sell animals for food, and, when prepared for market, to sell and dispose of their meat, subject to no condition more severe than that of any other party, including the defendants; and that they be maintained in their rights to construct all suitable buildings,

[1] [Reported by Benjamin Vaughan Abbott, Esq., and here reprinted by permission. 5 Am. Law Rev. 171, contains only a partial report.]

structures for landing, keeping, and preserving animals for sale or use that are allowed to any other citizen of the state, including the defendants.

The application brings up the question whether the civil rights bill applies to such a case as the present, and whether the fourteenth amendment to the constitution is intended to secure to the citizens of the United States of all classes merely equal rights; or whether it is intended to secure to them any absolute rights. And, if the latter, whether the rights claimed by the complainants in this bill are among the number of such absolute rights. (After intimating an opinion—subsequently modified—that the civil rights bill did not apply to the case, the judge proceeds:)

The law in question, under which the acts complained of were committed, is one of a remarkable character. It was passed March 8, 1869, and is entitled "An act to protect the health of the city of New Orleans, to locate stock landings and slaughter houses, and to incorporate the 'Crescent City Live Stock Landing & Slaughter House Company.'" It enacts that after June 1, 1869, it shall not be lawful to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock landing, yards, pens, slaughter houses, or abattoirs, at any point or place within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard, or at any point or place on the east bank of the Mississippi river within the corporate limits of New Orleans, or at any point on the west bank of the Mississippi above the present depot of the New Orleans, Opelousas, & Great Western Railroad Company, except that the Crescent City Live Stock Landing and Slaughter House Company may establish themselves at any point or place as hereinafter provided. A penalty of two hundred and fifty dollars is imposed for every violation of this section. Thus far, the act, barring the exception at the close, is a mere police regulation, and, no doubt, a very proper one. The territory named extends some eight or ten miles on each side the river Mississippi, and includes the entire city of New Orleans and a large extent of surrounding country.

The next section incorporates William D. Sanger and others, seventeen persons in all, and their successors, into a body politic and corporate, to be called "The Crescent City Live Stock Landing & Slaughter House Company."

The third section enacts that said corporation may establish and erect, at its own expense, at any point or place on the east bank of the Mississippi river, within the parish of St. Bernard, or the corporate limits of the city of New Orleans, below the United States barracks, or at any point or place on the west bank of the river, below the present depot of the Opelousas Railroad, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals; and that said company shall have the sole and exclusive privilege of conducting and carrying on the live stock landing and slaughter house business within the limits and privileges granted by the provisions of this act. The section then enacts that all cattle and other animals destined for sale or slaughter in New Orleans or its environs, shall be landed and kept at these landings and yards, for which the company are to be paid certain fees named in the act; and, in default of payment, are to have the privilege of selling the cattle therefor; and every violation of these privileges by landing or yarding elsewhere, is to be subject to a penalty of two hundred and fifty dollars. The section goes on to require the company, by June 1, 1869, to build a grand slaughter house of sufficient capacity to accommodate all butchers, and in which to slaughter five hundred animals per day; also sheds, stables, &c., to accommodate all the stock received at this port, under penalty of forfeiting their charter.

The fourth section authorizes the company to erect landing places for live stock at any points or places consistent with the act, and to have the exclusive privilege of having landed thereon all animals intended for sale or slaughter in the parishes of Orleans and Jefferson; and to erect one or more slaughter houses at any points or places consistent with the act, and to have the exclusive privilege of having slaughtered therein all animals the meat of which is destined for sale in the parishes of Orleans and Jefferson.

Section 5 directs the closing of all other stock landings and slaughter houses, after the completion of the company's, in the parishes of Orleans, Jefferson, and St. Bernard, and forbids any slaughtering therein under a penalty of one hundred dollars for every offense, and enacts that all animals to be slaughtered in the parishes of Orleans and Jefferson must be slaughtered in the slaughter houses erected by the company, and the company, on refusal to permit the same, will be subject to fine.

Section 6 provides for an inspector of cattle, to be appointed by the governor, to inspect all cattle to be slaughtered.

Section 7 fixes the fees to be paid to the company for slaughtering in their houses,—namely, one dollar apiece for all beeves, &c., besides the head, feet, gore, and entrails.

Section 9 authorizes the company to lay railroads from their buildings to the city, and to establish ferries across the Mississippi river.

Section 10 limits the charter to twenty-five years.

These are the provisions of the law. The complainants allege that they have been injured by its operation, and by the acts and

proceedings of the defendants under it. They state in their bill that for a long time past they have been engaged in the lawful prosecution of the live stock landing and slaughter house business, and in procuring, preparing, dressing, and vending of animal food for the markets of New Orleans and the parishes of Jefferson and Saint Bernard, and the steamers and other vessels engaged in the commerce of the same; and that more than a thousand persons were connected with the trade aforesaid, and that the corporation complainant was formed to prosecute the trade and to provide suitable houses and conveniences therefor, and that the said corporation and its members, to the number of two hundred and fifty persons, and others in their employ, to the number of two hundred persons, have been hitherto engaged in the said trade and business. They complain that their rights are invaded by the act in question; that the Crescent City Company have brought several hundred suits against them or some of them, have obtained injunctions, and in other ways vexed and harassed the complainants under color of the said act; that the decision and judgments of the state supreme court have been adverse to the complainants; and that although the said decision and judgments have been removed to the supreme court of the United States by writs of error, in such manner that said writs operated as a supersedeas, yet that the defendants have disregarded the same, and have applied to the eighth district court of the parish of Orleans, and have obtained a writ, which they call an injunction, directed to the Metropolitan Police Board, without making the complainants or any of them parties to the proceeding, by which writ said Metropolitan Police Board were commanded and enjoined to prevent all persons from landing, keeping, or slaughtering any cattle, beeves, calves, sheep, swine, or other animals, and from keeping or establishing any stock landings, yards, pens, slaughter houses, or abattoirs, at any point or place within the city of New Orleans, or the parishes of Orleans, Jefferson, and Saint Bernard, and to prevent any and all persons from selling or offering for sale in the city of New Orleans any animal for human food, not slaughtered and inspected at the slaughter house of said company; and that the said Metropolitan Police Board did thereupon seize and possess themselves of meat, to the value of twenty thousand dollars, which was in carts and vehicles on their way to the markets, and have kept the same open and exposed until it has spoiled. The bill contains other allegations showing that the complainants are exposed to a multiplicity of suits, to vexatious litigation, and to irreparable mischief and damage by the unjust acts and proceedings of the defendants, the Crescent City Company.

To this bill the defendants have filed an answer in the nature of a demurrer, objecting, first, to the jurisdiction of this court, because the parties all reside in Louisiana, and the circuit court of the United States cannot enjoin proceedings in a state court. Secondly, that the bills set up the same matters which are set forth in a petition filed by the complainants in the state court, and decided by the supreme court of Louisiana, and from which decision a writ of error has been granted to remove the same to the supreme court of the United States. Thirdly, because the statute referred to is constitutional and valid, containing only police regulations, in no manner conflicting with the constitution of the United States, or the amendments thereof.

Before proceeding to examine the technical points raised by the defendants, we will discuss the main question arising upon the act of the legislature and the fourteenth amendment.

[As to the civil rights bill, we are clearly of opinion that it does not apply; that it was intended merely to secure to citizens of every race and color the same civil rights and privileges as are enjoyed by white citizens; and not to enlarge or modify the rights or privileges of white citizens themselves. The fourteenth amendment is much broader in its terms, and must be examined with more attention and care.] [2]

The constitution of the United States, before the adoption of the recent amendments, contained several provisions for the protection of the people in the enjoyment of their civil rights, liberties, and privileges, some of which were binding upon the government of the United States, and others upon the several states. Of the former kind were those which declared that the privilege of the writ of habeas corpus should not be suspended, unless when in cases of rebellion and invasion the public safety should require it; that no bill of attainder or ex post facto law should be passed; that no capitation or other direct tax should be laid, unless in proportion to the census; that the trial of all crimes shall be by jury, and shall be held in the state where committed; that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court; that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted, &c.

Those binding on the states were, that no state should make any thing but gold or silver coin a tender for payment of debts; nor pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or lay any imposts or duties on imports or exports, except as provided in the constitution; and that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2] [From 3 Chi. Leg. News, 17.]

The latter class of provisions could not be carried into effect by congressional legislation, and depended for their vindication upon the voluntary action of the state legislatures and such jurisdiction as the courts of the United States might have when a case arose in which one of these rights was violated.

Since the breaking out of the late war, several amendments to the constitution have been adopted, intended to protect the citizens from oppression by means of state legislation, and to confer upon congress the power by appropriate legislation, to carry the amendments into effect. Amongst these, the fourteenth amendment declares that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States, and of the state wherein they reside, and that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The new prohibition that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" is not identical with the clause in the constitution which declared that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It embraces much more.

It is possible that those who framed the article were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.

The "privileges and immunities" secured by the original constitution, were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the citizens of other states.

But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.

What, then, are the essential privileges which belong to a citizen of the United States, as such, and which a state cannot by its laws invade? It may be difficult to enumerate or define them. The supreme court, on one occasion, thought it unwise to do so. [Conner v. Elliot] 18 How. [59 U. S.] 591. But so far as relates to the question in hand, we may safely say it is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments; it is also his privilege to be protected in the possession and enjoyment of his property so long as such possession and enjoyment are not injurious to the community; and not to be deprived thereof without due process of law. It is also his privilege to have, with all other citizens, the equal protection of the laws. Indeed, the latter privileges are specified by the words of the amendment.

These privileges cannot be invaded without sapping the very foundations of republican government. A republican government is not merely a government of the people, but it is a free government. Without being free, it is republican only in name, and not republican in truth, and any government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose,—is tyrannical and unrepublican. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government.

There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor. This right is not inconsistent with any of those wholesome regulations which have been found to be beneficial and necessary in every state.

It is not inconsistent with the exclusive right to make, use, and vend to others, for a limited period, a new and useful invention which the grantee or patentee has produced from his own brains or ingenuity. Society only gives to him the temporary use of that which, without him, it would not have had the benefit of, and as a consideration of that benefit, and to encourage others to make like use of their powers.

It is not inconsistent with the exclusive right to use a franchise,—that is, a right to do what the legislature alone can authorize to be done, and which no private citizen has a right to do without such authority,—such

as to build and operate a railroad, to make a canal or turnpike, to establish a ferry, and other such public rights which involve a charge upon the public, and, in most cases, an exercise of the right of eminent domain. These franchises may be conferred upon a limited number of persons, natural or corporate, with power, and even exclusive power, to exercise them in certain localities, on certain terms, and under certain restrictions. Society obtains a consideration for the grant of these franchises in the investment of large amounts of capital in public improvements, which are required for the development of the country and its resources. They are franchises which can only be exercised as they are conferred by public authority, and cannot be exercised and enjoyed by all. They are far different from those ordinary pursuits and employments of mankind which all citizens may properly and lawfully follow as their inclination leads them, and as the laws of demand and supply will allow.

Again, this fundamental right of labor is not inconsistent with that large class of cases in which the laws require a license or a certificate of requisite qualifications for admission to a particular employment or profession. No doubt there are many such, as to which the interests of society require that due preparation should be made and due qualifications should be possessed, before a person shall be allowed to enter them. But then they are open to all alike. None are excluded from the race of honorable competition by which to enter those employments, or by which to attain their honors. There is no corporate and exclusive guild of privileged individuals to which they are confined, and beyond the sacred pale of which there is no hope of admittance or promotion.

Nor is it inconsistent with the granting of a limited number of municipal licenses to follow certain pursuits, such as vending of intoxicating drinks, selling of drugs, or even selling of meats and keeping a market therefor. Public policy may require that these pursuits should be regulated and supervised by the local authorities, in order to promote the public health, the public order and the general well being. But they are open to all proper applicants, and none are rejected except those who fail to exhibit the requisite qualifications and guarantees, or who, after proper selections are made, would increase the number beyond what the interests and good order of society would bear. In those cases, none are excluded for the purpose of sustaining a monopoly. But each application is, or at least is supposed to be, examined on its own merits. All these systems of regulation are useful and entirely competent to the governing power; and are not at all inconsistent with the great right of liberty of pursuit, which is one of the fundamental privileges of an American citizen.

The next question is: Does the law complained of, and the proceedings under it, conflict with the enjoyment of this fundamental privilege of the complainants; or is it only such a political and police regulation as it is competent for a state legislature to make? The legislature has an undoubted right to make all police regulations which they may deem necessary (not inconsistent with constitutional restrictions) for the preservation of the public health, good order, morals, and intelligence; but they cannot [interfere with liberty of conscience, nor with the entire equality of all creeds and religions before the law. Nor can they,] [3] under the pretense of a police regulation, interfere with the fundamental privileges and immunities of American citizens. The question has its limits in both directions; and whilst we are to be specially careful not to do any thing that may trench upon the vast and almost limitless field of legislation, where the will of the people is supposed to be most freely and powerfully expressed, it is nevertheless our duty, with a firm and unflinching hand, to prevent the invasion of any clear and undoubted individual rights of the citizen which are secured to him by the constitution.

So far as the act of the legislature of Louisiana is a police regulation, it is, of course, entirely within its power to enact it. It is claimed to be nothing more. But this pretense is too bald for a moment's consideration. It certainly does confer on the defendant corporation a monopoly of a very odious character. If it be not fairly and fully within the definition of a monopoly given in the great case of monopolies (11 Coke, 85), it is difficult to conceive of a case which would be within it. But it is not sufficient to show that it is a monopoly and void at common law, for the legislature may alter the common law, and may establish a monopoly, unless that monopoly be one which contravenes the fundamental rights of the citizen protected by the constitution. We have already seen that some monopolies are legal, if not politic. But is this such a one as will be endured in a free country, under a constitution which guarantees to the citizen his fundamental privileges and immunities? This is the precise question for us to decide. And we admit that the question is one of great delicacy and embarrassment. When the question was first presented, our impressions were decidedly against the claim put forward by the plaintiffs. But the more we have reflected on the subject, the more we are satisfied that the fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character. And it seems to us that it would be difficult to conceive of a more flagrant case of violation of the fundamental rights of labor than the one before us.

[3] [From 3 Chi. Leg. News, 17.]

It was very ably contended, on the part of the defendants, that the fourteenth amendment was intended only to secure to all citizens equal capacities before the law. That was at first our view of it. But it does not so read. The language is, "No state shall abridge the privileges or immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States? Are they capacities merely? Are they not also rights?

In the case before us, the citizen has chosen a lawful and useful employment. He has been brought up to it, and educated in it. He has invested property in it. He is willing to comply with all police regulations, properly such, in the exercise of it. He will not offend in any particular the regulations which the legislative or the municipal authorities may adopt. He will observe times, seasons, places, localities. But all these are not enough. He is required to land his cattle on a privileged person's landing; to keep them in that person's yard or pen; to slaughter them in that person's house, and to pay a burdensome toll for these restrictions. He may construct a landing, a yard, a slaughter house equally as good, within the prescribed limits of locality, and subject to all the necessary regulations; but that will not do. He must go to the privileged person and use his premises, and pay for their use.

This is not because the privileged person is the inventor of such accommodations, nor because the use of them is a franchise lying only in the public grant, nor because the privileged person is qualified by superior education and license, nor because he has received a municipal license as a herdsman or a butcher, but because he has obtained the exclusive privilege granted by the act.

The ipse dixit of the legislature assigns a lawful and ordinary employment to one set of men, and denies and forbids it to another. The injustice perpetrated under acts of irresponsible legislation has become a crying evil in our country. And while it must generally be without redress, except through the action of the elective body or the local courts, yet in those instances where the federal constitution has provided a remedy, we ought not to shrink from granting the appropriate relief. We do not give any weight to imputations upon the honesty or integrity of the legislature, the courts, or the executive of this state. We are not authorized to do so. We are bound to presume, and do presume, that they have severally acted in good faith, and with an honest purpose not to transcend the limits of their constitutional powers. They have their duties to perform; we have ours. And whilst we feel it due to them to examine their acts with great caution and due respect, we nevertheless feel bound to exercise an independent judgment. Unless this be done by all who have public duties to perform, there will be no certain foundation to stand upon.

In the exercise of that judgment, we feel compelled to decide that the act in question is a violation of one of the fundamental privileges of the citizen, and that an injunction would have to be granted substantially as prayed for, but for one of the technical objections raised by the answer of the defendants.

[The defendants to the bill had filed an answer, in the form of a demurrer, objecting first to the jurisdiction of the court, because all the parties resided in Louisiana, and the circuit court of the United States could not enjoin proceedings in the state courts.

[Secondly, that the bill sets up the same matter which was set forth in the petition filed by the plaintiffs, in the state court, upon which a decision was rendered, and from which a writ of error had been granted.

[Thirdly, because the statute referred to was constitutional and valid, containing only police regulations, in no manner conflicting with the constitution of the United States and the fourteenth amendment.] [4]

The objection that the circuit court of the United States cannot enjoin proceedings in the state court, is an objection which cannot be surmounted. The fourteenth amendment authorizes congress, by appropriate legislation, to carry its provisions into effect. Congress, in the exercise of the power thus given, would undoubtedly have the right to authorize the federal courts to take jurisdiction of cases of this sort, and to enjoin proceedings in the state courts, as well as proceedings in the federal courts. But congress has not as yet assumed that jurisdiction, and therefore the court are left to the provisions regulating the proceedings of the United States courts passed seventy or eighty years ago. Section 3 of the act of 1793 declares that no writ of injunction shall be granted to stay proceedings in any court of a state. This act has never been repealed. The court, therefore, feel compelled to refuse the injunction to restrain the defendants from proceeding with the legal remedy which they have instituted in the state courts.

The remedy of the parties is to allow the proceedings to pass to judgment, and if the highest court of the state should decree against the construction of the fourteenth amendment which is claimed by them, and which this court has assented to, then they can carry the case up by writ of error to the supreme court of the United States, and have the whole question reviewed.

[For reasons orally assigned, considering that this court is without power to enjoin process from the state court and other objections raised to the jurisdiction, it is ordered and decreed that the injunction applied for by the complainants be denied with costs.] [4]

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[4] [From 3 Chi. Leg. News, 17.]

At the opening of the court on Saturday morning, June 11, Justice BRADLEY made the following announcement:

In the Slaughter House Case yesterday [Case No. 12,938], we expressed the opinion that the civil rights bill did not apply to the case; that it was intended merely to secure to all citizens, of every race and color, the same privileges as white citizens enjoy, and not to modify or enlarge the latter. This portion of the opinion was not written at the time, and was somewhat hastily expressed. Our attention had been chiefly given to the main question—the true construction of the fourteenth amendment. On a more careful examination, considering that the civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment; was reported by the same committee; was in pari materia; and was probably intended to reach the same object, we are disposed to modify our opinion in this respect, and to hold, as the counsel on both sides seem to agree in holding, that the first section of the bill covers the same ground as the fourteenth amendment, at least so far as the matters involved in this case are concerned.

And while we still hold that the act is not intended to enlarge the privileges and immunities of white citizens, it must be construed as furnishing additional guarantees and remedies to secure their enjoyment; and this is probably the reason why congress has neglected to pass an additional law for carrying the fourteenth amendment into effect, the civil rights bill being regarded as having already supplied the necessary provisions for that purpose.[6] Still, this bill has not repealed the law which prohibits the federal courts from issuing an injunction to stay proceedings at law in the state courts. The prayer for injunction will, therefore, stand denied to that extent, but granted as to the residue, and the rule will be corrected accordingly.

In pursuance of this announcement, the following decree was made in the case:

This cause came on before the court upon a motion for a special injunction, and was argued by counsel for the plaintiffs and defendants, and thereupon it is declared by the court that the said plaintiffs are entitled to land, keep, or slaughter any cattle, beeves, calves, sheep, swine, or other animals, and to have, keep, or establish any stock landing, yard, pens, slaughter houses, or abattoirs at any point or place on the east bank of the Mississippi river within the limits of the parish of Saint Benard, or in the corporate limits of the city of New Orleans below the United States barracks, or at any point on the west bank below the present depot of the New Orleans, Opelousas, and Great Western Railroad Company, to the same extent of right as the said Crescent City Live Stock Landing and Slaughter House Company have and enjoy, subject to inspection, and such other police regulations as the said company, and others engaged in like employment, are subject to; and that the said parties (plaintiffs) may carry on the live stock landing and slaughter house business, and may prepare animal food for market, and may vend and dispose of the same, and may keep and maintain animals for sale, and erect wharves, sheds, stables, and yards, and do whatever it may be lawful for the said defendants to do under the terms of their act of incorporation as an exclusive privilege, subject to like regulations as aforesaid; and the court directs that an injunction be issued from this court, enjoining and restraining the defendants from commencing or prosecuting any other suits upon their act of incorporation than such as are now pending against the said plaintiffs, or either of them, for doing or performing any act embraced in the declarative clause of this decree, or from suing for any fine or penalty imposed in said act of incorporation, or for doing or performing any of the acts aforesaid, and from interfering with them in the prosecution of their lawful occupations as live stock dealers, or butchers, or as vendors of animal food or animals.

And the said court here excepts from the operation of this decree, the proceedings in any of the courts of the state that are now pending, but reserves to the said plaintiffs all other remedies for their protection contained in the constitution of the United States and act of congress, whereby in the lawful pursuits aforesaid, they may be deprived of the rights here declared and ascertained.

[NOTE. There were pending at the time this case was decided, as noted in the decision above, quite a number of suits in the state courts, all involving the same question, in some of which the Cresent City Live Stock Landing & Slaughter House Company were plaintiffs and in some defendants. The cases were taken to the supreme court of the state of Louisiana upon appeals, and were decided in favor of the slaughter house company (State v. Fagan, 22 La. Ann. 547); whereupon the several parties against whom the decisions were rendered sued out writs of error in the supreme court of the United States. They then moved for writs of supersedeas in the same court. The motion was denied. 10 Wall. (77 U. S.) 273. The case was subsequent to this heard upon error. The constitutionality of the act of the Louisiana legislature of March 8, 1869, was attacked upon the grounds that the statute created a monopoly, and conferred odious and exclusive privileges upon a few at the expense of the whole population of New Orleans; that it would deprive a large and meritorious class of the citizens—all of the butchers of the city—of the right to exercise their trade, the business in which they have been trained, and upon which they depend for support. The opinion of the supreme court of Louisiana was affirmed upon the ground that the grant of the exclusive right to the slaughter house company for their abattoir was a police regulation for the

[6] An act for carrying into effect the fourteenth and fifteenth amendments was approved by the president on May 31, but had not obtained publicity at the time this decision was rendered. Section 18 of this act re-enacts the civil rights bill, and thus impliedly adopts it for the purpose of carrying the fourteenth amendment into effect.

health and comfort of the city, and that it was within the power of the legislature to pass such an act. Said Mr. Justice Miller, who delivered the opinion of the court: "It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated." That it does not curtail any of their fundamental rights the learned justice considered clear. Continuing, he said: "The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit." The contention so strenuously insisted upon in the Louisiana state courts and also considered by Mr. Circuit Justice Bradley above, that the act in question is in violation of the thirteenth and fourteenth amendments to the constitution, the learned justice considers untenable. The purposes of these amendments were to secure to the negro, newly emancipated, protection from injustice and hardships arising under state laws discriminating against him as a class. The inhibition preventing the states from passing laws abridging the privileges and immunities of citizens of the United States cannot be taken to mean other privileges and immunities than such as were within the purview of the constitutional amendment. Continuing, the learned justice said: "Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the federal government? And where it is declared that congress shall have the power to enforce the article, was it intended to bring within the power of congress the entire domain of civil rights heretofore belonging exclusively to the states? All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are the rights subject to the control of congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power of the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects." Mr. Chief Justice Chase, Mr. Justice Field, Mr. Justice Swayne, and Mr. Justice Bradley dissented, the last three of whom delivered dissenting opinions. 16 Wall. (83 U. S.) 36. After the decision above, the people of the state of Louisiana adopted a new constitution, which, among other things, in reference to the slaughter of cattle and other live stock in the municipalities of the state, enacted "that no monopoly of exclusive privilege shall exist in this state nor such business be restricted to the land or houses of any individual or corporation." The city of New Orleans granted a permit to a new company, the Butchers' Union Slaughter House Company, to erect within the city an abattoir and other necessary buildings, and to conduct the business of slaughtering cattle. The Crescent City Company, above, brought suit against the Butchers' Union Company in the circuit court for the Eastern division of Louisiana, setting up its exclusive right and privilege, and declaring that the ordinance of the city of New Orleans violated the federal constitution in impairing the validity of the contract entered into by the Crescent City Company at the time of building their works. The injunction asked for by them was granted by the circuit court (case not reported) from which decision an appeal was taken to the supreme court upon the ground that the exclusive right originally granted to the plaintiff was valid only as an exercise of the police power of the state, and was of that character, having reference to the public health; that it could not be made the subject of contract, and protected against subsequent legislation by the constitution of the United States. 111 U. S. 746, 4 Sup. Ct. 652. Upon the preliminary injunction granted in the case the plaintiff gave bond. Upon this bond defendant subsequently entered suit in the state court, in which he recovered judgment, which was affirmed upon appeal to the supreme court of the state, and was brought in error to the supreme court of the United States, which partially reversed the supreme court of Louisiana. 120 U. S. 141, 7 Sup. Ct. 472.]

Case No. 8,409.

The LIVE YANKEE.

[Deady, 420.] [1]

District Court, D. Oregon. June 20, 1868.

CARRIERS—DANGERS OF NAVIGATION—BURDEN OF PROOF.

A common carrier gave a receipt for two casks of wine, received in good order, and agreed to deliver them in like condition at the end of the voyage, the dangers of navigation excepted; in a suit by the shipper for the non-delivery of the goods, the carrier claimed that the wine was lost on the voyage on account of the dangers of navigation and insufficiency of the casks; *Held*, that the burden of proof is upon the carrier to show that the loss arose from the insufficiency of the casks or the dangers of navigation; and that, if upon the whole proof it was doubtful whether the loss arose from either of such causes, the shipper must recover.

[Cited in The Oriflamme, Case No. 10,571.]

In admiralty.

Eugene Cronen, for libellants.

Erasmus D. Shattuck, for respondents.

DEADY, District Judge. On April 20, 1868, Levi Millard and William J. Van Schuyver, merchants and partners in the city of Portland, filed their libel against the barque Live Yankee, then lying in the port of Portland on Wallamet. The libel alleges that the libellants on or about October 1, 1867, shipped on the Live Yankee, at the port of San Francisco, California, and bound for the port of Portland, among other goods, two ¾ casks of wine, in good order and condition, to the libellants, the damages of fire and navigation excepted; primage, etc. That the Live Yankee soon after sailed for Portland, at which port she arrived about November 1, 1867, and that by reason of the improper stowage of the casks and the negligence of the master and crew concerning the transportation of the same, they were wholly lost and destroyed, to the damage of the libellants $217. By the answer of the respondents, John Wiggin, master, and A. S. Abernethy, intervening for their interest in the barque, the voyage in question is admitted to have been made between October 4 and November 5, 1867, and that the libellants shipped thereon, among other goods, etc., two ¾ casks of port wine, as alleged in the libel; and as to the order and condition of such casks at the time

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

of shipment, the respondents say that they have no knowledge, but allege upon information that there were secret defects in the casks, not observed when received on board, and which could not have been observed or remedied after they were stowed, and that the value of the goods did not exceed $100. The answer also denies that the casks were carelessly or negligently handled or stowed, and alleges that the loss of the wine was owing to secret defects in the casks and the perils of navigation.

On the trial the libellants read in evidence a freight receipt as follows: "San Francisco, October 2, 1867.—Received from P. C. Dart, 419 Front street, in good order, on board the barque Live Yankee, for Portland, Oregon, (the damages of fire and navigation excepted,) the following packages, marked M. & V." Then follows a list of the goods shipped by the libellants, including the ¾ casks of wine. It being admitted by the answer that the casks of wine were received on board the barque, to be delivered to the libellants at Portland, and also that such delivery was not made, the barque is prima facie liable for the value of the goods. In addition to this, it appears from the freight receipt that the casks were in good order when received by the master. This being so, the burden of proof is upon the respondents, to show that the loss occurred, as they allege, from secret defects in the casks, or the perils of navigation. Seller v. The Pacific [Case No. 12,644]. As to the latter defence, the evidence fails altogether. True, as appears from the testimony of the master, the voyage was a long and stormy one, yet so far as he is able to testify no water went down the hatches, nor did any portion of the cargo shift from its position. At Astoria the master procured a survey of the hatches, and at Portland of the cargo. Gilman, an experienced seaman, and now and then a Columbia river pilot, was one of the persons who made these surveys. He testifies that no water passed down the hatches, and that no part of the cargo had shifted its position. There is no other evidence upon this point. Under the circumstances, to attribute the leakage of the casks to the perils of the sea, would be a mere arbitrary assumption unsupported by proof. It is not enough to show that the vessel encountered adverse winds and heavy weather, and therefore the loss might have been caused by these elements. The loss of the wine being admitted, if the respondents claim that it was occasioned by the dangers of navigation, the burden of proof is upon them to show it. This fact must be established with reasonable certainty, and not rest upon mere conjecture or possibility. If upon the whole it is doubtful whether the loss arose from the perils of the sea, or the negligence or want of skill in stowing the cargo or navigating the vessel, the vessel must bear the loss.

Counsel for the respondent maintains that if it is doubtful how the loss occurred there can be no recovery—that the vessel is exonerated; and cites Clark v. Barnwell, 12 How. [53 U. S.] 280. But I do not so read this authority. The court say in effect (page 283) that the proof was clear that the damage was occasioned by one of the dangers of navigation, and while it was competent for the libellants to show that it might have been prevented by proper skill and diligence on the part of the respondents, unless such proof was made, the law would presume that the damage occurred without negligence or fault on the part of the master or owners. The case cited clearly establishes the doctrine, that if it be first admitted or shown that the loss was occasioned by a peril of the sea, and upon the proof it be doubtful whether such peril could have been avoided by proper skill and diligence, and the loss thereby prevented, such doubt is to be resolved in favor of the vessel, for in that stage and posture of the case, the law shifts the burden of proof to the libellants, who must establish the negligence or unskillfulness of the respondents, before they can recover. But in the case before the court it is not admitted that the loss was occasioned by a peril of the sea. On the contrary this is the question in dispute and the burden of proof is upon the respondents, who have the affirmative of it. Then if upon the proof it be doubtful whether the loss was occasioned by a peril of the sea, that doubt must be resolved in favor of the libellants, for the burden is upon the respondents to establish that fact.

As to the question of whether the loss arose from the insufficiency of the casks or not, the case is not so clear. The master testifies that the casks were well stowed and dunnaged, with bungs up and bilge free. To the same effect is the testimony of Gilman. In one particular, however, there is a marked difference in the testimony of these two witnesses. The master states that these casks, with the others belonging to the libellants, were stowed on the bottom of the vessel, one tier deep, on one side of the kelson, and then covered with salt in sacks. Gilman states that the casks in controversy were stowed in the middle tier of three tiers of liquor casks; that the top tier was barrels of whisky, and that there was no salt upon them, but some light boxes of dry goods. It is not necessary to conclude that either of these witnesses made an intentional misstatement about this matter, but both their statements in this respect cannot be true. One of them at least must be mistaken about the stowage and position of this part of the cargo. But this flat contradiction in the testimony of the respondents' witnesses must be taken into account in estimating the value of their testimony. The observation or memory of one of them, and the circumstances do not disclose which of them, is much at fault

and unreliable. The casks have been brought into court. They will hold about thirty gallons each—are made of oak and hooped with wooden and iron hoops. The witnesses say they are French wine casks, or very good imitations of them. The stains and rust upon the exterior indicate that the casks are old, but no particular marks or appearances of decay can be seen. One of them is altogether empty, while in the other there is probably ten or twelve gallons. The chine-hoop is off one end of the empty barrel and a small piece of the chine broken off. From all the testimony I conclude that the casks are now in the same condition substantially as when they came out of the hold of the vessel. One witness testified that when the casks were placed upon the wharf, the bilge appeared to be pressed in, as if it had been subjected to a heavy pressure. The casks at this time have no such appearance, and I think the witness must have been mistaken in this particular.

Francis E. Hoag testifies that he was drayman for libellants when the wine arrived. That he saw these casks on the wharf and refused to take them because in bad order. "Both of them appeared to be jammed in the head and the liquor ran out of them." On being shown the casks this witness pointed out where the leak occurred, and in my judgment, the true cause of it. The leak was in the chine, and at that end of each cask there appears to have been a pressure at right angles with the length of the cask and parallel to the direction of the head and with the staves of the head. This pressure is apparent from the present shape of that end of the empty barrel, as one of the staves of the head is drawn endwise from its place at least ¼ of an inch. This is manifest from the position of the brand, "M & V., Portland," which I suppose was put on the casks just before they were shipped. The "M" is upon one stave and the "V" upon another. The character "&" is between these letters and was made partly upon one stave and party upon the other. Now one stave is pushed by the other, so that the corresponding parts of the character do not meet by at least ¼ of an inch. So with the word "Portland." It extends from one stave across on to the other, but now the letters do not meet by about the same distance. The shifting of the staves of the head of this cask caused the loss of the wine. Of this there can be no little doubt. What caused the shifting of the staves, and whether the head was of proper material and workmanship to support the ordinary handling and pressure of such a voyage, may admit of difference of opinion. The respondents have not shown that there was any secret defect or insufficiency about the cask to cause this leak. By their receipt they acknowledged that the cask was in good order when they received it. This is no ordinary leakage or evaporation such as liquor casks are subject to, but substantially a total loss from an injury to the cask after delivery to the vessel. Unless, then, the respondents show that this injury or slipping of the stave in the head was the necessary or probable result of the insufficiency of the workmanship or material of the cask or some part of it, the libellants are entitled to recover. No such proof has been made. What has been said of the empty cask applies also to the other one. The injury to it is not near so apparent, but of the same character. The leak is in the chine, and one of the staves of the head has slipped by the other a little. The probability is, that in slinging these casks into the hold, they got jammed, or that after being stowed they were subjected to a pressure from above and near the end, which started the staves in the head as has been described. As to the value of the wine, the only testimony upon that point is that of the libellant, Van Schuyver. He says that the wine, including freight and primage, cost $217 in currency. There must be a decree for the libellants for the value of the goods—$217—with legal interest since November 8, 1867, and for costs of suit.

LIVE YANKEE, The (ADRIAN v.). See Case No. 88.

LIVE YANKEE, The (GODDEFROY v.). See Case No. 5,496.

Case No. 8,410.

LIVINGSTON et al. v. BRUCE.

[1 Blatchf. 318.] [1]

Circuit Court, N. D. New York. June Term, 1848.

BANKRUPTCY—FRAUDULENT PREFERENCES — LIEN OF JUDGMENT.

1. A judgment was recovered by L. against A., which became a lien on real estate of his of sufficient value to satisfy the judgment. Subsequently, A assigned all his property to B., in trust for the payment of his debts, preferring L. over all other creditors. B. made payments on the judgment out of the personal property assigned, and the balance due on it was paid by a sale of the real estate on execution. Afterwards A. was declared a bankrupt under the act of congress of August 19, 1841 (5 Stat. 440), and J., having been appointed his assignee, brought an action against L. to recover back the money paid by B.: *Held*, that the action could not be maintained.

2. The lien of the judgment was saved by the proviso in section 2 of the bankrupt act.

3. Even though the voluntary assignment was void under the act, as having been made in contemplation of bankruptcy, no fraudulent preference can be predicated upon the payments made on the judgment, because the payment of it had become matter of legal right according to the act itself, the property charged being greater in value than the demand.

4. It makes no difference whether the payments were made by the voluntary assignee or by the bankrupt, because the rights of the general cred-

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

itors and of the judgment creditor are to be regarded in the same light as if no assignment had been made.

[In error to the district court of the United States for the Northern district of New York.]

On the 24th of December, 1841, [Van Vechten] Livingston and [Truman K.] Butler, of Utica, recovered a judgment against Adin Burdick, of Brookfield, for $1,897 74, which became on that day a lien on real estate of the debtor of sufficient value to satisfy the judgment. On the 4th of May, 1842, Adin Burdick made an assignment of all his property to Benjamin Burdick, in trust for the payment of his debts, preferring the debt to Livingston & Butler over all others. The assignee, on the 25th of May, 1842, informed Livingston & Butler of the assignment and of the preference in favor of their judgment, and on that day and various other days down to the 11th of July, 1842, he paid them the sum of $383 02 in all, which was applied on the judgment. On the 27th of July, 1842, an execution was issued on the judgment. Between that time and the 31st of October following, the assignee paid to Livingston & Butler $158 61 more, which was also applied on the judgment. On the 17th of September, 1842, certain creditors of Adin Burdick presented their petition to the district court, under the general bankrupt act of August 19, 1841 (5 Stat. 440), to have him declared a bankrupt. On the 9th of January, 1843, sufficient real estate was sold on the execution to satisfy the balance due on the judgment, and on the 5th of April, 1843, Adin Burdick was declared a bankrupt, and [Joseph] Bruce was appointed his assignee. In May, 1844, Bruce brought an action of assumpsit in the district court against Livingston & Butler, to recover the monies paid to them by the voluntary assignee, as having been paid in contemplation of the bankruptcy of the assignor and by way of fraudulent preference over his other creditors. The plaintiff had a verdict, and, after judgment, the defendants brought the case to this court by writ of error.

Hiram Denio and Willard Crafts, for plaintiffs in error.

Joshua A. Spencer, for defendant in error.

NELSON, Circuit Justice. It was proved on the trial that the real estate on which Livingston & Butler's judgment was a lien, was of sufficient value to satisfy it. The demand in question was therefore amply secured on the property of the debtor before he was declared a bankrupt. Such security was saved from the bankrupt act and from the proceedings under it, by the proviso in the second section of that act. The voluntary assignee took the estate under the assignment to him, subject to this charge. Moreover, aside from the bankrupt act, the preference given to the judgment and the payments made in pursuance thereof were legal and valid. The judgment had secured the priority. And, if we assume the voluntary assignment to be void and inoperative under the act, as having been made in contemplation of bankruptcy, the result is the same and for precisely the same reason. There can be no fraudulent preference predicated on the several payments made upon the judgment, because the payment of it had become matter of legal right according to the bankrupt act itself, the property charged being greater in value than the demand. It would be strange to hold the payment of a debt by a bankrupt to be a fraudulent preference within the meaning of the act, when it operated to discharge, for the benefit of his general creditors, an amount of property equal in value to the sum paid. It is true that in this case the voluntary assignee, after making payments on the judgment to the amount of between five and six hundred dollars, stopped, and the judgment creditors caused the balance to be satisfied by a sale of the real estate. But they were not bound to await the proceedings under the bankrupt act. These in no way affected their security. The previous payments diminished, by a corresponding amount, the charge on the real estate of the bankrupt, and if the petitioning creditors, (the sale having taken place before the appointment of the assignee,) had chosen to bid in the property for the benefit of the general creditors, the amount they would have been obliged to pay would have been calculated on a deduction of those previous payments.

The principle which must govern this case is well settled in England. In Thompson v. Beatson, 1 Bing. 145, payment by a bankrupt of a debt to a creditor, on his giving up a lien on a ship and her cargo, was upheld, and in Mavor v. Croome, Id. 261, payment by a bankrupt of rent due was sustained, as the landlord had a right of distress and of re-entry which were waived by the receipt of the rent. In Marshall v. Lamb, 5 Adol. & El. (N. S.) 115, Lord Denman, referring to this principle, observed, that if the property covered by the mortgage in that case had belonged to the bankrupt, the payment by him would not have been a fraudulent preference, because the assignees would have had the mortgaged property, and it was indifferent to them whether they had the property free from the mortgage, (supposing it to exceed in value the amount of the mortgage,) or the property subject to the mortgage and the amount of the mortgage money in cash. But, the mortgaged property was not the bankrupt's, and, for that reason, the payment was held to be a fraudulent preference within the act. Mr. Justice Patteson observed, in the same case, that where the creditor had a lien on property of the debtor, there was no fraudulent preference in paying money to discharge it, because the assignees, to recover the property, must do

the same. Eden, Bankr. Law, 263, 266, 290.

It was said on the argument that the judgment creditors could look only to the property charged, and that the payments out of the personalty amounted to a fraudulent preference. But, it was a matter of indifference to the other creditors which fund was applied, provided the property charged exceeded in value the demand. And, besides, according to the case of Mayor v. Croome, the payments out of the personal property did not amount to a fraudulent preference, inasmuch as the judgment creditors could issue execution and levy on it at any time. The cases before referred to and the principle upon which they are founded assume that the payments have been made out of property of the bankrupt other than that specifically charged with the debt.

It can make no difference whether the payments be made by the bankrupt himself or by his voluntary assignee. The effect is the same, both as regards the estate of the bankrupt and the general creditors. The assignment neither prejudiced the rights of Livingston & Butler in respect to the former, nor did it give any new rights to the latter. Both are to be regarded in the same light as if no assignment had been made, and every thing done by the voluntary assignee had been done by the bankrupt himself. Judgment reversed.

LIVINGSTON v. The EXPRESS. See Cases Nos. 4,596 and 4,598.

Case No. 8,411.

LIVINGSTON v. JEFFERSON.

[1 Brock. 203;[1] 4 Hall, Law J. 78; 4 Hughes, 606; 11 Myer's Fed. Dec. 721.]

Circuit Court, D. Virginia. Dec. 5, 1811.

COURTS—JURISDICTION—TRESPASS — LANDS WITHOUT DISTRICT.

1. An action for a trespass committed on lands, is a local action, and the United States circuit court for the district of Virginia cannot take cognizance of a trespass committed on lands lying within the United States, but beyond the limits of the district, although the trespasser be a resident of Virginia.

[Cited in U. S. v. Ames, Case No. 14,441; Rundle v. Delaware & R. Canal, Id. 12,139; Ex parte Van Aernam, Id. 16,824; Foot v. Edwards, Id. 4,908.]

[Cited in Thayer v. Brooks, 17 Ohio, 493; Wooster v. Great Falls Manuf'g Co., 39 Me. 248; Eachus v. Illinois & Michigan Canal, 17 Ill. 536; Brown v. Irwin, 47 Kan. 50, 27 Pac. 184; Texas & P. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 608.]

2. The distinction between transitory and local actions is, that the former may have accrued any where, and those only are considered local where the cause of action is necessarily local.

3. Actions of trespass on lands are classed with those actions which demand the possession of land, and with actions of waste, which are local: whilst actions founded on contracts respecting lands are transitory, and may be sustained wherever the defendants are found.

[Cited in Taylor v. Carpenter, Case No. 13,785.]

4. Although this distinction is merely technical, and Lord Mansfield attempted to abolish it, and to establish as the proper rule, the distinction between such actions as operate in rem, and such as merely sound in damages, (and if his opinion had prevailed, the action of trespass on land would have been deemed a transitory action,) yet the old distinction is too firmly established to be now shaken.

[Cited in Mehrhof Bros. Brick Manuf'g Co. v. Delaware L. & W. R. Co., 51 N. J. Law 60, 16 Atl. 12.]

5. The adjudications of English courts, pronounced since the American Revolution, are not of binding authority in the courts of this country, but they are entitled to the respect which is due to the opinions of wise men, who have maturely considered the case they decide. And where a distinction is of ancient date, and the attempt to overrule it has itself been overruled since the Revolution, such modern adjudication can be considered in no other light than as the true exposition of the ancient rule.

6. The jurisdiction of the courts of the United States, depends exclusively on the constitution and laws of the United States.

[Cited in U. S. v. Drennen, Case No. 14,992; Same v. Ames, Id. 14,441; National Bank v. Sebastian Co., Id 10,040; Pierson v. Philips, 36 Fed. 838.]

This was an action of trespass, brought in the circuit court of the United States, for the district of Virginia, by Edward Livingston, a citizen of the state of New York, against Thomas Jefferson, a citizen of the state of Virginia, and late president of the United States, for a trespass alleged to have been committed by the defendant whilst he was president, in removing him from the batture, in the city of New-Orleans, in the then territory of Orleans, now the state of Louisiana. The suit was commenced in 1810, after the expiration of Mr. Jefferson's last term of office.

The declaration contained eight counts. The first count charged, that the defendant, on the 25th day of January, 1808, at the city of New-Orleans, in the district of Orleans, to wit, at Richmond, in the county of Henrico, and district of Virginia, with force and arms, a certain messuage or dwelling-house, and a close or parcel of land thereto adjoining, the said close being part of a parcel of land, known by the name of the "Batture of the Suburb St. Mary," of him, the said Edward, then and there being, did break and enter, and 200 spades, (and various other tools, planks, rails, nails, &c., specifying the number and kind,) of the proper goods and chattels of the said plaintiff, of the value of ten thousand dollars, then and there being found, did break, cut in pieces, and utterly destroy, and 200,000 cart loads of earth, (sand and clay,) of the soil of the said close, with spades, &c., did dig and raise, the said soil so dug and raised being of the value of $50,000, and with carts, &c., did carry away and convert to his own use, by which digging, the soil of the said close was greatly injured, and the said plaintiff wholly lost the said parcel

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

thereof so dug and raised, &c. All the other counts laid the venue in the same way, "at the city of New-Orleans, &c., to wit, at Richmond, &c., &c." The second count charged the defendant with the forcible breaking and entry of the said close, and the putting out, expelling, and removing the said plaintiff from the possession and occupation thereof, from the said 25th of January, till the serving out the writ in this suit, and with digging and carrying away the earth, &c., during that time, whereby the plaintiff not only lost the said soil, but the close was greatly injured, and the plaintiff was prevented from making and constructing divers canals, embankments, and improvements, &c., and from receiving the rents and profits thereof, &c. The third count charged him with entering on the close called Livingston's canal, driving off his workmen and servants, and interrupting their work, during the said period, whereby the work being unfinished, the river Mississippi rose, carried away the materials, and destroyed, and filled up the said canal, &c. The fourth count charged him with entering on the northern part of the said batture, and driving off his, the plaintiff's, workmen and servants, engaged in making a levie, embankment, or dyke, to restrain the annual inundation of the river Mississippi, and interrupting their work during the said period, during which the river rose, destroyed the levie, &c., and inundated the close, &c. The fifth count is the same with the first, except that the charge is that the defendant, "with his servants" did enter, &c. The sixth, seventh, and eighth counts, are the same with the second, third, and fourth, with the same exception.

The defendant demurred to the second, fifth, sixth, seventh, and eighth counts. He also pleaded the general issue, and four several pleas of justification. He justified the act as being done under a law of congress, and in his character of president of the United States, without malice. It is unnecessary to say more of these pleadings, since the question before the court turned on the third plea, which was a plea to the jurisdiction of the court. That plea was as follows: "And the said defendant in his proper person, comes and defends the force and injury, and saith that the messuage, or dwelling-house, and close or parcel of land, being a part of a parcel of land known by the name of the 'Batture of the Suburb St. Mary,' in the first and fifth counts of the plaintiff's declaration mentioned, and the several closes in the second, third, fourth, sixth, seventh, and eighth counts of the plaintiff's declaration mentioned, for the supposed breaking and entering of which said messuage, or dwelling-house, and closes, the said action is brought, are not situate, lying, and being within the Virginia district, or within the jurisdiction of this court, but are situate, lying and being in the territory of the United States of America, called the 'Territory of Orleans,' in which said territory there was, at the time of the said supposed trespasses, and long before, and at the time of the institution of the plaintiff's said action, and yet is, a court of competent jurisdiction to try and decide upon all pleas of trespass, and all causes of action arising within the said territory, wherefore since the house and lands in the declaration mentioned are not within the Virginia district, and the jurisdiction of this court, but in the said territory, the defendant prays judgment, if the court here will, or ought to have further conusance of the plea aforesaid, &c." To this plea the plaintiff replied, that ever since his cause of action, against the said defendant, accrued, "the said defendant has resided without the jurisdiction of the courts of the territory of Orleans aforesaid, to wit, within the district of Virginia, and within the jurisdiction of this court, where he now resides, by reason whereof he is not amenable to the jurisdiction of the courts of the territory of Orleans aforesaid, for the trespasses in the declaration set forth, wherefore he prays judgment, &c." To this replication the defendant demurred generally, and the plaintiff joined in demurrer.

Mr. Wickham, for plaintiff.
Hay, Wirt & Tazewell, for defendant.

Before MARSHALL, Circuit Justice, and TYLER, District Judge.

[2][TYLER, District Judge.[3] This case, although so ably and elaborately argued on both sides, affords but a single question; and that may be drawn within a narrow compass; and while I freely acknowledge how much I was pleased with the ingenuity and eloquence of the plaintiff's counsel, I cannot do so much injustice to plain truth, as to say, that any conviction was wrought on my mind, of the soundness of the arguments they exhibited in a legal acceptation. It is the happy talent of some professional gentlemen, and particularly of the plaintiff's counsel, often to make "the worse appear the better cause;" but it is the duty of the judge to guard against the effects intended to be produced, by selecting those arguments and principles from the mass afforded as will enable him to give such an opinion at least, as may satisfy himself, if not others. These arguments and this eloquence, however, have been met by an Herculean strength of forensic ability, which, I take pride in saying, sheds lustre over the bar of Virginia.

[But to proceed in the examination of the point before us; and that is, to inquire, whether this court has jurisdiction over this cause? And how it comes to be made a question at this day, I confess myself entirely at a loss to say; but as it is made, we must determine it. By the common law, which was adopted by an act of convention of this state, so far

[2] [From 4 Hall, Law J. 78.]

[3] This was the elder John Tyler, father of the president.

as it applied to our constitution, then formed, this point has been settled uninterruptedly for centuries past, and recognized by uniform opinion and decisions, both in England and America. It is true, the great luminary of the judicial department of Great Britain, did make an effort to shake the principle they had established; but the judges in that country would not suffer it to be unsettled, it having been so long acknowledged as the indubitable law of the land. Nor was it for them—nor is it for us, to be over scrupulous in inquiring for the reasons on which the opinion was originally given, why an action of trespass should be deemed a local action. Time may have cast a shade over the reasons of many maxims and principles; and yet they are principles and maxims much to be respected. But to me, some appear to be evident; for instance, in this action, the title and bounds of land may come in question: and who so proper to decide on them as one's neighbors, who are so much better acquainted with each other's lines, and everything else which may lead to a fair 'decision? In an action of this kind, it may be necessary to direct a survey and lay down the pretensions of both parties; for, the defendant has a right to show in himself, a better title, and defend himself on that title. He calls for a direction from the court for this purpose, and if it goes at all, it must go to an officer to carry his posse to remove force, if any should be offered. And suppose the sheriff and jury should deny the power of the court, could they be coerced? And is not this an undeniable proof of the want of jurisdiction; since, although we should sustain the cause in court, by a sort of violence against principle, we should not be able to complete what we begun? The law never sanctions a vain thing. How vain, therefore, to begin what we cannot end! Is not this enough to show the locality of the action, and the consequent want of jurisdiction?

[I shall not attempt to travel up to the time, when both real and personal actions were local. This has been sufficiently done—though perhaps not necessary—by gentlemen at the bar, nor shall I inquire when the distinction took place between local and transitory actions. It is enough to say, that, notwithstanding this distinction, the action for trespass, quare clausum fregit, still remained local, and is so held to this day. The jury of the vicinage was, and still is, a valuable privilege in both cases. May it not be true, that when Great Britain had emancipated herself from her insulated state, figuratively speaking, by spreading her canvas, and carrying her commerce over every clime and every region, this change, this distinction soon followed after it, so as to give greater energy to the transactions between man and man; therefore, by a fiction in law, suffer a transitory action to be maintained anywhere and everywhere, in which a contract could be made. But somehow or other the court must have jurisdiction of every cause it attempts to sustain; and I can conceive no better scheme than that which is pursued, of giving the court jurisdiction by a fiction in transitory actions in this way; that a contract for instance was entered into in New Orleans, to wit, in the city of Richmond, between the parties, (not traversable but in case of jurisdiction,) from which city or the county in which the city is, the jury must come. I say must be supposed to come, notwithstanding the act of assembly which requires the bystanders to be summoned, for they are of the county or vicarage; and this act saves the necessity of venire facias in every case. The venire therefore is indispensable in my opinion to show jurisdiction.

[Again, I well recollect a case of waste brought in the Petersburg district court, when the county of Greensville was supposed to make one which composed that district. The cause went on to trial and a verdict passed for the plaintiff, without its being observed that Greensville belonged to Brunswick district; but at length the defendant's counsel found it out, and moved in arrest of judgment; but the verdict was sustained; an appeal was taken, and the high court of appeals reversed the judgment, because, it being a local action, it ought to have been instituted in the district where the trespass was committed over which that court alone had jurisdiction—notwithstanding a verdict had passed upon the general issue, and it often has been determined that no consent of the parties by their pleadings could prove jurisdiction. Various are the causes which have been determined in this country, in support of the doctrine laid down in this cause, and not one to the contrary, I venture to affirm can be adverted to. Why then attempt to alter this settled principle? Has any statute been passed in this country, that in the slightest manner disturbs the uniform decisions? The case I have referred to was between Gall and Thweatt; and I own is a strong one, as the place wasted and recovered was to have been delivered up, and the court had no power to enforce the judgment. But I have given reasons enough to show how inadequate would be the power of this court to carry on the cause before us and enforce the judgment. It seems clear then, that where title of land is in question, the action must be local, notwithstanding what may be and has been said of a contract to convey land; I well know there is a legal and moral obligation on every man to perform what he contracts to perform, and this among others, is a reason why an action personal should follow a person wherever he might be found, and there rise in judgment against him.

[Upon the ground taken, so far then, the action cannot be maintained in this court; but the ingenious counsel, never at a loss for argument and new matter, has resorted to what he calls the general, the universal

law. Now, I want to see this undefined law, before I can sustain a principle under it. I suppose what is meant by the general or universal law is the law of nature and nations—and who yet has been able to find where the law of nature has defined what a civil action is, or directed the mode of proceeding in it, or in what court it should be brought. These are high-sounding words indeed, but they only serve to round a period and fill up a vacuum in the argument. This is something like the last resort of kings, when everything else fails; for, I know of no other actions in that quarter, but such as flow from that source. Neither do I know of any law that can change the locality of a man's land in New Orleans, to the city of Richmond. This mighty engine, therefore, fails; this undefined law as to the case before us, ceases to be anything more than empty sound. But I will suppose for the sake of argument, that we now were proceeding with the trial of the cause, and the witnesses with the survey and plat were before us, which would show the trespass, if one had been committed, to have been committed in the territory of New Orleans; what could the court do but send the cause out of doors? For, take notice, there is no fiction in a local action. Here the venire is laid in Henrico, the evidence would come from a distant territorial government, and would not agree without allegations in the declaration; and here would end the struggle. Indeed, taking the premises which I have laid down, to be true, which cannot well be denied, and the question resolves itself into a self-evident proposition. But there would be a failure of justice, unless we sustain this action, and to avoid this evil, we must enact a law; for, I know of no other way of answering the plaintiff's design; but this I cannot consent to do: neither can I fly in the face of my own decisions, until better taught. But there is no failure of justice; there is a court of competent power to try the cause, if an actual trespass has been committed; and there ought the suit to have been brought against the real trespasser. I own there may be cases where a man might so manage his matters as to run through another's ground, and to lay waste his enclosures, and even pull down his fences, and then flee from justice, like another criminal, and thus get out of the reach of the law; which is not uncommon. There are cases that no law can well provide against, and they may be considered as partial evils, and exceptions to a good general rule. I am too unwell to follow and pay respect to all the arguments which have been advanced in support of the jurisdiction of this court over the case before us—and therefore must conclude by giving my decided opinion in favor of the plea to the jurisdiction. The cause must therefore go out of court.] [4]

[4] [From 4 Hall, Law J. 78.]

MARSHALL, Circuit Justice. The sole question now to be decided is this—Can this court take cognizance of a trespass committed on lands lying within the United States, and without the district of Virginia, in a case where the trespasser is a resident of, and is found within the district? I concur with my brother judge in the opinion that it cannot. I regret that the inconvenience to which delay might expose at least one of the parties, together with the situation of the court, prevent me from bestowing on this question that deliberate consideration which the very able discussion it has received from the bar would seem to require—but I have purposely avoided any investigation of the subject previous to the argument, and must now be content with a brief statement of the opinion I have formed, and a sketch of the course of reasoning which has led to it. The doctrine of actions local and transitory has been traced up to its origin in the common law—and, as has been truly stated on both sides, it appears that originally all actions were local. That is, that according to the principles of the common law, every fact must be tried by a jury of the vicinage. The plain consequence of this principle is, that those courts only could take jurisdiction of a case, who were capable of directing such a jury as must try the material facts on which their judgment would depend. The jurisdiction of the courts therefore necessarily becomes local with respect to every species of action. But the superior courts of England having power to direct a jury to every part of the kingdom, their jurisdiction could be restrained by this principle only to cases arising on transactions which occurred within the realm. Being able to direct a jury either to Surrey or Middlesex, the necessity of averring in the declaration, that the cause of action arose in either county, could not be produced in order to give the court jurisdiction, but to furnish a venire. For the purpose of jurisdiction, it would unquestionably be sufficient, to aver that the transaction took place within the realm. This however being not a statutory regulation, but a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, was thought susceptible of modification—and judges have modified it. They have not changed the old principle as to form. It is still necessary to give a venue; and where the contract exhibits on its face, evidence of the place where it was made, the party is at liberty to aver that such place lies in any county in England. This is known to be a fiction. Like an ejectment, it is the creature of the court, and is moulded to the purposes of justice, according to the view which its inventors have taken of its capacity to effect those purposes. It is however, of undeniable

extent. It has not absolutely prostrated all distinctions of place, but has certain limits prescribed to it, founded in reasoning satisfactory to those who have gradually fixed these limits. It may well be doubted, whether at this day, they are to be changed by a judge not perfectly satisfied with their extent. This fiction is so far protected by its inventors, that the averment is not traversable for the purpose of defeating an action it was invented to sustain; but it is traversable whenever such traverse may be essential to the merits of the cause. It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

In the case at bar, it is traversed for that purpose, and the question is, whether this be a case in which such traverse is sustainable; or, in other words, whether courts have so far extended their fiction as, by its aid, to take cognizance of trespasses on lands not lying within those limits which bound their process. They have, without legislative aid, applied this fiction to all personal torts, and to all contracts wherever executed. To this general rule, contracts respecting lands form no exception. It is admitted, that on a contract respecting lands, an action is sustainable wherever the defendant may be found: yet, in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may become necessary. A question of boundary may arise, and a survey may be essential to the full merits of the cause: yet these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court. That this consideration should lose its influence, where the action pursues a thing not within the reach of the court, is of inevitable necessity; but for the loss of its influence where the remedy is against the person and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment. If, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it.

The distinction taken is, that actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature necessarily local. If this distinction be established; if judges have determined to carry their innovation on the old rule, no further; if, for a long course of time, under circumstances which have not changed, they have determined this to be the limit of their fiction, it would require a hardihood which I do not possess, to pass this limit. This distinction has been repeatedly taken in the books, and recognized by the best elementary writers, especially Judge Blackstone, from whose authority no man will lightly dissent. 3 Bl. Comm. 294. See, also, Mr. Chitty's note (4) in his edition of Blackstone (volume 2, 233). He expressly classes an action for a trespass on lands with those actions which demand their possession, and which are local, and makes only those actions transitory, which are brought on occurrences that might happen in any place. From the cases which support this distinction, no exception, I believe, is to be found among those that have been decided in court, on solemn argument. One of the greatest judges who ever sat on any bench, and who has done more than any other to remove those technical impediments which grew out of a different state of society, and too long continued to obstruct the course of substantial justice, was so struck with the weakness of the distinction, between taking jurisdiction in cases of contract respecting lands, and of torts committed on the same lands, that he attempted to abolish it. In the case of Mostyn v. Fabrigas, 1 Cowp. 166, Lord Mansfield stated the true distinction between proceedings which are in rem, in which the effect of a judgment cannot be had, unless the thing lie within the reach of the court, and proceedings against the person where damages only are demanded. But this opinion was given in an action for a personal wrong which is admitted to be transitory. It has not, therefore, the authority to which it would be entitled, had this distinction been laid down in an action deemed local. It may be termed an obiter dictum. He recites in that opinion, two cases decided by himself, in which an action was sustained for trespass on lands lying in the foreign dominions of his Britannic majesty; but both those decisions were at nisi prius. And though the overbearing influence of Lord Mansfield might have sustained them on a motion for a new trial, that motion never was made, and the principle did not obtain the sanction of the court. In a subsequent case,—(Doulson v. Matthews (1792) 4 Durn. & E., 4 Term R. 503),—these decisions are expressly referred to and overruled, and the old distinction is affirmed.

It has been said that the decisions of British courts, made since the Revolution, are not authority in this country. I admit it—but they are entitled to that respect which is due to the opinions of wise men, who have maturely studied the subject they decide. Had the regular course of decisions previous to the Revolution, been against the distinction now asserted, and had the old rule been overthrown by adjudications made subsequent to that event, this court might have felt itself bound to disregard them; but where the ancient date has been long preserved, and a modern attempt to overrule it, has itself been overruled since the Revolution, I

consider the last adjudication in no other light than as the true declaration of the ancient rule.

According to the common law of England then, the distinction taken by the defendant's counsel, between actions local and transitory, is the true distinction, and an action of quare clausum fregit, is a local action.[5] This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connection with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority. But it has been said, that this rule of the common law is impliedly changed by the act of assembly, which directs that a jury shall be summoned from the bystanders. Were I to discuss the effect of this act in the courts of the state, the inquiry, whether the fiction already noticed was not equivalent to it in giving jurisdiction, would present itself. There are also other regulations, as, that the jurors should be citizens, which would deserve to be taken into view. But I pass over these considerations, because I am decidedly of opinion, that the jurisdiction of the courts of the United States depends, exclusively, on the constitution and laws of the United States.

In considering the jurisdiction of the circuit courts, as defined in the judicial act [1 Stat. 73], and in the constitution which that act carries into execution, it is worthy of observation, that the jurisdiction of the court depends on the character of the parties, and that only the court of that district in which the defendant resides, or is found, can take jurisdiction of the cause. In a court so constituted, the argument drawn from the total failure of justice, should a trespasser be declared to be only amenable to the court of that district in which the land lies, and in which he will never be found, appeared to me to be entitled to peculiar weight. But according to the course of the common law, the process of the court must be executed in order to give it the right to try the cause, and consequently the same defect of justice might occur. Other judges have felt the weight of this argument, and have struggled ineffectually against the distinction, which produces the inconvenience of a clear right without a remedy. I must submit to it. The law upon the demurrer is in favor of the defendant.

[5] In the state courts of Virginia all actions of debt for rent in arrear, all actions on the case for the use and occupation of lands and tenements, all actions of trespass quare clausum fregit, and all actions of waste, may now be prosecuted in the county or corporation in which the defendant may reside or be found, in like manner as transitory actions may be prosecuted therein. 1 Rev. Code 1819, p. 450, § 14. See the opinion of Green, J., in Payne v. Britton's Ex'rs. 6 Rand. [Va.] 105, where the extent of the abolition of the old distinction between local and transitory actions effected by this act is discussed.

Case No. 8,412.

LIVINGSTON v. The JEWESS.

LOCKWOOD v. SAME.

[1 Ben. 19 (note).]

District Court, S. D. New York. Dec., 1854.

PRACTICE IN ADMIRALTY—STIPULATIONS—RE-ARREST OF VESSEL.

[A vessel arrested upon attachment was released upon stipulations entered into by S. The next day she was re-arrested by other parties claiming liens, and was subsequently sold, and the proceeds therefrom brought into court. Upon motion by S. to be relieved from the stipulations it was *held*, that the purpose for which the stipulations were given,—i. e. to enable the vessel to be employed in her appropriate business, having failed through the subsequent process of the court, and without fault of S.; that, therefore, the motion to relieve should be allowed.]

[Cited in The Empire, Case No. 4,472; U. S. v. Mackoy, Id. 15,696.]

[These were libels by Herman T. Livingston against the steamship Jewess, and by John L. Lockwood against the same.]

These were motions in behalf of a stipulator to be discharged from his undertakings. The vessel was arrested on process of attachment in each suit, and thereupon Mr. Sands, the petitioner, entered into stipulations in each case for costs, and also to satisfy the final decree, and the vessel was accordingly discharged from arrest in the causes. On the next day, August 10, the vessel was again attached under process issued in behalf of seamen. She remained in custody under that process, and numerous others issued in behalf of material men, until she was sold by consent of all parties (since these motions), and the proceeds brought into court, the rights of all parties to remain unaffected by such sale. The stipulator now moves to be exonerated from its undertakings, and that the stipulations be vacated by order of the court.

Mr. Betts and Mr. Burrill, for the application.

HELD BY THE COURT (BETTS, District Judge): That though a stipulation to respond to the final decree be given on the discharge of property from arrest, still the res is not regarded as discharged from the jurisdiction of the court, so as not to be reclaimable on the same process, if the equities and rights of the parties demand it. And accordingly the court will order additional sureties to the stipulation, or re-arrest the property to satisfy the lien upon it, upon proof that the libellant is like to be preju-

diced by leaving it on the bail substituted in its place. But there is not equal equity in favor of the stipulator to authorize his discharge from his undertaking, on restoring the property to the custody of the court. And it is clear, upon the principles of the admiralty practice, that the stipulator cannot do this at his option (Lane v. Townsend [Case No. 8,054]), nor can it be done by order of the court, merely at the instance of the stipulator and for his relief. He is regarded as voluntarily having made a conventional undertaking with the libellant which, in the ordinary course of an admiralty action, concludes him from its conception to its completion.

But that another element of equity has been mingled with this case by the re-arrest of the property; that the object for which the stipulations were given, viz., that of allowing the ship to be employed in her appropriate business, was frustrated by the act of the law, in no way promoted or concurred in by the stipulator; that the claimant was deprived by act of law of the benefit of the discharge, and that deprivation was so nearly concomitant with the discharge itself, as equitably to operate as a revocation of it, particularly in respect to a mere surety.

That if the stipulator, immediately upon the seizure of the vessel on August 10, had, upon that fact, applied to the court to rescind his stipulation, the application must have been granted from the manifest justice of not fastening on him, as surety, an obligation, when the purposes for which it was entered into had been intercepted and defeated by act of law, and when no legal or equitable right of the libellants against the vessel would be changed or diminished by such discharge.

That as those rights and equities remained in the same position when the petition was presented, the surety should not lose his claim to relief because he omitted to ask it at the earliest day.

The order therefore is, that the petitioner be exonerated on paying the costs of this application.

[In 1 Ben. 21, this case is published as a note to The Empire, Case No. 4,472.]

Case No. 8,413.

LIVINGSTON et al. v. JONES et al.

[1 Fish. Pat. Cas. 521;[1] 2 Pittsb. Rep. 68; 18 Leg. Int. 293; Merw. Pat. Inv. 658; 7 Pittsb. Leg. J. 169.]

Circuit Court, W. D. Pennsylvania. Nov. 17, 1859.

PATENTS—ADMISSION OF ORIGINALITY AND VALIDITY—PLEADING.

1. A party using contrivances to supplant another in the use of a patent, by obtaining the assignment of the extended term thereof, and by his answer and his cross-bill, admitting under oath the validity of the patent, claiming the ownership of the extended patent, and praying an injunction against the complainant, must be regarded as admitting the originality and value of the patent, although he subsequently amends his answer and denies both.

2. It is not enough, to defeat the originality of an invention, that prior contrivances are produced which might, by a little change, have been made into the patented contrivance, though not so intended by the maker.

[Cited in Cook v. Ernest, Case No. 3,155; Pennsylvania R. Co. v. Locomotive Engine & Safety Truck Co., 110 U. S. 494, 4 Sup. Ct. 222.]

3. The originality and value of the Sherwood patent for Janus, or double-faced, door-locks, investigated and established.

This was a bill in equity [by Laureston R. Livingston, W. B. Copeland, James K. Morehead, and others against J. Hervey Jones, Alexander M. Wallingford, and others] to restrain the infringement of letters patent [No. 2,886], granted to John P. Sherwood, December 14, 1842; reissued October 7, 1856 [No. 401], and extended for seven years from December 14, 1856, and assigned to complainants. The claims of the reissued and extended patent were as follows: "I claim making the cases of door-locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock or cased fastening may answer for a right or left-hand door, substantially as described. I also claim the peculiar construction and double-action (upon an inclined and horizontal track or way) of the locking-car, B, as hereinbefore described, and the combination of the locking-car, B, and safety-cars, GG 2, with one another, and with the connecting or vibrating bar and bolt, A, as within described, so as to fasten the bolt, C, securely, and prevent its being picked. I also claim so constructing the bolt as hereinbefore described, that by simply turning it over in the lock-case, it is adapted to a right or left-hand door."

[2] [The history and merits of the invention in question, were essentially thus: Till within a few years past most of the door-locks used in this country, were imported from England. It was an important object, therefore, to discover or invent some plan by which this article could be made more cheaply and better than the imported, notwithstanding the higher price of labor here. Such an inventor, who, by bringing his invention into market, could expel the foreign article, would evidently be a public benefactor, the article of door-locks being one of immense consumption in this country. This object was in part effected by making the locks of cast-iron; but a difficulty in the way of these cheaper productions was found in the fact that door-locks had to be made right and left, and a lock made for a right-hand door would have to be turned upside down in order to be used on a left-hand door, and vice versa. It became, therefore, a very important object to

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

[2] [From 18 Leg. Int. 293.]

those who manufactured, and to those who dealt in this article, that this difficulty of right and left hand locks should be some how obviated, and that every lock might be equally capable of use on right or left hand doors.

[An American, named Sherwood—under whom the complainants claimed—was the first to invent a mode of effecting this object, and soon succeeded in establishing a manufacture at once cheaper and better than the imported. His patent was for "a new and useful improvement in door-locks." The schedule stated that every part of the lock might be made of cast-iron as the cheapest material, but did not claim this as the patentee's discovery. "What I claim as my invention," is Sherwood's language, "Is making the case of door-locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock may answer for a right or left hand door."

[The defence set up to the bill was want of originality in the invention; and great numbers of locks were brought into court, many of them old and rusty things, which undoubtedly were cased on both sides. Three were specially relied on; one from the custom house, one from the city hospital, and one from the gate of St. Mark's Church. Several manufacturers of more or less reputation, who were offered as experts, testified that in their opinion these were not essentially different in principle from Mr. Sherwood's lock. But the defendants did not show either that any one of these locks had been made with an intention to obviate the difficulty of having right and left hand locks, or that practically any one of them had ever, in a single instance, been so used, or that any person, before Sherwood, in seeing any one of them, had conceived the possibility of thus applying them.

[The custom house lock was, in fact, from an open out-door gate. Its inside was covered tight in order to preserve the works of the lock from the weather and from rust—a device necessary in all out-door locks. It was not well suited for a Janus-faced lock, and was finished on one side only. It was a left-hand lock, and not a door-lock properly speaking, at all. The lock taken from the city hospital gate was a dead-lock; a right-hand lock. By putting it wrong side out, and making some alterations, it might have been converted into a left-hand dead-lock. The same was to be said of the gate-lock of St. Mark's Church, and of all the others. The mechanic who made the custom house lock in 1840, swore that it was intended and finished only as a left-hand lock; that he never thought of a Janus-faced lock, and never manufactured one; but had different patterns for right and for left hand locks. And yet undoubtedly to the eye of high inventive genius, the finished production of Sherwood was visible in nearly every one of these rude productions. It required but the "vital spark," to kindle the train, and to convert, in an instant, the manufacture designed for one purpose, into an object applicable to quite another. Sherwood had no other merit than to have seen, in an instant, that which others had discovered without being in the least aware of it.][2]

Shaler & Co., Bakewell & Cushing, and E. M. Stanton, for complainants.

Stowe & Hampton, G. P. Hamilton, and Geo. Gifford, for defendants.

GRIER, Circuit Justice. The parties to this bill are two manufacturing firms, in the city of Pittsburg. They are both engaged in the manufacture of door-locks. The complainants claim to be the owners of a patent, granted to John P. Sherwood, for an improvement in door-locks, issued, originally, on December 14, 1842, and afterward extended for seven years, from December 14, 1856.

The bill charges the respondents with infringing this patent. The respondents' first answer admitted the use of the patented invention, but claimed that they are the true owners of the extended patent, and by a cross-bill, they prayed that complainants might be enjoined from using the invention. After the testimony had been taken on both sides, upon this issue involving the title to the patent, the respondents discovering that they must necessarily be defeated, obtained leave from the court to withdraw the answer and cross-bill which admitted the validity of the Sherwood patent, and to file another answer denying its originality and validity.

This being the only question in the case, it is unnecessary to notice further the history of the patent, its renewals and assignments. Till within a few years past, most of the door-locks used in this country were imported from England. It was an important object, therefore, to discover or invent some plan by which this article could be made cheaper and better than the imported, notwithstanding the higher price of labor here. Such an inventor who, by bringing his invention into market, could expel the foreign article, would evidently be a public benefactor; the article of door-locks being one of immense consumption in this country. This object was in part effected by making the locks of cast-iron. But another difficulty, in the way of their cheap production, was found in the fact that door-locks had to be made right and left, and a lock made for a right-hand door would have to be turned upside down in order to be used on a left-hand door, and vice versa. It became, therefore, a very important object to those who manufactured and to those who dealt in this article, that this difficulty of right and left-hand locks should be somehow obviated, and that every lock might be equally capable of use on right or left-hand doors.

Sherwood was the first to invent a mode of effecting this object, but, as it required the expenditure of a large capital and much

[2] [From 18 Leg. Int. 293.]

enterprise, to make and establish in the market, a new manufacture of this kind, the invention was not put into successful operation. The inventor had not the capital necessary, and failed to persuade others who had, to embark in the speculation. The complainants having embarked in the manufacture of door-locks, and properly appreciating the value of Sherwood's invention, sought out the inventor and purchased his patent, and have now succeeded in establishing a manufacture both cheaper and better than that imported.

There is no better evidence of the value of this invention than the contrivances used by the respondents to supplant the complainants, by obtaining the assignment of the extended term of the patent, which, they must have known, has been obtained by the money and active exertions of the complainants and for their use. Their conduct proves their apprehension of the value of the patent, and their oath on record admits its originality.

After such a course of conduct they must be held to make a clear case of mistake in the patent office and in their own sworn answer, as regards the originality of this invention. The patent is for a "new and useful improvement in door-locks." The schedule states that every part of the lock may be made of cast-iron, as the cheapest material, but does not claim that as the patentee's discovery.

The first improvement claimed, is in the case, which is to be made double-faced, and the schedule points out the form and mode of making the castings for such cases. The second improvement is in making the bolt with notches, as described, so as to put them, by simple reversion, to a right or left-hand door.

The claim, which it is admitted that respondents infringe, is as follows: "What I claim as my invention, and for which I desire an exclusive right by letters patent, is, making the cases of door locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock or cased fastening may answer for a right or left hand door, substantially as described."

Simple as this improvement may appear at first view, it is clear it had never before been suggested or put in practice for the purpose of making a better manufacture at a cheaper rate. Before this patent, door-locks had not been so made, nor had it occurred to any one that, by these simple contrivances, this manufacture could be thus improved and cheapened.

The respondents, in support of the issue tendered by them, of want of novelty, have not pretended to prove that any one had ever manufactured Janus-faced door-locks with this device, intending thereby to obviate the difficulty of having right and left hand locks.

But they have given evidence concerning certain locks on gates, which, having been necessarily made with close faces on each side, it is supposed, might, if used merely as dead-locks, have been applied either to right or left hand gates.

The complainants have taken the wise precaution of purchasing all these old locks and producing them in court in propria persona, accompanied, also, by the testimony of the manufacturer of the only one whose age is satisfactorily established to be older than the patent. An examination of these locks is much more satisfactory than the examination of the testimony of witnesses calling themselves experts and delivering opinions.

Not one of these locks was ever intended to be a right and left hand, or Janus-faced lock. The custom house lock is from an open out-door gate. Its inside is necessarily covered tight to preserve the works of the lock from weather and from rust—a device necessary in all out-door gate locks. It is not suited, and never intended, for a Janus-faced lock. It is evidently finished on one side only. It is a left-hand lock, and is not a door-lock at all.

The lock taken from the city hospital gate is a dead-lock, a right-hand lock. By putting it wrong side out, and making some alterations, it might be converted into a left-hand dead-lock. The same may be said of the gate-lock of St. Mark's Church, and all the others. The mechanic who made the custom house lock in 1840, swears that it was intended and finished only as a left-hand lock. That he never thought of a Janus-faced lock, and never manufactured one—but had different patterns for right and left hand locks.

It is abundantly clear from the inspection of these locks that the makers of them were not in search for a plan for Janus-faced locks, or aware of the value of such an invention. They may have stumbled over it, but not seeking it, did not think it worth picking up or examining. As in many other cases, they were near the invention, and might have made it if they had only thought of it. Those who are wise after the event, and who have been examined as experts, have given testimony which, when analyzed, amounts to this, and no more: that these gate-locks, being covered on the inside, might, by a little change, have been made into Janus-faced locks, though not so intended by the maker. This fact is now apparent to a mechanic who has seen the patented invention before him.

Experience has caused me to have little confidence in the opinions of experts and professors, who often have more knowledge than judgment. Courts and juries may be much benefited in their researches by the one, while they would be led into great error by confiding too much to the other.

The art of printing was stumbled over for five thousand years, and if a patent for it were now presented to our expert, he would show you, at once, that the whole art consisted in multiplying impressions from a combination of movable types. He would point you to the tracks of animals as original

impressions from movable types, and show the invention of printing letters to be as old as Adam.

Few patents could stand the test of such ingenuity as this. Incredible as it may appear, yet it is nevertheless true, that on the trial of the originality of Morse's telegraph, it was gravely argued, that two thieves in the penitentiary, who had corresponded by means of scratches and dots on the prison wall, had preceded Morse, in the invention of this most astonishing and useful art.

We are of opinion, therefore, that the defendants have not succeeded in establishing the defense pleaded in their amended answer, and that the complainants are entitled to the decree prayed for in their bill.

[For other cases involving this patent, see Jones v. Morehead, 1 Wall. (68 U. S.) 155; Livingston v. Jones, Case No. 8,414; Moorehead v. Jones, Id. 9,791.

[NOTE. A decree was entered in favor of complainants upon the account rendered for $13,282.92. Thereupon they moved to treble the damages, under the act of July 4, 1836 (5 Stat. 123), but the court rendered a final decree for the sum above. Case No. 8,414. From this decree an appeal was taken to the supreme court, which reversed the decision. 1 Wall. (68 U. S.) 155.]

Case No. 8,414.

LIVINGSTON et al. v. JONES et al.

[2 Fish. Pat. Cas. 207; 3 Wall. Jr. 330; 18 Leg. Int. 340.] [1]

Circuit Court, W. D. Pennsylvania. Nov. Term, 1861.[2]

PATENTS—INFRINGEMENT — MEASURE OF DAMAGES —PROFIT—LICENSE FEE—PATENT CONTROVERSIES—AT LAW—IN EQUITY—REMEDIES.

1. The only cases in which the measure of the patentee's damages is the amount of the infringer's profit, are, when the invention is of some new machine, or a new form of any kind of known machine, which, as a distinct species of machine or manufacture, is more valuable, or can be put into market cheaper, so as to supersede or exclude other machines or manufactures of the same genus; and, where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine or manufacture as a unit, to the exclusion of all competition.

[Cited in Vaughan v. Central Pac. R. Co., Case No. 16,897.]

2. If the inventor's profit consists neither in the exclusive use of the thing invented, nor in the monopoly of making it for others to use, but in having a general use of it by all who are willing to pay him the price of his license, then the nonpayment of the license fee by the infringer is the only wrong done to the patentee.

[Cited in Washington, etc., Steam Packet Co. v. Sickles, 19 Wall. (86 U. S.) 617; Vaughan v. Central Pac. R. Co., Case No. 16,897.]

3. It is plain that a patentee, whose invention is only valuable because used by all who pay a license fee, has fixed his own measure of compensation, and needs none of the remedies which it is the duty of the chancellor to give for his protection. An injunction would do him no good; an account is not wanted; and the only remedy to which he is entitled being a judgment for a given sum of money, with interest, a court of law is his proper resort.

[Cited in Vaughan v. Central Pac. R. Co., Case No. 16,897; Brooks v. Miller, 28 Fed. 616.]

4. Although the statute gives original cognizance of patent controversies equally to courts of equity as to courts of law; and consequently, a chancellor may decide a controversy as to infringement without requiring a previous verdict in a court of law, yet it does not follow that all distinctions, as to remedies granted by each tribunal, are to be abolished.

[Cited in Atwood v. Portland Co., 10 Fed. 285.]

5. A court of law can not issue an injunction, nor a court of equity take jurisdiction to enforce a penalty or merely punitive damages. Each court will give the remedy peculiar to its own functions.

[Cited in Perry v. Corning, Case No. 11,003.]

6. The machine being a unit, a specific article well known in the market, having peculiar value because of the patentee's discovery or invention, the attempt to arbitrarily divide the profits of the monopoly of the whole machine, among its parts, is without precedent, and receives no countenance from the case of Seymour v. McCormick, 16 How. [57 U. S. 48].

[Disapproved in Ingels v. Mast, Case No. 7,034. Cited in Mulford v. Pearce, Case No. 9,908.]

[See note at end of case.]

[7. Cited in Dole v. Johnson, 50 N. H. 455, to the point that the testimony of experts can be received implicitly only on points of a scientific character, and the persons offered must be really men of science.]

[3] [Appeal from a master's report, the case being thus:

[Till within a few years past most of the door locks used in this country, were imported from England. It was an important object, therefore, to discover or invent some plan by which this article could be made more cheaply and better than the imported, notwithstanding the higher price of labor here. Such an inventor, who, by bringing his invention into market, could expel the foreign article, would evidently be a public benefactor, the article of door locks being one of immense consumption in this country. This object was in part effected by making the locks of cast iron; but a difficulty in the way of these cheaper productions was found in the fact that door locks had to be made right and left, and a lock made for a right hand door would have to be turned upside down in order to be used on a left hand door, and vice versa. It became, therefore, a very important object to those who manufactured, and to those who dealt in this article, that this difficulty of right and left hand locks should be somehow obviated, and that every lock might be equally capable of use on right or left hand doors.

[1] [Reported by Samuel S. Fisher, Esq., and by John William Wallace, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 2 Fish. Pat. Cas. 207, and the statement is from 3 Wall. Jr. 330.]

[2] [Reversed in 1 Wall. (68 U. S.) 155.]

[3] [From 3 Wall. Jr. 330.]

[An American, named Sherwood—under whom the complainants [Laureston R. Livingston, W. B. Copeland, James K. Moorhead, and others], claimed—was the first to invent a mode of effecting this object, and soon succeeded in establishing a manufacture at once cheaper and better than the imported. His patent was for "a new and useful improvement in door locks." There was necessarily in Sherwood's improved locks, a vast deal—much the greater part—of what had previously been in locks, and he claimed, of course, no merit for inventing door locks generally. "What I claim as my invention," is the language of his application for letters, "is making the case of door locks and latches double faced, or so finished that either side may be used for the outside, in order that the same lock may answer for a right or left hand door." After Sherwood had obtained his patent and sold it to the complainants, which he did for $600, the respondents [J. Hervey Jones, Alexander M. Wallingford, and others] conceiving that the invention patented was without originality, undertook to disregard the patent, and, during a term of two years and six days, did disregard it in a reckless and defiant way, as well as upon an extensive scale. And being able to sell for $31 per dozen, locks which it cost but $10.64 to make, their profits were large. The owners of the Sherwood patent (the parties making the present motion) having filed a bill some time since in this court and got a perpetual injunction and reference for account [Case No. 8,413] obtained a final decree for $13,282.92 damages; a sum, which though large, was still much less than what seemed to be shown as the profits of the other side. They now, therefore, moved to treble these damages, under the 14th section of the act of July 4, 1836 [5 Stat. 123], an enactment which is in these words: "Whenever, in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment of any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs." The question now was, whether, assuming as proved, that the violation had been wilful and gross, the court, in a form of proceeding coming from a bill in equity, could treble the damages under the enactment quoted.

[Messrs. Loomis & Stowe, against the motion.

[The earlier decisions about patents were often characterized by a ruinous severity, but of late they have been modified and even changed; a change which, if not itself found in the case of Seymour v. McCormick, 16 How. [57 U. S.] 480, may be traced to the wisdom exhibited in the resources of the jurist who pronounced the opinion in that case. The object of the patent laws is to promote the prosperity of the many by giving reasonable protection to the inventions of genius. But they have no further objects. The complainants claim in the matter now pending before the court, a sum exceeding—say $13,000—for two years' use of their discovery; and that this sum shall be trebled by the court sitting here in equity. That is to say, they demand that the defendant shall pay about $40,000, for having participated in their simple discovery; a discovery for which they paid $600. This claim appears rather formidable to men of moderate means and accumulations. It is an amount equal to the acquisitions of many persons during a life of industry, and what would be usually regarded fair success. The collection of such a sum would ruin the defendants. The sum may appear trifling, and the consequences by no means momentous or important to those who can look complacently upon their overgrown fortunes, and calmly and unconcernedly upon the mode of acquisition, however reprehensible, and its consequences to others, however disastrous. It would pay the salary of a judge of the highest judicial tribunal for a term of many years. Such a claim exhibits neither a spirit of fairness nor a sense of justice. It betokens a thirst for acquisition, and an indifference to the mode and means of attainment. The tendency of such claims is to enrich one class of persons and impoverish another; to elevate one class to undeserved wealth, and depress another to unmerited poverty. But the act of congress of July 4, 1836, § 14, plainly refers to cases on the law side of the court. The expressions which it uses, "action for damages," "verdict," "plaintiff," "judgment," point plainly to common law suits, and are inapplicable to a proceeding in equity, which this is. Indeed, this point may be said to have been decided in Sanders v. Logan [Case No. 12,295], where this court said, "equity can inflict no exemplary or punitive damages as a court of law may;" and suggested to the counsel that where the object sought was neither "account nor injunction," "but only a decree for a certain sum of money as fixed, actual damages"—which is just what is sought by the request to treble the damages—"the party may have a better remedy in a suit at law." But if the court sitting in equity could treble the damages, is this a case for so doing. In other words would it be done at law? Sherwood has not invented locks. He has, at most, invented but one part, or rather, improved one part of them, the face. The specification of Sherwood himself shows that what he claimed was only for making the "cases of locks double faced." In the remaining parts of the locks

—parts quite separable from the rest, and the profits on each one of which, as in Sherwood's case, can be computed separately—he claimed and could claim no right.

[In Seymour v. McCormick [supra] the supreme court decide that it is error to instruct a jury, that as to the measure of damages, the same rule is to govern, whether the patent covers an entire machine, or an improvement on a machine, and because such an instruction was given below, the judgment was reversed. In a part of the opinion they say: "If the measure of damages be the same, whether a patent be for an entire machine, or for some improvement in some part of it, then it follows, that each one who has patented an improvement in any portion of a steam engine, or other complex machine, may recover the whole profits arising from the skill, labor, material and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine, even the smallest part is made equal to the whole, and 'actual damages' to the plaintiff may be converted into an unlimited series of penalties on the defendant." This language is conclusive.

[Mr. Bakewell, in support of the motion.

[Assuming as the proof is, that the infringement of Sherwood's patent has been gross, the question is whether the court, sitting in equity, cannot render a decree for more than the actual damage. It is true, that in Sanders v. Logan [supra] it is said by the court, "that a court of equity can inflict no exemplary or punitive damages as a court of law may." The case was decided, however, on other grounds. As a general proposition, it is correctly stated, that in equity punitive damages are not recoverable; but the equity jurisdiction of the circuit courts of the United States, in questions arising under the patent laws, is peculiar, and the rules of equity applicable to ordinary cases do not necessarily apply. In equity, damages are not recoverable, excepting as incident to other relief, for the reason that there is an adequate remedy at law, and mere suits for damages, which could be recovered at law, are not sustainable in equity. But in relation to patent cases, the reason does not apply, since the statute expressly gives a concurrent remedy at law and in equity, and where the reason fails, the rule ceases to apply. The act of congress of 24th September, 1789, § 16 [1 Stat. 82], provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law;" but this was merely adopting the long established principles of the English court of chancery. If this rule applied to suits under the laws of the United States, granting to inventors the exclusive right to their inventions, a patentee would be required to establish the validity of, and his legal right to, a patent in a court at law, before he could obtain a decree of a court of chancery to restrain the infringement of his rights. But in the United States, the circuit courts sitting in equity, do not, in patent cases, act as auxiliary to the courts of law, but have, by virtue of the act of congress of 4th July, 1836, original and independent jurisdiction. They will not, therefore, direct an issue of law to test the validity of a patent, but will decide that question and the legal title of the plaintiff, if necessary, in an equity proceeding, as is said in Sickels v. Gloucester Co. [Case No. 12,840].

[In England, a patentee having sustained his patent at law, appeals to the courts of equity to obtain an adequate recompense for the violation of his patent privilege. Hindmarch, p. 305, 306. It cannot be, that in the United States, where the circuit courts have a larger and more complete jurisdiction over this class of cases, that the reverse is the case, and that a party whose patent is infringed has a better remedy in an action at law than he can have in a suit in equity. It is the practice in equity suits for infringement of patents in United States courts, to give the complainant the actual damages he may have sustained by reason of the infringement of his patent, without the verdict of a jury, or the intervention of a court of law, the amount being ascertained by reference to a master, and awarded by decree of the court; and yet, by examining the acts of congress, we find no express provision for the recovery of damages for infringement, otherwise than by suit at law. The 14th section of the act of 4th July, 1836, contains the only provision in relation to the recovery of damages in such cases; it provides, that "such damages may be recovered by action on the case in any court of competent jurisdiction." The 17th section of the same act provides, that "all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the powers and jurisdiction of a circuit court; which courts shall have power, upon a bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable." Here the relief granted is an injunction to restrain the further infringement of the plaintiff's rights, and no allusion is made to the recovery of damages. The proceedings in equity cases under this act are not regulated by any express provisions, nor is the defence

which the respondent is permitted to set up to the suit, in any way alluded to, either expressly or by reference to the like provisions regulating the action at law. The 15th section of this act provides, that the defendant may plead the general issue, and give the act and any special matter in evidence, of which notice in writing may have been given to the plaintiff or his attorney, thirty days before trial, &c., and throughout the act the proceedings contemplated are evidently adapted to a suit at law. But the decisions of the courts and the practice of the bar have been to accommodate the requirements of the act to equity proceedings, so that it has been held that if the respondent wishes in an equity suit to try the question of originality, he must set out in his answer the names of persons and places by whom and where the invention had been previously used, because the act of congress, as was decided in Orr v. Merril [Case No. 10,591], peremptorily requires notice of these facts in a trial at law or at most written notice must be given to the complainant a sufficient time before the hearing. So in Wyeth v. Stone [Id. 18,107] one of the statutory defences against an action at law was held to be good in equity, although the statute expressly refers to these defences only in reference to an action which may be instituted at law. These instances of the accommodation of equity proceedings to the provisions of the statute, which refer in terms only to actions at law, are cited for the purpose of sustaining the position that, by a like accommodation, the provision of the act of 1836 (section 14), notwithstanding that it speaks of plaintiffs, and verdicts, and judgments, authorizes the court, in the exercise of a sound discretion, to make a decree in favor of a complainant in equity, to an amount exceeding the "actual damage" found by the master's report. It is not necessary to seek in the ordinary proceedings in chancery for any authority for, or example of, such a decree; for neither is it warranted by the principles nor practice of the law, but derives its authority from the statute, and its example from the provisions of the prior patent laws of the United States.

[The idea of compensating the owner of a patent, whose rights have been wantonly invaded, by giving him, in the shape of damages, more than the actual amount of his direct loss from the infringement, is no new feature of the present patent law alone. It is an idea which pervades the whole series of statutes on this subject. The patent act of 1790, § 5 [1 Stat. 111], allowed such damages (it does not say actual damage) as may be awarded by a jury, and the forfeiture to the plaintiff of the thing, &c., unlawfully made or vended. By the act of 1793, § 5 [1 Stat. 322], the defendant forfeited at least three times the sum which the patentee usually charged as a license fee; and in the act of 1800, § 3 [2 Stat. 38], the forfeit was a sum equal to three times the actual damage; thus the law remained until the present act of 1836 was passed. This power of increasing the damages even to triple the actual amount, is left solely with the court; they certainly will not exercise it in a case at law, unless it is, in their judgment, fair and right, and necessary to fully compensate the plaintiff. There is no legal necessity imposed on the court to increase the damages in a suit at law, which they escape from in a suit in equity, and if it is equitable in the one case, it certainly is in the other. There is nothing in the form of the proceeding which should vary the exercise of a discretionary power like this. It is not as a penalty that this increase of damages is to be regarded, still less as a vindictive proceeding, but as a means of compensation for injuries and losses sustained by the aggrieved party which result from the infringement, and yet are not covered by the amount of profits received by the infringer. Dean v. Mason, 20 How. [61 U. S.] 203, comes near to an authority. That was a bill in equity for infringement of a patent. A decree was entered against the defendant, and it was referred to a master to take an account. The court say: "The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general, is the damage done to the owner of the patent. * * * Generally this is sufficient to protect the rights of the owner; but where the wrong has been done under aggravated circumstances, the court has the power, under the statute, to punish it adequately by an increase of the damages."

[In this suit in chancery the supreme court gives as a reason for restricting the amount awarded by the master to the actual damage, that in such a case the court has the power to increase it. That this is a case where, at law, the damages would be trebled, appear to us obvious. The violation here has been reckless and defiant. But independently of this, the true measure of damage to the patentee is what he could have got from his patent if it had not been infringed: and this again is shown by the profits which the infringers have made. There are cases, indeed, in which it would be unjust to estimate the damage, by reason of infringement, at the entire profit on manufacturing the whole article. The books of Reports give us some such. Thus in Silsby v. Foote, 20 How. [61 U. S.] 392, the patent was for the use in a stove of an inflexible rod, which being acted upon by the changes of temperature in the stove, would regulate the draft. Here was an improvement which was but a slight variation from stoves known and used before. It was not the first regulator stove by any means, the patentee had no monopoly of regulator stoves, or of regulating the heat by a self-acting damper, and he was clearly not entitled to the profits on the whole stove. Seymour v. McCormick, 16 How. [57 U. S.] 489–491, while it decides that the inventor of an improvement in a

particular part of a well known machine, cannot claim the whole profit as the measure of his damages, yet equally asserts that where the invention is on the whole article or machine whereof the patentee has the monopoly of the manufacture and sale, and desires to preserve that monopoly of the article, the rule is to give him the profits arising from the thing as a whole. The exceptions prove the rule. The invention in this case is for a right and left hand lock—not for an improvement in right and left hand locks. It was a highly important object to those who manufactured and those who dealt in door locks, that every lock might be equally capable of use on right or left hand doors; and Mr. Sherwood was the first to invent a method of effecting this object. In other words, a right and left hand lock was a new thing, and was patented by Sherwood, the patent being now owned by these complainants. The lock is a unit, and the respondents cannot say truly that our patent is only on the case which encloses the works. In the cases in the Reports, where the profit of making the entire article is not allowed as the measure of damage, there is a difference. In the regulator stove, for instance (Silsby v. Foote [supra]), the regulator of the peculiar kind patented is not essential, for another kind of regulator could be substituted, and the stove would still be perfect, and a regulator stove too, without infringing the patent. In a planing machine, where the patented feature is an improved kind of cutter; these cutters might be replaced with others of a different kind and the machine still remain; so of a patent of a peculiar kind of standard for a plow, or cut-off in a steam engine, and other cases, in many of which the patented feature might be removed and the machine still exist as a perfect and operative whole. But in this lock, the right and left or Janus-faced feature is everything; take away the case, and what remains are a few disjecta membra, unless, except when applied to the case. Further, it is not only necessary that the lock should be capable of looking equally well, when turned either side out, having two faces, each equally applicable to the outside, but the works must also be so constructed as to be capable of being used either way.

[If, however, the court sitting in equity had no power of trebling the damages, then surely the rule of Teese v. Huntingdon, 23 How. [64 U. S.] 2, which excludes in actions at law, counsel fees and other items of actual expense and loss caused directly or indirectly by the infringement, will not be applied in equity; and it will be proper to have the case referred back to the master, to ascertain the amount of such expenses and loss of which he has taken no account in his report.] [3]

[3] [From 3 Wall. Jr. 330.]

GRIER, Circuit Justice. An examination of the facts and the principles of Seymour v. McCormick, 16 How. [57 U. S.] 480, relied on by both sides here, and a comparison of its facts with those presented by this case, will be necessary to a correct decision of the present controversy. The patent of the reaping machine of McCormick had expired, but McCormick had obtained a patent for a small addition or improvement to this machine (a raker's seat). The machine with the raker's seat did not, as a whole, constitute a new machine or manufactured article, giving an entire monopoly in the market to the patentee and his licensees. The patentee had not the exclusive right of making or selling the peculiar reaping machine as one invention. He could not supply the market with the machines with or without the addition of the raker's seat. On the contrary, his price for a license to make and use this improvement on the machine was ten dollars. The wrong done McCormick was the non-payment of the license fee, which respondent had previously paid. The court below had instructed the jury that the measure of damages for infringing the patent for this addition or improvement, to a well known machine, should be the profit made on the whole machine. This was decided to be error. The court say that there can not, in the nature of things, be any one rule of damages which will apply to all cases, and the mode of ascertaining the damages must depend upon the peculiar nature of the monopoly granted.

If the inventor's profit consists neither in the exclusive use of the thing invented, nor in the monopoly of making it for others to use, but in having a general use of it by all who are willing to pay him the price of his license, then the non-payment of the license fee by the infringer is the only wrong done to the patentee. The only cases in which the measure of the patentee's damages is the amount of the infringer's profit, are, when the invention is of some new machine, or a new form of any kind of known machine, which, as a distinct species of machine or manufacture, is more valuable, or can be put into market cheaper, so as to supersede or exclude other machines or manufactures of the same genus; and where the profit of the patentee consists in a complete monopoly of the right to make and vend the new machine or manufacture as a unit, and in the exclusion of all competition. In such a case, the only measure of damage in a court of equity is the amount of profits made by the infringer, and it is in such cases that the injured party should seek his remedy in a court of chancery, where he can have a decree for an account, and an injunction to protect his monopoly. But it is plain that a patentee, whose invention is only valuable because used by all who pay a license fee, and who suffers no other wrong than the detention of such

fee, has fixed his own measure of compensation, and needs none of the remedies which it is the duty of the chancellor to give for his protection. An injunction would do him no good; an account is not wanted; and the only remedy to which he is entitled being a judgment for a given sum of money, with interest, a court of law is his proper resort, where also he may recover a penalty to the extent of treble damages, if the judge sees fit to inflict it.

An injunction is never granted vindictively, but only when it is necessary to protect the rights of the complainant. An account can not be required unless where a knowledge of the profits made by the infringer is necessary to a just determination of the controversy.

Although the statute gives original cognizance of patent controversies equally to courts of equity as to courts of law, and consequently, the chancellor may decide a controversy as to infringement without requiring a previous verdict in a court of law, yet it does not follow, that all distinction, as to remedies granted by each tribunal, is to be abolished; a court of law can not issue an injunction, nor a court of equity take jurisdiction to enforce a penalty, or merely punitive damages. Each court will give the remedy peculiar to its own functions. The remedies of a court of chancery are by injunction and account: penalties and vindictive damages can be recovered only in courts of law. The case of Dean v. Mason, 20 How. [61 U. S.] 203, was one where the monopoly of use of a patented machine (a planing machine), in a particular county, had been infringed. It is said in such a case, that "the rule of damages is the amount of profits received by the unlawful use of the machines. as this, in general, is the damage done to the owner of the patent." The court afterward say: "Generally this is sufficient to protect the rights of the owner. But where the wrong has been done under aggravated circumstances, the court has the power, under the statute, to punish it adequately by an increase of the damages." This is no doubt correct as a general proposition. But the question whether a chancellor would interfere to punish parties by assuming the functions of a common law court, and whether the remedies given in a court of chancery should not be such as are peculiar to that jurisdiction, was not before the court.

These remarks as to inflicting penal damages, though a little out of regular order, have been made in answer to an argument of the learned counsel in this case, in which he questions the correctness of our remarks on this subject in the case of Sanders v. Logan [Case No. 12,295].

The great question of the case now recurs: Is this Janus-faced lock a peculiar and distinct machine, introduced into market as a cheaper and better article, than other machines without the peculiar characteristic of the patented one? Does the value of the patent to its owners consist in the close monopoly of the right to make and sell this species of lock as one individual machine? Has it peculiar characteristics which distinguish it from other machines of the same genus, and which give it a peculiar value in market? If so, the complainants have a right to demand that the defendants, who have infringed their exclusive right to make and sell this peculiar machine or manufacture, are justly liable to refund all the net profits made by such infringement. If, on the contrary, the patent is for some addition or improvement on an old and well-known implement, or some separate part or device thereof of small importance compared with the whole—if the license to use the improvement or addition was sold as separate and distinct from the whole machine, the measure of damage would be the price of a license, and not the profit made by the exclusive right to make and sell the whole machine.

The history of this invention, its object and results are fully stated in the case of Livingston v. Jones [Id. 8,413], between these same parties, when the originality of Sherwood's invention was assailed.

The claim of the Sherwood patent was for "making the case of door locks and latches double faced, or so finished that either side may be used for the outside." The arrangements of the internal parts of the lock and devices necessary to such a lock, are set forth in the specification. They were rather complex, and required, in order to change the lock from a right hand to a left hand lock, that it should be opened and some change made in the position and arrangements of the internal parts. For the purpose of the present discussion it is unnecessary to describe these devices. The name "Janus-faced" locks was given to this machine, to distinguish it from others which had not its peculiar qualities. Now, it is evident, that although the patent of Sherwood may be said to be for an improvement in the manufacture of locks, a well-known implement or machine, nevertheless, the lock contrived by him was a new and different species, having certain qualities differing from all other locks; that the Janus-faced lock is a specific article (although of the genus lock), known in the market, having peculiar value; and that the value of the monopoly granted by the patent consisted in the exclusive right to manufacture this peculiar machine without any competition, and have all the profits of such monopoly. The respondents have made large gains by trespassing on the rights of the complainants. The profits they made by this trespass justly belong to the true owner. They have partaken equally with the complainants in the profits of the monopoly granted to them alone, without license and in defiance of their rights. The only measure of the redress to which the

complainants are entitled is an account of the actual profits made by respondents. It has been argued that this is not full measure of compensation for the injury done to complainants, but it is all that can be made matter of account in equity; all that is specifically claimed in the bill, and all that comes properly within the sphere of the remedies administered by a chancellor.

The machine being a unit, a specific article well known in the market, having peculiar value because of the patentee's discovery or invention, the attempt to arbitrarily divide the profits of the monopoly of the whole machine among its parts is without precedent, and receives no countenance from the case of Seymour v. McCormick [supra].

Decree for $13,282.93.

As to the case of Adams v. Jones [Case No. 57], the court said: "The complainants are sole owners of the right to make this improved machine, either with or without the improvement invented by Adams. As equitable owners of their partner's invention, and their claim being for the infringement of their exclusive right to make the machine with or without it, their damages can neither be apportioned nor increased, in consequence of the mistake of a separate suit on the Adams patent. A decree for profits on the whole machine to the partners jointly, will preclude any claim by any one of them for a particular part." The court, therefore, in decreeing $13,282.93 to Livingston & Co., in the first case, render a decree for one cent in the case of Adams v. Jones [supra].

[NOTE. For other cases involving this patent, see note to Livingston v. Jones, Case No. 8,413.

[NOTE. From this decree an appeal was taken by the defendant to the supreme court, which reversed the decree of the circuit court, rendering a decree for the complainant for the nominal sum of $1.00. Mr. Justice Miller delivered the opinion of the court, in which he said: "Sherwood claims that he is the inventor of three distinct parts going to make up his lock, which thus made up answers a certain purpose, namely: a lock capable of being applied indifferently to a door opening from the right or left. Two of these claims have been long since superseded by other improvements, and abandoned by everybody, and have never been used by the defendants. The other claim which they have used is found to be invalid for want of novelty. What is left of the Sherwood patent? It is clear that no part of the patent which is valid has been used by defendants, and they cannot be made infringers by an argument that mingles the valid and invalid parts of a patent, and calls it a unit; and then claims that defendants are infringers because they have used one part of this unit, although it was a part as to which the patent is void. It, therefore, appears that, in point of fact, the defendants have not infringed the Sherwood patent, and if we were unembarrassed by the pleadings, we should dismiss the bill with costs." In the court below the defendants in their answer had admitted that they made locks as described in Sherwood's patent. It is upon this admission alone that the decree is allowed to stand even for the nominal damage. 1 Wall. (68 U. S.) 155.]

Case No. 8,415.

LIVINGSTON v. JORDAN.

[Chase, 454; [1] 10 Am. Law Reg. (N. S.) 53.]

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

INFANCY—ESTATE OF INFANT — SALE — PROCHEIN AMI — CIVIL WAR — JURISDICTION OF STATE COURT OVER ONE RESIDING IN LOYAL STATE.

1. No person has a right to intervene as a volunteer for a minor child, and make a contract for a sale of a minor's estate.

2. If such a volunteer has made such a contract, a court of equity afterwards has not jurisdiction to ratify it.

3. The courts of a state forming part of the Confederate States had no jurisdiction during the Civil War over parties residing in states which adhered to the national government.

4. As between parties residing in South Carolina and parties residing in states adhering to the national government, the courts of South Carolina could have no jurisdiction while the war continued.

5. A party professing to act as prochein ami for infants resident in Maryland, applied to a court of equity of South Carolina to ratify a sale made by him of the real estate of the infants lying in South Carolina. The application was made in February, 1861. The application was referred to the master, and proceedings were not finally terminated until April, 1862, when the sale was ratified, and subsequently the purchaser paid the purchase money in Confederate currency. The professed prochein ami was stepfather of the infants, and was as well as they resident in Maryland during the whole war. On the restoration of peace they repudiated the whole transaction, and brought ejectment for the land. *Held*, that the proceedings before the South Carolina courts were void, as to them, and that they must recover.

This was an action of ejectment to recover the premises described in the pleadings. Mary S. Livingston (formerly McRa) and Julia M. McRa were entitled under the will of their grandfather to the Wateree plantation. Mary S. and Julia McRa were minors, living in Baltimore. On February 12, 1861, Henry Oehlrich, their prochein ami, filed his petition in the court of equity for Sumter county, setting forth the contract for the sale of the plantation, the deposit with solicitor of petitioners of the cash portion, and praying confirmation of sale. This petition was referred to commissioner in equity, who reported on March 20, 1861, that Mary S. McRa had come of age; that Julia M. McRa was over eighteen years old, when according to the laws of Maryland as in evidence before the commissioner, the guardianship of female infant ceases. The report further recommended confirmation of sale. A decretal order was made by the court, March 29, 1861, confirming the report and ordering the commissioner, on execution of bonds and mortgage for the credit portion, by the purchaser, to execute a deed

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

of the property. In April, 1862, the commissioner in equity reported that the purchaser had not executed the bonds as required by the decree, and further time was granted by the court, and on October 29, 1862, the purchaser complied, and the commissioner in equity executed to him a conveyance of the property. The bonds, as they fell due, were paid in Confederate currency, and by an order of court invested in Confederate bonds. The cash portion was deposited by the solicitor in banks, and now lost. Subsequently the purchaser sold and conveyed the premises to the defendant.

Porter & Conner, for plaintiff.

I. There was no contract of sale, for infants could not contract, and there was no one authorized to contract for them. Sale of real estate of infants can only be effected through court of equity. Court will only act with the greatest precaution, and when sale is for manifest advantage of infant. Otherwise jurisdiction is liable to the most obvious abuse. Pearse v. Killian, McMul. Eq. 234; Bulow v. Buckner, Rich. Eq. Cas. 401. Defendant relies on decree of court, but taking title under the court, he is bound at his peril to see that court had jurisdiction, and that proceedings were regular. The proceedings were irregular, and parties not properly before the court, and of course not bound by the decree. The petition is by H. Oehlrich, as next friend and guardian in Maryland. We object: 1. That petition is not signed or sworn to by next friend. 2. That next friend must reside in the state, so as to be within the control and reach of the court. 3. That it prays sale of real estate and payment of funds to guardians residing out of the state, a thing the court will not permit. 2 Daniell, Ch. Pr. 100; 2 Madd. Ch. Pr. 375; Ex parte Copeland, Rice, Eq. 69. 4. That the evidence before the commissioner showed that the infants were over eighteen years; that the guardian was appointed under laws of Maryland, and that he was no longer guardian under laws of that state, and never had been appointed guardian under laws of South Carolina. The proceedings were not only irregular but were fatally defective. The only parties to be bound by the decree were not legally before the court. The petition was signed by no one but the solicitor who filed it. He was not appointed by any one authorized to act for or bind the infants. Even if any semblance of authority existed for the institution of the proceeding, it terminated as to Mary S. McRa three days after petition was filed, for she then came of age. And it terminated as to Julia McRa, March 6, 1862, when she came of age. In April, 1862, when commissioner in equity reported that purchaser had failed to comply with decree of court it was in evidence before the court that both infants had come of age. Any previous authority to represent them had expired. No new authority had been given. All subsequent proceedings were null and void. The only ground of jurisdiction, the infancy of the parties, had ceased. Tested by the established principles of equity the proceedings were unauthorized and invalid, the parties in interest never properly before the court, and the decree not binding upon them.

II. But even if the proceedings before the court had been regular and legal, and the solicitor had had authority to bind the parties at the inception of the suit, the war suspended his authority and suspended the jurisdiction of the court. The petitioners were alien enemies. There was no persona standi in judico; "absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations." Griswold v. Waddington, 16 Johns. 468.

CHASE, Circuit Justice (charging jury). This is an action of trespass upon the case to try title. There is very little in it for you to pass upon. The question of fact lies within a very narrow compass. The only question of importance in the case is a question of law. It is very clear that this contract made between Mr. Moses and Mr. Robertson did not bind the plaintiffs. It was a contract without authority from them. No person has a right to intervene as a volunteer for a minor child, and make a contract for the sale of a minor's estate. This is so clear that it needs no argument. If, however, as apparently in this case, a person does intervene and make such a contract, it may become binding by subsequent assent of the parties on arriving at full age, or through proper proceedings in a court of equity.

There is no allegation in this case, that we have heard, of any such subsequent consent of these parties. You have heard the testimony of Chief Justice Moses. He stated distinctly there was no intercourse between him and these minor children in relation to this contract. It was made solely at the instance of their mother and stepfather. So far as their consent goes, therefore, it may be laid out of the case. The next question is whether there is any jurisdiction in a court of equity of the state of South Carolina to make a decree confirming the contract, or for the sale of the minor's estate. Upon that point we entertain very serious doubts. Undoubtedly an infant may bring suit by next friend in a court of equity; and the court has jurisdiction in such a suit to make an order giving authority to sell the estate of the infant. There is no question upon that point. In this case, however, the suit was brought by the stepfather, representing himself as next friend of the minors; but he himself resides in Maryland, beyond the jurisdiction of the

court in which the suit was brought. Though represented as the guardian of the minors, he was not such in fact. He had ceased to be the guardian of one under the laws of Maryland for more than two years, and of the other for nearly two. And one of the heirs became of age, according to the laws of South Carolina, within four days after the suit was brought, and the other long before the final decretal order under which the defendant claims title; and neither was ever brought formally into court.

As we have already said, we doubt upon the question of jurisdiction; but for the purposes of this case will rule that jurisdiction to confirm this contract made in behalf of the minors, or to pass the final decretal order under which the title was conveyed, did not exist. The defendant, if dissatisfied, may move in arrest of judgment, or for a new trial.

Under this ruling, gentlemen, your verdict must be for the plaintiff; for, if there was no jurisdiction in the court, the defendant can not protect himself by its decree.

It is proper to say, further, that although we have put this case, for the present, upon the absence of jurisdiction in the state court to confirm or order the sale, there is another objection to the defendant's title equally fatal.

The jurisdiction of the state court over the plaintiffs, whatever it was, terminated when the Civil War broke out. Upon that point we entertain no doubt. As between parties residing in the state of South Carolina, and parties residing in the states which adhered to the national government, between whom war made intercourse impossible, there could be no jurisdiction in the courts of South Carolina while the war continued, by which the rights of non-residents could be injuriously affected. This ruling, indeed, applies only to the orders made during the war; it is decisive, however, of this case.

We charge you, gentlemen, that the courts of South Carolina had no jurisdiction of these plaintiffs, and no jurisdiction to make any order prejudicial to their rights during the war. These instructions, gentlemen, leave nothing for your determination but the question of damages. The measure of damages must be the amount of net profits made by the defendant from the plantation. The defendant in this case is Mr. Jordan, not the original purchaser, Mr. Robertson. If you have heard any evidence of profits made by him, you will give damages to that extent.

The jury returned a verdict for plaintiff, but gave no damages. [Damages one cent, on which the court entered judgment, and issued a writ of habere facias possessionem.] [2]

[2] [From 10 Am. Law Reg. (N. S.) 53.]

Case No. 8,416.

LIVINGSTON et al. v. MOORE et al.

[Baldw. 424.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1830.[2]

REAL PROPERTY—LIEN BY STATE—ACCOUNTS SETTLED—JUDGMENTS—ACTS OF LEGISLATURE.

1. The accounts between John Nicholson and the commonwealth, or some of them, were so settled and adjusted, that the balances or sums of money found due to the commonwealth, were good and valid liens on all the real estate of John Nicholson throughout the state of Pennsylvania.

2. The judgments rendered by the supreme court of the state in favour of the commonwealth against John Nicholson, also constituted good and valid liens upon all his real estate throughout the state.

3. The several acts of the general assembly of Pennsylvania, passed on the 31st of March, 1806 [4 Smith's Laws, 355], and on the 19th of March, 1807 [Id. 381], are not repugnant to or in violation of the constitution of the United States or of Pennsylvania, but are good and valid laws, and a rightful exercise of the powers of the legislature of Pennsylvania.

[This was a suit by the lessee of Livingston and Nicholson against Moore, Mahon and others.] The pleadings in this cause continued for upwards of two weeks, after which HOPKINSON, District Judge, delivered the following charge to the jury: [3]

The argument of this cause has been spread over a wide surface; and matters introduced into it, by way of illustration or otherwise, which have greatly increased its proper size and difficulties. The magnitude of the interests at stake, and the high principles which have been discussed, have excited extraordinary exertions from the able and distinguished counsel who have appeared before you. These are the rights and duties of the counsel. It is the business of the court to select from the great mass the matter most worthy of your attention, and to put it before you in as plain and simple a shape as it will admit of. Such will be my object on this occasion; and I trust that both you and I will enter upon our duties, and endeavour to perform them, with a single eye to the authority of the laws, which we are bound to obey, and which we are placed here to maintain. If the state to which we belong has fallen into an error, and injured one of her citizens by an illegal and unauthorized act of legislation, it is here that the error must be corrected, or the wrong will be perpetual. On the other hand, we are not to deal lightly with the power and rights of a state; or to overthrow her most solemn acts in a spirit of wantonness, or in the indulgence of speculative theories and ingenious refinements. The facts of this case, supported

[1] [Reported by Hon. Henry Baldwin, Circuit Justice.]

[2] [Affirmed in 7 Pet. (32 U. S.) 469.]

[3] The notes of the judge of the arguments of the counsel in this case, being mislaid, we are obliged to omit the usual outline of them. If they should be recovered, the outline will be given in an appendix.

by documentary testimony, are before us, with no contrariety in any thing material; and it is our duty to seek for the law which governs them, and so pronounce our judgment between the parties.

The title of the plaintiffs to the land in question is derived from J. Nicholson, who, in the year 1794, purchased it from the commonwealth. By an agreement made between the parties in this cause, it is stated that "as both parties claim under J. Nicholson, the title to the premises shall be admitted to have been in him, unless divested by the alleged lien and proceedings of the state of Pennsylvania." The defendants also claim title from the same J. Nicholson. They purchased their lands severally under the alleged lien and proceedings of Pennsylvania, and bought them from the state as the property of J. Nicholson; and "as and for such estate as the said J. Nicholson had and held the same at the time of the commencement of the lien of the commonwealth against the estate of the said J. Nicholson." By this clause in the act of assembly directing the sales, the original contract between the commonwealth and J. Nicholson is recognised and affirmed; his right and property in the lands admitted; and the commonwealth undertook to sell to the purchasers, the present defendants, only such estate as J. Nicholson held in them. Both parties then claim to have the title and right in these lands, which J. Nicholson once held, and the question now to be decided is, which of them has made good his claim; which of them has proved and maintained his right by the facts of the case and the law of the land. The original title being admitted to have been in J. Nicholson, his heirs, who claim immediately from him, have and hold his rights, "unless they have been divested by the alleged lien and proceedings of the state of Pennsylvania, under which the defendants have title."

This simple view of the case brings us at once to the question we have to examine, to wit: Has the lien of the state on this property, and the proceedings of the state to enforce that lien, divested J. Nicholson and his heirs of the title and estate he once had in it; and have the title and estate of John Nicholson become vested in the defendants by virtue of that lien and those proceedings? In pursuing this inquiry, our first step must be, to trace this lien and these proceedings from their origin to their termination; and examine whether they have brought these lands which J. Nicholson once held, lawfully and rightfully in the possession of the defendants, with all the title J. Nicholson had to them. If they have not done so, the defendants stand without title; they pretend to no other; the original rights of J. Nicholson in the land are unchanged by these proceedings, and the plaintiffs now holding those rights are entitled to recover. We must turn a careful attention to some of the laws of the legislature of Pennsylvania, and settle their meaning and effect, before we consider the various acts that have been done under them. The foundation of the title of the defendants is found in the twelfth section of the act of the 18th of February, 1785 [2 Dall. Laws, 251]. It enacts that "the settlement of any public account by the comptroller-general, and confirmation thereof by the supreme executive council, whereby any balance or sum of money shall be found due from any person to the commonwealth, shall be deemed and adjudged to be a lien on all real estate of such person throughout this state, in the same manner as if judgment had been given in favour of the commonwealth for such debt in the supreme court." This act, 1. gives a lien in favour of the commonwealth upon all the real estate of any person who shall be found to be a debtor to the commonwealth, in any balance or sum of money, by a settlement of his account by the comptroller-general, confirmed by the executive council; 2. this lien is to attach to the estate in the same manner as if a judgment had been given for the debt in the supreme court. I have not been able to satisfy myself of the meaning of the legislature in this last phrase—"in the same manner as if a judgment had been given in the supreme court." It is true that at the time when this act was passed, a judgment in the supreme court extended its lien over the whole state; but as the act had previously declared that the lien under it should be on all the real estate of the debtor, throughout the state, we must presume something more was intended by the subsequent clause.

The defendants contend, that by the words, "in the same manner," &c., the legislature intended that a purchaser under this lien should hold the land in the same manner as a purchaser under a judgment; and have the same protection against a subsequent reversal for any errors in the proceedings antecedent to the lien. If this construction be the true one, it will greatly abridge our inquiries in this cause. It closes up all the objections of the plaintiffs to the settlement of the accounts; and ratifies every irregularity, if there be any, prior to the lien. It therefore becomes necessary to examine, and, as far as we can, determine what was the meaning of the legislature in using these words, "shall be deemed and adjudged to be a lien on all the real estate of such person, throughout this state, in the same manner as if a judgment had been given in favour of the commonwealth against such person, for such debt in the supreme court." Did they mean to say that a sale made under a lien, in such manner as might afterwards be directed, for this act made no provision for a sale, should have the same protection or immunity from errors, as was given by the law of 1705 [1 Dall. Laws, 67], to sales by execution under a judgment? I have suggested already, that while the act of 1785 gives to the settlement of an account the effect of a lien by judgment, it provides no mode or proceeding by

which the lien is to be enforced, or the money secured by it collected. I cannot but infer from this that it was the intention of the legislature to make the debt secure by the lien; but that it was to be recovered and collected in the ordinary way of a suit, a judgment and an execution; the settlement being conclusive evidence of the debt. If this be so, then as the sale would also be by a venditioni by virtue of the judgment and levy, the purchaser would of course receive the deed of the sheriff, and have all the protection given by the ninth section of the law of 1705 to such a sale. In this view of the act no provision was necessary for the security of the purchaser, and therefore none can be intended by the words in question.

Again, the lien is given in the same manner as if a judgment had been given in the supreme court. Now a judgment in the supreme court had no special privilege or rights in this respect; but a purchase under a judgment in any other court had the same protection from disturbance in case of a reversal of the judgment as if it had been rendered in the supreme court. On comparing the twelfth section of the act of 1785 with the ninth section of that of 1705, it will be found very difficult to connect them in the manner contended for by the defendants. By the law of 1785, the lien is put on a footing with a judgment and no more. Now the provision of the law of 1705 has no reference to the judgment, but the sale made by the sheriff, by virtue of the levy, condemnation and venditioni exponas issued from the court. It is the sale which is not to be avoided by a reversal of the judgment, but the purchaser is confirmed in his right and title to the land, and its former owner, the defendant, can demand a restitution only of the money for which it was sold. If the act of 1785 had authorized an execution to issue, on the settlement which in truth is the substitute for the judgment as regards the debt, or a sale to be under any process to satisfy it in the same manner as a sale under a judgment, the conclusion might have been fairly made that the purchaser at such a sale would stand as secure in his title as a purchaser under a judgment. From 1785 to 1806, no provision was made to enforce the payment of the money secured by the lien in any other way than by a judgment and execution to be obtained as for any other debt. In 1806 [4 Smith's Laws, 355], an act was passed specially for the case of J. Nicholson, leaving the collection of the debts due from all other persons to the commonwealth, still to be made in the ordinary way. In the case of J. Nicholson, for reasons very apparent on the face of the act, the legislature provided a proceeding "for the more speedy and effectual collection of certain debts due to this commonwealth," by which, and another act passed in the following year, a sale was ordered to be made by commissioners as in the manner prescribed by the acts, of the lands of J. Nicholson, subject to the lien of the commonwealth. This sale differs in many respects from that authorized by the law of 1705, by virtue of a judgment and execution. The lands are to be sold absolutely, and not, as in the other case, only "where a sufficient personal estate cannot be found." No inquisition is to be held to ascertain the annual value of the land; and in other matters, it is wholly unlike a sheriff's sale; why then shall we say it is to have the effect of a sheriff's sale, in this particular, which effect is expressly given to that sale by the law which authorizes the sale in question? I am inclined to think this redundancy of expression is but a pleonasm which may occur in legislative compositions as in other works of the pen. The full and perfect validity of this act has not been questioned, nor could be. Every government assumes and rightfully has the power to take care of its own revenue, to protect it by extraordinary securities, to collect it by extraordinary remedies. Without this power and a liberal exercise of it, the government might be thrown into ruinous embarrassments and distressing disappointments, and delays in meeting the expenses of the public service. The United States by an act of congress are entitled to a preference in certain cases over all other creditors, and even a judgment will not protect a creditor from the extraordinary right of the government for the payment of an ordinary debt.

We proceed then on the undisputed ground, that the state of Pennsylvania has taken to herself no illegal nor unusual advantage by the enactment of the twelfth section of the law of 1785 [2 Dall. Laws, 251], but that any balance or sum of money due from any person, ascertained and settled in the manner therein prescribed, "shall be deemed and adjudged to be a lien on all the real estate of such person throughout the state." You have observed that the settlement of the account to which the lien is given, must be confirmed by the supreme executive council. This was in 1785; in the year 1790, the people of Pennsylvania made for themselves a new constitution, or form of government; and thereby the executive power of the commonwealth was vested in the governor, and the executive council of course ceased to exist. Many acts of legislation became necessary to accommodate the laws of the state to the new government; among others to vest in the governor the power of the executive council. On the 13th of April, 1791 [3 Dall. Laws, 73], a general act was passed which enacted that the governor of the commonwealth shall have and exercise all the powers that by any law or laws were vested in the supreme executive council. The duration of this act was limited to the 1st of August following. On the 21st of September, 1791 [3 Dall. Laws, 113], the act of April was continued to December, and in the law of September, we find the following provision: "That in all cases where accounts ex-

amined and settled by the comptroller-general and register-general, or either of them, have heretofore been referred to the executive authority, to be approved and allowed or rejected by the governor, the same shall only, for the future, be referred to the governor, when the said comptroller-general and register-general, shall differ in opinion: but in all cases when they agree, only the balances due on each account shall be certified by the said comptroller-general and register-general to the governor, who shall thereupon proceed in like manner, as if said accounts respectively had been referred to him according to former laws upon the subject. And provided also, that in all cases when a party or parties shall not be satisfied with the settlement of their respective accounts by the comptroller-general and register general, or when there shall be reason to suppose that justice has not been done to the commonwealth, the governor may and shall, in like manner, and upon the same condition, as heretofore, allow appeals, or cause suits to be instituted as the case may require." The meaning and construction of these provisions have formed a prominent subject of the discussion you have heard. It is my duty therefore to give you my views of it. We must go back for a moment.

By the law of 1782 [2 Dall. Laws, 44], great powers were given to the comptroller-general, in the settlement of accounts; and no appeal was allowed from his decision, or any means given by which a party aggrieved by his settlement could bring his case before the court and jury upon its facts or its law. To remedy this injury and injustice, the act of 1785 was passed. It enacts that wherever the comptroller-general shall settle an account in pursuance of the previous law and transmit it to the executive council for their approbation, if the party be dissatisfied, he may, within one month after notice given to him by the comptroller, appeal to the supreme court on certain terms not now material. The sixth section of the law of 1785 directs that if the council be dissatisfied with the settlement made by the comptroller, they may direct a suit to be instituted against the party, with whose accounts they may be dissatisfied. This brief recurrence to previous laws will aid us in understanding the acts of September, 1791, with one additional reference. On the 28th of March, 1789 [2 Dall. Laws, 704], an act was passed for the appointment of a register-general, and the comptroller is required to submit all the accounts he shall adjust, before he shall finally settle them, to the examination of the register-general, and take his advice and assistance in making such settlement; and the settlements made by the comptroller with the aid and assistance of the register, are to be laid before the executive council. Afterwards by a law of April, 1790 [2 Dall. Laws, 787], all accounts are ordered, in the first instance, to be submitted to the register, and after his liquidation and adjustment to be transmitted to the comptroller for his examination and approbation, who shall in like manner transmit them to the executive council for their final approbation. Thus we see that antecedent to the law of September, 1791, the course of settling an account with the comptroller was: 1. To have it examined and adjusted by the register-general; 2. By the comptroller-general; 3. By the supreme executive council; and it was not considered to be a final settlement until it was examined, adjusted and approved by all these tribunals. All the rights of appeal by the party, and of a suit by the executive on behalf of the commonwealth, remained as they were given by the act of 1798 [4 Dall. Laws, 268].

We now come to the act of September, 1791, and the changes effected by it in the settlement of public accounts. In the first place it enacts that the reference of the accounts to the governor, or executive power, to be by him approved and allowed, or rejected, shall in future only be made when the comptroller and register shall differ in opinion. When they agree the accounts are not to be transmitted to the governor, or in any manner referred to him for his approbation or rejection, but the register and comptroller are required to certify to the governor only the balances due on the one side or on the other on each account. It is, however, provided that if the party shall be dissatisfied with the settlement, he shall have an appeal in like manner and upon the same conditions as heretofore; and so on the other hand, if the governor shall suppose that justice has not been done to the commonwealth, he may cause a suit to be instituted against the party, and in either case the whole account will be investigated and recommended by a court and jury. But if the party does not take his appeal in the manner prescribed, and the governor does not cause a suit to be instituted, both the commonwealth and the party are presumed to acquiesce in the settlement made by the register and comptroller, and it is finally conclusive upon both. Such was the law of the commonwealth for the settlement of public accounts, when the accounts of J. Nicholson, now before the court, were adjusted and settled.

We are now prepared to approach the question of lien. The right of a commonwealth to a lien on all the real estate, throughout the state, of any person for the sum or balance found due, being given by the law of 1785, we have to inquire whether such a balance or sum of money was found due from J. Nicholson to the commonwealth, in such manner and form as to give this lien to the commonwealth on all the real estate of J. Nicholson throughout this state for such balance or sum. In other words, were the accounts of J. Nicholson with the commonwealth so settled, according to the laws of this state, and the balances or sums alleged

to be due from him so found, as to entitle the commonwealth to the lien given by the twelfth section of the act of 1785? Was there, on the 31st of March, 1806, when the act was passed "for the more speedy and effectual collection of certain debts due to this commonwealth;" was there a debt due from J. Nicholson to the commonwealth; and was there a valid and subsisting lien on his real estate for the security and payment of that debt? The defendants allege the affirmative of both these questions. And they rest their proof: 1. On the settlement of certain accounts of J. Nicholson in 1796. 2. On two judgments rendered against him by the supreme court of the state in favour of the commonwealth: one on the 18th of December, 1795, the other on the 21st of March, 1797.

(1) The accounts. Three having been laid before you, and they were produced by the plaintiffs in the opening of the case, I shall take them in their order of time.

1. An account which affirms on the face of it to have been settled and entered in the office of the comptroller-general on the 3d of March, 1796, and in the office of the register-general on the 8th of March, 1796. This account is headed, "Dr, John Nicholson on account in continental certificates with the state of Pennsylvania, Cr." You will have it with you; it is therefore sufficient for me to say, that on this account there is a balance struck against J. Nicholson of 58,429 dollars 24 cents.

2. An account "settled and entered" in the office of the register-general on the 20th of December, 1796, and "approved and entered" in the comptroller's office on the 22d of December, 1796, headed "Dr, John Nicholson on account in continental certificates with the commonwealth of Pennsylvania, Cr." The balance of the former account, 58,429 dollars 24 cents, is here charged to J. Nicholson, and credits are given to him which reduce that balance to 51,209 dollars 22 cents. This balance and the former contract is stated to be carried to account on new account.

3. An account which is thus vouched by the accounting officers: "Settled and entered, Samuel Bryan, register-general officer, 30th June, 1800. December 20, 1796. N. B. This account was settled in December, 1796, but not entered in the books till the 30th of June, 1800. Also examined and entered, John Donaldson, comptroller-general officer, December 20, 1796." This account is headed, "Dr, John Nicholson, account three per cent stock of the United States, in account with the commonwealth of Pennsylvania, Cr." A balance is struck against John Nicholson of 63,729 dollars 86 cents, carried to the new account. As the lien of the commonwealth, by which the defendants maintain their right, is in part alleged to have been created by those accounts and their settlements, they have properly attracted a particular attention from both parties, and been the subject of great part of the discussion that has been laid before you. The objections to these settlements, urged by the plaintiffs, are numerous, and I shall draw your notice to such of them as I think we may now consider. You have observed that one of these accounts has been brought before the supreme court of the state in the case of Smith v. Nicholson, reported in 4 Yeates, 6. Such of the questions now raised as were clearly decided in that case, I shall not trouble you with; I shall abide by that decision, not only on account of the obligation I am judicially under to do so, but because I am entirely satisfied with it. I speak of the law there settled. In that case the commonwealth claimed a priority over a private creditor of John Nicholson, who had taken in execution a tract of land as the property of Nicholson. The commonwealth maintained her claim by virtue of her alleged lien on all the real estate of Nicholson given to her by the law of 1785, on a certain settlement of one of his accounts, by which the sum of 58,429 dollars 24 cents, made on the 3d and 8th days of March, 1796, was found due to the commonwealth. This is one of the accounts and settlements on which the defendants now rely. The question submitted to the court was, whether the said settlement created any lien on the real estate of John Nicholson. We must observe that this is the account which was first settled and entered in the books of the comptroller-general, and afterwards settled and entered in the books of the register-general, which is here insisted upon to be a fatal irregularity. It is also expressly stated that the accounts were not transmitted and received no confirmation from the governor. These facts were then distinctly presented to the court, and their opinion given on the law of such a case.

1. That the account settled was but one of the various accounts between the commonwealth and the debtor.

2. That the settlement had been made first by the comptroller, and afterwards by the register.

3. That it had never been transmitted to the governor, or received any confirmation by him; and the question submitted to the court was, whether this settlement of their account created a lien on the lands of the debtor in favour of the commonwealth.

THE COURT then decided:

1. That the provision in the law of 1785, which creates the lien, is not repealed by any subsequent law or laws, expressly or by implication.

2. That the settlement of the account before them, made in the manner mentioned, did create a lien on all the real estate of J. Nicholson throughout the state.

This decision is the law of the case as it was presented in the supreme court of the state, and no further. The party here, who

was not a party to that suit, has a right to the benefit of any new facts which would vary the case, if there be any such. We must therefore consider such of his objections to the settlements as were not brought into view, and have not been disposed of by the judgment of the court in the case cited.

It is alleged that John Nicholson had a legal right to notice of the intended settlement of his account; that he had no such notice, and that therefore the settlement made by the accounting officers of the commonwealth was ex parte, and had no binding force on him or his property. This allegation, as an affirmative fact that he had no notice, is not supported by evidence or admission, as it was in Fitler's Case; but the case here is, that no proof has been produced that he had notice. We come at once to these questions: Was any notice necessary to give a legal validity to these settlements? May a notice be now presumed? Is there any evidence of it, which, at this distance of time, and under the circumstances of the case, ought to satisfy us that it was given, or that, what is equivalent to it, the party attended at the settlements? One of the plaintiff's counsel has insisted that the notice directed by the fifth section of the law of 1782, which is in truth a process of summons, to be issued by a prothonotary and served by a sheriff, was such a notice as John Nicholson was entitled to. On turning to the act, it, to me, is extremely clear, that the notice there has no reference whatever to accounts which should afterwards arise and be settled with the treasury of the commonwealth. It applies only to certain accounts, then of loong standing, and unsettled or not finally closed, with persons having in their hands large sums of money or effects belonging to the commonwealth, in danger of being lost, if "vigorous measures be not taken to compel such persons to settle their accounts, and discharge the balances which may appear to be due to the state." The comptroller is ordered to form lists or abstracts of the names and places of abode, &c. of such persons; and it is to them that the notice or summons is to be issued, to be followed by the subsequent proceedings, according to the act.

We recur to the question, was any notice required to be given to John Nicholson, of the intended settlements of his accounts? Certainly none is directed by the numerous acts of assembly which have been passed for settling the accounts of public debtors. It is nevertheless insisted that it is indispensable; and the opinion of the supreme court of the state is relied upon (Fitler's Case, 12 Serg. & R. 277) to prove the necessity of notices, although none may be expressly directed by the act under which an account is settled. The circumstances of that case were very peculiar, showing a strong and clear equity with the defendant, not merely in the point of notice, but in the substantial merits in controversy. Great wrong had been done him in the settlement, and it was admitted by the accounting officer: what is more material, there were many expressions and provisions of the acts under which his accounts were settled, from which the court thought it was "manifest the legislature intended, in such case, that the party should have been summoned, or in some way or other have had notice." The case decided by the court, was very different from this; it is an authority only so far as they are the same. In the acts of the legislature we have to construe, there are no such provisions as are found in Fitler's Case, from which the court inferred a manifest legislative intention of notice. Some general expressions of the chief justice, in delivering the opinion of the court, are resorted to to sustain the objection here; such as that notice to the party, "is one of the most substantial requisites of natural justice;" that "in proportion as power approaches to arbitrary discretion, it should be restrained within the limits prescribed to it by the legislature." Again, "the word 'settlement' imports a joint act of the parties who have computed together; and an ex parte settlement (if any thing properly be so called) is contrary to the plainest principles of natural justice." This is all true, and well applied to the case before that court, in which they thought that the proceeding of the accounting officer had not been "restrained within the limits prescribed to it by the legislature;" but it would be a bold step in this, or any other court, to pronounce an act of a state legislature unconstitutional and void, on such general opinions and principles, however just in themselves; and without going thus far, they will avail nothing for the plaintiffs in this case. If, therefore, it were here proved or admitted that J. Nicholson had no notice of the settlements now charged upon him and his property, made by virtue of legislative acts, which it is admitted require no notice, I should not imagine myself to be authorized to pronounce the acts and proceedings of the legislature invalid; for the argument, on the subject of notice, followed out, ends in this, if it is to serve the plaintiffs, that the acts of 1806 are unconstitutional and void, because they ordered the sale of the estate of John Nicholson, by virtue of a lien created by a settlement of his accounts, which settlement was made without notice to him, and therefore gave no authority to the legislature to pass the acts in question; or that no lien was, or constitutionally could be created, by a settlement of accounts without notice to the parties, although the legislature had required no notice, and that such a settlement itself was illegal, and not binding on the party or his property. That is (supposing the notice not to be required by the laws), that the legislature has no power to direct a settlement of a debtor's accounts, nor to make the balance due on such a settlement, a lien

on his property without notice. Granting this to be just; is it a void act?

If the argument does not come to this conclusion, it does not help the plaintiffs. And can we soberly and judiciously bring it to this conclusion? Can we solemnly pronounce a law of this state to be void, because a notice was not given, when none was required, by the power having the clear right to say whether it should be given or not? I might think notice to be a "substantial requisite of natural justice," but in a certain case, the legislature has thought otherwise; and they had a constitutional right to think so, and to act upon their own opinion of this abstract question, as well as of its application to the case they were providing for. In Fitler's Case, the only question was, whether he should be charged with interest on the balance of his account, a question peculiarly within the equity of the court, and the opinions of substantial justice; that court was not called upon on such a point, to declare a law of the state void, and to prostrate it as an illegal assumption of legislative power. No court has yet presumed to question a legislative act, on the ground of a difference with their notions of natural justice; and no legislature would, or ought to submit to such a restriction of their authority. To affect the defendant's title, on this point of notice, we must declare that the settlement and the acts directing it, are unauthorized and void, because they give no notice, and therefore created no lien, and that the acts of 1806–07 are void, because they order a sale without settlement or lien.

If then the legislature had a right or a power to direct a settlement of the accounts of a debtor without notice to him, and they have done so, we might dismiss this objection with the remark, that however unjust we might deem it, yet as it violates no provision of the constitution, we cannot put the judicial veto on a law on this account. But I will proceed a little further with it. The counsel for the defendants have insisted, and are well supported by precedent, by principle and sound policy, in the administration of justice, that after a lapse of thirty-four years since these accounts were settled, a fair and legal presumption arises, that all was done which the law required to be done or which ought to have been done, to give validity to the settlements; that it must be presumed, in the absence of all proof to the contrary, that the appointed and sworn officers of the commonwealth who settled the accounts, performed their duties with a proper regard to the rights of the other party; that the whole proceeding was regular and lawful. But allow me to call your attention to the evidence you have had of the circumstances which may at this time be considered as proof of notice or of the attendance and acquiescence of the party, John Nicholson. It does not seem to be questioned by the plaintiffs, that slight circumstances might now be received as proof of notice; are there not such circumstances in this case? In the first place, we have the official certificates of the register and comptroller, that these accounts were "settled." If we may with the plaintiffs adopt the suggestion or allegation of Judge Gibson in Fitler's Case, that the word "settlement" imports a joint act of the parties, can we refuse the same interpretation to the word "settled." If where the law directs a settlement of an account, it implies that both parties are to be present and acting in making it: when the officer certifies that it is settled, the same implication arises not only from the force of the term, but from the presumption that it was settled according to law. Again, the proofs of these accounts were in the hands of J. Nicholson, probably in November, 1796; in which it is severally stated, that his account was "settled" in March, 1796. If the term has the meaning now given to it, J. Nicholson had then an allegation by the accounting officers, that these settlements were by the said officers in conjunction with him, and he never denied the allegation, or the inference; but by taking, as it is asserted for him, these accounts as the basis of the judgment afterwards confessed by him, affirmed it.

On all these grounds I am of opinion, that this objection of the want of notice of the settlement of the accounts of J. Nicholson cannot avail the plaintiffs in this cause, or affect the validity of the settlements. The case of Smith v. Nicholson [4 Yeates, 6] decides, and I think very properly, that where the register and comptroller agree in the settlement of an account, the account need not be transmitted to the governor for his confirmation or revisal; of course I make no further answer to this objection: but it is argued that if this be so, yet in all cases the balances must be reported to the governor by whom the appeal is to be allowed and certified. This is true, and no such point was brought to the view of the court in the case just mentioned. The reason is obvious, the question then was, as it now is, as to the lien of the commonwealth, and which lien was given by the law of 1785, on and by the settlement of the account, and was full and complete when that settlement was full and complete, which it was on the agreement of the register and comptroller. When the further confirmation of the governor was necessary to the settlement, then the lien did not attach until that confirmation was obtained; but no act of the governor being necessary to this settlement, it at once created the lien; subject it is true to such alteration in the amount secured by it as on appeal might be found due, but if no appeal was taken, it stood for the balance found by the register and comptroller on the settlement of the accounts. This answer also will meet the objection that these accounts were not entered in the books; al-

though those produced are certified by both officers to be entered. The entry either of the whole account or the balance is no essential part of the settlement; on the contrary, the account must be settled and finally, unless appealed from, before it can be entered.

It has been strongly argued that the balances must be in money, not in stock, certificates or other effects. For this I can only look to the accounts themselves, which profess to give money balances in dollars and cents. I believe no continental certificates, or certificates of stocks, were given for dollars and cents. If in this I am correct, it is clear that in stating the accounts and striking the balances, the stocks had been valued and reduced to money.

It is said that the order of settlement by the accounting officers has been reversed. There might be some embarrassment on this question, if it were material; but as accounts have been produced, settled in both ways, and any one is sufficient to give a lien to be the foundation of the subsequent acts of assembly, we need not stop to examine this objection more particularly; we are not now settling the accounts, nor inquiring which of several has given a legal balance; but whether any account has been settled so as to give a lien to the commonwealth, under the provisions of the law of 1785.

Besides the objections to these settlements by the force of which it is maintained that they created no lien in favour of the commonwealth, it has been argued that if such lien were given by them, it was afterwards lost by the judgment entered for the same debt in March, 1797, rendered in a suit brought against J. Nicholson, in the supreme court of the state to September term, 1795.

This was antecedent to the settlements. The argument is that the commonwealth had two modes of proceeding, to secure and recover moneys or effects due to her. 1. The ordinary proceeding by a suit in one of her courts, regularly prosecuted to judgment. 2. By a settlement of the account of the debtor, and the lien thereby created for the balance found due. That she could not have or use both at the same time, and in this case having made her election to proceed by suit, she can claim nothing by the settlement. It has been further strongly urged by the last counsel, in connexion with this point, that the two claims are here inconsistent, for that while the suit demands the certificate and stock as the property of the commonwealth, the accounts, by charging him with their value, consider them as the property of J. Nicholson. The declaration is produced to show this understanding of the case. This is very much a technical view of the proceeding. But this is not the only answer or explanation of it. When the suit was brought, and the declaration has reference to that period, the account had not been settled, and the certificate and stock were really the property of the commonwealth, in the hands of the defendant. More than a year afterwards the accounts are settled between the parties, and a value is given to the certificates and stock which had been claimed in the suit, and he is charged with them at their money value. Then they become the property of J. Nicholson, and he becomes indebted to the commonwealth for the value; the account is accordingly so settled, with all the legal effects of the settlement. At the next meeting of the court, in March, 1797, when the cause is called for trial, a judgment is given and taken for the money value, previously accorded to the certificates and stock: and the result of the whole operation is, that the commonwealth has a settlement, lien and a judgment at the same time, against the same person for the same debt. If there is anything illegal or unusual in this, it is unknown to me. Are not the instances without number, in which a party is allowed to have two or more securities, and two or more remedies for the same object or debt, which he may prosecute sometimes together and sometimes successively without impairing either? If the judgment did merge and destroy the lien; could it do so without becoming its substitute and as fully serving all the purposes of the defence? To avoid this conclusion, the plaintiffs have made an extraordinary effort. They argue at one time that no lien can be claimed by virtue of the settlements, because neither the commonwealth nor her accounting officers, had any such expectation or intention: and the judgment of March, 1797, is invoked to demonstrate the truth of this allegation. At another time they argue that the commonwealth can have no advantage in these sales from the lien of her judgments, because the legislature had no such expectation or intention, but looked altogether to the settlement liens. By this ingenious process of reasoning, the commonwealth is made to destroy her own rights, by her own intentions; and it is not the least remarkable feature in the argument, that she has done this by the very acts by which we may say she supposed she was strengthening and securing those rights. In 1797 she abandoned the settlements to rely upon her judgment: and in 1807 she abandoned the judgment to resort to the settlements which she had surrendered and lost ten years before.

If the defendants are to be deprived of the liens of the law of 1795, they then go to the judgments obtained by the commonwealth against J. Nicholson, as sufficient to support the sales ordered by the acts of 1806 and 1807, and their titles derived from those sales. And why are they not? Why are these judgments not such liens as satisfy the provisions of those acts and afford a foundation for the proceedings thereby directed? The only pretence set up by the plaintiffs against them is, that the legislature did not intend it, with a reference to a section in one of the acts which relates to a dispute with the Asylum Company, to support the allegation. Can I

say that the legislature did not intend to exercise all the rights which these judgments gave to the commonwealth? Can I say, by a forced and remote inference, that they intended so great a wrong to the interests they were bound to protect? I turn to the acts for this intention, and do not find it any where declared or expressed. I find no abandonment of any right the commonwealth had against J. Nicholson or his property, for the recovery of the debt he owed to her. The language of the acts is of sufficient comprehension to include the liens by the judgments —indeed as fully and clearly as the liens by the settlements—and there is no more exception of the one than of the other. The various provisions of these acts relate to the lands of J. Nicholson, subject to the lien in one act, and to the liens in the other, of this commonwealth. I look in vain for any reason, legal or logical, to induce a belief that the legislature, in their acts of 1806 and 1807, intended to relinquish the lien which the law gave them upon the lands of J. Nicholson, by virtue of the judgments against him.

If the law of 1785 is a good and valid act of legislation, and if, either by virtue of settlements made of the accounts of J. Nicholson, or by the judgments rendered against him at the suit of the commonwealth, there was in 1806 a legal and subsisting lien on all his real estate within the state, the only remaining question is, whether the acts of 1806 and 1807, or such parts of them as are necessary to the title of the defendants, are valid and constitutional laws, or whether they violate any of the provisions of the constitution of the United States, or of the constitution of Pennsylvania, and are so inconsistent with them, or either of them, that it is the right and duty of the court to declare them to be null and void. The power and right of the court to do this has been freely admitted by the counsel on both sides; indeed I do not see how it is possible to doubt it. If we are bound faithfully to administer the law of the land, if it is our duty to give to every suitor the rights he is entitled to under that law, it follows that it is our right and duty to seek for that law in the declared will of the people, who alone have the power to make it; and if in this search we find conflicting acts, both professing to be the will of the people, we must yield submission to the greater or paramount law, and disregard the inferior.

That the constitution is that paramount law, and that acts of legislation are subordinate to it, cannot be denied, and the consequence is, that where they cannot be reconciled, where both cannot be executed, the courts, when called upon to declare the law, must give effect to the constitution, and annul the act which would violate and defeat it. This is, however, a high exercise of power, and should always be attempted under a deep sense of the responsibility assumed by the court, with a profound respect for the legislative body, and anxious desire to give effect to both acts, if they can be reconciled. The incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases or supposed consequences. It must be clear, decided and inevitable, such as presents a contradiction at once to the mind, without straining either by forced meanings or to remote consequences. It is the constitution that must be violated, and not any man's opinions of right and wrong, or his principles of natural justice. These are uncertain standards of legislative power, and must be referred to the discretion of those to whom the people have given that power, and to whom they must answer for an abuse of it. Under the direction of these principles, I approach the constitutional objections that have been made to the acts of the legislature of Pennsylvania of 1806 and 1807, and shall give to them a distinct and separate consideration. They are charged with oppression, injustice, partiality, an injurious departure from the ordinary modes of proceeding, and a total disregard to the rights and interests of others in the pursuit of the rights and interests of the state. If all this were true, there may nevertheless be evils for which we are not authorized to administer a remedy; there may be injuries we cannot redress, and errors we cannot correct; our power over the subject is measured to us by the constitution, and we must take care that in our zeal to redress real or supposed wrongs, we do not commit a greater wrong. If we agree that the state of Pennsylvania has exercised her authority with a strong arm and a selfish spirit, if she has been a hard creditor, still this will not bring us to the point where we may array the federal power against her acts, and demand of her to surrender the advantages she has thus obtained. If the authority she has exercised be her right, we have no control over the manner in which she may choose to use it. It has been more than once urged upon you that it is the liberal and humane policy of Pennsylvania to postpone the payment of debts due to herself, and to pay individuals first. There is such a provision in the law of 1794, directing the order for the payment of the debts of a decedent by executors or administrators; but does this furnish a rule for any other case? Has it ever done so? If by a general law (not the constitution) debts due to this commonwealth were in all cases to be paid last, would this take from the legislature the power either to repeal the law altogether, or to alter it in a special case for reasons thought by them to be sufficient, which would be a repeal pro tanto? Other states claim a priority in all cases, and can it be unconstitutional or unjust in the legislature of Pennsylvania to do so in a very peculiar case, taking upon themselves to judge of the reasons.

The acts in question are alleged to be illegal:

1. Because they authorize a sale of the lands of the debtor without a previous inquisition to ascertain whether their rents and profits would not pay the incumbrances on them in seven years. We ask, what is the right of a debtor to this inquisition? How does he derive it? Assuredly not from the constitution, nor from those natural and eternal principles of justice which have been so often mentioned. It is the gift of legislative indulgence, a mere gratuitous benevolence to the debtor in derogation of the rights of the creditor, who on strict principles of justice ought to have his money immediately—ought to be allowed to make his debtor's property available to pay his debt without delay, and not be compelled to take the possession and care of an estate he does not want, and wait for its slow and uncertain proceeds for the payment of a debt which, by the contract of the debtor, was to have been discharged long before. This right is by no means so sacred as has been supposed, nor a resumption of it so unusual. The legislature has not hesitated to withdraw it when they thought the public interest required it. Lands are sold for taxes without an inquisition, and by a very summary process, and this has never been deemed illegal or oppressive. Further, the courts of the commonwealth have taken upon themselves the authority to dispense with this proceeding in many cases in which they believed it would be useless, as in cases of levies on unseated lands, on vacant town lots, on uncertain estates in land. It would be strange to say, after such precedents, that the act of 1807 is unconstitutional and void, because it orders a sale of J. Nicholson's land without an inquisition, or even to complain of it as unusual, oppressive and injurious, especially as, so far as we are informed of the situation of these lands, the inquisition would not have been necessary for a sale under a judgment and execution. Who has been injured, who oppressed by this proceeding? (I mean the omission of the inquisition). Neither J. Nicholson nor his creditors. On the contrary, a great and useless expense has been avoided, which would have consumed no inconsiderable portion of the proceeds of the sales to the loss of J. Nicholson and his creditors.

As connected with this part of the argument, I will now remark, that the sales by the commissioners instead of by the many sheriffs of the many counties in which the lands lie, has the same effect in saving expenses and charges which would exhaust the fund. It is replied that the state has saved perhaps five per cent by giving ten to the commissioners. But it must be observed, this ten per cent was paid by the state out of her moneys and constitutes no charge upon J. Nicholson or his creditors.

2. The want of a public notice of these sales, has been urged against the legality of this act; and this is presumed because no proof of notice has been given. I cannot allow the inference. By the express enactment of the law, the deed of the commissioners is declared to be prima facie evidence of the grantee's title, and of course of the regularity of their proceedings. If there was not a provision of the law, I should certainly, in the first instance, presume, at this late day and under the circumstances of the case, that the proceeding had been regular, and the notice required by the act given. The legislature provided liberally for this notice; much more so than the debtor would have been entitled to, if his land had been sold under the executions. In that case the notice of the sale would have been "by so many writings upon parchment or good paper, as the debtor shall reasonably request to be put up in the most public places of the county at least ten days before the sale." By the act of 1807, it is ordered that "in all cases of sales to be made by the commissioners, at least twenty days notice shall be given of the time and place of sale, by advertisement in the newspaper printed in the county where the lands respectively lie, if any be there printed, and if not, in the newspaper printed nearest to such county, and also in two papers printed in the city of Philadelphia." The notice here directed is similar to, if not the same, with that directed of sales of unseated lands for taxes.

3. The power given to the commissioners to make compromises with persons who may allege title to any of the lands, has been vehemently complained of, and even declared to be unconstitutional. What is the ground of this complaint and charge? How is this an unconstitutional grant of power? Does the state assume any right that any individual would not possess in like circumstances? When about to sell a tract of land as the property of J. Nicholson, to satisfy a debt due by him, a third party sets up a claim to the land. Instead of encountering the trouble, expense and delay of litigation to decide this question, the state offers a compromise, and authorizes the commissioners or agents to arrange the terms of the compromise, and to bind her finally and conclusively by their decision and agreement; "their proceedings shall be final and conclusive upon the commonwealth," not upon John Nicholson or his creditors, who have not the most remote interest in this proceeding. It is an arrangement and contract, in its terms, in its object and in its effect, wholly between the commonwealth and the claimant of title to the land; it touches no right of J. Nicholson or his creditors; it deprives them of nothing, and makes no change in their condition or relation to the land, to each other, or to the commonwealth. As respects the rights of J. Nicholson and his creditors, every thing remains as before.

When a compromise is effected, what are the commissioners authorized to do? "To execute and deliver an assignment of so much of the liens of the commonwealth against the estate of J. Nicholson as may be equivalent to the consideration paid; and the holders of the assignment "may at any time proceed upon the liens to sell the lands which were the subject of compromise." Was not this an assignable right or interest; and when assigned, would not the assignee hold all the rights of the commonwealth in the subject assigned, and no more? Whatever objections of law or fact J. Nicholson or his creditors could have opposed to this lien or any proceeding under it while it remained in the hands of the commonwealth, they could oppose with like effect to the assignee holding from the commonwealth.

The purchaser of the lien stands precisely in the place of the state, with no greater rights than she had, and no greater wrong to J. Nicholson or his creditors. The only difference is, in case of a controversy they will have an individual instead of the commonwealth for their antagonist. Is this complained of as an injury? What provision or principle of the constitution is violated by it?

While the objections to these laws we have just considered were charged to be violations of the constitution, the charges were left on the general allegation and argument, but no attempt was made to designate the articles or provision of the constitution which it was supposed were violated. On some other points the counsel for the plaintiffs have been more specific in their objections under this head, and have referred us to parts of the constitution of the United States and of Pennsylvania, which they allege to be infringed. They assert that these acts impair a contract, or the obligations of a contract. That they take away the trial by jury and deprive a citizen of his property without the judgment of his peers. You are familiar with the parts of our constitution to which these allegations refer, and it is unnecessary for me to recite them. We proceed to inquire what contract or obligation of a contract has been impaired by these laws or either of them? The plaintiffs have mentioned two: 1. The original contract between J. Nicholson and the commonwealth for the sale and purchase of the land. 2. The contract or agreement made between them when the judgment was entered against him in the supreme court of Pennsylvania. (1) The contract for the purchase of land. The argument is that John Nicholson had by his warrant, survey and the payment of money to the commonwealth acquired an equitable or inchoate title to these lands, and that the commonwealth had bound herself to complete this title by delivery to J. Nicholson of a legal deed of conveyance, but that by selling these lands under the laws in question, she had put it out of her power to complete or perform this part of it; and thereby has virtually violated it. Let us consider whether by these laws the commonwealth repudiated any right she had given to John Nicholson by her contract with him; and whether she had disabled herself from doing any thing she was bound to do by that contract. What had she done? She had vested in him the property of these lands; he had legally acquired the property in them. Does she deny it, or resume it by these acts? By no means; on the contrary, all the proceedings directed by these laws are founded on the basis that the lands are the property of J. Nicholson, and as such liable to the liens of the commonwealth. What says the first act on this point? The commissioners are ordered to procure copies of deeds and other writings relating to the real estate of John Nicholson, to ascertain the quality of the estate of John Nicholson, subject to the lien of the commonwealth. Through every section of this act the lands to be sold under it are invariably spoken of and described as the estate or property of J. Nicholson. So of the act of March, 1807. The governor is to issue process to the commissioners to sell such lands as they may specify "as the property of the late John Nicholson." The purchaser is to receive a deed for the property sold to him "as and for such estate as the said J. Nicholson had and held the same at the time of the commencement of the liens of the commonwealth against the estate of the said John Nicholson." A scrupulous regard is here paid to the right of any citizen who may have acquired any right in these lands from John Nicholson between the period of his purchase from the commonwealth, and the commencement of the lien, a space of more than two years. The original contract then, it is evident, was unaffected, nay it was in terms affirmed by the laws of 1806-07. Did these impair her further undertaking to give a deed or patent for the premises? In the first this undertaking was not absolute, but depended on contingencies or things to be further performed on the part of the purchaser. But let that pass? Can it be denied that the right of property which John Nicholson had in these lands was such as he might alienate and transfer to another? that it was such as might be taken and sold by process of law for his debts, and that his alienee or the purchaser at a sale for his debts would acquire all his interest, all his title, and all his right to any further assurance of title. This part of the contract of the commonwealth is neither violated, impaired or diminished by the passing of the land from John Nicholson to any other person, but it follows and sticks to the soil, and becomes vested in any and every legal owner of the

soil. The sale under the law of 1807 manifestly has no more effect upon the obligations of the commonwealth to complete the inchoate title sold to John Nicholson in 1794, than if the land had been assigned by John Nicholson to a bona fide purchaser, or sold under a judgment and execution from one of the courts of the commonwealth.

We will now briefly inquire how these acts violate or impair the agreement made at the time when the judgment was entered, in March, 1797. This agreement we have on the records of the supreme court of the state, and is now fully before us. It is agreed on the part of J. Nicholson, that a judgment be entered against him for the sum of 110,000 dollars 89 cents, rating the stock for which the suit was brought at certain specified prices. It is stipulated that "in the set off the stock be allowed at the same rate, the defendant to be allowed three months to point out any errors to the satisfaction of the comptroller-general and register-general; such errors to be deducted from the sum for which the judgment shall be entered." Errors, if any, against the commonwealth, are also to be corrected. The agreement concludes, "the sum for which judgment is now entered to be altered by the subsequent calculation of the comptroller-general alone." What are we to understand by this? That the commonwealth claims of J. Nicholson on that suit the sum of 110,000 dollars 89 cents; that J. Nicholson, having then nothing to show to diminish that sum, agreed that a judgment should be entered against him; a final judgment for that amount: but supposing that he might show himself entitled to some reduction or set off, or might detect some error in the account, a right is reserved to him to do so, provided it was done within three months. If within that period he had shown an error or a further credit, he was entitled to do so. What effect would that have had on the judgment? It would neither have opened it, nor in any manner disturbed it, nor have entitled J. Nicholson to any further trial before a jury. It would have lessened the amount to be paid in satisfaction of the judgment, and for which an execution might be issued, and nothing more; nor even this, unless the comptroller and register were satisfied of the justice of the deduction demanded. But J. Nicholson lived for several years after the date of this agreement, and never pointed out an error or claimed any deduction or set off, as far as we are informed. Further, an execution issued on that judgment two years before J. Nicholson's death, and we know of no objection made to it by him, or any allegation or pretence that it was contrary to the agreement for entering the judgment.

It has been finally argued that these laws violate the contract made by the commonwealth when she sold them, that they should be subjected to the payment of the debts of the purchaser only in the usual mode by which other lands of any other citizen were subject. We ask, where is this contract or any evidence of it? Again, how has it been shown that the lands of any other citizen, being a debtor to the commonwealth, might not have been subjected to the same proceedings? The plaintiffs must sustain both these positions to give any force to the argument. In this case it is not only the lands of J. Nicholson, bought of the commonwealth, that are subjected to the provisions of these laws, but all his real estate, however he may have obtained it. The effect of this argument would be to render the law void as to the real estate purchased of the commonwealth, and good and constitutional as to all the rest. The case of Stoddard v. Smith, 5 Bin. 355, sufficiently answers this objection. Certain lots in the city of Washington were sold, and bonds and notes taken for the purchase money. These not being paid, the commissioners resold the lots, agreeably to an act of the legislature of Maryland, passed subsequently to the contract of sale; and it was contended that this impaired the validity of the contract and was therefore unconstitutional. The supreme court of this state said, No; it does not impair the contract, but merely gives a new remedy. This act of Maryland gave a special procedure in a particular case which has been so strongly urged as unconstitutional against the acts of Pennsylvania. If the process to sell the land in 1798, was not a violation of the agreement, how is the process for the same purpose a violation in 1807, provided it is clear of other objections?

We proceed to the other objections, on constitutional grounds.

1. It is a judicial act. The position that a legislature cannot constitutionally perform a judicial act, is supported by no authority: nor has it any reason in public policy or convenience. On the other hand it is contradicted by legislative usage and the highest judicial decisions. It is true, as has been argued by the plaintiffs, the constitution of Pennsylvania divides the powers of government under three general heads of legislative, executive and judicial: that it ordains that "the legislative power of the commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives," that "the supreme executive power shall be vested in a governor," and that "the judicial power shall be vested in a supreme court," &c. This, however, is only a declaration of the general system or theory of our government, and was never intended to fix exact and impassable limits to each department. There are things necessary to be done in the administration of the government, of a character so mixed and blended, partaking of the elements of all these divisions of power, that we could not know to which to assign it; it could not be

exclusively claimed by either. If, however, the acts performed in this case by the legislature were clearly judicial, they are not therefore unconstitutional and void. So have the supreme court adjudged in several cases, at least in relation to the constitution of the United States; so have the courts of Pennsylvania repeatedly said, sitting under the constitution of Pennsylvania, and deciding upon acts of the legislature partaking largely of judicial functions. That this division of power is not to be taken so strictly as the plaintiffs contend for, is manifest from the unquestioned laws that have been produced upon this trial, treated and claimed by both parties as good and valid acts of legislation, in which you have seen judicial powers, strictly such, given to the executive in the settlement of the accounts of persons with the commonwealth. This is a question of debtor and creditor, of charges and vouchers between the commonwealth and a citizen, and the governor is constituted the tribunal to decide it, with all the powers of a judge and jury, in all cases where the register and comptroller shall differ. The whole judicial authority in such cases is vested in the governor; he decides the law and the fact; he receives or rejects evidence; he exercises, indeed, higher and greater judicial powers, than are given to any court, between citizen and citizen.

I have given this consideration to the question, because it has been so seriously insisted upon by the counsel for the plaintiffs. But how does this objection stand in point of fact? What judicial power was exercised by the legislature in these acts? I can discover none. They do not decide the question of indebtedness of J. Nicholson to this commonwealth, nor its amount. This was finally and conclusively done, not only as regards J. Nicholson, but the commonwealth also, by a settlement of an account more than ten years before. It was also done as conclusively by a judgment confessed by J. Nicholson in the supreme court of the state, the supreme judicial power, ten years before. There was nothing left on this head to be decided by any authority. Does then the act decide the other question between the commonwealth and J. Nicholson, that is, the alleged lien on all his real estate? Not at all. It neither creates the lien nor gives it any strength or legality that it had not before. The lien had been created by a law of the commonwealth passed more than twenty years before, and acted upon in relation to all public debtors from that period. In 1807, the legislature, taking the debt as it had been legally and finally ascertained by a settlement of the account of J. Nicholson, or as it had been confessed and admitted in March, 1797, by J. Nicholson himself, and taking this lien as it had been given by the law of 1785, proceed to collect their debt, and enforce their right by the provisions of the laws now questioned. They are truly and strictly, as has been argued for the defendants, remedial acts to enforce a right, not to give it; to collect a debt, not to adjudge it to be due.

These observations will also serve as an answer, or at least as expressing my opinion of the objection that has been so pressed upon these laws as being made in violation of the constitutional right to a trial by jury. Trial by jury should be as heretofore. This is true, but it must be in a case in which there is something for a jury to try. On a careful examination of these acts, I have been unable to see a simple fact or enactment in which J. Nicholson or his heirs have the least interest or concern which could, by any of our forms of proceedings or principles in the administration of law, be submitted to a jury for any purpose or in any shape. Was it the province of a jury to decide upon the powers given to the commissioners, the process or proceedings directed in order to make the sales, the terms of sale, the manner of sale, the authority to make compromises? In short, if a trial by jury were this moment offered to the heirs of J. Nicholson, in relation to any of the provisions or matters contained in these laws, I know not what they could point out as a subject upon which a jury could act within the ordinary and established limits of their jurisdiction or authority. There is no novelty in this proceeding as to the material matters of fixing the debt and selling the lands of the debtor without the intervention of a court or the use of the ordinary process of the law. The ordinary taxes apportioned upon every citizen by assessors and commissioners, may be collected by a summary sale of the goods and chattels of a delinquent, on a very short notice. The taxes assessed on unseated lands, whose owners may reside at any distance, may be sold for such taxes without the aid of any court, or jury, or inquisition, under the authority of county commissioners, and by a course of proceedings very similar to that provided by the acts now in question, and very different from the ordinary modes of proceeding to recover debts. These revenue laws have never been questioned as infringing the right to a trial by jury, or violating any part of the constitution.

Some other provisions of the constitution of the United States and of Pennsylvania have been referred to, especially those which declare that no man shall be deprived of his property unless by the judgment of his peers, or the law of the land. The construction put upon this clause in the constitution is repudiated by the opinion of the court in Stoddard v. Smith, already referred to. It does not mean that his property may not be made to answer for his debts in any other way than by the usual and established modes of proceeding to recover debts, and the general laws of the land on that subject. A direct act of legislation to take his property and give it to another, or to the commonwealth, might be liable to the exception. But when

a man holds property which is subject to his debts, is a law unconstitutional which directs a proceeding by which this property is made to produce the money or debt to the payment of which he was liable? Is this depriving him of his property against or without the law of the land? The objection made to these laws arising from the sections in relation to the asylum company, appears to me to have no unconstitutional enactments, even as regards that company, much less any of which the present plaintiffs can avail themselves. I also pass over the lien claimed by the defendants in virtue of the general law of Pennsylvania, by which the debts of a decedent are charged upon his lands. If necessary hereafter the defendant will have the benefit of these laws.

Upon the whole, and the best consideration I have been able to give this long and interesting case, during a trial in which my attention has been so much absorbed by the arguments of the most able counsel, coming out in their utmost strength, with great labour and long preparation, I am of opinion:

1. That the accounts between John Nicholson and the commonwealth, or some of them, were so settled and adjusted that the balances or sums of money thereby found due to the commonwealth, were good and valid liens on all the real estate of John Nicholson throughout the state of Pennsylvania.

2. That the judgments rendered by the supreme court of the state in favour of the commonwealth against John Nicholson, also constituted good and valid liens upon all his real estate throughout the state.

3. That the several acts of the general assembly of Pennsylvania passed on the 31st of March, 1806, and on the 19th of March, 1807, are not repugnant to or in violation of the constitution of the United States, or of Pennsylvania, but that they are good and valid laws, and a rightful exercise of the powers of the legislature of Pennsylvania. The whole law of the case is therefore in favour of the defendants.

Verdict and judgment for defendant.

On a writ of error to the supreme court, the judgment in this case was affirmed. 7 Pet. [32 U. S.] 469.

[NOTE. Upon the question of the constitutionality of the acts of the legislature of Pennsylvania Mr. Justice Johnson, who delivered the opinion of the supreme court, said: "We shall search in vain in the constitution of the state or of the United States, or even in the principles of common right, for any provision or principles to impugn them; and on this point I am instructed to report it as the decision of this court that the words used in the constitution of Pennsylvania in declaring the powers of its legislature are sufficiently comprehensive to embrace the powers exercised over the estate of Nicholson in the two acts under consideration, and that there are no restrictions, either express or implied, in that constitution, sufficient to control and limit the general terms of the grant of legislative powers to the bounds which the plaintiffs would prescribe to it." 7 Pet. (32 U. S.) 546.]

Case No. 8,417.

LIVINGSTON v. PRATT.

[Brown, Adm. 66.] [1]

Circuit Court, D. Michigan. June Term, 1857.

PRACTICE AT LAW—SUPPRESSION OF DEPOSITION—RETURN TO COURT—IN POSSESSION OF OPPOSING ATTORNEY.

1. Though a deposition be taken under a stipulation waiving "all objections as to the form and manner of taking," it must still be returned to court in all respects, as provided by law.

2. Where a deposition so taken was left for several months in the hands of defendant's attorney, and was not placed on file until the morning of the trial, it was *held* it could not be read.

Motion to suppress a deposition. On the 3d of July, 1856, by stipulation between the parties, it was agreed that the testimony of one Whittemore might be taken before a United States commissioner, "subject to all legal objections for irrelevancy and incompetency, but all objections as to the form and manner of taking being hereby waived, and that said deposition may be used as evidence on the trial of this cause, as if regularly taken under the act of congress." The deposition was taken on behalf of the defendant. It was indorsed as follows: "I certify that, on the 18th June, 1857 (the day of trial), I received the within deposition from the hands of C. C. Jackson, Esq., the commissioner who took the same; that the same was handed to me in open court by said Jackson in person, and the same was without envelope. Jno. Winder, Clerk." Upon the motion the affidavit of the plaintiff's attorney was read, to the effect that he had been informed, the day before, by the defendant's attorney, that the deposition had never been returned and filed, or delivered to the clerk, and that the same had been for several months in the possession of defendant's attorney; that, upon inquiry of the commissioner, he was informed that the deposition was not in his custody, but that he had delivered it to defendant's attorney several months before; that, when the cause was called up for trial, the deposition had not then been filed. A further affidavit was read to the effect that, about three months after the deposition was taken, the witness had written to the defendant's attorney, stating that he was mistaken in his testimony, and desiring it retaken; and that the witness had since died. The 30th section of the judiciary act [1 Stat. 88], relating to testimony taken de bene esse, provides that "the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court."

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

Messrs. Wells, Cook, and Lothrop, for plaintiff.

Messrs. Campbell and Hand, for defendant.

HELD BY THE COURT: McLEAN, Circuit Justice. (1) That, notwithstanding the stipulation, the deposition should have been returned in all respects, as provided by the act. (2) That the deposition, having been retained in the hands of defendant's attorney for a long time, and being placed on file on the morning of the trial for the first time, could not be read in evidence.

Case No. 8,418.

LIVINGSTON v. PROPRIETORS OF ORE BED.

[16 Blatchf. 549.] [1]

Circuit Court, D. Connecticut. Aug. 1, 1879.

EQUITY—LACHES—FIFTY YEARS' ABANDONMENT.

L. filed a bill in equity against a corporation, to compel it to issue to him 50 shares of its stock, representing one-eighth of all its shares. The stock grew out of a bed of iron ore. L. claimed under a will made by H., who died in 1872. H. had enjoyed no benefit from the property for 50 years before he died. No demand was made for the stock till L. made it, in 1874. Other persons had openly enjoyed and claimed title to the same 50 shares from 1847. H. was, during the 50 years, in a position to know that his property, if any, was claimed and enjoyed by others. *Held*, that, because of acquiescence and laches and the staleness of the claim, L. could not recover.

[See Badger v. Badger, Case No. 718.]

[Bill by Herman T. Livingston against the proprietors of the Ore Bed in Salisbury for the recovery of fifty shares of stock and the dividends due upon the same.]

Thomas C. Ingersoll, Jacob F. Miller, and Jacob Sutherland, for plaintiff.

Donald J. Warner, Henry C. Robinson, and Charles B. Andrews, for defendant.

SHIPMAN, District Judge. This is a bill in equity to compel the defendant, a corporation established by the general assembly of Connecticut, to issue to the plaintiff, a resident and citizen of the state of New York, fifty shares of the stock of said corporation, which are alleged to belong to the plaintiff, and to pay the amount of the dividends which may have become due upon said stock, or for such other and further relief as the nature of the circumstances may require, and as may be just and equitable. In 1735, the governor and company of the colony of Connecticut, granted in fee to John Ashley an undivided fourth, and to each one of six other persons an undivided eighth, of a tract of land containing one hundred acres, situated in the town of Salisbury, and subsequently known as the "Ore Bed Ground," or the "Salisbury Ore Bed," and which contained valuable iron ore. In 1784, the proprietors of this tract were incorporated by the general assembly of this state under the name of "the Proprietors of the Ore Bed in Salisbury." The powers conferred were, in general, "to adopt, ordain and make such rules, regulations and by-laws as they shall judge reasonable and right for employing miners to raise said ore and promote the increase thereof, to appoint a committee or agent to order, direct and superintend the same, according to such rules and orders as he or they shall receive from the proprietors in their said annual meeting, and that such committee or agent shall have, and hereby are vested with, full power and authority, in his or their name, for and in behalf of the proprietors of said ore bed, to sue and prosecute to final judgment and execution any person or persons, whether proprietors or others, who shall, without his or their consent, dig or raise any ore in said bed, contrary to the rules or by-laws so adopted by said proprietors, or shall, in any wise, trespass upon the said common interest of the proprietors, the avails whereof they or he shall hold for the use and benefit of the common interest, and all cost and expenses attending the same shall be by such committee or agent paid out of the common treasury of said proprietors," and "to make and ordain all and every such rules, ordinances and by-laws concerning their common interest and the management of the same, that they shall judge necessary, so as the same be not repugnant to the general law of this state." About 1790, Robert Livingston, the last proprietor of the manor of Livingston, died seized and possessed in his own right, in fee, of an undivided four-eighths of said ore bed. He was, also, the owner of the Ancram furnace, in the state of New York. This furnace was about five miles from the ore bed, and was supplied with ore from his share of the bed. By his last will, duly proved and approved December 8th, 1790, before the surrogate's court for the county of Columbia, in the state of New York, his sons, Walter, Robert Cambridge, Henry, (subsequently known as "General Henry,") and John were made residuary devisees of all the real estate not specifically devised. His interest in the ore bed was a part of the residuary devise. He also devised to said four sons a large part of the manor of Livingston. After his father's death, Walter conveyed his estate in the part of the manor so devised, to his brother Henry. This part having been divided into four great lots, numbered one to four inclusive, by a deed of partition between Robert, John and Henry, dated October 4th, 1792, Robert took title to No. 2, John to No. 4, and Henry to Nos. 1 and 3. The Ancram furnace was in lot No. 3. Walter also conveyed his one-eighth of the ore bed to Henry, by deed of October 6th, 1792. General Henry, upon the organization of the corporation in 1784, was appointed its agent, and so continued until his death in

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1823. Each proprietor was in the habit of receiving whatever ore he desired for his own purposes, of which an account was kept by an officer called "clerk of the hill;" and ore was sold to non-proprietors. Annually, or oftener, the accounts were adjusted and settled, and the amount due to each proprietor, by way of dividend or net profits, was paid. It is apparent, from the treasurer's accounts, which are preserved to the year 1802, that, up to that time, General Henry received the dividend or profits upon four-eighths of the ore bed business; and it is not doubted that he paid one-eighth to Robert Cambridge, or to his children. The book containing the treasurer's accounts from 1802 to 1835, has been lost, but memoranda of dividends, and drafts of accounts, for parts of eleven years, between 1820 and 1835, have been preserved. It does not appear when this payment of four-eighths to General Henry ceased, or when the payment of one-eighth directly to Robert's children commenced; but, in the years 1820 and 1821, General Henry received three-eighths, and thereafter the payments to him and to his devisee, and to his devisee's devisee, seem to have been, uniformly, the last named fractional part, while Robert's representatives took directly one-eighth. General Henry died in 1823, unmarried, and, by his last will, devised in fee to his nephew, Henry Livingston, afterwards called Henry of Claverack, son of John Livingston, "all my right, interest and estate of and in the ore bed and its appurtenances, situated in the town of Salisbury," and also devised to him one undivided half of great lot No. 3. John Livingston had died in October, 1822, aged 74, and, by his will, it appears that his son's inheritance of a share in his bachelor uncle's estate was not unexpected. John's will recites, that, "Whereas, my brother Henry Livingston has frequently and solemnly engaged that he will, by his last will and testament, or otherwise, give and devise to my said son Henry, his heirs and assigns, the one equal moiety of all that portion of the Manor of Livingston, * * * known and distinguished by the name of great lot No. 3, now," &c. General Henry and John lived within five miles of each other, and were reputed to be on very intimate terms. John's residuary devisee was his son Herman, who was thirty years old when his father died. Henry of Claverack was immediately appointed agent of the corporation, in place of his deceased uncle, and so continued until his death in the year 1828. He devised to his son Henry, (called "Dock,") the Ancram property, and all his right in the ore bed. The widow of Henry of Claverack claimed her dower in his estate, and, upon her petition, the court of probate for the district of Sharon set out to her a life estate in one undivided third part of three undivided eighth parts of the ore bed. Henry Livingston, (called "Dock,") and his wife conveyed, in 1843, to his brother Herman Livingston, and to his brothers-in-law, Alonzo Bogardus and James S. Talbot, the Ancram property, and his right and title in the ore bed. On March 5th, 1844, these three grantees, by a deed reciting, that, whereas, "General Henry Livingston, of the town of * * * was owner of three equal undivided eighth parts of the Salisbury ore bed, situate in the state of Connecticut," and by his will devised the same to Henry Livingston, of Claverack, who, by his will, devised the same to his son Henry, who, with his wife, had, on July 8th, 1843, by deed, conveyed all their right, title and interest of, in, or to the same Salisbury ore bed to them, the said Herman Livingston, Alonzo Bogardus and James S. Talbot, by which deed they became seized in fee, as tenants in common, of 3/8ths of the ore bed, and were desirous of severing their joint interest in the ore bed, released and conveyed to each other an undivided eighth thereof. These three-eighths, subsequently, and prior to 1847, were conveyed as follows: 1/8th by Herman to Timothy Chittenden; 1/8th to Maria S. Bogardus; and 1/8th to Orsamus Bushnell, trustee for Catherine L. Talbot. In the year 1844, the general assembly amended the defendant's charter. The amendment provided, among other things, that the property of the corporation should be deemed personal estate, to be divided into shares not exceeding $100 each, transferable in such manner as the corporation should direct. In the year 1847, the charter was further amended in manner following, omitting the preamble: "Sec. 1. The proprietors of said ore bed are hereby created a corporation, by the name of 'The Proprietors of the Ore Bed in Salisbury,' with a common seal, which they may establish and alter at pleasure, and that, by that name, they may sue and be sued, contract and be contracted with, and that they shall have all the powers and privileges which may be necessary to the full, complete and profitable enjoyment of their said property, rights and privileges. Sec. 2. The ore bed of said proprietors, and the rights and privileges of said proprietors to the same, and in the land aforesaid, are hereby declared, and the same hereafter shall be, personal estate and not real estate; and the same shall be a corporate stock, divisible into shares, not exceeding one hundred dollars per share, transferable on the books of the corporation in such manner as its by-laws shall direct. Sec. 3. The application of said proprietors, made by them, their guardians, agents or attorney, shall be binding upon said proprietors; and this resolve shall be binding upon all other proprietors who may not have joined in said petition, and who shall not, within one year from its passage, signify, in writing, to the clerk of said corporation, his dissent from the provisions of the same. Sec. 4. The shares of said proprietors in the corporate stock shall be in proportion to their respec-

tive interests in said property; and any proprietors aggrieved by the refusal of said corporation to assign to him his relative share or shares of said stock, may have the same determined by proceedings upon a bill in equity, or by an action upon the case, in any court of competent jurisdiction. Sec. 5. The officers of said corporation shall consist of a president, clerk, who shall be sworn, and three directors, all of whom, after the first meeting, shall be chosen at the annual meeting of the corporation, by ballot. Sec. 6. The first meeting of said corporation may be called by the said William Ashley or Timothy Chittenden, by a notice published in the Litchfield Enquirer, three times before the day of holding said meeting; at which meeting the officers aforesaid may be chosen, and such by-laws, rules and regulations established as said corporation shall determine, which said by-laws, rules and regulations may be altered, modified or repealed, as occasion shall require, at any annual meeting of said corporation. Sec. 7. Said by-laws, rules and regulations shall contain nothing repugnant to the constitution and laws of this state; and this resolve shall at all times be subject to alteration or repeal by the general assembly. Sec. 8. Those parts of the resolves of 1784 and 1844 which are inconsistent with this resolve are hereby repealed." Under the amendment of 1847, the corporation was reorganized, at a meeting held August 25th, 1847, at which Timothy Chittenden, Orsamus Bushnell, trustee for Catherine L. Talbot, and Charles Paget, as attorney of Maria S. Bogardus, each claiming one-eighth part of the real estate, were present. At this meeting by-laws were adopted, providing, among other things, that the shares of the proprietors should be four hundred in number, of the expressed value of $100 per share, and for the form of the stock certificates. There was a contest between the Ashley and the Adam families, as to the title of two-sixteenths of one-eighth. Timothy Chittenden, William G. Bates and Samuel F. Adam were appointed a committee to ascertain the true owners of the ore bed, and report at the next annual meeting the names of said owners and the amount owned by each. At the next meeting, on November 30th, 1847, the following resolution was adopted: "That each individual proprietor in the ore bed, before he receives any stock or dividends, shall convey all his interest in said ore bed to the corporation; that, upon giving such conveyance, stock equal in amount to the interest of the proprietors shall be apportioned to such proprietor, upon his giving satisfactory security to the directors, to indemnify the corporation for all loss or damage it may sustain in consequence of issuing the same or paying dividends thereon, and that he will surrender, on demand, for cancellation, so much of said stock as shall appear to have been improperly issued." At a meeting held November 28th, 1848, the committee reported, "that the stock be issued to the several proprietors according to the proportions which have been paid for the last twenty years or upward, and that the corporation receive deeds from the several proprietors, of their respective shares in said ore bed, excepting that two-sixteenths part of one-eighth of said bed shall not be affected by such conveyances, and that the same shall be reserved, as a fund for the payment of debts and expenses, until the title to said fractional part shall be investigated, and that, to secure the rights of the several proprietors to their shares of said two-sixteenths, the following vote (resolution) be passed, which shall save to each the same rights he now has to the same: 'That, whereas, for a period of more than twenty years, the rents and profits of the ore hill in Salisbury has been divided as follows, viz.: to the heirs of Philip Livingston and their grantees, three-eighth parts of the same; to William Ashley and his grantors, one-eighth; to Timothy Chittenden and his grantors, one-eighth; to the heirs of Samuel Forbes two-eighths and fourteen-sixteenths of one-eighth; and also to all the said proprietors, in like proportion, the remaining two-sixteenths of one-eighth part of the same: and, whereas, there is a difference of opinion between certain of the proprietors as to the ownership of two-sixteenths of one-eighth of said ore bed, now, therefore, it is hereby voted and declared, that the corporation will receive deeds from said proprietors, of the respective proportions of said ore bed, as above stated, and will issue stock to the owners of said ore bed according to the proportions above stated; and that the remaining two-sixteenths of one-eighth of said ore bed be left without any issue of scrip for the same, until otherwise ordered, when the title to the same shall be ascertained, and that, in the meantime, the rents and profits of the same be appropriated towards the payment of the debts and expenses of the corporation.' The report was accepted, and the accompanying vote was passed. A certificate for fifty shares of stock was issued to Timothy Chittenden, Orsamus Bushnell, trustee for Catherine L. Talbot, and Maria S. Bogardus, each. These one hundred and fifty shares of stock represent the same, and all the same, three-eighths interest which Robert Livingston devised to his sons, Henry, Walter and John. These shareholders conveyed, by separate deeds, to the company, their interest in the ore bed, and said Chittenden and said Bogardus annexed to their deeds a covenant, by which, after referring to the by-law or resolution requiring security, by way of indemnifying the corporation for all loss it might sustain, &c., they covenanted to indemnify the corporation against all loss or damage it might sustain by issuing stock to them, and against all loss or damage it might sustain by paying dividends thereon; and that they, their executors, &c., would, at any

and all times, surrender, on demand, for cancellation, so much of said stock as should appear to have been improperly issued." Dividends have regularly been paid to these shareholders, or to their assignees, upon said one hundred and fifty shares of stock, ever since the year 1847. Herman Livingston, son of John, died in May, 1872, aged eighty years, and, by his will, made Herman T. Livingston, the plaintiff, his residuary legatee and devisee, who made demand of the defendant for fifty shares of stock, on May 5th, 1874. This was the first demand ever made upon the corporation by any heir or representative of John Livingston. Herman Livingston asserted, in conversation with his son and others, in the latter part of his life, that he had an interest, through his father, in the Salisbury ore bed, which ought to be pressed. Since 1848, the corporation has been in entire and exclusive possession of the real estate. No fraud or concealment of facts on the part of the defendant, or of General Henry, or of his successors, is claimed.

Assuming what is denied by the defendant, that the wills of Robert and John were legally probated in this state, and, as probated, are competent evidence of the title to real estate in this state which was devised by such wills, it is apparent that an undivided one-eighth of the ore bed became vested in John, in fee, by the residuary devise in Robert's will, and that this one-eighth has never been conveyed by any recorded deed of John, Herman or Herman T.; and it is also apparent, that, at least since 1844, the grantees of the grand-nephew of General Henry have openly and continuously claimed to be the owners of the one-eighth which was devised to John.

For the purpose of deciding the questions which naturally arise under this equity proceeding, it is not necessary to determine whether there has been a technical ouster or disseisin or dispossession of John or Herman by any or all of their cotenants, or whether there has been such a series of acts, or claim of right or title or adverse possession, from which an ouster or dispossession can be presumed; but it is important to ascertain the real nature of the relations between General Henry and his brother John, or between their devisees, respecting John's interest or rights in the land or the profits arising from his one-eighth, if an ascertainment is practicable. The plaintiff's theory is, that General Henry was the representative of the Livingston family, in the management of the ore bed; and that, as such representative, he received the dividends or profits belonging to such branch, and paid John his share. The defendant's theory is, that there was an arrangement or agreement between the two brothers, by which John's share in the profits or in the land was sold or transferred to Henry. It is to be observed, that the testimony in the case, except that derived from the record title and the deeds of the various parties, is exceedingly scanty. There are no memoranda or agreements or receipts or letters which throw any light upon the way in which General Henry and his brother regarded John's ore bed interest. This lack of evidence does not arise from any laches in the preparation of the case, for, the astute and learned counsel have, evidently, made diligent search in all the hiding places in which they supposed that information might be concealed. But, there are some significant facts which plainly appear. The ore bed interest which Robert Livingston owned, was not, in his lifetime, of large pecuniary value, but it was not an insignificant part of his great estate. It supplied his Ancram furnace with ore of a remarkable quality. Robert Livingston and his father diligently added to the one-eighth which Philip Livingston received by grant in 1735, until Robert owned, at his death, one-half of the bed. The ore bed right which John inherited did not probably disappear from his sight or memory, as a trifling affair. If Henry took it, he took it with the full knowledge of his brother. It is apparent to my mind, that, after John's death, in 1822, no moneys were paid upon ore bed account to Herman, his residuary legatee. If there had been, Herman, who was thirty years of age at his father's death, would have known and remembered the fact, and would not have waited until he was nearly eighty, before complaining that there was an interest in the ore bed which properly belonged to him. If he had ever received dividends, they would not have been quietly abandoned, while Robert's children were annually receiving their share; and such a fact would have been emphasized when he was making the general assertion that his father was interested in the ore bed, and that he did not believe that there had been any alienation of the interest. If, then, Herman did not receive any dividends, is it probable that there was a stoppage in payments at John's death? If Henry had been in the habit of paying dividends to John, that fact would have been known by John's children, and Herman would not naturally have permitted a change in the course of business without some expostulation and complaint; and the complaint would have been repeated as he informed his son of the loss of the interest. The theory that no dividends were paid to John gains some confirmation from this consideration: General Henry was the owner of great lot No. 3, in which was the Ancram furnace. He had promised to devise to John's son Henry one-half of this part of the manor. John knew, or expected, that his son was to be the heir of nearly one-half of his brother's patrimony, and might naturally have knowingly consented that the share of the ore bed, which was not of great value to him, but was of importance

to the owner of the furnace, should be enjoyed by Henry without compensation. There is no inherent improbability in the theory that no dividends were ever paid to John, and that the non-payment was the result of a friendly and family agreement to that effect, between two brothers who were on terms of intimacy, and who had made family treaties with each other in regard to their property, and that no deed or conveyance was ever made, but that it was understood that Henry was to be, in fact, the owner. But, in my opinion, the testimony in regard to the business relations between John and Henry is so scanty, that it cannot be found, either that no dividends were paid to John, or that no dividends were paid by reason of a family arrangement to that effect. It can, however, properly be found, that payment of dividends upon John's one-eighth was not made to his son after John's death in 1822.

It is not claimed that any facts were concealed from John or Herman, or that any fraud was practised upon them. It cannot be that they should not, in their lifetime, have known the condition of the ore bed rights. John and General Henry lived near each other, on terms of intimacy. General Henry was the agent of the corporation. Henry of Claverack, Herman's brother, was agent for five years after General Henry's death. Herman and John S. Livingston, son of Robert Cambridge, who sometimes attended the meetings of the corporation, were on quite intimate terms. It cannot reasonably be supposed that the affairs of this corporation, or its re-organization, should have been a sealed book to Herman during the fifty years after his father's death. He must naturally have known the general history of the corporation, and, knowing that his father had the legal title to one-eighth of the property, and believing that the title had never been transferred, it was his duty to look after the interest which he thought might belong to him, and, if he neglected or postponed that duty, his estate must suffer the consequences of his laches. If he was absorbed in other business and thoughts, and did not acquaint himself with the affairs of the corporation, he is still amenable to the charge of neglect.

What, then, is the position of the plaintiff, in a court of equity? He is claiming stock, growing out of real estate, the benefits of which his devisor did not enjoy for fifty years prior to his death, and which has been openly claimed, since 1841, by the present stockholders, or their assignors, as their own. The plaintiff's father remained silent while the corporation was being re-organized with no little deliberation, and no demand for stock was made until 1874. He was, during this fifty years, in a position to know the history of the corporation and of the interest in the ore bed which descended from his grandfather, and, while believing that his father's title had never been aliened, neglected to make any claim upon those who were notoriously in the enjoyment of the interest which he thought might be his own. The delay is owing to a want of the diligence "which is fairly to be expected from a reasonable person." Upton v. Tribilcock, 91 U. S. 45.

The principles which govern a court of equity in similar cases have been often stated, and are thus summarized in Badger v. Badger, 2 Wall. [69 U. S.] 87: "But there is a defence peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, courts of equity, acting upon their own inherent doctrine, of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor." The same general principles, in their application to different classes of facts, are either stated or alluded to in Upton v. Tribilcock, 91 U. S. 45; Sullivan v. Railroad Co., 94 U. S. 806; Broderick's Will, 21 Wall. [88 U. S.] 503; 2 Story, Eq. Jur. § 1520, a. But, it is said that the corporation, by the act of 1847, became the trustee, of a direct express trust, created by the Act, and not by contract, to issue to the proprietors of the ore bed scrip for the shares of stock to which they were entitled, which trust has never been executed, and that, in consequence of the provisions of the resolution in regard to indemnity and of the taking of indemnity by the corporation, it is in the same position as if it still held unissued shares of stock which belonged to the plaintiff. Admitting that, at the time of the re-organization, the corporation became a trustee to issue stock to those who were entitled to it, it does not follow that lapse of time constitutes no bar to a claimant of stock whose stock has been issued bona fide to an apparently rightful owner, and as to which the trust is no longer admitted by the corporation to exist, and where there has been no fraudulent and successful concealment of the facts from the knowledge of the cestui que trust. Badger v. Badger, 2 Wall. [69 U. S.] 87. "It is often suggested, that lapse of time constitutes no bar, in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestui que trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the cestui que trust. But when this relation is no longer admitted to exist, or time and long acquiescence have

obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust." 2 Story, Eq. Jur. § 1520, a; Wilmerding v. Russ, 33 Conn. 67. Neither is it true, that, in this case, the corporation is in the same position as if it held unissued stock for an unknown owner. The stock was originally issued to proprietors in the proportions in which dividends had been paid for twenty years and upwards. The corporation endeavored to perform its duty by issuing stock to the apparently rightful claimants, and to the only claimants. The aggrieved had their remedy, not, however, if they slept upon their rights and acquiesced for a great length of time, and if, in consequence of their laches, the corporation and bona fide purchasers were to be injured. It is manifest, that, at this late day, the covenants of Chittenden and Bogardus furnish no satisfactory indemnity to the defendant. Their stock is now owned by different persons. Let the bill be dismissed.

Case No. 8,419.

LIVINGSTON et al. v. SWANWICK.

[2 Dall. 300.]

Circuit Court, D. Pennsylvania. 1793.

WITNESS—PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

[A broker who makes a contract on behalf of his principal to deliver stock is competent to testify as to the transaction, and his authority to make such contract, in a suit against the principal for damages for nondelivery.]

This was an action on the case to recover the difference upon a stock contract which Samuel Anderson, as the broker and agent of the defendant, who resided in Philadelphia, had entered into with the plaintiffs, who resided in New York, in the following terms: "I do hereby engage to deliver to John R. Livingston, Esq., the engagement of John Swanwick, Esq., of Philadelphia, to deliver to J. R. Livingston, Esq., aforesaid, one hundred shares of the bank stock of the United States, on the 5th of January next ensuing, upon receiving from the said John R. Livingston payment for the same at the rate of twenty-one shillings and six pence in the pound. (Signed) Samuel Anderson. New York, 15th July, 1791."

I. On the trial of the cause, the plaintiffs produced a correspondence between Anderson and the defendant in relation to the contract, after it was made, and then offered Anderson himself as a witness, to prove that he had received a verbal authority to make the contract for the defendant; that he had accordingly executed the instrument above set forth; and that there had been a punctual compliance with the stipulations on the part of the plaintiffs. The defendant objected that Anderson was not a competent witness to prove his own authority, and that he was interested in the question, as he had an action actually depending for his commission on making the contract.

BY THE COURT. The witness is competent to prove every part of the transaction. He is not interested in the event of the suit; nor can the verdict in this case be given in evidence upon the trial of the action for his commissions. Anderson was a known, established broker; and unless he was admitted to give evidence of the instructions he received (which were oral in this case, and are usually so in similar cases), it would be impracticable to ascertain the facts that are essential to enable the court to decide upon the merits of the controversy.

The witness was thereupon admitted.

II. To the action and declaration (which contained five counts), the following exceptions were taken, in the course of the defence: 1st. That the action is brought in the names of Brockholst and J. R. Livingston, whereas the contract in writing is made with J. R. Livingston only. 2nd. That the first count states an agreement by Swanwick to transfer stocks at a certain day, but the evidence is only of an agreement to deliver an engagement for that purpose. 3rd. That the second and fourth counts state an agreement by Swanwick to deliver an engagement to transfer stock to J. R. Livingston, or order, but the evidence does not prove that he engaged to transfer stock to the plaintiff's order. 4th. That the third count states a contract being made by Anderson, as the authorized agent of Swanwick, that Swanwick should transfer stock to the plaintiff, but the evidence only shows a contract by Anderson that there should be delivered to the plaintiff an engagement of Swanwick to transfer the stock. 5th. That the fifth count states the plaintiff's attendance at the place of transfer, but there is no proof of the fact. But the exceptions were considered and overruled, in the charge of the jury, of which, in that respect, the following is the substance:

BY THE COURT. The objection to the form of the action ought not to prevail. The contract is proved by the testimony of Anderson, and the written paper is merely corroborative. At the time, then, of forming the contract, it was perfectly understood by the parties transacting the business that Brockholst and J. R. Livingston were jointly concerned; and, if the action had not been instituted in their joint names, it might have been pleaded in abatement. Nor is the objection to the variance between the declaration and the written contract, on account of the words "or order" being stated in the former, though not contained in the latter, material in point of law. It was unnecessary to set forth the written contract at all

in the declaration; and it is only now offered as additional evidence to prove the parol bargain between the parties. In the case of a bond, bill of exchange, or promissory note, there would be more weight in the objection; because they are, exclusively, the evidence of the respective contracts to which they give existence, character, and operation; but the written paper, in the present instance, is of no more force, than any other testimony of its contents would be. The words in the declaration must, therefore, be considered as surplusage, and do not affect the material parts of the charge. As to the other variances between the contract as laid, and the written contract produced, the same principles will apply. And the nonattendance of the plaintiffs at the place of transfer is sufficiently excused by the waiver, which has been proved on the part of the defendant.

Lewis, Rawle, Randolph & Dallas, for plaintiffs.

R. Tilghman and Ingersoll, Wilcocks & Serjeant, for defendant. [1]

Verdict for the plaintiffs for $19,400.

Case No. 8,420.

LIVINGSTON et al. v. VAN INGEN et al.

[1 Paine, 45; [2] 4 Hall, Law J. 56.]

Circuit Court, D. New York. April, 1811.

COURTS—INFERIOR COURT—JURISDICTION BY ACT OF CONGRESS—IN EQUITY—INFRINGEMENT OF PATENT.

1. The circuit courts are not inferior in the technical sense of the books, but are so only as subordinate to the supreme court. But their jurisdiction is special and limited.

2. If jurisdiction of "cases arising under the laws of the United States" be not conferred on the circuit courts by an act of congress, they cannot take cognizance of them.

[Cited in Re Barry, 42 Fed. 122; U. S. v. New Bedford Bridge, Case No. 15,867.]

3. And where congress have given an action at law in the circuit courts in certain cases, they do not thereby acquire jurisdiction so as to entertain in those cases a bill in equity not relating to an action at law.

4. But, whether, if it should become necessary in an action at law in the circuit courts to appeal to their equity side in aid or defence of such action, those courts would have the necessary equity powers. Query.

5. A bill filed to restrain the infringement of a patent, where both parties were citizens of the same state dismissed, and an injunction refused—congress having confined the remedy for a breach of patent rights to an action at law, and the judiciary acts not giving the court jurisdiction in equity, except in cases between citizens of different states.

[Cited in Cochrane v. Deener, 94 U. S. 782; Nevins v. Johnson, Case No. 10,136; Root v. Lake Shore & M. S. R. Co., 105 U. S. 191.]

In equity.

J. O. Hoffman, C. D. Colden, and C. Graham, for complainants.

T. A. Emmet and J. Wells, for defendants.

LIVINGSTON, Circuit Justice. The complainants by their bill appear to be proprietors of boats on the Hudson river, propelled by steam, and claim a right to the exclusive navigation of the waters of New York in that way, in virtue of two patents from the United States, and several laws passed by this state. The defendants have built and are using a steam boat on the same river for carrying passengers, and are building another for the same purpose, in violation, as it is alleged, of their rights under these patents and laws. The bill prays that the complainants may be quieted in the possession and enjoyment of these rights; that the defendants may be restrained by injunction from constructing or using these boats on the waters of the state of New York; and that the rights of the complainants under their patents and the laws of the state may be established. All the parties are citizens of the state of New York, and no action has been brought at law to try the title of the complainants. On the filing of this bill a motion has been made to a judge at his chambers for an injunction to restrain the defendants from the employment of their boat. The argument has been conducted with all the ability which might naturally be expected from the gentlemen concerned, and the importance and novelty of the case.

The application is resisted on two grounds. The defendants contend: 1. That a circuit court of the United States, as a court of equity, between citizens of the same state, has no jurisdiction of this cause. 2. That if it had, this is not a case proper for its interposition in this way.

It will not be denied that the awarding of a writ of injunction of this nature is one of the highest and most important functions which a court of equity can be called upon to exercise. The court is asked to inhibit a party from the full use and enjoyment of his property without any previous trial whatever—when that property is of a perishable nature, and must have been built at a very great expense, and when, if employed, it cannot fail of producing great gains, for the loss of which, however serious or extensive, the owners, if eventually successful in the controversy, will have no remedy against any one; while the plaintiffs, if aggrieved, will be entitled to a threefold recompense for any subtraction or diminution of profits to which they may for some time be exposed. This too, it is expected, will be done without the previous institution of any action at law, and without the opportunity of any other proper mode of trial to decide on the matters which the defendants are authorized by law to allege in their defence. When process of such

[1] The defendant's counsel tendered a bill of exceptions to the admission of Anderson's testimony, and also to the opinion of the court on the points stated in the charge. A writ of error was accordingly brought, but never prosecuted.

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

high import and serious consequences is applied for, it becomes a court, and still more a judge at his chambers, to inquire with more than ordinary circumspection into his powers, and to stay his hand, unless he shall be fully and entirely satisfied of his jurisdiction; that the merits of the complainants are very great, and that they are eminently entitled to the favour of the public, and to every reasonable protection which government can afford, no one will deny. But when we are inquiring not into what ought, but into what has been done, considerations of this kind, however naturally or excusably they may be pressed upon a court, can afford but little aid in coming to a correct decision.

A judge of the supreme court may in vacation allow a writ of injunction in those cases only, where it may be granted by the supreme or a circuit court. That the supreme court, unless on appeal, has the power of awarding this writ is not pretended. The examination therefore has been properly confined to the authority of a circuit court. If the circuit court of this district possesses no jurisdiction over the cause, it follows that the present application must fail. This jurisdiction is denied on the ground, that the parties, being all citizens of the same state, have no right to apply to the equity side of the court for relief by original bill, unless jurisdiction in such case be given by some act of congress. By the federal constitution, the judicial power is vested in one supreme court, and in such inferior courts as congress may from time to time ordain and establish, and extends to all cases in law and equity, arising under the constitution and laws of the United States, and controversies between citizens of different states. A further enumeration of its powers is not necessary for understanding the present question. By the judiciary act [1 Stat. 73], the circuit courts have original cognizance, concurrent with state courts, of all suits of a civil nature at common law or in equity, of a certain value, where the United States are plaintiffs, or an alien is a party; or where the suit is between a citizen of the state where it is brought, and a citizen of another state. By an act passed in 1800 [2 Stat. 37], an action on the case, founded on that, and a former act, is given to a patentee whose rights are invaded, to be prosecuted in the circuit court of the United States, having jurisdiction thereof, for a sum equal to three times the actual damage sustained. But this being a suit in equity, it is asked by what authority it is brought here, unless the parties be citizens of different states: and much has been said of the impropriety of an inferior tribunal extending its jurisdiction to cases not particularly assigned to it.

If these courts be not inferior in the technical sense of the books, which they most certainly are not, they are so in some respects. They are not only so considered by the constitution, but are in fact subordinate to the supreme court, and notwithstanding their high and responsible original powers, which extend to so many and such important cases, of a criminal and civil nature, and by appeal, to admiralty and maritime causes, there can be no doubt that their jurisdiction is special and limited, both in regard to the nature of the cases on which they can decide, and the character of the parties who can come into them. It is as certain, that they are indebted to congress, under the constitution, for their creation, and that instead of extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess. Owing as they do their existence to congress, from them must necessarily flow that portion of the general judicial power which, by the constitution, they have a right to divide among the inferior courts that may be established. Thus constituted and organized, little would it become them to transcend a jurisdiction, which the constitution intended should be limited at the discretion of the legislature, and which congress have circumscribed accordingly. While moving within their legitimate sphere, as marked out by the legislature, they may hope to give satisfaction, and to inspire confidence in the important department of government of which they form a branch. It would seem then enough to say that there being no act of congress conferring on these courts a right in any case to take cognizance of a suit in equity, between citizens of the same state, this court can have no jurisdiction of the present cause, which is between parties of that character. This seemed to be almost conceded, unless by the constitution there was secured to these courts certain powers which might be called into exercise without waiting for any special authority from congress. To show that this was the case, it was said, that this being a case arising under the laws of the United States, and being found in the constitutional enumeration of cases of federal cognizance, it must, whether allotted by congress to a particular tribunal or not, be cognizable by one or other of the courts which may be established. This argument proceeds on a "supposition that the whole power of the judiciary must always reside somewhere, so as to be called into operation as occasions may require. If congress had created inferior courts without any designation as to the cases of which they were to take cognizance, it is said they would have concurrent jurisdiction of all cases mentioned in the constitution, except of those which were therein exclusively devolved on the supreme court. That this being a case of chancery cognizance, and the district court, not possessing equity power, must, ex necessitate, be triable where such powers exist, or that there will be a failure of justice; and the danger of permitting congress in any way to abridge the objects of

cognizance secured by the constitution to the judiciary, and, through them, to the people of the United States, was expatiated on at some length. As congress cannot add to those powers, it should not be admitted for a moment, it was argued, that they possessed the right of substracting from them, or of permitting them to be dormant, by not legislating sufficiently. Without stopping to inquire whether there be any ground for these apprehensions, or denying any weight to the argument, it will not be deemed disrespectful to the counsel who advanced it, if it is not thought necessary to examine the course of reasoning, from which this conclusion is presumed to follow, because on this point we are not without authority. The supreme court has decided, and after an argument, which, if we except the one to which I have just had the pleasure and honour of attending, has perhaps never been surpassed on any occasion; that if jurisdiction of cases arising under the laws of the United States be not conferred on the circuit courts by an act of congress, they cannot take cognizance of them. The case of the Bank of the United States against Deveaux, is here referred to, which was decided in February term, 1809, a report of which is not yet published.

It was there made one question, whether a right was conferred on the bank to sue in these courts by its act of incorporation, or any other law of congress. It was decided not only that the circuit court derived no jurisdiction over a case arising under the laws of the United States from the judiciary act, that class of cases not being provided for by it, but that from the law which incorporates it, the bank acquired no right to bring an action in those courts, although there were expressions in that act, which it was very strongly insisted on, gave it to them. In support of this decision, if it required any to render it binding, reference might be made to a contemporaneous exposition of the constitution by the great and wise men who composed the legislature that organized the judiciary, and to what appears to have been the understanding of congress from that time to the present day; for whenever it was intended that these courts should take cognizance of a case arising under any law of the United States, such power was expressly delegated to one of the federal courts, congress well knowing that the judiciary act was silent on this point, and not supposing that any such power by the constitution was given to the circuit court. This too may be collected from an act that passed in 1800, which, in terms, gave to the courts then erected, jurisdiction over this class of cases, but which act, being afterwards repealed, although not on account of this clause, left us as before, without any general provision on the subject. If other evidences are wanting that the supreme court has not fallen into so great an error, as it was thought to have done by this decision, it might be collected from the journal of the senate of the United States. There we find that the judiciary act was prepared by a committee consisting of a member from each state, most if not all professional men, and it cannot be believed that, in a law drawn with so much care, and embracing such a variety of provisions, so important an omission was casual. It must have been the result of much reflection, and shows their sense at least, that congress were not bound to clothe the courts which they might create with all the powers which by the constitution they had a right to confer. When it is recollected that three gentlemen of this committee were afterwards judges of the courts of the United States, an allusion to what must have been their opinion when senators, on a point immediately under their consideration, cannot be thought improper. The same principle is recognised by the very laws under which the plaintiffs claim; for the judiciary act not having made any such provision in such a case, unless the parties were citizens of different states, it was thought necessary to establish by those acts the right of a patentee to sue in a circuit court, but at the same time, such right was restricted to its legal forum: as it regards this case then, the legislature is not chargeable with any omission, or with affording a remedy, without a designation of the tribunal which was to administer it, for although by the constitution the judicial power is extended to all cases in law and equity, arising under the laws of the Union, congress may certainly say that the relief which they intended to afford in a particular case shall be at law only. If it had been thought proper to proceed at law in this court, the complainants would probably have found no difficulty on the score of jurisdiction, and it may be added, that if this case be of equity cognizance at all, (which has been strongly controverted and on which no opinion is given,) it is probably so at common law, and in that case congress were not bound, even if they had the right, to give jurisdiction of it to any federal court.

It was further urged in favour of the present jurisdiction, that the supreme court of this state has decided that an action cannot be maintained there, founded on the patent laws of the United States; and that as the court of chancery of the state would give no relief, the parties thus excluded from the federal and state courts, would be without redress, if the decision of the supreme court of the United States were considered as applying to them. It is not for me to say what the chancellor of this state will think his duty, if a similar application be made to him; but if this be a case of equitable jurisdiction at common law, as it was sometimes alleged to be by the complainant's counsel, no objection is perceived to his taking cognizance of it. But should he think otherwise, there is still another answer to this difficulty, which is that if the parties be

remediless it is no fault of the law, which gives them if not a perfect, at least a liberal, and what will probably prove, if they choose to pursue it, a very effectual remedy; for it is not to be believed, as was supposed at the bar, that they will have to bring action after action to establish their right. Let them proceed in only one trial at law, and the defendants will not be hardy or foolish enough to continue on very unequal terms, what will then be settled to be a violation of their patent rights; such a verdict will for ever after keep all intruders at a distance. But if absolutely without remedy elsewhere, it does not follow that this court can help them. A court, constituted like this, is not to reason itself into jurisdiction from considerations of hardship, when a plain and safe rule is prescribed by the supreme court, which is, to examine on all occasions, what powers are committed to it, by the laws of the United States.

Another argument which it may be expected will be noticed, was, that as an action at law under the patent acts may be prosecuted in this court, even between citizens of the same state, there was, necessarily, conferred on it a right to hold jurisdiction of the present bill; for as the court possessed equity powers in virtue of the judiciary act, it was impossible to give it jurisdiction as a court of law, without at the same time calling into exercise its powers as a court of equity. If it becomes necessary in an action at law regularly before it, for either party to appeal to its equity side, in aid or defence of such action, such application might not be improper. But this is not a bill of that kind. It would be the action at law in such case, on which its jurisdiction would attach. But the answer to the argument is, that by the judiciary act no equity powers are given to this court, between citizens of the same state; and it results from the decision which has been cited, that a circuit court must not only confine itself to the cases defined by congress, but that if by a particular act it is authorized to proceed in the given case as a court of law only, a party must come into it on that side, to bring himself within the provisions of it. There being then no law conferring on this court a right to take cognizance as a court of equity of cases of this nature, between citizens of the same state, my opinion is, that this court cannot entertain cognizance of the present bill, and that the plaintiffs therefore can take nothing by their motion. After this decision, it would be superfluous and improper to express any opinion on any other of the important points which were made on the argument of the present question. If the parties were citizens of different states, it is not intended to say that the plaintiffs would or would not be entitled to the equitable relief which they seek.

NOTE. The chancellor of the state was afterwards applied to for an injunction in this case, and refused it; but on an appeal from his decision to the court of errors, it was granted. 9 Johns. 507. Congress have since supplied this defect of jurisdiction. By the act of 15th of February, 1819, it is provided, "that the circuit courts of the United States shall have original cognizance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable: provided however, that from all judgments and decrees of any circuit courts, rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the supreme court of the United States, in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of such circuit courts." 6 Colvin's Laws 369 [3 Stat. 481].

LIZARDI (GAINES v.). See Cases Nos. 5,174 and 5,175.

Case No. 8,421.

The LIZZIE.

[Blatchf. Pr. Cas. 243.] [1]

District Court, S. D. New York. Oct. Term, 1862.

PRIZE — SPOLIATION OF PAPERS BY THE MASTER — FALSE DESTINATION OF THE VESSEL'S PAPERS.

Vessel and cargo condemned for an attempt to violate the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured on the coast of North Carolina by the United States steamer Penobscot, August 2, 1862. The vessel was at the time destroyed by the capturing forces, as unseaworthy, and the cargo was sent to this port for adjudication, and was here libelled September 20, 1862. On the return of the monition as duly served, and on public proclamation thereon made, the default of all persons interested in the cargo was entered. No person intervening for the property on the hearing, the proofs in preparatorio, with the papers found on the vessel, were submitted to the consideration of the court. The vessel held a certificate of British registry, dated at Nassau, N. P., July 21, 1862, issued to George Campbell, of Scotland, merchant, which stated that she was a foreign vessel, built at New York in the year 1840. No bill of sale was attached to or accompanied the registry. Shipping articles of a voyage from Nassau, N. P., to Baltimore, signed by a master, a mate, a cook, and two seamen, were taken from the vessel; there was no date to the shipping articles, nor was any place or time of their execution named therein. A clearance of the vessel from Nassau to Baltimore, July 21, 1862, was on board, and

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

also a bill of lading of the cargo from the owner of the vessel to persons in Baltimore, dated July 19, 1862, without any signature. There was also a note, dated July 22, in the owner's name, to the consignees, addressed to them at Baltimore, advising them of the transmission of the articles named in the bill of lading. The master, the mate, and one seaman, captured with the vessel, were examined as witnesses in preparatorio. The master says that the letter of instruction was given to him by Campbell, and that he, the witness, was directed to throw it overboard if captured, and that he did so when the capturing vessel came in sight. He also says that Campbell appointed him master of the vessel, and that he, the witness, supposed him to be her owner; that he knew that the Southern ports were under blockade, and that that was well known in Nassau; that his vessel was out of a course for Baltimore, where, by her papers, she was bound, and was heading in towards the land; and that he intended to run her on shore. The mate says that the vessel was captured about eight miles to the northward and eastward of Wilmington, in North Carolina; that the fact of the blockade of the coast had been known at Nassau for a long time, and was of general notoriety; that the vessel attempted to enter Wilmington; and that he heard the captain say that, on her last voyage, she sailed out of Wilmington into Nassau. The port was both times under blockade; and the seaman testifies that on the voyage the vessel was steering a course leading her to the port where she was captured.

It seems to me that the case, on the proofs, stands clear of all ambiguity as to the culpable purpose of the voyage, and the actual attempt to carry out that intent. The voyage meant to be run was falsified on the papers. Papers tending to show the design of the voyage were destroyed. The vessel was detected in the effort to violate the blockade, and a decree of condemnation and forfeiture must be entered against vessel and cargo.

LIZZIE, The (MEAGHER v.). See Case No. 9,377.

LIZZIE HOPKINS, The (MYERS v.). See Case No. 9,993.

Case No. 8,422.

The LIZZIE MAJOR.

LOUD et al. v. PHILADELPHIA & READING R. CO.

[8 Ben. 333.] [1]

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

COLLISION AT SEA—STEAMER AND SCHOONER—LIGHTS—BURDEN OF PROOF.

1. A collision occurred in the Atlantic Ocean, off the coast of New Jersey, between the steamer A. and the schooner L. M., on the evening of February 2, 1875. The steamer was bound from New York to Wilmington, and the schooner was bound up the coast to New York. The wind was from the S. W. or S. S. W., and the schooner was on her port tack. In her behalf it was alleged that she was heading N. N. W.; and that both of the lights of the steamer were seen on her starboard bow, but the red light was shut in and the green light alone remained in view, and the schooner held her course without change, till the vessels were a few lengths apart, when the steamer suddenly ran across the schooner's bow, and, in answer to a hail from the steamer, the schooner's helm was ported, but she struck the steamer's port quarter with her bowsprit. On behalf of the steamer it was alleged, that the steamer was heading S. by E.; that the red light of the schooner was seen about two points on the steamer's port bow; that the steamer's helm was ported, and her course changed to S. by W.; and that the schooner's helm was starboarded and her course changed towards the steamer, and she kept on till she ran into the steamer. Cross-libels were filed by the owners of the respective vessels: *Held*, that it was the duty of the steamer to keep out of the way of the schooner, or to establish an excuse for not having done so.

2. It was impossible to reconcile the evidence that only the schooner's red light was seen over the steamer's port bow, with the evidence that only the steamer's green light was seen over the schooner's starboard bow; and no satisfactory conclusion as to the real state of the facts could be arrived at from the evidence.

3. The burden of proof was on the steamer, to show that the schooner had changed her course.

4. She had failed to establish such fact, and must be held solely liable for the collision.

Benedict, Taft & Benedict, for steamer.
Goodrich & Wheeler, for schooner.

BLATCHFORD, District Judge. These are cross-libels, growing out of a collision which took place in the Atlantic ocean, off the coast of New Jersey, on the 2d of February, 1875, in the evening, between the steamer Achilles, belonging to the Philadelphia and Reading Railroad Company, and the schooner Lizzie Major, whereby both vessels were injured. The steamer was bound from New York to Wilmington, North Carolina, and the schooner was bound up the coast to New York.

The libel in the first case, that against the schooner, was filed on the 26th of February, 1875. It alleges, that, after passing Sandy Hook, the wind at the time blowing a strong breeze from the southwest, the steamer heading at the time south by east, those on board of her discovered a vessel, which proved to be the schooner, showing her red light, about three-fourths of a mile distant and about two points on the port bow of the steamer; that the steamer's wheel was immediately ported, and her course changed to south by west, the schooner still approaching, showing her red light; that, when the schooner was about four points on the port bow of the steamer, her helm was put hard-a-starboard, and the steamer's helm was then hove hard-a-port; that the schooner, by this manoeuvre, changed her course, so as to head for the steamer's fore rigging, and showing her green light; that the schooner then saw that a collision

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

was imminent and put her helm a-port, but too late to avoid a collision, she striking the steamer on the port side; and that the schooner was guilty of negligence, in improperly changing her course from the course she was on when she was first seen by the steamer, which would have carried her far to the eastward of the steamer, and in not keeping a proper lookout, and in not sooner seeing the steamer, and in otherwise not properly navigating; and that the collision was the result of the careless, unskillful and improper conduct and management of those on board of and navigating the schooner.

The answer to that libel was sworn to on the 9th of March, 1875, and filed seven days thereafter. It alleges, that the wind was blowing a moderate breeze from the south south west, and the weather was clear; that the schooner had her regulation lights set, as required by law, and they were burning brightly, at the time of the collision; that, when the schooner arrived at a point opposite Sandy Hook beach, and close along the Sandy Hook shore, she had the Sandy Hook light one or two points on her port bow, her booms being swung over the starboard rail, about four points off; that she was steering north north west; that the steamer was discovered showing her two lights, about two or three miles distant, and on the starboard bow of the schooner; that the schooner held her course without any change whatever, but, when the vessels were a few lengths apart, the steamer suddenly ran across the schooner's bow, and some one on board of the steamer hailed the schooner to put her helm hard up, which was done, and the main sheet eased off, but the steamer struck, with her port quarter, the bowsprit of the schooner; and that the steamer was guilty of negligence in changing her course and running across the bows of the schooner, which manoeuvre was the cause of the collision.

The libel in the second case is, in all its material allegations, like the answer in the first case. It was sworn to on the 9th of March, 1875, and filed the next day.

The answer in the second case was sworn to and filed on the 15th of April, 1875. It differs, in its allegations, from the libel in the first case, in two particulars. One of them is, that the answer alleges, that, when the steamer's wheel was hove hard-a-port, after the schooner starboarded, the course of the steamer was changed thereby some four or five points more to the starboard hand. This allegation is not found in the libel in the first case. The other particular, and it is a very material one, is, that the libel in the first case alleges, that the schooner, when she put her helm hard-a-starboard, changed her course so as to head for the steamer's fore rigging and showed her green light, whereas, the answer in the second case, instead of alleging that the schooner changed so as to head for the steamer's fore rigging, avers merely that she changed her course toward the steamer, and the answer omits entirely the averment that the schooner then showed her green light. This is a very material point and a very material discrepancy. The story of the libel in the first case is, in substance, that those on board of the steamer saw at first the red light of the schooner, and saw no other light on the schooner from that time until the schooner starboarded, and then saw the schooner's green light, the schooner heading for the steamer's fore rigging. The implication in such libel, from the allegation therein that the schooner, before she starboarded, had got to be four points on the port bow of the steamer, is, that the schooner, by starboarding, shut in her red light to the view of those on the steamer and showed to them instead her green light. The answer in the second case tells a very different story in this particular,—and is to the effect, that the schooner, by starboarding, did not come around so as to head for the steamer's fore rigging and shut in her red light and show instead her green light, but only changed her course so as to head more towards the steamer, and continued to show her red light, and only her red light, and did not come around so far as to hide her red light and show instead her green light.

Nelson, the look-out on the steamer, who was on duty forward, about 10 feet from the steamer's head, testifies, that he first saw the light of the schooner when it was from three-quarters of a mile to a mile off; that he saw it on his port bow; that it was a red light; that he reported it; that the steamer then ported; that he continued seeing the red light until the schooner was close up; and that he did not see the green light of the schooner until the schooner's boom ran over the deck of the steamer. There is nothing in this testimony to show any change of course by the schooner. It shows that he thought the light he first saw was the red light; that he continued to see a light on the schooner all the time; that he thought the light he saw all the time down to the time the schooner's boom came across the deck of the steamer was the same light he first saw, and was the red light; and that, when the schooner's boom was coming across the steamer's deck, he thought the light he saw was the green light. The light he then saw must have been the green light, as the schooner's jib boom came over the port side of the steamer. He does not say that he saw one light disappear by being shut in and another light come afterwards into view. There is nothing in his testimony that is inconsistent with the fact, that the light he saw all the time on the schooner was the green light, and that he mistook it for the red light until it was close at hand. Adopting the conclusion that the light was all the time the red light until close at hand, and that then no red light was visible, but only

a green light, it was easy to jump at and swear to the inference, that the schooner starboarded and changed her course so as to shut in her red light and show her green light, this inference being strengthened by the fact that the steamer was porting all the time. But, if the schooner was really all the time showing her green light to the steamer, over the port bow of the steamer, and was holding her course, she was on a course that was drawing on to the course of the steamer, and the steamer, by porting, was crossing the bows of the schooner. If, as is the testimony from those on the schooner, the schooner was all the time steering north north west and if, as is the testimony of those on the steamer, the steamer was at first steering south by east, and then, when she saw the schooner's light, ported so as to head south by west, the schooner was at first drawing one point on to the course of the steamer, and then three points on to the course of the steamer, and the steamer was all the time promoting the collision.

Artis, the master of the steamer, who was in the pilot-house, at the starboard forward window, testifies, that he saw the red light of the schooner approaching about one or two points on his port bow; that, when he first saw it, it was from three-quarters of a mile to a mile off; that he immediately ported, so that, from heading south by east he headed south by west; that, after he made that change, the schooner's light bore about three points and a half on his port-bow; that the schooner got to be about five points on his port side and then starboarded hard-a-starboard and headed for the fore rigging and pilot-house of the steamer, being then from 75 to 100 feet distant from the steamer on her port beam; and that he saw no other light on the schooner before the collision than the red light. The conclusion of this witness, that the schooner starboarded, is based solely on his idea that the light he saw all the time was the red light, and on the conclusion, that, as that light was always seen over the port bow of the steamer, and as the steamer was all the time porting, the collision could not have happened if the schooner had not starboarded. But, if the light he saw was really the green light of the schooner, it would, as the steamer was porting, be brought all the time more and more on the port bow of the steamer, while the steamer was all the time, by porting, crossing the bows of the schooner. Artis saw no change of lights on the schooner. He did not see one light shut in and another one come in its place. He saw one and the same light all the time, as he says. If he saw at first the red light, and if that red light got to be four or five points on the port bow of the steamer, and if the steamer was porting all the time, it was impossible for the schooner to have starboarded so as to hit the steamer, without shutting in her red light and showing her green light. Yet Artis saw no such appearances.

Tilton, who was in the pilot-house of the steamer, testifies, that he saw the light of the schooner; that, when he first saw it, it was about a mile distant and about a point and a half on his port bow; that it was a red light; that he saw no other light on the schooner; that the steamer was heading south by east when he first saw the light; that the wheel of the steamer was then ported, so that she headed south by west; that he then took the night glasses and looked at the schooner and could see that she was luffing; that the wheel of the steamer was then put hard-a-port immediately; that this brought her up to about southwest by south; that, at the time the wheel was hove hard-a-port, the schooner was not more than 100 feet distant from the steamer; that he saw the green light of the schooner when she was within about 50 feet of the steamer; that the booms of the schooner were on her starboard side, with five points of sheet started; that he saw no changes in her booms or in her sails; that he saw the green light about a point forward of his beam; that it went out of sight again just before the collision; that he could then see the red light again; that he saw both lights of the schooner when her jib-boom was within about 20 feet of the steamer, and then the green light shut in and the red light came in view; and that that was the only time he saw both lights. Tilton does not say that the red light was hid and the green light came into view instead. What it was he saw, that made him think the schooner was luffing, when he looked at her through the night glasses, he does not say. The appearance he saw of the green light alone, and then the red light coming into view, so that he saw both lights at a time, and then the green light going out of view and the red light remaining in view, is the appearance that would be presented by the porting of the schooner just before the collision, on the hail from the steamer for her to port. There is nothing in all this inconsistent with the fact that the light he saw all the time till after the schooner ported was her green light.

Lawson, who was forward on the steamer's deck, near Nelson, testifies, that he saw the red light of the schooner on his port bow; that he did not see the green light at all; that, when he first saw the red light, it was about three points on his port bow and about three-quarters of a mile off; and that he saw the red light all the while up to the collision. He saw no change of lights on the schooner, indicating a change of course. He saw one light all the time, and the same light. There is nothing in his testimony as to the schooner's lights, inconsistent with the fact that the light he saw was really the green light.

It was the duty of the steamer to avoid the schooner. She seeks to excuse her not

having done so, by alleging that the schooner changed her course and thwarted the efforts of the steamer to keep out of the way of the schooner. If the light the steamer saw was the schooner's green light, the mistake of the steamer caused the collision. If the light was really the red light, and the green light was hidden from view by being intercepted by the schooner's jib, still, if the schooner did not change her course, the steamer was in fault for not avoiding her. The review which has been made of the testimony on the part of the steamer shows that such testimony is very inconclusive to show that the schooner changed her course, and that there is scarcely anything more than assertion that she changed, based upon the idea that her red light was first seen, and seen over the port bow of the steamer, and that the steamer ported and still a collision ensued, while the appearance of the lights on the schooner to those on the steamer indicated no such changes and movements of such lights as a change of course by the schooner, by starboarding, would require. It is clearly proved that the green and red lights of the schooner were properly set and were burning brightly all the time.

The testimony on the part of the schooner is very distinct, to the effect that the schooner did not change her course, by starboarding. Tracy, the master of the schooner, who was on deck, close to the man at the wheel, testifies, that the schooner was steering north north west; that he first saw the green light of the steamer about one point on his starboard bow; that he did not see her red light until she was within about four or five of her lengths from the schooner; that with the green light he saw her masthead light; that he held his course until hailed from the steamer to hard-up his wheel, and then he hove his wheel hard-up; that it was after such hail, and after the schooner had fallen off about a point, that he saw the steamer's red light, and he then saw it over his port bow; and that the steamer was not, at any time before the hail, on the port bow of the schooner. This testimony indicates not only that the schooner did not starboard, but that she presented her green light to the steamer's view, and that the steamer, by porting, ran across the bows of the schooner.

W. C. Torrey, who was forward on the schooner, testifies, that he saw the green and red lights of the steamer about two miles off, about two points on the lee bow of the schooner; that then the red light went out of sight, when the steamer was about a mile and a half off; that he saw the red light of the steamer again, when the steamer was about twice her length off; that the steamer then crossed the schooner's bow; and that, before the hail from the steamer, the steamer was not at any time on the port bow of the schooner. This testimony indicates that the schooner presented her green light to the steamer's view and that the steamer would, if she had not ported, have passed to the leeward of the schooner, in safety.

R. C. Torrey, who was on the deck of the schooner, aft, testifies, that he saw first the green light of the steamer, to the leeward, under the main boom, perhaps a mile and a half off; that just before the collision, the steamer's red light came into view, so that both the green and red lights were seen together by him, and then the green light went out of view, and the red light remained visible; that the schooner did not change her course; and that, before the hail from the steamer, the steamer was at no time on the port bow of the schooner. On this testimony, any change by the schooner, by starboarding or luffing, would have carried her away from the steamer, if made before the steamer ported; and, if made at any time, would have caused the green light of the schooner to be distinctly visible and would have shut in her red light.

O'Reilly, who had the wheel of the schooner, testifies, that he was steering his course north north west, by compass, and kept that course from the time he took the wheel, at 6 p. m., until the hail came from the steamer to hard-up the wheel of the schooner; that he did not see the steamer or her lights until he saw her coming across the bow of the schooner, and then he saw her red light on the port bow of the schooner; and that the master of the schooner, who had been standing near him all the time from 6 p. m., took the wheel, at the hail, and hove it hard-up.

Bickford, who was the first mate of the schooner, and was on the forecastle, clearing away the anchor, says that he saw the starboard light of the steamer first, and saw it on his starboard bow and when the steamer was a quarter of a mile away; that he saw the steamer's red light when she came across his bow and had not seen it before; that the steamer was two or three of her lengths off when he first saw her red light; that, before the hail from the steamer, the steamer was not at any time on the port bow of the schooner; and that, when he saw the steamer's green light, he at the same time saw her mast-head light.

It is, of course, impossible to reconcile the fact that the schooner's red light, and only that, was seen over the port bow of the steamer, with the fact that the steamer's green light, and only that, was seen over the starboard bow of the schooner. No entirely satisfactory conclusion as to the real state of facts can be arrived at from the evidence. I have examined it with care. The burden is upon the steamer to show that the schooner changed her course. She has, in my judgment, failed to do so, and it follows that the libel against the schooner must be dismissed, with costs, and, in the other suit, there must be a decree for the libellants, with costs; with a reference to a commissioner to ascertain the damages sustained by the libellants.

Case No. 8,423.

The LIZZIE MERRY.

[10 Ben. 140.] [1]

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

ADMIRALTY—CONTRACTS—POSSESSION—MASTER'S INTEREST.

1. By the agreement made for the building of a vessel, it was agreed that one L., who took an eighth of the vessel, should command and sail her as master. L. afterwards sold his eighth to K., who bought it, expecting to go as master of her, and gave a larger price for the share on that account. After his purchase, one-half of the vessel was owned in Damariscotta, Me., and the other half in Portland, Me. He ran the vessel as master for several voyages; and, the vessel being in New York, he was informed by her agent there that one of the Portland owners had sold out, and that the new purchaser with the Damariscotta owners had joined in appointing M. as master of the vessel. Thereafter M., coming to the vessel when K. was not on board, took possession of her. When K. came to the vessel and found M. on board, there was hard language between them, and M. threatened to have K. arrested. Thereupon K. filed a libel for possession, claiming that he was entitled to be master of the vessel and had been forcibly dispossessed. *Held*, that K. did not purchase from L. any right to continue as master.

2. The right which L. had to sail the vessel as master was neither by the terms of his agreement nor by its own nature transferable, being a contract resting in personal confidence.

3. Under the agreement between K. and the other owners, and under section 4250 of the Revised Statutes of the United States, the majority of the owners had the right to remove K. and appoint M.

4. There had been no forcible dispossession of K. What took place betwen K. and M., after M had taken possession, was immaterial and the libel must be dismissed.

In admiralty.

Beebe, Wilcox & Hobbs, for libellant.

R. D. Benedict and H. T. Wing, for claimants.

CHOATE, District Judge. The libellant, Howard B. Keazer, who is owner of five thirty-seconds of the vessel, and from December, 1875, to the 23rd day of August, 1878, had been her master, brings this suit against the vessel and the other owners to recover possession of the vessel and to be reinstated in his position as master. He alleges in his libel that one Lawrence was an original owner of four thirty-seconds in the vessel, and contracted for building it, and that it was agreed between Lawrence and the other owners "that he should sail and control said vessel as master and that his interest should be a master's interest and transferable as such;" that in December, 1875, the libellant purchased this interest of Lawrence with the consent and concurrence of the managing owners, and that it was agreed that he should be master so long as he held said interest, and that the other owners have acquiesced therein; that he thereupon became master and has ever since remained such, and that no complaint has ever been made of his conduct as master, and that he has in everything managed the vessel for the best interests of all concerned; that on the 29th of August, 1878, he was forcibly dispossessed of said vessel by one J. E. S. Merry, who claims to have been appointed master.

A majority in interest of the owners appear as claimants and deny the material averments of the libel in respect to the alleged agreement with the libellant. They also deny the forcible dispossession, and allege that Merry is the duly appointed master of the vessel.

The evidence wholly fails to sustain libellant's claim of the alleged agreement either with Lawrence or with himself. Under the agreement with Lawrence, which was in writing, no right is given to Lawrence to transfer, with his share in the vessel, his right to command her. It contained an agreement that he should command and sail the vessel, but that right is not by the terms of the agreement, nor by its nature, transferable. On the contrary, it is a contract in its nature resting in personal confidence and strictly personal. The evidence also does not show any agreement on the part of the other owners with the libellant, at the time of his purchase, that he should continue to command the vessel so long as he held this interest. He bought, and was encouraged to buy, the interest formerly held for the benefit of Lawrence, in the expectation that he would be appointed master, as indeed he was, and he gave for it a larger price than the share was worth to anybody else, because he expected to be master; but nothing took place between the parties impairing in any way the rightful authority of the majority in interest at any time to displace him and appoint another master. The case is also within the provisions of section 4250 of the Revised Statutes, which provides that "any person or body corporate having more than one-half ownership of any vessel, shall have the same right to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession, nor in any case where a master has possession as part-owner obtained before the 19th day of April, 1872." The alleged contract with the libellant was not in writing, and, therefore, if proved, would not avail him. There was then no legal claim on the part of the libellant, nor any reasonable pretence of such legal claim, that he held his position of master except subject to the will of the majority of the owners. On the 23rd day of August, he was informed by the agent of the majority of the owners, that Merry had been appointed master in his place. He well knew how the title was held. Up to a short time before that day, half the vessel had been owned in

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

Damariscotta, and half in Portland, Maine. He had been informed that one of the owners known as a Portland owner, had sold out to one of the Damariscotta owners, and that this interest united with the half-interest already held by the Damariscotta owners, to change the master. He does not appear to have objected then that the majority had not joined in this proceeding, but he took the ground that under his master's interest he was entitled to hold the command. I am satisfied with the proof as to the majority having joined in the appointment of the new master. Whatever question might be made as to the execution of the first power of attorney, upon which the name of John F. Stinson appears, a second power was shown to have been given, acknowledged before a notary, and put in the hands of the agent of the owners before he communicated their action to the libellant. After the libellant was informed that a new master had been appointed, and while he was absent from the vessel, the new master came to the vessel and took possession. The evidence does not show that any force was used, or threatened on his part, to obtain possession. If there was anybody on board holding or claiming to hold any authority from the libellant to resist the new master, or to prevent his taking possession peaceably, that person has not been called; nor is there any evidence, whatever, of anything that took place between him and the new master when the latter came on board and assumed command. There is no proof, therefore, of any forcible dispossession. Afterwards, the libellant came and found the new master in possession, and some hard language was used, the libellant insisting on his right, and the new master insisting on his, and threatening an arrest if disturbed; but the possession of the ship was already changed, and this affair is wholly immaterial. The libel is dismissed with costs.

Case No. 8,424.

The LIZZIE WESTON.

[Blatchf. Pr. Cas. 144.] [1]

District Court, S. D. New York. April Term, 1862.

PRIZE—VIOLATION OF BLOCKADE.

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

In admiralty.

BETTS, District Judge. This vessel sailed from Apalachicola, in January, 1862, under the rebel flag, laden with a cargo of cotton. She and her cargo were owned by residents of Florida, one of the Confederate States. She also had on board an English ensign, which the master was to hoist whenever directed to do so by the supercargo. She was documented by the Confederate States. Her destination was to Cuba, and back to a port in the Confederate States. She, however, has no specific limitation in her destination, but was to obey the directions of the supercargo as to her course. The owners of the vessel and cargo were on board of the vessel when she was captured. The seizure was made in the Gulf of Mexico, about one hundred and twenty miles off Apalachicola, by the United States gunboat Itasca. All on board of the schooner knew of the blockade of that port at the time she left it. The vessel on her capture was ordered to Philadelphia or New York, with her cargo for adjudication; but while on that course was compelled, by stress of weather and damage to the vessel, to put into Key West, where she arrived January 28, 1862. The schooner was there surveyed by authority of the United States officer, and reported to be in a bad condition to be navigated North. The cargo was transshipped to New York on board of the merchant vessel George W. Hull. The crew of the prize were dispatched to the same port, as witnesses, by the United States steamer Massachusetts, and were here examined in preparatorio. The vessel was left at Key West. A libel was filed in this court against the vessel and cargo March 18, 1862.

Upon the proofs, the vessel and cargo are subject to condemnation and forfeiture as enemy property. No claim was interposed in defence to the libel, and the cause was regularly defaulted in court; and if any objection might be offered because of a proposed outstanding interest of neutrals in the vessel and cargo, the testimony is conclusive of a wilful evasion of the blockade of the port of Apalachicola by both vessel and cargo in their egress from it. A decree of confiscation must be entered accordingly.

[At the next term of the court a motion to open the decree was denied, upon the ground that the court had no power to do this; its power over the judgment ending with the term of the court when rendered. Case No. 8,425.]

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

Case No. 8,425.

The LIZZIE WESTON.

[Blatchf. Pr. Cas. 265.] [1]

District Court, S. D. New York. Dec. Term, 1862.

JUDGMENT—TERM OF COURT ENDED — POWER TO OPEN.

This court, as a prize court, has no power to open a decree after the expiration of the term or session in which it was rendered.

In admiralty.

BETTS, District Judge. A final decree was entered in this suit in September term last. [Case No. 8,424.] On the 15th and 17th of November the counsel for one of the claimants moved the court, on affidavits alleging circumstances of equity in behalf of such

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

claimants, to open that decree, and award a compensation of about $12,000 to the claimant intervening, because of supposed interests of his affected by the decree. The motion was opposed by the libellants. The general rule of practice clearly prevailing in courts of law and admiralty is, that the power of a court over a judgment terminates with the sitting of the court which renders the judgment. The sitting is not necessarily limited to the particular day on which the judgment is pronounced, but includes and is restricted to the term or session of the court in which it is rendered. Hudson v. Guestier, 7 Cranch [11 U. S.] 1; Whiting v. Bank of U. S., 13 Pet. [38 U. S.] 13; Washington Bridge Co. v. Stewart, 3 How. [44 U. S.] 424; Bank of U. S. v. Moss, 6 How. [47 U. S.] 31; The Martha [Case No. 9,144]; U. S. v. The Glamorgan, [Id. 15,214]. An entire term (October) having, in this case, intervened after the final decree rendered in the suit, the court has no authority, on the application of either party, to reopen that decree at this time, and make a new disposition of the subject. The general practice of the prize court conforms to that of the admiralty on its instance side (2 Stat. 761, § 6), and thus corresponds in essential features with that of the high court of admiralty of England (Sup. Ct. Rule No. 7, of Aug. 8, 1791, 1 How. [42 U. S.] xxiv.; Jennings v. Carson, 4 Cranch [8 U. S.] 2). The instances which may occur in equity courts in England of a deviation thereafter from the foregoing rule do not affect its permanency and effect in the courts of admiralty within the United States. The motion to open the decree for further proceedings is therefore denied.

Case No. 8,426.

The L. J. FARWELL.

[8 Biss. 61; [1] 10 Chi. Leg. News, 9.]

District Court, E. D. Wisconsin. Sept., 1877. [2]

BILL OF LADING — ISSUED BEFORE GOODS DELIVERED—EFFECT OF SUBSEQUENT DELIVERY—ESTOPPEL—POWER OF MASTER.

1. If a master of a vessel signs bills of lading before the goods are on board, and afterwards they are placed on board as and for the goods embraced in the bills of lading, the bills operate on the goods as against the shipper and master, by way of relation and estoppel.

2. The master of a vessel delivered to D. a bill of lading for 8,000 bushels No. 1 wheat. Five days later he delivered to D. a second bill of lading for 8,300 bushels No. 1 wheat, but consigned to a different party. No wheat was at the time on board. D. attached the bills of lading to drafts drawn on the respective consignees which were duly paid. Subsequently 9,300 bushels of wheat were placed on board, when D. failed and could deliver no more. There was no designation by the shipper of any portion of the wheat as intended to fill either bill, it being his intention to fill both. On demand by the holders of the bill prior in time, the master delivered the amount called for in that bill: *Held*, that both bills became concurrently operative as the wheat was placed on board, and that in the absence of any appropriation by the shipper of any portion of the wheat to either bill, the holders of the bills became tenants in common and entitled to pro rata shares of the wheat actually delivered: *Held*, further, that the master could not on receiving the wheat on board, appropriate it to either bill, so as to bind the parties, and he having delivered the full 8,000 bushels to the holders of the bill prior in date, the vessel became liable to the holders of the second bill for the value of the pro rata quantity of wheat called for by their bill.

This was a libel filed against the schooner L. J. Farwell, to enforce a certain demand in favor of E. J. Burkam & Co., the libellants, arising upon the following state of facts: In August, 1874, George B. Dickinson was a forwarding and commission merchant at Detroit. Dennis Driscoll was master of the schooner Farwell, which on the 26th of August was lying at that port. On that day the master signed and delivered to Dickinson a bill of lading for 8,000 bushels of No. 1 wheat, consigned to Reed & Co., of New York. On the 31st day of the same month, the master signed and delivered to Dickinson another bill of lading for 8,300 bushels of No. 1 wheat, consigned to libellants. Drafts were drawn by Dickinson against both bills upon the parties to whom the wheat mentioned in the respective bills, was consigned, which drafts were duly paid on presentation.

At the time the bills of lading were delivered to Dickinson there was no wheat on board the vessel, of which fact the consignees, Reed & Co. and Burkam & Co., had no knowledge when they paid the drafts drawn upon them by Dickinson. No wheat was delivered on board the vessel until the 2d of September, when Dickinson began loading the vessel, intending to put wheat enough on board to fill both bills of lading. About 9,300 bushels were placed on board when Dickinson failed, and was unable to deliver any more wheat to the vessel. The captain testified that the vessel was chartered by Dickinson to carry 16,300 bushels of wheat to Buffalo, and that he put a bulkhead in the hold of the vessel before any wheat was delivered, intending to place the 8,000 bushels consigned to Reed & Co. aft the bulkhead, and the 8,300 bushels consigned to Burkam & Co. forward, thus keeping the two consignments separate. But he further stated that he did not wish to be understood as meaning that Dickinson told him that the first 8,000 bushels placed on board were for Reed & Co.; and the testimony disclosed that after putting 5,000 or 6,000 bushels aft the bulkhead, the remainder of the 9,300 bushels delivered, was placed forward, and if there was any purpose originally to keep the two consignments separate, it was abandoned. The bills of lading called for wheat of the same grade, and there was, in fact, to the extent that

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

[2] [Affirmed by the circuit court; case unreported.]

wheat was delivered, no separation of the same, for the purpose of distinct application on the respective bills.

When the two bills of lading were signed and delivered, it was the intention and expectation of both the shipper and the master, that the entire quantity of wheat called for by the bills, would be delivered on board and shipped, and the shipper, Dickinson, gave no directions for the application of wheat on one bill or the other, or for the apportionment of wheat to either bill.

The vessel did not leave Detroit, but on or about September 11th she was unloaded, and on demand of Reed & Co., and on receiving a bond of indemnity, the master delivered to them 8,000 bushels of the wheat, which was the quantity named in their bill of lading. Elevator receipts for the remainder of the wheat—between 1,300 and 1,400 bushels—were tendered to libellants, to apply on the bill in their favor on their giving a bond of indemnity, which tender was declined.

Finches, Lynde & Miller, for libellants.

Pond & Brown and Markham & Markham, for respondents.

DYER, District Judge. It is claimed by the libellants that the wheat should have been delivered to the respective consignees, each receiving such share of the whole as should be in proper proportion to the quantity of wheat called for by his bill of lading; that the libellants were entitled to 4,736 bushels; that the vessel is liable for non-delivery of the same, and that the libellants are entitled to a decree for the value of the wheat put on board as and for the wheat embraced in libellants' bill of lading, which, it is claimed, has been converted by the master and owners of the vessel. The question for determination involves, therefore, the ownership of this wheat under these two bills of lading.

The act of the master in signing and delivering the bills of lading in question, when there was no wheat on board the vessel, was unauthorized and irregular. A bill of lading is a contract by which the master engages to carry and deliver goods to the consignee, or to the order of the shipper. It acknowledges the goods to be on board, and they should be on board before the bill is signed. If, therefore, a master signs bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, as the act of the master is not within the scope of his authority, the owners of the vessel are not estopped from showing the facts in a suit brought against them for non-delivery, by a bona fide indorsee of the bill of lading. In such case the owners are not liable. 1 Pars. Shipp. & Adm. 187, note; The Freeman v. Buckingham, 18 How. [59 U. S.] 191.

If, however, the bill is signed before the goods are on board, but upon the faith and assurance that they are to be delivered, and afterward they are delivered as and for the goods embraced in the bill of lading, as against the shipper and master the bill operates on the goods by way of relation and estoppel. This being so, the bill of lading then represents the property as effectually as if the execution of the bill and the delivery of the goods on board had been concurrent; and any bona fide holder for valuable consideration, who, by transmission to him or negotiation, has obtained such bill of lading, gets as valid and effectual a title to the goods so placed on board as could be acquired by an actual delivery of the goods themselves. Rowley v. Bigelow, 12 Pick. 314; Halliday v. Hamilton, 11 Wall. [78 U. S.] 560.

Another general principle may be here stated, namely, that priority of lien or of title does not depend upon the mere priority of signing either bill of lading. It is the shipment which gives the lien; the delivery of the property on board with notice to the party, which fixes the right and vests the property. Stevens v. Boston & W. R. Co., 8 Gray, 265.

As fundamental propositions, then, to aid us in settling the rights of these parties, it may be stated that, although there was no wheat on board this vessel when these bills of lading were issued, if subsequently wheat to the extent of 9,300 bushels was placed on board as and for a portion of the grain embraced in the bills of lading, as against both Dickinson and Driscoll, the bills of lading became operative to cover the property by way of estoppel, and in such proportions with reference to each holder of a bill of lading, as, upon a correct application of the facts and law of the case, may be established; further, that the priority in date of the bill of lading held by Reed & Co. does not alone fix their right or title to any particular proportion of the wheat.

The lien or title, if any, of both Reed & Co. and the libellants, as we have seen, springs from the shipment—the delivery of the property on board.

Now, had the bills of lading called for different kinds of wheat, and if such different kinds had been put on board, the appropriation to each bill of the kind of wheat called for, would seem clearly consistent with the rights of each holder of such bill of lading. So, too, if the master had received on board 8,000 bushels of wheat, and then given to the shipper a bill of lading therefor, and afterward had issued another bill of lading for 8,300 bushels, and had then received but 1,400 bushels, there would be no difficulty in appropriating the 8,000 bushels to the first bill of lading. In these cases it would be apparent that the bills of lading covered specific wheat, and such appropriations would accord with the evident intentions of the parties as manifested by their acts.

But in the present case there was no wheat on board the vessel when either bill of lading

was issued. After both were issued, the shipper commenced delivering the wheat to the vessel, intending to fill both bills. Undoubtedly Dickinson could have controlled and directed the application of the wheat on either bill, and his direction in that respect might have been conclusive. But he made no such direction, and so far as his intentions were concerned, he delivered the wheat as much for one bill as the other, since it was his expectation to place on board the full amount of both consignments. He had it in his power to deliver first the wheat to fill the second bill, and could have refused to deliver any upon the first bill, and in that case the holder of the bill posterior in date would have taken his full quantum of grain. But there was no designation or appropriation by the shipper.

This being so, could the master, after receiving the wheat on board, appropriate it to such bill of lading as he chose, and bind the parties? After much deliberation upon this point, I am convinced he could not, and will presently state reasons for that opinion. Then, if there was no specific appropriation of the wheat on either bill by the shipper, and if there could be none by the master, how, according to legal principles, must it be appropriated?

As no wheat was placed on board until after both bills of lading were issued, and as there was no designation by the shipper, of specific wheat for either bill, but an intention on his part to deliver the entire cargo according to the charter, both bills, although bearing different dates, became concurrently operative; that is, both became effectual to cover their proportionate shares of the wheat delivered, as the wheat was placed on board. Without regard to the dates of the bills of lading, from the time the wheat delivered on both bills was in the custody of the vessel, the legal relations of Reed & Co. and of the libellants were fixed. As soon as the wheat was deposited with the carrier, the title to it and right of property in it, was vested in those parties. Their bills of lading called for wheat of the same grade; the property was mixed and could not be distinguished, and there was not sufficient to satisfy the demands of both.

They stood, then, in the position of tenants in common, and determining their rights accordingly, each was entitled to wheat from the common mass in proportion to the amount called for by his bill of lading, and it was the duty of the master so to deliver it. In my judgment this conclusion is not to be avoided, if it be conceded that the wheat was put on board as and for the wheat covered by both bills of lading. And I think the proofs show that the shipper placed the wheat on board as a part of the 16,300 bushels embraced in both bills, and as both bills became concurrently operative to pass the title to the wheat, the holders of the bills of lading took title in common.

But it has been ably contended by the learned counsel for respondent that the master was justified in delivering the 8,000 bushels of wheat to Reed & Co. because their bill of lading was prior in date, and should first be made good from the wheat first delivered; further, that up to the time any wheat actually went on board, the transaction between the shipper and the master was purely personal; that the master was personally liable to the parties to whom the bills of lading were transmitted, and who paid drafts on the faith of them; that, therefore, in the absence of any appropriation of the wheat by the shipper, the master had the legal right to cancel his liability to either party on the bill of lading held by such party, by delivery of wheat sufficient to fill that bill, and stand personally responsible to the party holding the other bill; finally, that upon the bills of lading being issued, Dickinson stood in the relation of debtor to Driscoll, and that when wheat was delivered without specific appropriation by the former on either bill, the master, as his creditor, had the right to apply it according to the doctrine of appropriation payments.

Upon the first point taken I have already sufficiently stated my judgment. As no wheat was delivered until after the issuance of both bills, and as it was the intention of the shipper to satisfy one bill as much as the other by delivery of wheat for both, and as the bills became operative only when wheat was deposited on the vessel, I am unable to see how priority in date of their bill gave Reed & Co. priority of right.

Had the master a right to so appropriate the wheat as to fully satisfy one bill of lading to the exclusion of the other? It is true, as already stated, that his action in signing the bills of lading before any wheat was delivered was irregular, and it may be admitted that he thereby incurred a personal liability to the holders of the bills. But when wheat was delivered by the shipper and was deposited on the vessel to meet the bills, certain relations sprang up between the consignees and the property. Certain rights in favor of the holders of the bills, and certain obligations on the part of the carrier, then became established, which could not be divested by any personal act of the master. The moment he began to receive grain on board to cover the bills of lading he began to act, not for himself alone, but as the agent of the vessel. The error of the position here urged arises from ignoring the legal relations to the property of Reed & Co. and Burkam & Co., which were created and fixed by the delivery on board the vessel for shipment, of wheat called for by the bills of lading. The argument on this point proceeds upon the theory that the master became personally liable to the holders of the bills of lading; that Dickinson became his debtor, and that in partial satisfaction of the debt Dickinson delivered to him this wheat, which

the master personally had the right to appropriate in payment of any part of his indebtedness created by the bills of lading. But the argument fails when we consider that the wheat was delivered on board the vessel; that in receiving it the master acted as the vessel's agent, and that, by established principles of law, when the wheat passed into the custody of the vessel, a right of property vested in the consignee, which could be no more affected by the personal act of the master than by that of any other person. And this is entirely consistent with the proposition that, as to all wheat called for by the bills of lading and not delivered on board the vessel, Dickinson and Driscoll, and not the vessel or its owners, are alone liable. It by no means follows that because originally, and before any wheat was placed on the vessel, the master may have incurred a personal liability by signing the bills of lading, he had the right to appropriate on either bill, as he saw fit, the wheat actually delivered on board.

It is further insisted that the master had the same right to appropriate the wheat to the bill of lading earliest in date, as a creditor has to apply moneys paid to him by his debtor upon promissory notes when the payment is generally by the debtor, and the demands are various in date. In other words, the doctrine of appropriation of payments is invoked, which is, that where a debtor owes his creditor on distinct accounts, he may direct his payment to be applied to either demand. If he makes no appropriation, the creditor may apply the money as he pleases. If no specific application is made by either party, the law will appropriate it as the justice and equity of the case may require.

I do not think this rule can be successfully invoked so as to give to the master the right to appropriate the wheat upon either bill of lading as he should choose. In the case of application of payments under the rule stated, no other party than the debtor and creditor are interested. The money paid by the debtor becomes the money of the creditor in his personal right, and the interests or rights of third parties are not involved. The views already expressed touching the rights of the holders of these bills of lading, and their relations to the property, afford a further answer to the particular point under consideration, and need not be repeated. In analogy to the present case, counsel suggested that if a vessel were chartered to carry wheat to one party, lumber to another, and shingles to still another, and bills of lading were accordingly issued before any part of the cargo was placed on board, and subsequently only wheat and a portion of the lumber were delivered, the party whose bill was not filled would not be heard to demand a pro rata share of the value of that part of the cargo delivered. The analogy fails, because in the case supposed the bills of lading would be issued for and on account of specific and dissimilar kinds of property. The consignee of lumber would have no right to call for wheat, and the holder of a bill of lading for shingles could not demand any other property than such as his bill specified. The bills of lading held by Reed & Co. and Burkam & Co. called for No. 1 wheat. With no specific designation of any particular portion to apply on either bill by the shipper, either expressed or to be inferred from the character of the property, the delivery of any part of the cargo would satisfy the terms of either bill of lading, and give to the consignees what they were entitled to.

It is said that the libellants cannot have a decree because they have failed to show ownership of any part of the wheat placed on board the vessel, and that the burden of proof is upon them to establish such ownership. The answer to this proposition involves a repetition of what has been already stated as to the effect to be given to the bills of lading, and the time when they became operative to vest the property in the holders of the bills. When the wheat was placed on board, these bills of lading represented that property, and the title to the wheat was changed and vested in the parties to whom it was to be delivered. Halliday v. Hamilton, 11 Wall. [78 U. S.] 564. To the extent that libellant's bill of lading represented the wheat on board, they became vested with title and ownership.

[The questions presented in this case are of unusual interest, and, it must be conceded, are not free from difficulty. Upon considering those questions with as much reflection and care as I have been able, in connection with other duties, to bestow upon them, I have been brought to the conclusion that the libellants should have a decree. And this conclusion seems in consonance with equity.] [3]

Let a decree be entered in favor of libellants for the value of their proportionate share of the wheat delivered to the vessel as prayed in the libel.

NOTE. On appeal, this judgment of the district court was affirmed by Mr. Justice Harlan. A bill of lading is as between the original parties in the nature of a receipt, and is open to explanation. The respondents are not estopped from setting up a mistake, and that the property receipted for was not all delivered to them; and where they have shown that the whole of a cargo of wheat received by them was actually delivered to the consignee, they are not liable for a deficiency from the amount receipted for in the bill of lading. The J. W. Brown [Case No. 7,590]. The master of a vessel has no authority from the owners to sign bills of lading in blank, and a bill of lading so signed is not valid against the owners, even in the hands of bona fide holders. The Joseph Grant [Id. 7,538]. Where two bills of lading describing the cargo shipped were made out in full, one of which was signed by the master, and the other by the shipper, and a third one was signed in blank by the master and left with the shipper, who, after departure of the vessel, filled up the blank bill with a change of consignee, and transferred it to a bank as collateral

[3] [From 10 Chi. Leg. News, 9.]

security for advances for the owners of the cargo, no maritime contract was thereby created between the bank and the vessel, without notice to the master, before delivery of the cargo according to the first bill of lading sent with the vessel. Id. Although as a receipt a bill of lading is subject to explanation, and can be affected by parol proof, yet, in so far as it is a contract, this rule does not apply. The Wellington [Id. 17,384].

Case No. 8,427.

LLADO v. The TRITONE.

[8 Reporter, 165.] [1]

Circuit Court, S. D. New York. June 23, 1879.

EVIDENCE—NEGLIGENCE—STOWAGE OF FREIGHT—DELIVERY BOOKS—TESTIMONY OF CREW—CONDITION OF FREIGHT—RECEIPTS OF VESSEL.

1. The delivery books of a cargo showed that a large amount of lead was taken out before certain corks which were injured. *Held*, that the books were to be relied on rather than the testimony of the crew to the contrary.

2. In the absence of proof to the contrary, the receipt of the vessel for the freight in good order will make a prima facie case against the vessel.

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

August 23, 1872, A. G. Boye & Co. shipped on board the barque Tritone thirty-one bales of cork, in good order, to be carried to New York, and there delivered in like good order and condition to the libellants. Some lead was stowed on top of the corks, and in this way a part of the corks were flattened and pressed out of shape, so as to render them unfit for use. Action was brought and judgment given against the vessel.

WAITE, Circuit Justice. I entertain no doubt whatever, from the evidence, that the flattening of the corks which is complained of was caused alone by the improper stowage of the cargo. The cargo consisted in part of over 6,000 pigs of lead, weighing more than 500 tons. In discharging it is apparent that more than one-half of the lead came out before any considerable part of the corks. I am aware that most of the witnesses for the vessel testified to the contrary, but the delivery books show that they must be mistaken. This being so, it is clear that some of the lead must have been stowed on top of the corks. The port warden who surveyed the cargo as it was discharged testifies to that effect, and in his certificate, made at the time, he states that the cork in a few bales were slightly flattened from the rocking and pressure of the cargo. The testimony on the part of the vessel is of such a character as not to be entitled to confidence. At any rate, inasmuch as no evidence has been given to show that the corks were in bad order when shipped, I am clear that the vessel has done nothing to overcome the prima facie case made against her by her receipt for the property in good order. It follows that the judgment of the district court was right. Judgment affirmed.

[1] [Reprinted by permission.]

LLEWELLYN (JONES v.). See Case No. 7,477.

Case No. 8,428.

LLEWELLYN et al. v. TWO ANCHORS AND CHAINS.

[1 Ben. 80.] [1]

District Court, E. D. New York. Oct., 1866.

SALVAGE—DERELICT—THE WHOLE VALUE DECREED.

In a case of derelict property, of small value, notice of the proceedings having been brought home to the owners of it, who failed to appear in the suit and had expressly abandoned the property to the libellants, the court awarded the whole balance ($107) to the salvors after payment of costs.

[Cited in The Carl Schurz, Case No. 2,414.]

[This was a libel in rem by John Llewellyn and others against two anchors and chains.]

Mr. Goodrich, for libellants.

BENEDICT, District Judge. This is a case of salvage of two derelict anchors and chains of no great value. Although actual notice of the proceeding is brought home to the owners of the property, no appearance is entered for any claimant, and the proofs disclose that the owners in express terms abandoned the property to the libellants. In such a case the balance of the whole proceeds, after payment of the costs, may be awarded to the salvors, by whose exertions the property was saved. The William Hamilton, 3 Hagg. 43. Let a decree be entered awarding to the libellants the whole proceeds in court ($107), after deducting the costs.

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

Case No. 8,429.

In re LLOYD.

[15 N. B. R. 257; 5 Am. Law Rec. 679; 15 Alb. Law J. 293; 24 Pittsb. Leg. J. 113.] [2]

District Court, W. D. Pennsylvania. Feb. 21, 1877.

BANKRUPTCY—MEMBER OF PARTNERSHIP—QUORUM OF PETITIONING CREDITORS—PARTNERSHIP CREDITORS—SECURED CLAIM — BOND WITH SECURED SURETIES—REGISTER'S LIST OF CLAIMS.

1. In involuntary proceedings against a separate partner, creditors of the partnership must be counted in computing the legal quorum of petitioning creditors.

2. One-fourth of the creditors whose provable debts severally are over two hundred and fifty dollars, and in the aggregate are equal in amount to one-third of all the provable debts, are sufficient; or, in default of enough of this class signing the petition, one-fourth in number of all the

[2] [Reprinted from 15 N. B. R. 257, by permission. 15 Alb. Law J. 293, contains only a partial report.]

creditors, whose debts, without regard to their several amounts, equal in the aggregate one-third of all the provable debts, must be joined.

[Cited in Re Blair, Case No. 1,481.]

3. The claim of a creditor on a bond, the sureties on which have been indemnified by mortgage, is not a secured claim and should be counted.

4. The register should return lists of the claims counted and rejected with his report.

In bankruptcy.

G. M. Reade and L. W. Hall, for petitioning creditors.

John M. Kennedy and S. S. Blair, for Lloyd.

KETCHUM, District Judge. In the matter of the exceptions to the report of Noah W. Shafer, Esq., register in bankruptcy, on the petition of creditors of William M. Lloyd, referred to said register by order of this court of March 16, 1876, to ascertain whether the petitioning creditors constitute one-fourth in number and one-third in amount of the debts provable against said Lloyd. On the 11th day of November, A. D. 1875, a petition was filed in this court by a large number of the creditors of Lloyd, praying his adjudication as bankrupt, and since that time, before the register, a supplemental petition for the same purpose, the two petitions representing two hundred and seven thousand five hundred and seventy-two dollars and ninety cents. On the 16th day of March, A. D. 1876, Lloyd filed in court a list of creditors, representing in all, debts of different descriptions, to the amount of one million and sixteen thousand four hundred and sixty-two dollars and twenty-six cents. Attached to his list is his affidavit, stating inter alia, that he, William M. Lloyd, did business at Altoona, Pa., in the name of William M. Lloyd & Co.; and at Ebensburg, Pa., in the name of Lloyd & Co.; and that he and C. H. Hamilton did business in New York in the name of Lloyd, Hamilton & Co.; and that he and D. T. Caldwell did business at Tyrone, Pa., in the name of Lloyd, Caldwell & Co.; and that he and George Huff and W. A. Watt did business at Latrobe, Pa., as Lloyd, Huff & Watt; and that he and George Huff and F. D. Kitchell did business at East Liverpool, Ohio, under the style of Huff & Co. The list of debts filed by Lloyd includes the liabilities of the different firms as aforesaid; also a number of secured claims and the individual indebtedness of Lloyd to the firms aforesaid.

It appears by the evidence accompanying the report, that Lloyd & Hamilton dissolved partnership and settled their partnership affairs between themselves, by Lloyd taking all the assets, and undertaking to pay all the debts, and also that Hamilton is insolvent. The register, in his computation, rejected all the liabilities of all the firms except William M. Lloyd & Co., at Altoona, and Lloyd & Co., at Ebensburg, respectively; also all the indebtedness of Lloyd to the different firms; also several claims as secured, and among them, a claim of the executors of Doctor Alexander Johnson, and several other claims for different reasons, and finds the amount of individual indebtedness of Lloyd provable to be five hundred and forty-three thousand two hundred and sixteen dollars and forty-three cents, and the amount to be counted, of which one-third is to represent or constitute the statutory quorum, to be four hundred and seventy-seven thousand nine hundred and forty-four dollars and fifty-seven cents—being the aggregate amount of the debts over two hundred and fifty dollars in amount. And that this aggregate amount is owned or held by four hundred and thirty-nine creditors, of whom one hundred and seventy-three join in the petition and hold one hundred and ninety-four thousand seven hundred and fifty-three dollars and seven cents of the said aggregate.

Thus: Total provable debts.....		$543.216 43
Amount of debts of over two hundred and fifty dollars.....		477,944 57
Number of creditors whose debts exceed two hundred and fifty dollars each.....	439	
Number joining in the petition of this class	173	
Amount of this class of debts held by them.....		194,753 07

And computes the quorum, by taking one-fourth of the creditors whose debts are each over two hundred and fifty dollars, and one-third of the aggregate of debts of over two hundred and fifty dollars each.

Thus: One-fourth of 489, say	110	
One-third of $477,944.57		$159,314 85

Making a surplus of petitioning creditors over a quorum of sixty-three creditors, whose debts are over two hundred and fifty dollars, and a surplus of value, in the aggregate of debts of over two hundred and fifty dollars, of thirty-five thousand four hundred and thirty-eight dollars and twenty-two cents. If this result is reached correctly, of course the quorum is made out. But Lloyd has excepted to it, and files no less than thirty exceptions thereto. I shall not consider them all.

With my view of the law, I think it necessary to consider only the first, second, fourth, fifth, sixth, seventh, eighth, ninth, thirteenth, sixteenth, twenty-first, twenty-fourth, twenty-fifth, twenty-sixth, twenty-eighth, and twenty-ninth exceptions.

First. It is excepted, that the register states that Lloyd admitted that he carried on business at Altoona and Ebensburg in his own name. If, as I understand him, he means that Lloyd carried on business alone as William Lloyd & Co., at Altoona, and alone as Lloyd & Co., at Ebensburg, the proof in evidence, Lloyd's acquiescence in his answer to the petition, and all through the proceedings, and his affidavit attached to the list of creditors filed by himself, fully establish it.

Second. It is, excepted that the register finds that "only the creditors of William M. Lloyd have provable claims under the act of congress, the creditors of the firms of which

he was a partner being primarily creditors of the said firms." This and exception twenty-fourth are to the same point and are well taken. The claims against these firms should have been counted, except the claims of one firm against another; and where, by the act of the parties, they have been rendered unprovable. Creditors of a partnership have a right to prove their claims against the estate of a bankrupt partner, and are good petitioners under a separate commission whatever may be their fate as to the dividends, and should therefore be counted in making the quorum. Tucker v. Oxley, 5 Cranch [9 U. S.] 34; Barclay v. Phelps, 4 Metc. [Mass.] 397; Howe v. Lawrence, 9 Cush. 553; Harmon v. Clark, 13 Gray, 114; Agawam Bank v. Morris, 4 Cush. 99; Wilkinson v. Henderson, 1 Mylne & K. 582; Nelson v. Hill, 5 How. [46 U. S.] 127; Story, Partn. § 383; In re Frear [Case No. 5,074]; In re Melick [Id. 9,399]; U. S. v. Lewis [Id. 15,595]. The register very naturally fell into the error under this exception; for, with the impress on the mind of all the preceding bankrupt acts under which a single creditor, either firm or individual, had a right to take a commission without reference to any other creditor, it is difficult to divest one's self of the notion of the independence of the different classes of creditors, even under the arbitrary grouping of the quorum of the act of 1874 [18 Stat. 178]. At a day when all the partnership business of Great Britain was scarcely equal in importance to that of one London firm of the present time, the courts in bankruptcy permitted the firm creditor to take a separate commission, and to prove his debts against the separate estate. And in all succeeding bankruptcy, both in England and America, until our amended act of 1874, a single creditor, either firm or individual, could force the individual partner into bankruptcy. By our act, as it now stands, it is provided that, on the conditions therein prescribed, any person committing certain acts of bankruptcy shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts, provable under the act, amount to at least one-third of the debts so provable. If firm creditors are to be counted in the adjudication of a separate partner, then in many cases individual creditors, for want of sufficient numbers of their own class, will be dependent upon the firm creditors for assistance to make out the quorum; and in every case, where the firm assets and the other solvent partners may be sufficient to pay the firm liabilities, and also, on the other hand, in every case where the separate estate may be no more than sufficient to pay the separate liabilities, the firm creditors will have nothing to gain by the petition against the separate partners, and their indifference alone, the simple fact of their existence, will be sufficient to defeat the individual creditors. It has always been held that secured creditors were not to be counted in the computation of the quorum, because, having a special security, they are not interested in the general estate; and it is unfair and unequal that they should be permitted to meddle in determining what shall be done with the estate. Neither they nor their debts are permitted to become an interfering element in the question of jurisdiction in a proceeding in which they may never have any interest. Upon what principle, in a separate adjudication, are firm creditors who, by reason of their inferior relative right, have no vote in the election of an assignee, nor voice in the direction of the proceeding after it is set on foot, I say, upon what principle are they given the power to prevent the proceeding altogether, and exclude the separate creditors with their primary rights from the remedy by involuntary bankruptcy? But it may be said that, because the separate partners are jointly and severally liable for the firm debts, the firm creditors have an interest in the adjudication of a separate partner, and should be heard in the proceeding, and moreover, if they undertake the separate adjudication, and their number is not sufficient, they are reciprocally dependent upon individual creditors for help to make out the quorum. All this is true, but by no means renders the case reciprocal or equal. They have an interest, but it is only secondary. It is the chance for dividends only in the balance of the insolvent partner's separate estate after all his separate creditors shall have been paid in full. To this extent only are they affected by their dependence on separate creditors, and even here the separate creditor's claim, being preferred, and the separate estate being his only resource, the separate creditor's interest is in sympathy with the firm creditor in aid of the adjudication. The separate creditor has a secondary interest in the management of the firm assets; he has a right to all the interest of a separate partner in the firm after the settlement of the firm debts, and the adjustment inter se; but no one will pretend that the separate creditor must be counted on a petition to adjudicate a firm. It would be considered monstrous that firm creditors with their primary rights should be dependent upon the will of separate secondary creditors for the adjudication of the firm. Why congress saw fit to pay this deference to firm creditors, and did not give to the separate creditors the power to constitute a quorum out of their own number independent of any other class, we cannot tell. It is clear enough from the provision itself, and the other amendments of the act of 1874 in connection with it, that it was adopted in restraint of involuntary bankruptcy, perhaps as a compromise between the old law and its repeal altogether. This restraint seems to have been the leading purpose, and its practical relative bearing upon different classes of creditors was probably

left to be settled by experience. However, such is the law. Our duty is to administer it as we find it. The law requires one-fourth of the creditors of a bankrupt, and one-third of the debts provable against him, to put him into bankruptcy, whether partners, firm, or separate individual debtor. Firm creditors are the creditors also of the partners, and firm debts are also debts of the partners, therefore one-fourth of the partner's creditors and one-third of the debts provable against him must be taken to mean indiscriminately one-fourth in number of all his creditors, both individual and firm creditors, and indiscriminately one-third of all his debts, both individual and firm debts. The language of the provision is plain, certain, and conclusive.

It may be remarked, however, that the result of the computation in this case is not dependent altogether upon the action or indifference of firm creditors; for while they have abstained from joining in the petition, numerous as they are, yet they are not alone in standing aloof, for there is not represented in the petition more than about one-third of the aggregate of the separate individual indebtedness of Lloyd, provable under the act, though amounting to a much larger aggregate than the provable firm debts.

Fourth. It is excepted that the register erred in finding that Doctor Alexander Johnson's claim ought not to be counted. It appears from the evidence that this claim is on a bond dated May 1st, 1875, signed by William M. Lloyd, with two sureties, Sylvester C. Baker and Thomas McCaulley, conditioned for the payment of the sum of fifty thousand dollars to Doctor Alexander Johnson, the balance returned by Lloyd as unpaid being forty-two thousand six hundred and ninety dollars and thirty-five cents. To indemnify the sureties on the bond, Lloyd executed to them a mortgage on certain real estate dated on the 8th day of May, A. D. 1875. This mortgage was not recorded till September 17th, 1875. The register rejects the claim of Doctor Alexander Johnson, as a secured claim and as affected by the preference supposed to have been given by Lloyd in indemnifying the sureties. This is clearly erroneous. The sureties in the bond are no such security as can render the claim in the bond a secured claim within the sense of the bankrupt law. The mortgage in indemnifying the sureties does not render the debt of the principal a secured debt within the meaning of the bankrupt act, and, as to any question of fraudulent preference in giving the mortgage, Alexander Johnson does not appear in any way a party to it, and therefore his debt cannot be tainted by it. This debt therefore should have been counted. This exception is sustained.

Fifth. That the register erred in counting out the claim of the Ginter heirs as secured. I think there was no error in this. The claim is for purchase-money for land on contract, the vendor still holding the legal title, and is a secured claim and not provable. Some evidence was taken before the register showing depreciation of the value of the land in order to show a balance provable; but the claimants were not parties to the proceeding and have not offered to release or to liquidate their security, and it cannot be assumed that they will part with the legal title and not have recourse to a recovery of the land for the balance of the purchase-money, so in its present status the claim is a secured claim. The amount of the claim as stated in the list was corrected and reduced by proof of payment; but, for the purpose of this adjudication, that is not material, and does not affect the question, as the claim was rejected by the register by subtracting its amount from the aggregate amount of the list of debts. This exception is overruled.

Sixth. As to the Jonathan Hamilton judgments, they are admitted to be liens upon real estate and secured. Therefore this exception is overruled.

Seventh. As to John Riley's claim, and, exception sixteenth, as to the claim of Huntley, Moon, Barker and Davis, both of their claims are so involved in the question of preference and security as to put the onus upon the claimants to purge them, which they have failed to do. These exceptions are therefore overruled.

Eighth. That the register erred in counting out the claim of Lloyd, Huff & Watt. This is a claim of a firm of which Lloyd is a partner, so that, as to Lloyd's interest in it, it is Lloyd's claim against himself in competition with his firm creditors, only the portion of it found on settlement of the partners inter se to be due to the other partners as individuals could be a provable debt. In its present form, it is not properly a debt of a creditor of Lloyd, and for the same reason no claim of one firm of which Lloyd is a partner, against another firm of which he is a partner, is a provable debt against him. By the reference of the petition to the register he has power and it is his duty to ascertain the amount of provable debts, and under the proof before him to arrive at the real balance against the debtor, the petitioning creditors sustaining the affirmative of allegation and denial. But he is not bound to consider claims that are not distinctly liabilities of the debtor, or that may not be shown to be such without resort to the aid of extraneous proceedings at law or in equity to ascertain the interest of the creditors. This exception is therefore overruled.

Ninth. The register erred in excluding the claim of James Loudon for five thousand three hundred and eighty-three dollars and thirty-three cents. The only reason assigned for excluding this claim is, that James Loudon is a trustee under the voluntary assignment of Lloyd for the benefit of his creditors. This, without showing some fraud connected with it, is not a sufficient reason. In re Horton

[Case No. 6,707]. This exception is sustained.

Thirteenth. That the register erred in finding that any of the claims on the debtors' list should not be counted, for the reason that they are too small. There is no evidence that the register, for the reason given, found that any claim should not be counted which ought to be considered a provable claim in bankruptcy. This exception is therefore overruled.

Twenty-First. As to the Christy claim, it appeared that this claim was got into a judgment by an award of arbitrators, filed September 28th, 1875, ten days after Lloyd had made a voluntary assignment for the benefit of his creditors, and from all that appears it is prima facie no lien, and should be counted. As to the Richie claim, there is no evidence of the fact, though it seems to be admitted that it is an award of arbitration, filed on some day (in blank) in September, 1875, and admitted like the Christy claim to have been entered of record after Lloyd's voluntary assignment. There is no evidence that either of these claims is secured. They are therefore provable, and the exception is overruled.

Twenty-Fifth. That the register erred in finding that the petitioning creditors constituted one-fourth in number of Lloyd's creditor's, and the aggregate of their debts amount to at least one-third of the debts provable against Lloyd.

Twenty-Sixth. That the register erred in not finding that the petitioning creditors did not constitute the statutory quorum required to join in the petition for the adjudication of the bankruptcy of the said Lloyd. These two exceptions refer to the same thing, the computation of the legal quorum.

The register, in computing the statutory quorum, adopted the rule laid down in Re Hymes [Case No. 6,986], that creditors whose debts do not exceed two hundred and fifty dollars are to be excluded in the computation as to the amount as well as to the number of creditors, and taking from the petition one-fourth of Lloyd's separate creditors, whose claims are above two hundred and fifty dollars each, and whose aggregate claims amount to one-third of the aggregate of the debts of over two hundred and fifty dollars, he adopts this as the statutory quorum. I think he is wrong in this. The only aggregate for his purpose is all the provable debts, without reference to their respective amounts. The statute says, the debtor shall be adjudicated a bankrupt on the petition of one or more of his creditors who shall constitute one-fourth in number and the aggregate of whose debts, provable under the act, amount to at least one-third of the debts so provable. It also contains this qualification: "And in computing the number of creditors aforesaid who shall join in such petition, creditors whose respective debts do not exceed the sum of two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed the sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid." For what purpose aforesaid? Certainly for the purpose of computing the number of creditors aforesaid who shall join in the petition. But there are no creditors aforesaid in question but those holding one-third in amount of the debts provable, and the provability of a debt under the act does not depend upon its size or amount. Therefore whatever selection of creditors there may be in constituting the quorum in number, whether holding debts above or below two hundred and fifty dollars, the one-third in amount held by them must be one-third in amount of the debts provable against the bankrupt, be they large or small. Under the act of 1867 [14 Stat. 517], any creditor, or any number of creditors together, holding debts of the amount of two hundred and fifty dollars, could force a man into bankruptcy. But, under the present law, it is required that at least one-fourth of the creditors and at least one-third in amount of the debts shall be consulted, and shall take the responsibility of the act, before the interests of the debtor and of his creditors shall be committed by compulsion to the fortunes of bankruptcy. The two hundred and fifty dollars qualification does not vary the aggregate of debts which forms the basis of the computation; but does vary the mode of computation, so that, according to the facts of the case, one or the other of two modes may be adopted in computing the quorum: First, by joining in the petition at least one-fourth of the creditors whose provable debts severally are over two hundred and fifty dollars, and in the aggregate are equal in amount to one-third of all the debts provable under the act; or, secondly, in default of enough of these joining in the petition, then by joining creditors, at least one-fourth in number of all the creditors whose debts, without regard to their several amounts, are equal in the aggregate to one-third of the aggregate amount of all the provable debts of the bankrupt. This alternative is prescribed, and by one or the other mode in every case the one-fourth of the creditors, and the one-third in amount of the debts provable under the act, can be computed. The resort to two different aggregates, as in the Hymes Case [supra], I think is neither required by the language of the act, nor necessary to effectuate its purposes; but, on the contrary, in every case where it is applied, it defeats one of the principal purposes of amending the act of 1867. Why should there be any distinction as to the merit of the debts held by large or small creditors? Why should one class be required to hold one-third of all the debts, and another class only one-third of all the debts of over two hundred and fifty dollars in amount?

So far as I can discover, whenever the question has been raised, since the decision In re Hymes, before referred to, the courts have taken the view I have adopted. In re Hadley [Case No. 5,894]; In re Bergeron [Id. 1,342]; In re Currier [Id. 3,492]; In re Woodford [Id. 17,972].

Twenty-eighth and twenty-ninth exceptions, that the register erred in not returning lists of the claims counted, and of those rejected, are sustained. As a matter of practical convenience for referring to, and as explanatory of the report, it should always be done. The list of creditors, filed by Lloyd, March 16, 1876, and corrected by list filed February 17, 1877, shows liabilities of the different firms, for which he alleges he was at that date liable as a partner, as follows:

Lloyd, Hamilton & Co. of New York	$ 98,347 45
Lloyd, Caldwell & Co., of Tyrone, Pa.	149 912 78
Huff & Co., East Liverpool, Ohio	21,355 05
Lloyd, Huff & Watt, Latrobe, Pa., as per corrected list	70,191 24
Total	$339,806 52

Amounting in the aggregate to three hundred and thirty-nine thousand eight hundred and six dollars and fifty-two cents. From this amount is to be deducted amounts due from Lloyd, Hamilton & Co. to Lloyd, Huff & Watt, and Lloyd, Huff, Happer & Co., and to Huff & Co., as follows (released to Lloyd, Hamilton & Co., and assumed by Lloyd):

Lloyd, Hamilton & Co., to Lloyd, Huff, Happer & Co., at Irwins, Pa.	$13,222 07
Lloyd, Hamilton & Co., to Lloyd, Huff & Watt, at Latrobe, Pa.	15,087 01
Lloyd, Hamilton & Co., to East Liverpool Deposit Bank, admitted by Lloyd's counsel to be misstated, for Huff & Co.	8,117 37
Total	$36,426 45

Making the total amount of firm indebtedness to be deducted, thirty-six thousand four hundred and twenty-six dollars and forty-five cents, and leaving the aggregate amount of firm debts provable three hundred and three thousand and three hundred and eighty dollars and seven cents. Total provable firm debts, $303,380.07.

The amount of Lloyd's individual separate debts provable are found by taking the aggregate, reported by the register, with the changes I have made under the exceptions, as follows:

Total provable debts reported by the register	$543,216 43
Add claim of Alexander Johnson's executors	42,690 35
" " James Loudon	5,383 33
	$591,290 11

On Lloyd's additional list improperly rejected by the register, and to be added, are the following claims:

John Miller, trustee	$ 592 48
Beck, Happer & Co., Irwins, Pa.	709 01
John A. Anderson (interest to be added)	71 19
Total individual provable debts	$592,662 79
Add total firm provable debts	303,380 07
Total provable debts	$896,042 86

So we have a total provable indebtedness of eight hundred and ninety-six thousand and forty-two dollars and eighty-six cents. One-third of this amount is required for the quorum, being $298,680.95. The amount represented in the creditors' petition and supplemental petition of provable debts, is two hundred and seven thousand five hundred and seventy-two dollars and ninety cents. ($207,572.90), and is short of the amount required by the law by the sum of ninety-one thousand one hundred and eight dollars and five cents ($91,108.05). This being the case, it is not worth while to compute the number of petitioning creditors. The legal quorum, therefore, is not made out by the petitioning creditors, and the report of the register, finding a quorum, is overruled. This computation does not include any claims or petitions filed in court since the hearing before the register. Such claims, if any, are to be considered in the proceeding to amend the petition by way of additions. The creditors' petition is continued for ten days from the filing hereof for amendment.

[NOTE. From the petition, amended by way of additions, the case was subsequently heard. Other exceptions, not disposed of in the opinion above, were overruled, and a decree entered adjudging that a legal quorum of the creditors had joined in the petition. Case No. 8,430. From this decision a petition for review was filed in the circuit court by the bankrupt, which dismissed the petition upon the ground that the supervisory power of the circuit court does not extend to a decision of the district court upon the question of quorum. Case No. 8,431. The district court overruled the register's allowance to counsel for the petitioning creditors for fees, upon the ground that, although the service was meritorious, yet it was not in the power of the court to grant fees. 7 Fed. 459. An order confirming the sale by the assignee of certain of the bankrupt's real estate was rescinded in 11 Fed. 586. The bankrupt was a member of the firm of Lloyd, Hamilton & Co. The register admitted proof of debts of the creditors of the firm against the estate of the bankrupt. District Judge Acheson sustained the register's report upon this point, upon the ground that, there being no joint estate, the firm creditors had a right to share in the separate estate. 22 Fed. 88. The bankrupt was a member also of the firm of Lloyd, Huff & Watt. The firm was also bankrupt, and their assignee tendered proofs of debt against the estate of the bankrupt. These the register allowed, but the court (District Judge Acheson) sustained exceptions to the report, and disallowed the proofs. Id. 90.]

Case No. 8,430.

In re LLOYD.

[25 Pittsb. Leg. J. 69.]

District Court, W. D. Pennsylvania. 1877.

BANKRUPTCY—QUORUM OF PETITIONING CREDITORS—AMOUNT REPRESENTED.

When one-fourth in number of creditors holding provable debts over two hundred and fifty dollars in value to the amount of one-third of the aggregate indebtedness provable against the bankrupt have joined in the petition for his adjudication, their prayer will be granted.

[In the matter of William M. Lloyd, a bankrupt, for whom a petition for adjudication in bankruptcy had been filed. Case No. 8,429.]

Before KETCHAM, District Judge.

PER CURIAM. Now, December 13, 1877, the court having computed the aggregate indebtedness of all amounts provable against the bankrupt, and the number of creditors and the number of petitioning creditors; and having computed the amount and value of debts held by the petitioning creditors, it is ascertained that the total amount of provable debts is $896,312.25; that the entire number of creditors having provable debts of over $250 in amount is seven hundred and eight; and of these three hundred have joined in the petition, and that they hold provable debts over two hundred and fifty dollars in value, to the amount of three hundred and sixteen thousand one hundred and ninety-three dollars and seventy-nine cents. One-fourth in number, or one hundred and seventy-seven creditors holding one-third of the indebtedness, or two hundred and ninety-eight thousand seven hundred and seventy dollars and seventy-five cents, are sufficient to constitute a legal quorum.

It is therefore adjudged and decreed, that a legal quorum of one-fourth in number of creditors holding provable debts over two hundred and fifty dollars in value to the amount of one-third of the aggregate indebtedness provable against the bankrupt have joined in the petition for his adjudication.

Exceptions tenth, eleventh, twelfth, fourteenth, twenty-second and twenty-third of the exceptions filed July 8, 1876, to the register's original report, finding a quorum, are overruled—the other exceptions to said report were disposed of in opinion filed February 21, 1877.

The opinion of Judge KETCHAM, in this case, and which is referred to in the decree, was printed in [Case No. 8,429].

[NOTE. A petition for review of this decree was filed in the circuit court, but was dismissed, upon the ground that under the twelfth and thirteenth sections of the amended act of June 22, 1874, the circuit court had no power to review the action of the district court upon the question of the quorum of the creditors. Case No. 8,431. The case was again heard upon the question of the allowance of counsel fees (7 Fed. 459); upon the confirming of the assignee's sale of certain real estate (11 Fed. 586); upon the proof of partnership debts against the bankrupt (22 Fed. 88); and upon the tender of proof of a bankrupt partnership of which the bankrupt was a member, claiming debts against the estate of the bankrupt (Id. 90).]

Case No. 8,431.

In re LLOYD.

[25 Pittsb. Leg. J. 123.]

Circuit Court, W. D. Pennsylvania. 1878.

BANKRUPTCY—JUDGMENT UPON COMPOSITION—REVIEW.

The judgment of the district court declaring a composition final, precludes further review by the circuit court. 12th and 13th sections of act of congress of 22d June, 1874 [18 Stat. 178].

[In review of the action of the district court for the Western district of Pennsylvania.]

On December 13th, 1877, the district court made a decree that a legal quorum of petitioning creditors [of William M. Lloyd] had joined in the proceeding. See [Case No. 8,430]. On the 14th of December, 1877, the debtor filed a petition for review of this decision, in the circuit court, alleging that the district court had erred in respect to the number and amount of creditors who had joined in the supplementary petitions. The creditors, through their counsel, filed pleas to the bill of review, one of which pleas was to the effect that the supervisory powers of the circuit court did not extend to a decision of the district court upon the question of the quorum under the 12th and 13th sections of the amendatory act of 22d June, 1874. The case came up for argument upon the plea denying the right of review in such a case before the circuit court on the 26th of February last, and the court intimating that they were of the opinion that the bill of review would not be sustained; the counsel for the debtor alleged they were not prepared to argue this question: Whereupon the court adjourned the further hearing until the 15th of March, 1878, when, upon further hearing the counsel for the debtor, the court dismissed the petition.

Geo. M. Reade and Geo. Shiras, Jr., for creditors.

S. S. Blair and John M. Kennedy, for debtor.

McKENNAN, Circuit Judge, filed no written opinion, but announced that he was of opinion that the words in the 12th and 13th sections of the act of congress, approved 22d June, 1874, declaring that the judgment of the district court should be final, precluded all further inquiry upon this subject, and dismissed the petition on review.

[NOTE. The case was again heard upon the question of the allowance of counsel fees, 7 Fed. 459, upon the confirming of the assignee's sale of certain real estate, 11 Fed. 586, upon the proof

of partnership debts against the bankrupt, 22 Fed. 88, and upon the tender of proof of a bankrupt partnership of which the bankrupt was a member, claiming debts against the estate of the bankrupt. Id. 90.]

LLOYD (FARMERS' BANK OF ALEXANDRIA v.). See Case No. 4,661.

Case No. 8,432.

LLOYD v. HOO SUE et al.

[5 Sawy. 74;[1] 17 N. B. R. 170; 1 San Fran. Law J. 392.]

District Court, D. California. Feb. 7, 1878.

ASSIGNEE IN BANKRUPTCY—RIGHT TO REDEEM.

An assignee in bankruptcy is not merely the successor in interest of the bankrupt. He stands in the position of a judgment-creditor, and as such may redeem property of the bankrupt sold on execution, without discharging the claim of the judgment-creditor who has purchased at the sale, for the unsatisfied balance of his judgment.

[This was a suit in bankruptcy by John Lloyd, the assignee of Peter Gardiner, against Hoo Sue and others. The case is heard on a motion, by the complainant, for an injunction to restrain the defendants from proceeding with the sale of certain mortgaged property.]

Fifield & Bishop, for complainant.

E. D. Sawyer and Hepburn Wilkins, for defendants.

HOFFMAN, District Judge. On the —— day of November, 1876, the defendant, Hoo Sue, obtained in the twenty-second judicial district court of this state a decree of foreclosure of a certain mortgage theretofore made to him by the bankrupt. Under this decree the mortgaged premises were sold, and Hoo Sue became the purchaser at a price less than the amount due on the mortgage. A judgment for the deficiency was duly docketed on or about the fifteenth day of January, 1877. On the fifteenth day of February, 1877, a petition in bankruptcy was filed against Gardiner, and on the twentieth of February he was adjudged a bankrupt, and on the twelfth of April, 1877, the complainant was duly appointed assignee and received an assignment from the register.

On the third day of July, 1877, the assignee paid to the sheriff the sum of one thousand six hundred dollars and eighteen cents, being the aggregate of the amounts bid by Hoo Sue on certain parcels of the mortgaged land bought by him and which the assignee desired to redeem, together with the interest thereon as required by the laws of this state, and all taxes and assessments paid thereon by Hoo Sue and interest thereon. The bill charges that Hoo Sue has received the redemption money, but that he is proceeding to sell the same premises to satisfy the judgment docketed for the deficiency. An injunction is therefore asked to restrain the defendant from proceeding with the sale, and for such other relief as to the court may seem meet. By the redemption laws of this state the persons entitled to redeem real estate sold on execution are divided into two classes: (1) The judgment-debtor or his successor in interest; (2) creditors having a lien by judgment or mortgage on the property sold or some share or part thereof, subsequent to that on which the property was sold. The latter are termed "redemptioners." Code Civ. Proc. § 701. If the property be redeemed by the judgment-debtor "the effect of the sale is terminated and he is restored to his estate." Section 703. If a "redemptioner" redeems he is obliged to pay in addition to the amount bid by the purchaser, interest, taxes, etc., the amount of "any prior lien held by the purchaser other than the judgment on which the purchase was made." If no other redemption be made he or his assignee is entitled to the sheriff's deed.

From these provisions, it results that if the judgment-debtor redeems, he holds the property as if no sale had been made, and subject to all valid liens upon it. If the property be redeemed by a "redemptioner," he succeeds to the rights of the purchaser at the sale, and holds the property divested of the lien of the judgment on which it was sold. This statute is not explicit as to the effect of a redemption by "the successor in interest" of the judgment-debtor.

If the lien of the original judgment for the unsatisfied balance be considered as subsisting until a redemption is made by a redemptioner, or the purchaser's right to a conveyance becomes absolute, the grantee or successor in interest of the debtor would take the property, subject to that lien. This view finds some support in the fact that the statute does not require the sheriff's deed to be made to the successor in interest of the debtor who has redeemed, but only to the last "redemptioner."

If, on the other hand, it be considered that the lien of the judgment on the property sold is extinguished by the sale, and only re-attaches on a redemption by the judgment-debtor, because by such redemption "the effect of the sale is terminated, and he is restored to his estate," as if no sale had been made, then a conveyance by him before redemption will pass the title, divested of the lien, for the unsatisfied balance of the judgment. See Van Dyke v. Herman, 3 Cal. 296; Knight v. Fair, 9 Cal. 117; McMillan v. Richards, Id. 413; Sharp v. Miller, 47 Cal. 82.

I do not deem it necessary to decide this point, which may be open to much controversy, for I consider that the assignee in bankruptcy occupies a position essentially different from that of the grantee or successor in interest of the judgment-debtor.

A proceeding in bankruptcy has been described as an attachment levied upon all the

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property of the debtor for the equal benefit of all the creditors. An adjudication establishes the fact that the bankrupt is indebted, and the proof and allowance of the claims of the creditors operate as a judgment in their favor, against the assets in the hands of the assignee, in the same way as by the law of this state the allowance by the administrator and probate judge of claims against an estate have the force and effect of a judgment. 6 Cal. 412; Id. 166. The assignee represents not merely the bankrupt as his successor in interest, but also the rights of the creditors who are by the act forbidden to prosecute to judgment their demands. Thus transactions which are by law declared void or fraudulent as against creditors may be impeached by the assignee, although as against the bankrupt they would be valid. Edmondson v. Hyde [Case No. 4,285]. And yet, to enable a creditor to impeach such a conveyance in the ordinary tribunals he must establish his status as such by obtaining a judgment. So in Miller v. Jones [Id. 9,576] it was held that "the assignee in bankruptcy stands in the position of judgment-creditors with equal rights, the adjudication in bankruptcy being equivalent to the recovery of a judgment and a levy." So in Re Gurney [Id. 5,873], it was held that "an assignee in bankruptcy has a stronger right than the bankrupt. He stands in the place of an attaching or execution-creditor." See Barker v. Barker's Assignee [Id. 986].

In the case of Pellow v. Langtree, 5 Humph. 359, it was held that after adjudication a judgment-creditor of the bankrupt has no right to redeem and thereby secure to himself a preference, but that such right was exclusively vested in the assignee by the bankruptcy act. Unless he can exercise this right, and for the benefit of all the creditors the latter are deprived of an important privilege. The proceeding in bankruptcy prohibits them from obtaining judgments against the bankrupt. If they could do so they would have the right to redeem from the purchaser in the order of their priorities on paying to him the amount of his bid with interest, etc., together with the amount of any prior lien held by him other than the lien of the judgment under which the purchase was made. But if the assignee redeems merely as the grantee or successor in interest of the judgment-debtor, he will hold the property (it is contended) subject to the lien of the judgment for the unsatisfied balance, a burden from which it would be relieved if redeemed by a judgment-creditor.

By treating the assignee as a creditor who has obtained judgment against the bankrupt for all the provable debts due by him, the object of the redemption laws, and also that of the bankruptcy act, are attained. The creditors' right to redeem is protected and enforced as if they had all obtained a simultaneous judgment against the bankrupt; while the benefit of the redemption is, as the policy of the bankruptcy act requires, shared in by all equally. If the assignee can redeem only on payment of the unsatisfied balance of the judgment on which the property has been sold, or what is the same thing, takes the property subject to the lien of that judgment, the effect is to give the creditor a preference to the extent of the balance due him. If, on the other hand, the assignee declines to redeem, the creditor will hold the property he may have bought in, at perhaps a fraction of its value, freed from all liability to a redemption by judgment-creditors (for the bankruptcy act prevents the other creditors of the bankrupt from becoming such), and he may even prove for the unsatisfied balance under the bankruptcy, and claim his share of the dividends. The bankruptcy act would thus be used not only to defeat its own policy, but also to render practically inoperative the salutary provisions of the redemption laws.

The authority of the bankrupt act is paramount to that of the laws of the states; but both should, if possible, be so administered as to avoid conflict or interference. A construction of these provisions, which will carry out the policy and attain the ends of both, should therefore be unhesitatingly adopted. To allow the assignee in bankruptcy to exercise the rights of a "redemptioner," involves no greater violence to the strict letter of the statute, than the admission of a stockholder of a corporation to redeem its property sold under a decree of foreclosure, and to be subrogated to all the rights of the original purchaser at the sheriff's sale, notwithstanding that the title to the property was in the corporation, and that the stockholder was neither the judgment-debtor nor his successor in interest, nor had he any lien upon the property by judgment or mortgage. Wright v. Oroville Mining Co., 40 Cal. 20.

For these reasons I am of the opinion that the assignee's redemption had the same effect as if made by a judgment-creditor, and that he is like any other redemptioner entitled to a conveyance from the sheriff. I very much doubt, however, whether the court can on this bill give him the relief he is entitled to. The better course will be to apply to the state court for a mandamus upon the sheriff to make the conveyance, and for an order recalling the execution which Hoo Sue has taken out. In the meantime the injunction heretofore granted against the latter will be retained.

Since the above was written the supreme court of this state has decided—Simpson v. Castle [52 Cal. 645]—that the grantee of the judgment-debtor takes the property sold discharged of any lien for the unsatisfied balance of the judgment..

Case No. 8,433.

LLOYD v. LUND.

[Cited in Addison v. Duckett, Case No. 77. Nowhere reported; opinion not now accessible.]

Case No. 8,434.

LLOYD v. SCOTT.

[4 Cranch, C. C. 206.] [1]

Circuit Court, District of Columbia. May Term, 1832.

REAL PROPERTY—RENT CHARGE—LANDLORD AND TENANT—DISTRESS FOR RENT—REPLEVIN—AVOWRY—PLEAS IN BAR.

1. A rent-charge or annuity of $500 a year in consideration of $5,000 advanced and paid therefor, is not usurious on the face of the grant, although it contain the following covenants, namely, that the grantor will pay the said rent as it shall become due; and if not punctually paid, that the grantee may enter and distrain therefor; and that if the rent shall remain thirty days unpaid, and no sufficient distress found on the premises charged, the grantee may enter and from thence remove and expel the grantor, his heirs and assigns, and hold and enjoy the same as his absolute estate forever thereafter; that the grantor will keep the buildings insured against fire, and will execute and deliver any further conveyance necessary more completely to charge the premises with the said annuity and to carry into effect the intention of the parties. And a covenant on the part of the grantee, that if the grantor at any time after the expiration of five years, should pay to the grantee $5.000 and all arrears of rent, the grantee would execute and deliver, to the grantor, any deed or instrument necessary for releasing and extinguishing the said rent or annuity; which, on such payment, shall thereafter forever cease to be payable.

2. Nor is it a good plea in bar of an avowry of distress for rent due by such a grant, that the deed was made in pursuance of an agreement that the grantee should "advance" to the grantor $5,000, in consideration of which the grantor should, by such a deed grant to the grantee an annuity or rent of $500 with the covenants aforesaid; although the plea aver that "so" the said deed was made "in consideration of money advanced upon and for usury;" "and there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5,000 for the term of one year.

3. Nor is it a good plea in bar to such an avowry to say that the deed was made in pursuance of an agreement that the grantee should "lend" $5,000 to the grantor upon the terms and with the covenants contained in the said deed; although the plea aver that "so" the grantor saith the said deed was made "in consideration of money lent upon and for usury;" and that "by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5.000 so lent as aforesaid for the term of one year."

4. Nor is it a good plea in bar of such an avowry, to say that the said deed was made in pursuance of an agreement that the grantee should "advance" to the grantor $5,000 upon the terms and conditions, and in consideration of the covenants in the said indenture mentioned and contained. "and so the said John saith that the said deed of indenture was made in consideration of money advanced upon and for usury, and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5,000 so advanced as aforesaid for the term of one year."

5. Nor is it a good plea, in bar of such avowry, to say, that the said deed was made in pursuance of an agreement that the grantee should "lend" the grantor $5,000 "upon the terms and conditions and in consideration of the covenants and agreements in the said indenture mentioned and contained, and that he did so lend," etc.; "and so the said John saith that the said deed of indenture was made in consideration of money lent upon and for usury, and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5,000 so lent as aforesaid for the term of one year."

6. There is no rule of law or practice which forbids the court to grant a new trial where the verdict is against the weight of the evidence.

7. A motion for a new trial is an application to the sound legal discretion of the court.

8. The contract prohibited by the statute of usury in Virginia, is a contract to receive something for forbearance; that is, for forbearing to enforce some debt or right; and unless there was a right to demand payment, there could be no forbearance; and if no forbearance, no usury.

Replevin. The defendant, [Charles] Scott, makes cognizance as bailiff of W. S. Moore, and justifies the taking as a distress for $250 rent due under the following grant of an annuity or rent, namely: "This indenture, made this eleventh day of June, in the year one thousand eight hundred and fourteen, between Jonathan Scholfield and Eleanor his wife, of the town of Alexandria, and District of Columbia, of the one part, and William S. Moore of the same town, of the other part, witnesses, that the said Jonathan Scholfield and Eleanor his wife, in consideration of the sum of five thousand dollars to the said Jonathan Scholfield by the said William S. Moore in hand paid, of which the receipt is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to the said William S. Moore, his heirs and assigns forever, one certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements and appurtenances thereon erected, on the east side of Washington street, and the north of Duke street, in the said town of Alexandria, beginning, &c., &c., to be paid to the said William S. Moore, his heirs and assigns by equal half-yearly payments—$250 on the 10th day of December and on the 10th day of June forever hereafter: To hold the said annuity or rent to the said William S. Moore, his heirs and assigns, to his and their only proper use forever; and the said Jonathan Scholfield for himself, his heirs, executors, administrators, and assigns, does hereby covenant with the said William S. Moore, his heirs and assigns as follows, that is to say, that he the said Jonathan Scholfield, his heirs and assigns, will well and truly pay to the said William S. Moore, his heirs and assigns, the said annuity or rent of $500, by equal half-yearly payments on the 10th day of June and on the 10th day of December, in each year forever hereafter, as the same shall become due; and that if the same be not punctually paid, then it shall be lawful for the said William S. Moore, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy, by distress and sale of the goods and chattels there found, the rent in arrear

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

and the costs of distress and sale; and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress, sufficient to satisfy the same, can be found on the premises charged, then it shall be lawful for the said William S. Moore, his heirs and assigns, to enter on the premises charged, and from thence to remove and expel the said Jonathan Scholfield, his heirs and assigns, and to hold and enjoy the same as his and their absolute estate forever thereafter; and further, that the said Jonathan Scholfield is now, in his own right, seized in fee-simple in the premises charged as aforesaid, free from any condition or incumbrance, other than such as are specified and provided for in a deed from the said Jonathan Scholfield to Robert J. Taylor, dated the day before the date hereof; and that the said Jonathan Scholfield, his heirs and assigns, will forever hereafter keep the buildings and improvements which now or hereafter may be erected on the premises charged, fully insured against fire, in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said William S. Moore, his heirs or assigns, may appoint; to the intent, that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged. And that he, the said Jonathan Scholfield, his heirs and assigns, will execute and deliver any further conveyance which may be necessary more completely to charge the premises, before described, with the annuity aforesaid, to carry into full effect the intention of the parties hereto; and lastly, that he and his heirs will forever warrant and defend the annuity or rent hereby granted to the said William S. Moore, his heirs and assigns, against any defalcation or deduction for or on account of any act of him, his heirs or assigns. And the said William S. Moore, for himself, and his heirs and assigns, does hereby covenant with the said Jonathan Scholfield, his heirs and assigns, that if the said Jonathan Scholfield, his heirs or assigns, shall, at any time after the expiration of five years from the date hereof, pay to the said William S. Moore, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent, and a ratable dividend of the rent for the time which shall have elapsed between the half-year's day then next preceding, and the day on which such payment shall be made, he the said William S. Moore, his heirs and assigns, will execute and deliver any deed or instrument which may be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payment being made, shall forever after cease to be payable. In testimony whereof," &c. Scholfield afterwards sold the premises to the plaintiff, subject to this rent charge.

This cognizance or avowry was filed by the defendant on the 30th of November, 1827; and the plaintiff (after oyer of the deed) demurred to the cognizance, and assigned the following causes of demurrer: (1) Because the said deed of indenture shows, upon the face of it, a corrupt and usurious contract between Jonathan Scholfield and W. S. Moore, altogether void in law, and entirely incompetent to justify the taking of the said goods and chattels in the plaintiff's declaration mentioned; (2) because the essential parts of the indenture are not set forth in the cognizance; (3) because the indenture is variant and different from that alleged in the cognizance; and (4) because the cognizance is void and insufficient in law to justify the taking of the said goods and chattels.

The defendant joined in demurrer, and (as permitted by the Virginia law of December 12, 1792, p. 80, c. 66, § 39), after oyer of the deed, filed four special pleas: (1) "The said John [Lloyd] saith that the said Charles, as bailiff of the said William S. Moore, for the reasons before alleged, ought not justly to acknowledge the taking of the goods and chattels aforesaid in the said place in which," &c. "Because he saith, that before the making of the said indenture, that is to say, on the 11th day of June, in the year 1814, at the county aforesaid, it was corruptly agreed between the said Jonathan Scholfield and the said William S. Moore, that the said William S. Moore should advance to him the said Jonathan the sum of five thousand dollars, and in consideration thereof that he the said Jonathan and the said Eleanor his wife should grant by a deed of indenture duly executed and delivered to him the said William, his heirs and assigns, forever, a certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements," &c., (describing them as in the deed,) "to be paid to the said William, his heirs and assigns, by equal half-yearly payments," &c., (as stated in the deed); "and it was further corruptly agreed that the said Jonathan, in and by the said deed of indenture, should for himself, his heirs, executors, administrators, and assigns, covenant with the said William, his heirs and assigns, that he would well and truly pay to him the said William, his heirs and assigns, the said annuity or rent of $500," &c., &c., stating all the terms, conditions, and covenants in the very words of the deed. "And the said William did further corruptly agree that he would, in the said indenture, covenant for himself, his heirs and assigns, with the said Jonathan, his heirs and assigns, that if the said Jonathan, his heirs or assigns, should at any time thereafter, at the expiration of five years from the date of the said indenture, pay to the said William, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent," &c., (in the words of the deed,) "he the said William, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing

the rent or annuity thereby agreed to be created, which, on such payment being made, should forever after cease to be payable. And the said John saith that afterwards, namely, on the same day and year, at the county aforesaid, the said William, in pursuance and in prosecution of the said corrupt agreement did advance to the said Jonathan the said sum of five thousand dollars, and the said Jonathan and Eleanor his wife, and the said William did, then and there, make, seal, and duly deliver to each other respectively, the said deed of indenture as their several acts and deeds; which said deed was duly acknowledged by the said Eleanor and admitted to record, and so the said John saith that the said deed of indenture in the said cognizance mentioned, was made in consideration of money advanced upon and for usury; and that by the said indenture, there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of five thousand dollars so advanced as aforesaid, for the term of one year; and this the said John is ready to verify: wherefore he prays judgment if he ought to be charged with the rent aforesaid; and inasmuch as the said Charles hath acknowledged the taking of the said goods and chattels, he the said John prays judgment and his damages, on occasion of the taking and unjust detaining of the said goods and chattels to be adjudged to him," &c. (2) The second plea was exactly like the first, except that it charged the agreement to be, that Moore should "lend" to Scholfield $5,000, and that in consideration thereof Scholfield and wife should make the deed; and averred that Moore did, in pursuance and prosecution of such agreement, "advance," (not "lend,") the $5,000; and Scholfield and wife did make the deed, &c.; "and so the said John saith that the said deed of indenture in the cognizance mentioned was made in consideration of money lent upon and for usury, and that, by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5,000, so lent as aforesaid for the term of one year; and this the said John is ready to verify," &c. (3) The third plea, after oyer of the deed, averred, "that before the making of the said indenture, that is to say, on the 11th day of June, in the year 1814, at the county of Alexandria, aforesaid, it was corruptly agreed between the said Jonathan and the said William, that he the said William should advance to him the said Jonathan the sum of $5,000, upon the terms and conditions and in consideration of the covenants and agreements in the said indenture mentioned and contained; and that in pursu ance of the said corrupt agreement, and in the prosecution and fulfilment of the same, the said William did then and there advance to him the said Jonathan the said sum of $5,000; and the said Jonathan and Eleanor his wife, and the said William did then and there make, and seal, and duly deliver the said deed of indenture to each party respectively as their act and deed; and so the said John saith that the said deed of indenture was made in consideration of money advanced upon and for usury; and that by the said indenture there has been received and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5,000, so advanced as aforesaid for the term of one year; and this the said John is ready to verify," &c. (4) The fourth plea was exactly like the third, except that it charged the agreement to be, that Moore should "lend" to Scholfield $5,000; and that he did lend him the sum of $5,000; and that the indenture was made in consideration of money lent upon and for usury; "and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred for the forbearance of the said sum of $5,000, so lent as aforesaid for the term of one year; and this the said John is ready to verify," &c. This suit was commenced in Alexandria, D. C., where all the parties resided; but after the cause had been decided in this court and in the supreme court of the United States, upon the demurrers, and before any issue of fact had been made up, it was at the instance of the defendant's counsel removed to Washington on account of the large interest which many persons in Alexandria were supposed to have in the question, as many such annuities or rent charges had been made, and were supposed to be lawful.

The case first came before the court in Alexandria upon the plaintiff's demurrer to the defendant's cognizance, at November term, 1827, when it was argued by Mr. Swann, for plaintiff, and Mr. Taylor and Mr. Jones, for defendant.

Mr. Swann contended that the contract was usurious on its face, and that it was competent for the court to decide whether it was so or not; and cited Gibson v. Fristoe, 1 Call. 70, 73; Roberts v. Trenayne, Cro. Jac. 507; Richards v. Brown, Cowp. 776; Jestons v. Brooke, Id. 797; Levy v. Gadsby, 3 Cranch [7 U. S.] 180; Act Va. Nov. 23, 1796, p. 367, c. 209; Earl of Chesterfield v. Janssen, 1 Atk. 301; 7 Bac. Abr. 199; Lawley v. Hooper, 3 Atk. 278; 1 Fonbl. Eq. 235; Floyer v. Sherard, 1 Amb. 19; De Butts v. Bacon, 6 Cranch [10 U. S.] 253; Ellzey v. Lane, 4 Munf. 66.

Mr. Taylor and Mr. Jones, contrà. The intent must be found, but it does not appear upon this demurrer. The court cannot infer the intent. The question is whether there be a loan, or a forbearance of an antecedent debt. If it be an annuity it is not usury. This is the purchase of an annuity. There was no obligation upon Scholfield to return the purchase-money. It was never payable, and can never be recovered. There is no difference between a rent-charge and an annuity, as to the question of usury. The price

of this annuity is the usual market price, and nothing contrary appears on the face of the deed. The question is, whether it was a bona fide sale of an annuity, or a cover for a loan. Ord, Usury, 74, 75.

Mr. Swann, in reply. This is different from an ordinary ground-rent. Here is a personal covenant to pay the rent. Insurance of the houses and assignment of the policy, &c.

Before CRANCH, Chief Judge, and THRUSTON, Circuit Judge.

THE COURT (nem. con.) was inclined to the opinion that the contract was not usurious upon its face, but at the request of Mr. Swann took time to consider until the next term; when

CRANCH, Chief Judge, delivered the opinion of the court, after stating the substance of the deed of 11th of June, 1814, and the cognizance. To this avowry the plaintiff demurred, and insisted that the transaction was usurious upon the face of the deed. That the court may decide an instrument or contract to be usurious upon its face is not denied, but then the court cannot look to any thing out of the instrument.

It is contended that this contract was substantially a loan, and to this effect the following cases were cited:

(1) Roberts v. Trenayne, Cro. Jac. 507. That case was trespass quare clausum fregit, against the grantee of a rent-charge for entering for non-payment of the rent. But there the jury expressly found it to be a loan of £150 at an interest of £22 10s. per annum, and that security was given for the repayment. It was objected, that the jury had not found that it was corruptè agreatum. But the court said it was sufficient if they found all the circumstances which made it apparent to the court to be usurious, for "res ipsa loquitur." And Justice Dodridge said, "If I secure both interest and principal, if it be at the will of the party who is to pay it, it is no usury."

(2) Richards v. Brown, Cowp. 770. This was a case of an annuity forced upon a needy debtor, who came to borrow money. The court decided, from all the circumstances given in evidence at the trial, that the substance of the contract was a borrowing and lending, and that a slight colorable contingency will not take the case out of the statute. The circumstances were very strong to show the annuity to be a mere cover for an usurious loan; none of which circumstances appear, in the present case, as it appears upon the indenture.

(3) Jestons v. Brooke, Cowp. 797. This case was decided not to be usury, but to be an inequitable demand, and, therefore, not recoverable in an action for money had and received. It does not affect the present case.

(4) Levy v. Gadsby, 3 Cranch [7 U. S.] 186, was cited to show "that the construction of written evidence is exclusively with the court," who may decide on the face of a written instrument, that it imports a usurious contract.

(5) Earl of Chesterfield v. Janssen, 1 Atk. 301–305, 1 Wils. 295. In consideration of £5,000 advanced to Mr. Spencer, he bound himself to pay £10,000 at the death of the Duchess of Marlborough, in case he should survive her. It was decided not to be usury. Mr. Justice Burnett, in page 340, said, "Suppose a man purchase an annuity at ever such an under price, if the bargain was really an annuity, it is not usury. If on the foot of borrowing and lending money, it is otherwise; for if the court are of opinion the annuity is not the real contract, but a method of paying more money for the reward or interest than the law allows, it is a contrivance that shall not avoid the statute. A bargain on a mere contingency, where the reward is given for the risk, and not for the forbearance, is not usurious; for how can it be said, with any propriety, to be for forbearance when the day of payment may never come." Although the case is very long, this is all that seems pertinent to the present case; and this is only the assertion of a general principle which is not denied.

(6) Lawley v. Hooper, 3 Atk. 278. This was a bill to redeem an annuity granted for the life of the grantor. By the contract it was redeemable upon the payment of £1,050, the original sum given for the annuity, and £75, and all arrears of the annuity. Upon all the circumstances of the case, Lord Chancellor Hardwicke was inclined to think it was "a loan of money turned into this shape to avoid the statute of usury," but he did not think it necessary to determine that point; being of opinion that it was such an agreement as the court ought not to suffer to stand, taking it as an absolute sale. After the parties had agreed upon the terms of the annuity, and the deed was drawn and ready to be executed, the grantee insisted, that as there was no time limited after which only the grantor might redeem, he should, in case he determined to redeem, pay him £75 more than the original purchase-money of the annuity. This was assented to by the grantor, on account of the pressure of his affairs. The lord chancellor considered this variation of the agreement as "unreasonable," and, therefore, set aside the whole agreement, and considered it as a simple loan of £1,050 upon a lawful interest, and permitted him to redeem upon payment of that sum and interest; the payments of the annuity to be credited so as first to sink the interest and then the principal. There is nothing in that case to affect the present. The dictum of the lord chancellor, that it was to be taken to be a loan of money, was founded upon all the circumstances of the case; not upon the face of the instrument alone.

(7) Floyer v. Sherard, 1 Amb. 19. This case is cited for the dictum of Lord Chancellor Hardwicke, that when annuities "are

redeemable, the court looks upon it as an evasion of the statute of usury, and only a loan of money." It does not appear whether, by the word "redeemable," he meant redeemable at the option of the grantor alone, and where the grantee could not compel the grantor to redeem. If that was his meaning, the dictum is opposed by several cases in which that circumstance was not deemed sufficient to establish the contract as a loan; and is confirmed by none. See Murray v. Harding, 3 Wils. 390, 2 W. Bl. 859. See, also, the above case of Lawley v. Hooper, where, if the clause of redemption were conclusive of the fact of its being a contract for a loan, Lord Hardwicke would probably have placed his opinion upon that ground, and not "upon all the circumstances of the case." See, also, Rex v. Drury, 2 Lev. 7. And in Earl of Chesterfield v. Janssen, 1 Wils. 295, the same Lord Hardwicke says, "To make a contract usurious, there must be a loan to be repaid at all events with higher interest than the statute permits." See, also, Fountain v. Grymes, Cro. Jac. 252.

(8) Fountain v. Grymes, Cro. Jac. 252, 1 Bulst. 36. This was a case of annuity for two lives, "and there being no agreement to have the principal money," it was resolved that it was not usury; "but if there had been any provision made for repayment of the principal, although not expressed within the bond, it had been an usurious agreement."

(9) Rex v. Drury, 2 Lev. 7. "Brown had a lease of a messuage from the Earl of Suffolk for forty years, at £5 per annum rent. Brown agreed to assign this term to Drue for £300, but Drue, not having the money, Drury, by agreement with Drue, paid the £300, and took the assignment to himself. Drury then demised the messuage to Drue for thirty-nine and three quarter years, at the rent of £35, of which £5 were to be paid to the Earl of Suffolk, and the remaining £30 to Drury for his own use. Drue covenants to pay the rent, and other usual covenants for repairs, &c.; and Drury covenants, that if at the end of four years, Drue should pay him £300, then the rent shall cease, and he will convey to Drue the residue of the term. And, by Hale, C. J., this was not usury within the statute, for Drue was not bound to pay the £300 to Drury; but, at his election, he might pay this if he would, and thereby determine the rent and have the term; so that it is, in fact, but a bargain for an annuity of £30 per annum for thirty-nine and three quarter years for £300 to be secured in this manner, but determinable sooner at the will of the grantor; but the grantee has no remedy to have again the £300, unless the grantor please to pay it at the end of four years. But if Drury had had any security for the repayment of the £300, or by any collateral agreement this was to be repaid, and this manner of contract contrived to avoid the statute, it would have been otherwise."

(10) Doe v. Chambers, 4 Camp. 1. In this case, Trustram, the borrower of £300 and £600, making £900 from Chambers, assigned a lease, worth £2,000, to Chambers, as security, and took an under-lease from Chambers for seven years, at a rent of £70 per annum. Trustram covenanted to keep the premises in repair, and to pay the insurance and the landlord's taxes. Chambers covenanted that, upon repayment of the £900 within the seven years, he would reassign the lease to Trustram. Lord Ellenborough, at nisi prius, thought that the covenant to reassign on payment of the £900 was evidence that the real contract was a loan, and not an annuity, and so instructed the jury. The cases, already cited, show that that circumstance alone is not sufficient to make the contract usurious. None of those cases were cited at the trial of that cause. It was an off-hand dictum, at nisi prius; and there were other circumstances, which showed that the whole object of the contract was security for a loan. The assignment of the lease was a security for the repayment of the principal. The chief justice stated the evidence to the jury; not the law.

(11) Ex parte Aynsworth, 4 Ves. 678. This was an agreement to allow 30¼ per cent. discount for prompt payment of a bleacher's bill. The debtor had become bankrupt, and the commissioners allowed, as I understand the case, an interest of 5 per cent. on the smaller sum only; that is, they deducted 30¼ per cent. upon the bill rendered, and allowed 5 per cent. interest upon the balance. The creditors petitioned the chancellor to be allowed to prove the additional 25¼ per cent., and relied on the custom of the trade; but the chancellor refused, saying, "The custom of the trade cannot make the debt more than the money really advanced, with 5 per cent. The creditor cannot have more than 5 per cent. The commissioners have done right." Petition dismissed.

(12) Barker v. Van Sommer, 1 Brown, Ch. 149. This was a loan of silks to be sold by a young man to raise money. Lord Chancellor Thurlow considered it as a loan of the sum for which he sold the goods; and set aside the bond given for their estimated value, as being usurious.

(13) Lowe v. Waller, 2 Doug. 736, was a case of the same kind, at law, in which a bill of exchange given for the estimated value of the goods was deemed usurious and void; it being considered as a cover for a loan of the sum actually raised by the sale of the goods.

(14) Davis v. Hardacre, 2 Camp. 375. In this case the discounter of a bill required the other party to take part of the payment in goods, and it was held that this raised a presumption that the transaction was usurious.

(15) Lee v. Cass, 1 Taunt. 515. Upon discounting a bill, the discounter required that he should be permitted to guaranty the sol-

vency of the acceptor, and should receive for that guaranty a premium of 3½ per cent. This was held to be usury.

These are all the cases which have been cited, in behalf of the plaintiff. The five last-mentioned cases have no bearing upon the present, other than to show, that wherever the real object of a contract is the loan of money at a greater interest than the law allows, it will be deemed usurious. Upon the present demurrer, no facts are brought into view but those which appear in the deed granting the rent-charge. Here was no previous conversation about a loan of money; no purchase of an annuity at an under price; no remedy to recover the principal; no annuity forced upon a needy debtor to cover a loan; no forbearance; no day of payment. It has never been decided, that the grantor's right of redemption, alone, made the contract usurious; but the contrary has been expressly adjudged. Rex v. Drury, 2 Lev. 7; Murray v. Harding, 2 W. Bl. 859, 3 Wils. 390; Fountain v. Grymes, Cro. Jac. 252, 1 Bulst. 36. The covenant, that in case the rent be in arrear for thirty days and no sufficient distress be found, the grantee might enter and expel the grantor and hold and enjoy the premises as his absolute estate, is believed to be a covenant usually inserted in the grant of a rent charge; and would, in equity, if not at law, be considered as an authority only to enter and hold to satisfy the rent, and as a security therefor. 3 Cruise, Dig. 300 (198) tit. 28, c. 1, § 73. The other covenants in the deed do not seem to affect the question of usury, otherwise than by corroborating the idea of a sale of an annuity, rather than that of a loan of money.

Upon the whole, we are of opinion, upon this demurrer, that it is not a case of usurious loan, but of a fair purchase of an annuity or rent charge; and as this is the only point argued and submitted to the court, the judgment must be for the defendant.

After this opinion was delivered, namely, at November term, 1828, the defendant demurred to the plaintiff's four pleas of usury, and the plaintiff joined in demurrer, and the case was submitted without argument to the court, who rendered judgment for the defendant, being of opinion that the case was not varied by the new pleadings, because every plea refers to the written contract which, the court had decided, purported upon its face to be a sale of an annuity or rent-charge, and not a loan, as there never was a day of payment, and therefore no forbearance. The plaintiff obtained a writ of error to the supreme court of the United States, who affirmed the opinion of this court as to the construction of the deed of the 11th of June, 1814; but reversed the judgment of this court upon the defendant's demurrer to the plaintiff's second and fourth pleas of usury. [Lloyd v. Scott] 4 Pet. [29 U. S.] 205. Upon the coming down of the mandate, at November term, 1830, the cause, as before stated, was removed to Washington for further proceedings; the demurrer to the plaintiff's second and fourth pleas being withdrawn, and issue joined thereon by the defendant. At May term, 1831, at Washington, the cause came on for trial upon the issues of fact joined upon the second and fourth pleas; but the jury could not agree upon a verdict, and the cause was continued until May term, 1832, when a verdict was rendered for the plaintiff.

The defendant moved for a new trial, on the ground that the verdict was against the weight of the evidence. After argument, THE COURT (MORSELL, Circuit Judge, absent) intimated a strong opinion in favor of the motion, on the ground that the verdict, if not absolutely against evidence, was against an irresistible weight of evidence.

CRANCH, Chief Judge, however, said that the motion for a new trial might stand open until he could have time to look minutely into the notes of evidence taken by the parties, and into the law of the case. And it was agreed that his opinion should be given in writing by the 1st of October then next, so that if a new trial should be granted, the parties should have time to prepare for it.

In pursuance of that agreement, on the 25th of September, 1832,

CRANCH, Chief Judge, delivered and filed the following opinion, (after stating the second and fourth pleas upon which the issue was joined,) namely: To each of these pleas there was a general replication and issue, and verdict for the plaintiff. The defendant has moved for a new trial, and assigned, as reasons therefor: (1) Because the court misdirected the jury as to the law applicable to the case. (2) Because the jury misconceived the instructions given to them by the court. (3) Because the verdict was against law. (4) Because the verdict was against evidence. (5) Because the verdict was without evidence.

1. In regard to the instructions of the court to the jury, as bills of exception have been taken, the court will not grant a new trial on that ground, although there may be some doubt whether Mr. Scholfield's testimony should have been admitted.

2. As the verdict was general, we have no means of ascertaining whether the jury misconceived or disobeyed the instructions of the court; but if the evidence did not justify the verdict under those instructions, it may be presumed that the jury misunderstood or disregarded them.

3. If the verdict was justified by the evidence and the instructions of the court, it cannot be considered as a verdict against law.

4. The fourth reason assigned is, that the verdict was against evidence. If this was the case, a new trial ought to be granted.

It is objected, that there was evidence on both sides, and therefore the verdict cannot

be said to be against evidence; and if the verdict was merely against the weight of evidence, the court cannot grant a new trial. But there is no rule of law or practice, which forbids a court to grant a new trial where the verdict is against the weight of the evidence. On the contrary, there have been many new trials granted on that ground. A motion for a new trial is an application to the sound legal discretion of the court. They will not always grant a new trial when the verdict is against the evidence; nor will the court always refuse it where there was evidence on both sides, to be weighed by the jury.

If the evidence be doubtful, and great interests are involved; if the verdict be conclusive; if it goes to enforce a forfeiture, or to affect the reputation of the party, or to charge him with a criminal offence; or to unsettle titles, or to destroy securities deemed valid; if it be a hard verdict, and seem to the court unjust; all these are considerations to guide the discretion of the court. The court has been reminded of the case of Ross v. Gill, 1 Wash. [Va.] 90, where the court of appeals of Virginia say, "If the court admit improper evidence, an exception may be taken to their opinion; but if the question depend upon the weight of testimony, the jury, and not the court, are exclusively and uncontrollably the judges." But this is not said by the court in reference to a motion for a new trial; for none was made in that case; it was said, and it is true in regard to the relative functions of the court and the jury upon the trial of the issue; and it is because the jury are exclusively and uncontrollably judges of the fact, that the power to grant new trials is given to the court. The court has also been referred to the case of Bogle v. Sullivant, 1 Call, 561. There, the court below had refused to instruct the jury, that evidence of the handwriting and death of the subscribing witnesses to a bond, was, upon the issue of non est factum, sufficient proof of the execution and delivery of the bond; "but left it to the jury to determine the weight of such evidence." The judgment was affirmed by the court of appeals, who said: "The court sees no difference between this and other cases where the evidence is admitted, and the weight it ought to have is left to the jury, who have a right to decide it." There was no question respecting a new trial. The case of Fehl v. Good, 2 Bin. 495, has also been cited, in which C. J. Tilghman says: "The character of witnesses, and the credit that is due to them, are subjects peculiarly within the province of the jury; and where the verdict has depended upon these points, the court has always refused to interfere, except in extraordinary cases." The case of Griffith v. Willing, 3 Bin. 317, 320, has also been cited. In that case, the fact of partnership depended upon a mass of testimony, written and parol. It did not appear to the judge as it did to the jury. The subject was complicated, and the chief justice, although the verdict was contrary to his expectation, thought best not to disturb it. Judge Yeates was not satisfied with the amount of damages; but, viewing the verdict in all its different aspects, he could not say that it presented so plain a case of mistake, of law or fact, in the jury, as would justify the interposition of the court. "The facts," he says, "are much complicated, and we cannot wonder that different inferences should be drawn from them by different minds." This was a question entirely to the discretion of the court. The case establishes no principle. The case of Cowperthwaite v. Jones, 2 Dall. [2 U. S.] 55, has also been cited, where Judge Shippen, in delivering the opinion of the court, said: "New trials are frequently necessary for the purpose of obtaining complete justice; but the important right of trial by jury, requires that they should never be granted without solid and substantial reasons; otherwise the province of jurymen might be often transferred to the judges, and they, instead of the jury, would become the real triers of the facts. A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But whenever it appears, with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded upon an evident mistake, either in point of law or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or have given extravagant damages, the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties." The case of Cogswell v. Brown, 1 Mass. 237, only decides the general principle, that a new trial ought not to be granted upon a formal objection, where substantial justice has been done, nor where the party has, under a statute of Massachusetts, a right, in certain circumstances, to a "review," which is, in effect, a new trial at law.

These cases do not show any positive rule of law or practice which prevents a court from granting a new trial, on the ground that the verdict was against the weight of evidence. On the contrary, it will be found that almost all the cases in which new trials have been granted because the verdict was against evidence, have been cases where there was evidence on both sides, and the verdict was against the weight of evidence. In the case of Bright v. Eynon, 1 Burrows, 393, Lord Mansfield says: "Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials. If an erroneous judgment be given, in point of law, there are many ways to review and set it right. Where a court judges of fact, upon depositions in writing, their sentence or decree may, many ways, be reviewed and set right; but a general verdict can only be

set right by a new trial, which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done." "Most general verdicts include legal consequences as well as propositions of fact; in drawing these consequences, the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts obtained under these, and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial. "For a good while," "the granting of new trials was holden to a degree of strictness so intolerable, that it drove the parties into a court of equity;" "and therefore, of late years, the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases; and the rule laid down by Lord Parker, in the case of Queen v. Corporation of Helston [10 Mod. 202], seems to be the best general rule that can be laid down upon this subject, namely: 'Doing justice to the party, or, in other words, attaining the justice of the case.' The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case, considered under all its circumstances." Mr. Justice Dennison added, "That it would be difficult, perhaps, to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of each particular case, and directed with a view to the attainment of justice." Mr. Justice Foster "agreed to the propriety of what had been said as to such cases in which the juries give verdicts against evidence, and even to cases where there may be a contrariety of evidence, but where the evidence upon the whole, in point of probability, greatly preponderates against the verdict, which, depending upon a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule. But in all cases where the evidence is nearly in aequilibrio, he declared that he should always consider himself bound to have regard to the finding of the jury; for, ad quaestionem facti respondent juratores. In such a case, it is not the province of the judge to determine; it ought to be left to the jury."

In the case of Steinmetz v. Curry, 1 Dall. [1 U. S.] 234, Chief Justice McKean says: "Granting new trials depends upon the legal discretion of the court, guided by the nature and circumstances of each particular case. The courts of England have granted them where the jury have found a general verdict, and the court has directed a special one. So, where the verdict is against the strength of the evidence, and the trial is peremptory; and where the matter appears to the court to deserve reëxamination, they have likewise frequently ordered a new trial. In the present case the verdict appears to be against the strength of the evidence." A new trial was granted. So, in the case Jackson v. Sternbergh, 1 Caines, 167, Mr. Justice Thompson, in delivering the opinion of the court, said: "The testimony is certainly very contradictory, but none of the witnesses appear to have been impeached. Their testimony, however, may make a very different impression, when put on paper, from what it would to hear them examined. Judging only from the case, the weight of evidence is with the defendant; and, although this, of itself, is not sufficient ground for granting a new trial, in all cases, yet, from the whole that appears, there is well founded reason to believe that justice has not been done, and that another examination of the case ought to be made before the possession is changed. We are, therefore, of opinion that a new trial ought to be granted, on payment of costs." So, in Estwick v. Caillaud, 5 Term R. 425, Buller, J., says: "On an application for a new trial, the only question is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case." "If, indeed, the facts be doubtful, and the attention of the jury has been drawn from the consideration of them, that is ground for a new trial; but, if the facts be clear, and those facts have been laid before the jury, we ought not to grant a new trial in order to give the unsuccessful party the chance of obtaining another verdict, if the former verdict be agreeable to the equity and conscience of the case." In Norris v. Freeman, 3 Wils. 39, a new trial was granted because the verdict was against the weight of evidence. So, in Barnewall v. Church, 1 Caines, 235, a new trial was granted upon the same ground, although there was direct and palpable contradictory testimony. So, in Mumford v. Smith, Id. 523, Livingston, J., in delivering the opinion of the court, says: "We would not, willingly, disturb a verdict where there had been no contrariety of testimony, or where the proofs are nearly in aequilibrio; perhaps not unless their decision was most manifestly against the whole evidence. Such, we think, is the case here." The case, however, shows that there was some evidence in support of the verdict; but the court was of opinion that the verdict was against the weight of the evidence, and granted a new trial. In Earl of Mountedgecombe v. Symons, 1 Price, 278, it was decided that a new trial will be granted on questions deciding

important rights, when the judge expressed an opinion, at the trial, contrary to the verdict, although he afterwards reports that he is not dissatisfied with it. In Swinnerton v. Marquis of Stafford, 3 Taunt. 91, it is said, that when there has been only a short time for investigating a question of real property, of a doubtful or obscure nature, and of great value, although conflicting evidence has been left to the jury, and the court does not think their verdict wrong, yet, if the inheritance is to be bound forever, the court will grant a new trial, on payment of costs. The result of all the cases upon new trial is stated by Starkie, Ev. (part 3, p. 435), to be this: "In granting or refusing new trials the courts exercise a discretionary power according to the exigency of the case, upon principles of substantial justice and equity."

The questions, then, which arise for the consideration of the court, in the exercise of its discretion in the present case, are, (1) Whether the verdict is against the justice and equity of the case. (2) Whether the verdict is against the weight of the evidence.

1. As to the justice and equity of the case. Every man has a right to make what contracts he pleases, if not restrained by some law; and justice and equity require that such contracts should be executed, if fairly made. Here no fraud is alleged. Scholfield was not, in any manner, under the power of Moore. It is true, that Scholfield wanted to raise money to finish his houses, and for other purposes; and Moore wished to invest his money in a permanent and productive fund. The circumstances were, by no means, uncommon. No man sells an annuity or ground-rent, unless he wants to raise money; and no man purchases an annuity or ground-rent unless he wishes to invest his money in a productive fund. There is no evidence of any great and particular pressure upon Scholfield at that time; and certainly of none created by Moore. Scholfield, according to his own testimony, went to Moore and told him he wanted to borrow or to raise a sum of money upon an annuity or ground-rent. The market value of ground-rents, in fee, in Alexandria, was known to both parties, to be ten years' purchase; and it is natural to suppose that irredeemable ground-rents in fee, which were always salable at that rate, and which afforded the means of a permanent investment of money, would be more valuable than a ground-rent redeemable at a short period. There was no evidence of any circumstance which made it unconscientious in Moore to accept the offer of Scholfield. Moore wished for a permanent investment. Scholfield wished to redeem the rent in a year; and they finally agreed that he should have a right to redeem it at any time after five years. Surely this was not one of those hard, unconscientious bargains that a court of equity would set aside. It was not the case of a spendthrift heir speculating upon the death of his ancestor; nor of a debtor writhing under the grip of an unrelenting creditor; nor of a weak and simple man entangled in the net of a crafty one. Each party knew exactly what he was doing. The contract, therefore, if not liable to the objection of usury, was fairly made, and ought to be executed, even if this were a suit between the original parties. But it is not. The present plaintiff bought the property, subject to this incumbrance, and, of course, paid as much less for it as the incumbrance was worth; so that if he now recovers he will have deducted from his purchase-money twice that value. It appears, however, in the evidence, that, to avoid this objection, and to induce and qualify Scholfield to become a witness for him, he has agreed to pay the value of this ground-rent to Scholfield's creditors, in case he should recover in this suit; and, in anticipation of such payment, those creditors have actually released Scholfield from $5,000 of their claims upon him. But, on the other hand, it appears in the evidence, that the present plaintiff is the principal creditor of Scholfield, and will, in fact, (as Scholfield is indebted to him in a much larger sum, and is insolvent,) derive the principal benefit from this action in case of recovery. As between this plaintiff and this defendant, therefore, there is no justice or equity on the side of the plaintiff, even if there were between the original parties to the contract; which, clearly, there is not. It is a maxim in equity, "Nemo locupletari debet aliena jactura." The verdict, therefore, if the contract was not usurious, is against the justice and equity of the case.

2. The next question is, whether the verdict was against evidence, upon the point of usury. The pleas aver that Moore lent Scholfield $5,000, and the issue is joined upon that allegation. The question, then, is, did Moore lend the money to Scholfield? If the real contract between the parties is truly stated in the written instrument, this court, and the supreme court of the United States, have said it was not a loan. Unless there was parol evidence, therefore, from which, in connection with the written, the jury could reasonably infer a different contract, the verdict, which could only be justified by proof of a loan, was against the weight of the evidence. The first presumption is in favor of the written contract. When the parties have reduced their agreement to writing, it is prima facie to be presumed that the writing states the agreement truly, and contains all the terms of the contract. The presumption of law is also always against the allegation of fraud, corruption, and violation of law. He who would add to, or derogate from, a written contract, or who alleges fraud, corruption, and violation of law, should prove his allegations clearly. An agreement, or contract, requires the assent of both parties. The desire, or intent, of one party, to borrow, does not make the contract a loan un-

less the other party intends to lend. There cannot be a loan without an express or implied obligation, on the part of the receiver, to return the thing, either specifically or in kind; and there cannot be a forbearance of that which the party has no right to demand. The contract prohibited by the Virginia statutes of usury (of December 8, 1786, p. 37, and November 23, 1796, p. 367), is a contract to receive something for forbearance, that is, for forbearing to enforce some debt, or right. Unless, therefore, Moore had some right to demand the principal, there could be no forbearance of that principal on his part, and the money he was to receive could not be for forbearance. The words of the act of 1796 are: "That no person, upon any contract, entered into upon or after the first day of May next, shall take directly or indirectly, for loan of any money, wares, or merchandise, above the value of six dollars, for the forbearance of one hundred dollars for a year, and after that rate for a greater or lesser sum, or for a longer or shorter time; and all bonds, contracts," &c., "thereafter to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void."

This court and the supreme court have decided, that neither the covenant by Moore to extinguish the rent after five years, upon the receipt of $5,000 and all arrearages of rent, nor the right of entry and distress, made the contract a loan. By what evidence, then, did the jury arrive at the conclusion, that the contract was for a loan, and not for the purchase of a ground-rent? It appeared, by the written instrument, that Scholfield, in consideration of $5,000, bargained and sold to Moore, an annuity or rent of $500 in fee, charged upon certain houses and lots in Alexandria, with the right of distress, and of entry and eviction, in case the rent should be in arrear. Scholfield covenanted to pay the rent, and keep the houses insured; and Moore covenanted that if, at any time after five years, Scholfield should pay to Moore the sum of $5,000 with all arrears, Moore would execute a release of the rent. In order to show that this transaction was a loan, and not, as it purports to be, a sale of a rent-charge, the plaintiff produced Scholfield himself as a witness, made (in the opinion of the court,) competent by certain releases, who testified that, being in want of money for various purposes, he went to Moore and told him that he wished to borrow or to raise $5,000 upon an annuity or ground-rent, upon his row of houses, or some of them. He was not certain that he used the term "borrow," but thinks his language was to "borrow or raise." That he did not wish to sell the houses, but wished to have the privilege of returning the money, and extinguishing the annuity after one year. That Moore proposed that the annuity should be irredeemable for ten years; but finally agreed that he should have the privilege of returning the money and extinguishing the annuity after five years. He thinks, but he is not certain, that the agreement was made in Moore's counting-room. That he afterwards met Moore at Mr. Taylor's office, and the deed was executed a few days after that meeting.

This testimony, with that of Alexander Moore, who stated that W. S. Moore was generally reputed to be a lender of money, and the fact admitted or proved, that Scholfield was a man of a speculative turn, and was in the habit of borrowing money, was the principal, if not the only evidence produced on the part of the plaintiff, to support the allegation that the money was lent. But, instead of proving a contract different from that stated in the written instrument, it seems to me strongly to corroborate it. Nothing was said between the parties respecting a loan. No previous debt existed. No debt was raised at the time. Scholfield, according to his own testimony, wanted to raise the money on an annuity, charged upon his houses. This was his first offer. Whether he used the term "borrow," or not, is quite uncertain, and is wholly immaterial, because it appears by his own testimony that he offered a ground-rent; and that Moore did not desire a return of the money; and that there was no promise nor engagement, either in honor or law, on the part of Scholfield, to return it. According to Scholfield's account of the matter, it seems to me to be as clear and valid a sale of a ground-rent, as it would have been if he had been previously the owner of a ground-rent and had sold it to Moore at ten years' purchase, in the same manner as ground-rents were selling almost daily in Alexandria. There was inadequacy of price. Ten years' purchase had been the uniform market price of ground rents in fee, for many years. The right of redemption was not, of itself, evidence of a loan. That point was decided by this court, and by the supreme court. It was a privilege reserved, by Scholfield, entirely for his own benefit. It imposed no obligation upon him to refund the money. It gave no right to Moore to demand it. The right to distrain, and to enter for the non-payment of the rent, and the covenant to insure the houses, were only intended to secure the rent, not a return of the money. Nor does the right of redemption, taken in connexion with the parol evidence, justify an inference that the transaction was a loan; for the parol testimony, as before observed, corroborates the written evidence. There is no repugnance, nor discrepancy, between them. There is no evidence of a pre-existing debt, nor of a newly-created debt. There was never a time when the $5,000 was a debt due by Scholfield to Moore. There was not, therefore, and could not be, any forbearance of the $5,000 by Moore, even as the contract is represented by Scholfield himself.

The fact, that Moore was reputed to be a

lender of money, cannot, of itself, justify an inference that the transaction was a loan; and even if such an inference could be drawn from such a reputation, it would be rebutted by the particular evidence of the transaction given by Scholfield himself, whose testimony seems to me to justify the strongest inference that no loan was intended; but that both parties understood it as the ordinary transaction of sale of a ground-rent. I thought, at the trial, and still think, that the testimony of Mr. Scholfield, instead of impeaching the bona fides of the written instrument, strongly confirms it. Viewing the subject in this light, it seems to me that the verdict is not merely against the weight of the evidence, but against the whole evidence. I deem it unnecessary, therefore, to recur to the strong and clear testimony of Mr. Taylor, who was the agent of Mr. Moore in the negotiation, and who established, to my satisfaction, the bona fides of the transaction, as the purchase of a ground-rent; and negatived all intention on the part of Moore, to lend the money, or to advance it with a view to repayment. I think the whole evidence shows that Moore did not wish to lend the money, but desired and intended to invest it in a permanent fund.

But it is said, that the terms were so hard upon Scholfield as to be equivalent to an obligation on his part to refund the $5,000; and that Moore relied upon the pressure of those terms for a return of his money. But the terms of the sale of the ground-rent were not so hard as they have been represented. They were the usual terms upon which ground-rents were then, and had for twenty years, been sold in Alexandria; and Scholfield might, at almost any time, have purchased equivalent grount-rents at the same price. It is evident, that the more beneficial the contract was to Moore the less desirous would he be that the money should be returned; and the less would be the probability that he would require any engagement on the part of Scholfield, either legal or honorary, to return it; or that he would reserve a right to demand it; and unless there was some sort of an obligation on the part of Scholfield to return it, and some sort of a right on the part of Moore to demand it, there could be no forbearance; nor could there be a contract for forbearance of that which could not be forborne. This indenture was not an assurance made for payment of the $5,000. Moore could not, in any form of action upon this instrument, recover that money. It was only an assurance for the rent, not for the purchase-money. It is not, therefore, such an assurance as is made void by the statute. It is objected, also, and it is true, that the evidence shows it to be an investment of money at ten per cent. per annum; but it does not follow that it was a loan. If a man should buy six per cent. corporation stock of Washington at seventy-five per cent. it would be an investment of money at eight per cent. per annum; yet it would not be usury. It is also objected, that when the court, without expressing an opinion upon the evidence, have said it was for the jury to decide upon it, and left it to the jury, saying it is their province to do so, a new trial ought not to be granted, however slight the evidence may be upon which the verdict was founded; and that to set it aside upon the very point upon which the court has said it is the peculiar province of the jury to decide, and upon the very point left by the court to them to decide, is the exercise of a power that cannot be sustained by authority.

But it should be remembered, that the court is bound to submit all facts in issue to the jury. The court could not do otherwise. If there be any evidence, however slight, tending to prove the fact, and the court is not called upon to tell the jury that there is no evidence of the fact, the matter must be left to the jury. The court is not permitted to tell the jury which scale preponderates. If the doctrine contended for be correct, the court could never grant a new trial on the ground that the verdict was against the weight of the evidence. The idea of the effect of leaving a matter to the jury, may have been taken from the practice of the English judges at nisi prius. There, when there is a manifest preponderance of evidence on one side, the judge tells the jury so, plainly; and almost directs their verdict. But when the scales are nearly balanced, or when there has been contradictory evidence, and the verdict depends upon the credibility of the witnesses, the judge gives no opinion upon the evidence; but says he leaves the fact to the jury; and in such case a new trial is generally refused. But here, where all facts are left to the jury without the judge's opinion, it would be strange indeed, if the court should not have the power of granting a new trial where they perceive that the verdict was manifestly against the weight of the evidence. The trial by jury in civil causes, could not long subsist without such a power somewhere, as was justly observed by Lord Mansfield in the case of Bright v. Eynon, before cited. Besides, in a general verdict, the jury undertake to decide the law as well as the facts of the case, and it cannot appear upon which ground they decided. If the facts do not coincide with their inclination, they can bend the law. If the jury understood the law of this case as the court understood it, then it seems to me that the verdict was against evidence. If they understood the evidence as the court understood it, then I think the verdict was against law.

When, therefore, I consider that the verdict takes away the property of the heirs of Moore, to whom it justly belongs if the contract was not usurious, and gives it to one who has no equitable claim to it, that it works a forfeiture and inflicts a penalty for a supposed offence not malum in se but merely malum prohibitum; that it goes to change the relative situation of the parties, and is peremptory as to the property; and when I consider the amount of property dependent upon the prin-

ciples involved in this case; and that the verdict was against the weight of the evidence, it seems to me clear that a new trial ought to be granted, on payment of the costs of the last trial.

THRUSTON, Circuit Judge, concurred in the result of this opinion.

LLOYD (STEVENS v.). See Cases Nos. 13,402 and 13,403.

Case No. 8,435.

LLOYD v. STROBRIDGE.

[16 N. B. R. 197;[1] 10 Chi. Leg. News, 1; 1 San Fran. Law J. 13.]

District Court, D. California. 1877.

BANKRUPTCY—PREFERENCE—KNOWLEDGE OF INSOLVENCY BY CREDITOR PREFERRED—PROMISE TO GIVE SECURITY.

1. Where the bankrupt at the time of giving a mortgage, in pursuance of a previous agreement, to secure a pre-existing debt, requests the creditor to permit him to secure other creditors in such instrument, such request is notice of the existence of such creditors and of the bankrupt's inability to pay them.

2. A creditor who has obtained a preference is chargeable with knowledge of facts, the existence of which he could have ascertained by the slightest effort.

3. It is not necessary that the creditor should know that the law prohibits him from taking the preference; it is enough if he knows such facts and circumstances as bring it within the prohibition of the law and make it a fraud in legal contemplation.

4. An oral promise, made at the time the debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent.

[Cited in Douglass v. Vogeler, 6 Fed. 56.]

[This was a suit by John Lloyd, assignee, against J. H. Strobridge.]

HOFFMAN, District Judge. It cannot, I think, be doubted that the bankrupt was in a condition of utter insolvency at the time he executed the mortgage which the bill seeks to set aside. The real questions in the case are: Did the defendant have reasonable cause to believe that the bankrupt was insolvent, and did he know that a fraud on the act was intended?

1. The notes given for the original advances by defendant had remained unpaid for about two years. No part of the interest had been paid, except six hundred dollars, which was credited on account of interest then due, and which was the price of some horses sold by the bankrupt to the defendant. The latter states that he supposed that the interest accruing on other indebtedness was kept down by the profits arising from the milk ranchos which the bankrupt was operating. But he was fully aware that the latter was unable to pay the interest on the notes held by himself. He was also aware that the bankrupt owed debts to a very considerable amount, which he was unable to pay; for he was urged by the bankrupt to accept a joint mortgage to himself and two other creditors, which he refused, and insisted on the fulfilment of the bankrupt's promise to give him a first mortgage on the distillery premises.

That the defendant had no accurate and detailed information as to the resources and liabilities of the bankrupt may be admitted. But the request of the bankrupt, to be permitted to secure other creditors in the instrument to be executed to the defendant, was notice to him of the existence of those creditors and of the bankrupt's inability to meet their demands. The circumstance that he demanded the mortgage which the bankrupt had promised to execute to him at any time when "he felt scared or dubious about his loan," and the fact that he asked for security, and not for a payment of a long over-due debt, indicate a knowledge on his part of his debtor's inability to satisfy his indebtedness.

The bankrupt seems to have entertained sanguine and, perhaps, visionary expectations of success in his distilling operations, under a patent in which he was interested, and hoped to extricate himself from his embarrassments by forming a stock company, and obtaining, by the sale of the stock, the means of paying his debts and carrying on his business.

But this project seems to have failed—at least so far as the defendant and his friends were concerned, and it was only on their definitive refusal to embark in the enterprise that the promised security was exacted. The slightest inquiry would have apprised the defendant of the bankrupt's real condition; for he seems to have been known, to almost all who had dealings with him, except the defendant, to be "hard up," or impecunious. The defendant had no right to wilfully close his eyes to facts, the existence of which he could have ascertained by the slightest effort.

I think that all the circumstances of the case, taken together, lead irresistibly to the conclusion that at the time this defendant received his mortgage, he not only had reasonable cause for believing, but was morally certain, that the debtor was insolvent.

If so, it follows that he knew, or is charged with the knowledge that he had no right to give a preference to any of his creditors, and that in doing so he committed a fraud upon the act [of 1867 (14 Stat. 517)]. Of course, it is not meant that either of these parties was guilty of any moral delinquency. They no doubt considered it fair and just that the debtor should redeem the promise made when he obtained his advances, to give security if required. But if the law forbade his fulfilment of that promise, and if in doing so he has given a preference, the transaction is in fraud of the act, and must be annulled.

[1] [Reprinted from 16 N. B. R. 197, by permission.]

It is not necessary that the creditor should know that the law prohibited him from accepting the preference, for, otherwise, ignorance of the laws could always be set up as a defence of the transaction. It is enough if the creditor knows such facts and circumstances as bring the act within the prohibition of the law, and make it a fraud in legal contemplation.

If I am right in these views, the security given in this case can only be sustained by virtue of the previous promise of the bankrupt to execute it. Whatever may be the law in England, it is settled in this country that a general promise, made at the time the debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent. Bank of Leavenworth v. Hunt, 11 Wall. [78 U. S.] 394; Graham v. Stark [Case No. 5,676]; Ex parte Ames [Id. 323]; In re Jackson Manuf'g Co. [Id. 7,153].

And this is for the obvious reason that such a promise is merely a promise to give a preference if a preference should be called for. In Ex parte Ames Mr. J. Lowell seems to have inclined to the opinion that "a specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and a change of circumstances." In Re Jackson Manuf'g Co. [supra], it is suggested that perhaps the security given on the faith of a contemporaneous oral promise to give a definite security might be sustained, on the ground that the money advanced was so far a part performance of the contract as to entitle the creditor to a specific performance.

But the decisions in England and America are nearly uniform, that payment of the purchase money is not of itself sufficient to take an oral promise to convey land out of the statute of fraud. Admission into possession, expenditure of money in meliorations of the estate, payment of increased rent, or the like, have always been required.

"I take it," observes Lord Redesdale, "that nothing is to be considered as part performance that does not put the party into a situation that it is fraud upon him unless the agreement is performed. For instance: if, upon a parol agreement, a man is admitted into possession, he is made a trespasser if there be no agreement. * * * Payment of money is not part performance, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for, in the case of Foxcraft v. Lyster [unreported], which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." Clinan v. Cooke, 1 Schoales & L. 41.

The learned editors of Leading Cases in Equity observe, in their note to Lester v. Foxcroft (1 Lead. Cas. Eq. pt. 2, p. 1054): "It is fully settled at the present time that payment of the purchase-money is not, of itself, sufficient to withdraw a parol agreement from the operation of the statute, because the money may be recovered back at law." And for this numerous authorities are cited.

If this be the law, it results that the oral promise made by the bankrupt, to give a mortgage on the distillery, created no equitable charge or lien upon it, and the contract was not one which a court of law or equity would enforce in invitum. The creditor, therefore, had, by reason of that promise, no legal or equitable right to insist upon a preference over other creditors. If he has chosen to postpone his demand that the promise should be executed until the bankrupt was in a situation where the law forbade him to fulfil it, he must accept the consequences of his own indulgence or neglect. Let a decree be entered accordingly.

Case No. 8,436.

LLOYD v. TURNER.

[5 Sawy. 463.] [1]

District Court, D. California. April 28, 1879.

BANKRUPTCY — CLAIM PURCHASED TO BE USED AS A SET-OFF.

A claim against the bankrupt purchased before the filing of the petition, but with full knowledge of the insolvency, and with intent to use the claim as a set-off, is available for that purpose to the purchaser in a case of voluntary bankruptcy.

[Cited in Mattocks v. Lovering, 3 Fed. 214.]

[This was a suit by John Lloyd, assignee, against Polly Turner].

Du Bruts & Dickinson, for plaintiff.
Geo. W. Tyler, for defendant.

HOFFMAN, District Judge. The principal question in this case is whether a claim against the bankrupt, purchased before the filing of the petition, but with full notice of the insolvent condition of the bankrupt, and with intent to use the claim as a set-off, is available for that purpose to the purchaser. This question was carefully considered by this court in the case of City Bank of Savings, Loan & Discount [Case No. 2,742], and resolved in the affirmative. An opposite conclusion was reached in Hitchcock v. Rollo [Id. 6,535]. The question underwent an elaborate re-examination in Hovey v. Home Ins. Co. [Id. 6,743], in which the learned judge arrived at the same conclusion as that reached by this court. The subject seems to have attracted the attention of congress, and in 1874 [18 Stat. 178] an amendment was adopted intended to remedy the evils suggested by the decisions in The City Bank

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

of Savings, Loan & Discount and Hovey v. Home Ins. Co., Blum. Bankr. p. 283. That amendment provides that in cases of compulsory bankruptcy no offset shall be allowed of a claim purchased or transferred after the act of bankruptcy in respect of which the adjudication shall be made, and with a view of making such set-off. In voluntary cases the original language of the act has been suffered to stand, and the set-off is prohibited only when purchased or transferred after the filing of the petition.

I recognize the force of the argument made by the learned judge in Hitchcock v. Rollo [supra], but I cannot admit it to be sufficient to countervail the suggestions contained in In re City Bank of Savings, Loan & Discount [supra], and in the elaborate opinion delivered in Hovey v. Howe Ins. Co. [supra]. The latter derives much support from the case of Sawyer v. Hoag, 17 Wall. [84 U. S.] 610. Independently, however, of these authorities, I must consider the amendment above cited as an implied legislative adoption of the construction given to the act in the two cases I have mentioned. The amendment, Mr. Blumenstiel observes, was adopted in view of those decisions, and the careful restriction of its terms to compulsory cases and to cases where the offset has been acquired after the commission of the very act of bankruptcy on which the adjudication is based, seems to indicate quite clearly that congress intended to leave the law with regard to voluntary cases to be administered according to the construction given to it in the cases referred to. The objection to the allowance of the set-off must, therefore, be disallowed.

It is also objected that the claim is for unliquidated damages which have not been assessed under the direction of the court. But the debt is a provable debt, and therefore available as a set-off. If the damages have not been assessed, an application to the court for the purpose can be made, although I can see no objection to taking that proceeding in this suit—to which the assignee is a party, and in which he will have ample opportunity to reduce the claim for damages to its just proportions.

LLOYD (UNITED STATES v.). See Cases Nos. 15,614–15,619.

Case No. 8,437.

LLOYD v. YOST.

[Nowhere reported; opinion not now accessible.]

LOBDELL (BURLEIGH ROCK DRILL Co. v.). See Case No. 2,166.

LOCH GOIL, The (CURRY v.). See Case No. 8,495.

Case No. 8,438.

LOCK v. PENNSYLVANIA R. CO. et al.

[1 N. Y. Law J. 227.]

Circuit Court, D. New Jersey. July 23, 1878.

PRACTICE.

1. A complainant cannot acquiesce in the taking of testimony, and afterwards object to it for want of notice.

2. Semble. Where a defendant gives notice of a prior use of the invention by a specified person, he is not obliged to call the person indicated, but may prove the fact by some one else.

This was an application to the court by the complainant to strike from the record the testimony of certain witnesses, upon the grounds, substantially, that no proper foundation has been laid in the answer for their examination, under the provisions of section 4920 of the Revised Statutes of the United States. That section provides, amongst other things, that where the answer sets up the previous invention, knowledge or use of the thing patented, the defendants shall state the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used. The defendants in their answer allege that the complainant was not the original and first inventor of the thing claimed as new in his letters patent; that, anterior to his supposed invention, the same was used in various places, and was known to and used by divers persons in the United States, and, among others, certain parties named.

Before McKENNAN, Circuit Judge, and NIXON, District Judge.

NIXON, District Judge (after reviewing the facts). 1. The motion comes too late as to Dripps & Wood. They were examined without objection, and it does not appear from the record that the complainant raised any question as to their competency until after the close of their examination. It is well settled, as a matter of practice, that complainant cannot acquiesce in the taking of testimony under such circumstances, and afterwards object to it for want of notice. The law does not allow such experiments to be made. See the opinion of this court in Roemer v. Simons [Case No. 11,997], and the subsequent affirmation of the case by the supreme court in 95 U. S. 214.

2. Nor does the objection apply to the evidence of Buzby. His name is given in the answer, and he is described as a resident of Bordentown, N. J. I think that this is sufficiently definite where the witness resides in a small place like Bordentown. Slight inquiry would find him if he was there. A different rule would probably have been applied to a large city like Philadelphia, if the complainant had not waived the objection by allowing the examination of Mr. Dripps.

3. I have had more difficulty in allowing to stand the testimony of the other witnesses, whose names were not disclosed in the an-

swer. The defendants do not claim that it should be received as evidence of their own knowledge, or prior use of the invention, but simply as proof of the alleged prior use by the Camden and Amboy Railroad. With this restriction of its scope, it is perhaps competent. The weight of authority seems to be that where a defendant gives notice of a prior use of the invention, by a specified person, he is not obliged to call the person indicated, but may prove the fact by some one else.

The motion to strike out is refused.

Case No. 8,439.

In re LOCKE.

[1 Lowell, 293; [1] 2 N. B. R. 382 (Quarto, 123).]

District Court, D. Massachusetts. Dec., 1868.

BANKRUPTCY — ILLEGAL PREFERENCE — NOT CONTEMPLATING BANKRUPTCY—DISCHARGE—TRADER NO LONGER IN BUSINESS.

1. It seems, that under the bankrupt act [of 1867 (14 Stat. 517)] an insolvent debtor may make an illegal preference though he does not contemplate bankruptcy. The question is of intent to give one creditor an advantage over the others. This is a question of fact which is not conclusively decided by showing a known insolvency, though it may be inferred from such insolvency in the absence of controlling evidence.

[Cited in Re Silverman, Case No. 12,855; Baldwin v. Wilder, Id. 806; Re Seeley, Id. 12,628.]

2. A fraudulent preference which will prevent a discharge of the bankrupt, under section 29, is defined in that section and in section 35, without reference to section 39.

[Cited in Re Warner, Case No. 17,177; Re Perry, Id. 10,999; Re Pierson, Id. 11,153; Re Carrier, 47 Fed. 444.]

3. One who had ceased to be a trader and had disposed of all his property many years before the bankrupt act was passed, but had not settled all his trade debts, and was living on his salary as a clerk, paid his rent and some other necessary expenses monthly, without intending to become bankrupt; *held*, that such payments were not fraudulent preferences within section 29, of which his trade creditors could take advantage in opposing his discharge, though made within four months before bankruptcy, and when the debtor knew he was insolvent.

[Cited in Re Burgess, Case No. 2,153; Re Wolfskill, Id. 17,930; Re Boynton, 10 Fed. 279.]

[The bankrupt [Worthington S. Locke,] has been fully examined, and his examination, which is not impeached or contradicted, tends to show that he was extensively engaged in trade, in several cities of the United States, down to the year 1856, when his business was concentrated at Portland, in Maine; and that in December, 1857, he failed. He settled with many of his creditors on such terms as he could offer and they could accept; but with some of them he made no settlement, for reasons not disclosed nor pertinent here. Since his failure he has from time to time earned money by service in the army and as a clerk, and has supported his family and made occasional payments on his old debts. No imputation is made upon his fairness, or that he has accumulated any property that he now holds concealed, or that he has committed any fraud in fact. Two of his creditors have proved their debts, and they oppose his discharge on the ground that he has made illegal preferences. One of these illegal preferences turns out to have been made before the passage of the bankrupt act; the other two are payments made from time to time, during four months before the filing of the petition, for rent, and for groceries furnished the bankrupt's family. The petitioner admits that he was insolvent when he made these payments and for ten years before, and knew it; but testifies, if the evidence is admissible, that he had no intention to prefer the persons to whom he made the payments, nor any contemplation of bankruptcy, when he made them. The case has been fully argued. On the part of the objecting creditors it is insisted that when a person subject to the bankrupt law is insolvent, and knows it, and pays one creditor in full, he necessarily prefers that creditor, and must be conclusively presumed to have intended the necessary consequences of his act, and that no evidence of actual intent can be admitted to control this inference. On the other side the contention is that the question of preference is one of fact, and is open to proof, like any other fact, including, of course, inferences from the acts and situation of the debtor.] [2]

J. D. Ball, for creditors.

J. S. Abbott, for bankrupt.

LOWELL, District Judge (after stating the facts as above). In its origin the doctrine of preference is a creation of the courts. The word is not found in the English statutes; but the courts soon discovered that many acts, legitimate at common law, would tend to defeat the equal and proper operation of the bankrupt laws, and declared such acts to be frauds on the statute. Thus the conveyance of the whole of a trader's property with a view to the payment or security of past debts, has always been held a fraud on the act, although there may have been no wrong intended. I had occasion to examine these decisions on a former occasion, and to show that they rest in principle on the doctrine of preference. The English courts hold that such a conveyance is conclusive evidence of insolvency, and ipso facto a fraud on the law. But they have taken an entirely different view of assignments of only a part of the property, and especially of payments made by a trader in the course of his business, or on suit brought, or even on demand made by the creditor; and the rule in those cases is, that a payment to be an act of bankruptcy must be voluntary, that is, without pressure or demand, and in

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

[2] [From 2 N. B. R. 382 (Quarto, 123).]

contemplation of bankruptcy; for they will not admit any inference of an intent to give an advantage to a creditor who is merely pursuing his own rights; nor that a debtor who really hopes to keep up his business, and goes on paying in that hope, can fairly be said to intend to prefer one, when he really intends to pay all. It is a question for the jury in each case whether the payment was made without a demand, and with the prohibited intent (Fidgeon v. Sharpe, 5 Taunt. 541; Morgan v. Brundrett, 5 Barn. & Adol. 289); though the court or jury may infer the intent from the insolvency of the trader (Ex parte Simpson, De Gex, 9).

Under the bankrupt act of 1841, the preferences declared void by the second section were such as were made by one who at the time contemplated becoming a bankrupt under the act. Buckingham v. McLean, 13 How. [54 U. S.] 150.

In our existing bankrupt law preferences are spoken of in three different sections, viz., 29, 35, and 39. The first-named section treats of the debtor's discharge, and what fraud or misconduct shall prevent or avoid it; the second, of frauds which the assignee may avoid; and the third, of acts of bankruptcy for which a warrant may issue on the petition of creditors.

It is argued that under section 39 neither contemplation of becoming a bankrupt under the act nor a voluntary payment need be shown to create a preference which shall be an act of bankruptcy, and that section 29 avoids a discharge for every thing which by section 39 is an act of bankruptcy. On the first point, I agree with the argument. The later statutes of Massachusetts, which our law appears to have followed very closely in this particular, have been construed to mean that the payment or conveyance need not be made in contemplation of becoming an insolvent under the act. Ex parte Jordan, 9 Metc. [Mass.] 292; Holbrook v. Jackson, 7 Cush. 136; Williams v. Coggeshall, 8 Cush. 377. And such is the true construction of the bankrupt act; for without it, the reference to insolvency as well as bankruptcy in sections thirty-five and thirty-nine would be without meaning. If, then, a debtor is insolvent, and knows himself to be so, and pays one creditor in full with intent to give him an advantage over the body of creditors, that is an act of bankruptcy. Nor does pressure by the creditor relieve the act of its character as a preference. The statute is silent on this; and in point of fact, such a proceeding has a no less injurious effect on the other creditors that it may have been solicited by the particular creditor; and so I have often ruled. See Denny v. Dana, 2 Cush. 160. But on the other hand, I am not prepared to say that the mere payment of a debt by a debtor who is insolvent and knows it, is always and necessarily an act of bankruptcy. Upon this point I give no opinion. Such a rule is open to the same objection with the one just considered, namely, that it substitutes an inflexible rule of law for an inference which is properly one of fact. That every person must be presumed to contemplate the necessary consequences of his act is true; but when we come to consequences that are only more or less probable, it is fit that the jury should say whether they were in the mind of the party or not. No doubt in the absence of controlling evidence they may decide by the act itself; but the intent to prefer must include, I think, the intent, or at least the fear, of stopping payment, which idea is not necessarily included in insolvency. Besides I am much inclined to think that section 29 does not, in this respect, adopt the provisions of section 39. The latter section is remedial, and should be construed broadly in favor of creditors; because its scope and purpose are to oblige insolvent traders to take advantage of the act, and thus to ensure an equal distribution of their estate under its carefully framed provisions. Accordingly, we find that many acts, which are innocent in themselves, are made grounds for a petition in invitum. Such are, lying in prison for seven days, allowing commercial paper to be dishonored, &c. All of these may, without impropriety, be called frauds on the bankrupt act. But section twenty-nine is intended for the benefit of honest and careful traders. It sternly prohibits both fraud and negligence. Not keeping proper books of account, wasting money by gaming, not keeping the estate for the assignee after the petition has been filed, and many other acts of omission and commission are grounds for withholding the certificate, though several of them are not acts of bankruptcy. But in dealing with preferences its language is peculiar. It first enacts that the discharge shall be refused if the debtor has given any fraudulent preference contrary to the provisions of the act; it then, in the same sentence defines a preference thus: "Or, if he has, in contemplation of becoming a bankrupt, made any pledge, payment, &c., for the purpose of preferring any creditor," &c. And finally, if he has been guilty of any fraud whatever contrary to the true intent of this act. Considering the intent of this section to repress fraud and negligence, and the full description of the various acts which may be relied on in bar of the certificate, I am not prepared to say that the general words refer to the merely technical frauds created by the thirty-ninth section. They may, no doubt, include all frauds in fact, whether specifically defined in any part of the statute or not, but hardly mere acts of bankruptcy as such.

I am further of opinion that the payments which this debtor made are not within any true definition of a fraudulent preference. It is very rarely that the payment of rent,[3] or

[3] I have ruled this in several cases.—Judge Lowell.

of a butcher's or grocer's bill, in the ordinary course of dealing, can be a preference, because the consideration is a continuing one. If the tenant does not pay his rent, he is ejected, and the main consideration is the forbearance; and so of the other like bills, though in a less degree. We have seen that a debtor cannot be said to intend a preference, unless he expects or fears either to stop payment or to become bankrupt. The evidence shows that this defendant did not contemplate bankruptcy. He had, indeed, years before stopped payment, and ceased to be a trader, and had disposed of his trade capital by what may or may not have been preference by the law of his domicile. But he had accumulated no new estate, and the payments which are now objected to were for his current expenses, and made out of his current earnings, though they were made monthly and not day by day. If these were technical preferences under section 39, which I doubt in the case of one not a trader, and not paying one trade creditor before another, yet I cannot believe they were fraudulent preferences within section 29, which should bar his discharge. Discharge granted.

LOCKE (BARRON v.). See Case No. 1,054.

Case No. 8,440.

LOCKE v. CANNON.

[2 Cranch, C. C. 186.] [1]

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

BAIL IN CIVIL CASE — RIGHT TO APPEAR WITHOUT BAIL—PLEA TO JURISDICTION.

Upon a common-law attachment under the Virginia statute of 26th December, 1792 (section 6), the court may, in its discretion, suffer the principal defendant to appear without bail, and without discharging the attached effects, at the first term after the return of the attachment, to plead to the jurisdiction.

This was a common-law attachment against an absconding debtor, issued by a justice of the peace, under the act of Virginia of 26th of December, 1792 (page 116, sections 6–8). A vessel belonging to the defendant and one Primus Woodland was attached, and judgment entered at this term, which was the first term after the attachment.

Mr. Mason, for defendant, offered to appear without bail, for the purpose of pleading that the defendant was never an inhabitant of the District of Columbia, and therefore could not be an absconding debtor, and the justice had no jurisdiction to issue the attachment.

Mr. Swann, for plaintiff, contended that the defendant could not appear without bail.

Mr. Mason, in reply. If bail be given, the defendant can only plead to the debt; not to the jurisdiction.

THE COURT (MORSELL, Circuit Judge, absent) set aside the judgment, and permitted Mr. Mason to appear for defendant without bail, and without discharging the attached effects; and to plead to the jurisdiction as suggested.

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

LOCKE v. The PENELOPE. See Case No. 16,946.

Case No. 8,441.

LOCKE v. POSTMASTER GENERAL.

[3 Mason, 446.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1824.

OFFICIAL BOND—SURETY—RELEASE—POSTMASTER.

The neglect of the postmaster-general to sue for balances due by postmasters within the time prescribed by law, although he thereby is rendered personally chargeable with such balances, is not a discharge of the postmasters on their sureties upon their official bonds. Nor is an order from the postoffice department, directing a postmaster to retain the balances due until drawn for by the general postoffice.

[Cited in United States v. De Visser, 10 Fed. 648; Hagood v. Blythe, 37 Fed. 250.]

[Cited in Read v. Cutts, 7 Me. 193; Mayor, etc., of Newark v. Stout (N. J. Sup.) 18 Atl. 948; Watertown Fire Ins. Co. v. Simmons, 131 Mass. 86.]

Debt, upon an official bond given on the 23d of December, 1811, by John Walker, Jr. (who was appointed postmaster at Burlington, Massachusetts,) and by one John Walker and the defendant, Joseph Locke, as his sureties, to the postmaster-general, conditioned for the faithful performance of the duties of his office by Walker, as postmaster at Burlington. Plea of general performance. Replication, the neglect of Walker to pay over the sum of $181.08, for which he was indebted as postmaster. Rejoinder, that the postmaster-general, on the 14th of December, 1812, gave a written order to Walker, to detain the balances due until drawn for by the general postoffice, which order remained uncountermanded until the dismissal of Walker from office, and that thereby Walker was prevented from paying over the balances, which subsequently became due every quarter; and that the postmaster-general neglected to sue for the same balances with six months after the expiration of each quarter. To this rejoinder there was a demurrer, and joinder in demurrer.

Mr. Shaw, for defendant, contended, 1. That the giving of time to the principal by the written order of 1812 was a discharge of the surety; 2. That the omission of the postmaster-general to sue for the subsequent balances within six months after they became due, according to the 29th section of the postoffice act of 1810, c. 54 [2 Story, Laws,

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

1165; 2 Stat. 602, c. 37], was such laches as worked an extinguishment of the right of action. He further contended, that the bond was not to be considered as a public bond due to the government, but a private bond to the postmaster-general, and so like a bond given to any other individual. And he cited Ludlow v. Simond, 2 Caines, Cas. 1; People v. Jansen, 7 Johns. 332; Samuell v. Howarth, 3 Mer. 272; Hunt v. U. S. [Case No. 6,900]; Holt, N. P. 84; 2 Brown, Ch. 581; 4 Ves. 833; Bean v. Parker, 17 Mass. 591; Cro. Eliz. 396.

Mr. Blake, for the United States, argued e contra on all the points, and cited U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 720, 735; Davey v. Prendergrass, 5 Barn. & Ald. 187.

STORY, Circuit Justice. The pleadings in this case are very loose and inartificial, and must be pronounced insufficient for a judgment, if objected to. But the parties have expressly waved all exceptions on this head, and desire, that the case should be decided upon its merits. The case, then, which is meant to be presented for the consideration of the court, is as follows: The action is brought upon a bond given by John Walker, Jr. and the defendant as his surety, for the official good conduct of Walker as postmaster at Burlington. The condition is in substance (after reciting the appointment), that Walker "shall well and faithfully, once in three months, and oftener if thereto required, render accounts of his receipts and expenditures, as postmaster, to the general postoffice, in the manner and form prescribed by the postmaster-general in his several instructions to postmasters, and shall pay all monies, that shall come to his hands for the postages of whatever is by law chargeable with postage, to the postmaster-general of the United States for the time being, deducting only commission, &c., and shall faithfully do and perform, as agent for the general postoffice, all such acts and things, as may be required of him by the postmaster-general, and account for all moneys, bills, bonds, notes, receipts, and other vouchers, which he, as agent as aforesaid, shall receive for the use and benefit of the said general postoffice." By the replication it appears, that a balance of $181.08 is due to the general postoffice by Walker; and this fact is not denied. But the rejoinder states as a defence, first, a written order of the postmaster-general, of the 14th of December, 1812, requesting Walker "to retain in his hands the balances arising on his postoffice accounts until drawn for" from the general postoffice, which order was in full force until Walker's dismissal from office, whereby he was prevented from paying over the quarterly balances until his dismissal; and, secondly, the omission of the postmaster-general, notwithstanding these balances were unpaid, to sue for the same within the six months prescribed by law.

I have said that the defendant, Locke, is a surety; but he is not so described in the bond. It is, however, an irresistible inference from the recital and tenor of the condition, since he is bound, not for his own acts, but for those of a third person. The questions then raised at the bar are, first, whether Locke, as a surety, is discharged by the order of 1812, directing Walker to retain the balances until drawn for; secondly, whether the omission of the postmaster-general to sue for the same balances within the six months prescribed by law, is a bar to the action.

At the argument it was suggested, that the present bond was not a public, but a private obligation, given for the indemnity of the postmaster-general, and that, therefore, it ought to have the same construction as any other contract between private persons, and to be affected by the common doctrine of laches. It appears to me, however, that the postmaster-general is a public officer, superintending a great department of the government, and all the postmasters appointed under him are public officers of the government. Their appointment is regulated, and their duties are prescribed by general laws, and their official misdemeanours are visited with heavy punishments. There is not a single clause of the postoffice acts, which does not contemplate them as public agents, and not as mere private servants of the postmaster-general. It is true, that there is no provision in the existing laws, which requires them to give, or the postmaster-general to demand, official bonds for their good conduct. But the practice is believed to be coeval with the earliest institution of the office, and a clause in the 29th section of the postoffice act of 1810 (chapter 54) manifestly contemplates all such obligations as public contracts for the sole use and benefit of the government. That clause provides, "that all suits, which shall be hereafter commenced for the recovery of debts or balances due to the general postoffice, whether they appear by bond or obligations in the name of the existing or any preceding postmaster-general, or otherwise, shall be instituted in the name of 'The Postmaster-General of the United States.'" There cannot be a doubt, that all the monies recovered on these official bonds belong to the government, and are not the private property of the incumbent in the office of postmaster-general at the time, when they are taken. In truth, the whole structure of the laws proceeds upon the notion, that the postmaster-general is but an agent for the United States, as to all official acts and contracts; and the very fact, that the suit may be in his official name, without any personal designation, demonstrates the sense of the legislature in the fullest manner. Such, as far as I know, has been the uniform and unquestioned construction of the laws on this subject. I consider it, therefore, clear, that this is a public bond for the benefit of the United States, and

taken ex officio upon this known interpretation of its obligatory force. The case is then to be considered precisely in the same manner, as if the government were directly a party to the suit, instead of their official agent.

That there has been a breach of the condition of the present bond cannot well admit of dispute. The terms of the condition are general, that Walker "shall pay all moneys, that shall come to his hands for the postages, &c. to the postmaster-general of the United States for the time being," and the pleadings admit an unpaid balance, for the recovery of which the suit is brought. Why should not the plaintiff have judgment for this amount?

It is said, that the order of 1813 is a contract giving time for payment to the debtor, injurious to the surety, and against the express injunctions of law. The postoffice act of 1810, in the first section, directs, that the postmaster-general "shall obtain from the postmasters their accounts and vouchers for their receipts and expenditures once in three months or oftener, with the balances thereon arising in favour of the general postoffice." Comparing this with the provisions of the 29th section, on which I shall hereafter have occasion more particularly to comment, the fair inference certainly is, that the postmaster-general is to require quarterly payments of all balances due to his department, and the omission to do it is a plain departure from duty. But these sections constitute no part of the obligation of the present bond. They are public regulations, directory to the postmaster-general; for the fulfilment of which he may be justly held responsible; but they form no condition in the contract with the postmasters or their sureties. The latter, in entering into any bond, may rely on the provisions of the law, and the fidelity of the officers of the government in the regular discharge of their duties; but unless there is a special contract for such fidelity, forming a part of their bond, as a condition of its obligation, they are presumed to confide in their own vigilance, and the interest of the government in enforcing a punctual accounting by the postmasters.

But is the order of 1813, in any just sense, a contract giving time to the postmaster? It merely authorizes him to retain the balances until drawn for. It does not stipulate, that he shall retain them for any particular period. They may be drawn for the next hour, the next day, or the next week. The postmaster has no right granted to him to retain them a moment, except as a mere depositary. The reason for such an order must be obvious. In the numerous small postoffices scattered through the country, the quarterly balances must always be very small, and often in such unequal sums for transmission by the mail to the general postoffice, that the inconvenience, as well as the risk, of transmission would be very great to the parties. An order, that should authorize the postmasters to retain such small balances during the pleasure of the department, so far from being injurious to the sureties, might sometimes save them from serious losses. At all events, where there is no contract for a specific delay, but a mere discretionary forbearance to enforce the law, the case does not, in the most favourable view, come up to the doctrine of those adjudications, which have been cited at the bar.

What is that doctrine? Not that a mere delay to require a performance of the contract, at the time stipulated is a discharge of the surety; but that a contract, postponing payment until a future day, and creating obligations inconsistent with the original contract, is a discharge of the surety. In Skip v. Huey, 3 Atk. 91, the obligee cancelled the bond, and took notes payable at future days in payment, and afterwards, these being unpaid, brought his suit to set up the bond in equity against the surety. Lord Hardwicke very properly refused the application; and the remedy at law was gone against the surety. In Nisbet v. Smith, 2 Brown, Ch. 579, the obligee, without communication with the surety, took a warrant of attorney to confess judgment from the principal with an agreement, that no execution should issue for the debt for three years; and Lord Thurlow held the surety discharged. In Rees v. Berrington, 2 Ves. Jr. 540, the obligee took notes for the debt from the principal payable at a future day. Lord Loughborough said: "The form of the security forces these cases into equity; but take it out of that form, and suppose in this instance, that the plaintiff was surety by a proper bond at law, as surety, what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security." And he accordingly held the security discharged. Law v. East India Co., 4 Ves. 824, recognizes the same principles. Lord Eldon, in Boultbee v. Stubbs, 18 Ves. 20, acted upon them, and in Samuell v. Howarth, 3 Mer. 272, he assumed them to be undeniable. It is observable, however, that these were all cases in equity, where there was an express contract for delay, and not a mere forbearance during pleasure, after the debt was due. The ground perpetually alluded to by the court is, that the obligee had disabled himself from calling in the intermediate time upon the principal, and thus had changed the legal predicament of the surety. But in none of these cases was any doctrine broached, that if the obligee had said to the principal, "Retain the money until I call for it, or draw for it," that would have been a discharge of the surety. What difference is there in point of law between an express declaration to retain the money, until called for, and an implication to the same effect, deducible from the forbearance to demand payment? I adhere to the doctrine, which was stated in Hunt v. U. S. [Case No. 6,900], and which I am glad to find supported by the authority of Mr. Chancellor Kent (King v. Baldwin, 2 Johns. Ch. 554. See, also, Ludlow v. Simond, 2

Caines, Cas. 1), that mere delay without fraud, or a contract for a specific forbearance, is not a discharge of the surety. It is not a discharge even in equity; a fortiori, it is not at law.

And this leads me to say a few words as to the proposition asserted at the bar, that if the defence were now good in equity, it is equally good in law. I exceedingly doubt that. Something to the effect fell from Lord Loughborough in Rees v. Berrington; and Lord Eldon, at a late period, seems to have understood, that the courts of law, contrary to their former practice, now held, that the principles, which will discharge a surety in equity, will operate to discharge him also at law. Samuell v. Howarth, 3 Mer. 272, 277. But it does not appear to me, that any such general and broad doctrine is sustained by the authorities. In respect to bills of exchange, guaranties, and other commercial contracts, not under seal, courts of law have been long in the habit of treating them as subject to a very enlarged equity, and affected by defences, which, in former times, would have driven the parties into a court of chancery. But sealed contracts have not as yet been adjudged to be liable to the same consideration. There are stubborn rules of the old law, which prohibit it. In Trent Navigation Co. v. Harley, 10 East, 34, Lord Ellenborough denied, that mere laches in the obligee would discharge a surety at law, however it might be in equity. In Moore v. Bowmaker, 6 Taunt. 379, 2 Marsh. C. P. 81, the court of common pleas held, that the giving time to the plaintiff in replevin was no discharge of the surety of the replevin bond. In the very late case of Davey v. Prendergrass, 5 Barn. & Ald. 187, the question came directly before the court of king's bench. It was debt on a bond conditioned for the payment of money, and a special plea was put in, that the creditor had given time to the principal, and taken a warrant of attorney for payment of the debt by instalments. Upon demurrer, the court held the plea bad, upon the ground, that the obligation, created by a sealed instrument, could not be discharged except by an instrument of equal validity, and that therefore the parole agreement for time was not a discharge of the bond, either against principal or surety. The proper remedy was in equity. It appears to me, that this decision is well founded in law, and proceeds upon principles that cannot be shaken without danger of confounding the distinct jurisdiction and duties of courts of law and of equity. The case of Orme v. Young, Holt, N. P. 84, before Lord Chief Justice Gibbs, although earlier, does not in the slightest degree trench upon this doctrine. The only question in that case, which could properly come before the court, sitting at nisi prius, was, whether the issue was proved; and there is not a syllable which dropped from the judge that establishes the validity of such a plea at law. But I refer to the language of Lord Chief Justice Gibbs on that occasion, showing his understanding of the rule in equity, as directly applicable to the defence now under consideration. He says: "If the creditor have given time to his debtor, the surety cannot sue him (i. e. the creditor in equity;) but the fact to be tried is, was time of payment given without the privity of the sureties? What is forbearance and giving time? It is an engagement, which ties the hands of the creditor. It is not negatively refraining, not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief; because the principal having tied his own hands, the surety cannot release them." Now apply this test to the present case. Where is the contract disabling the postmaster-general for a moment from suing the debtor? Where is the incapacity of the surety to come into equity, and demand to sue the debtor in the name of the postmaster-general? I am fully aware that in the case of People v. Jansen, 7 Johns. 332, the supreme court of New York held, that the defence was good at law; but with the utmost deference for that learned court, I have never been able to reconcile that case to my own judgment, and its authority has been expressly denied in the recent case of U. S. v. Kirkpatrick, 9 Wheat. [22 U. S.] 760, by the supreme court of the United States.

There is another point of view, in which this part of the defence may be presented, which ought not to be forgotten. It is, that as the postoffice act has expressly required quarterly payments to be made by all postmasters, any contract by the postmaster-general, which impugns this provision, is utterly void from its illegality. So that if such a contract had been made, it could not have been available to the party; and the right of action on the bond would not have been for a moment suspended. It requires no argument to show, that a void contract for delay is, in respect to the public, precisely the same in effect, as if no contract had been made. It appears to me, therefore, that the first ground of defence, considered either at law or in equity, is unsustainable and must be abandoned.

The other point, whether the neglect of the postmaster-general to sue the debtor within the period prescribed by law is a discharge of the surety, may be disposed of in a few words. The act of 1810 (section 29) provides: "That if any postmaster, or other person authorized to receive the postage of letters and packets shall neglect or refuse to render his accounts and pay over to the postmaster-general the balance by him due at the end of every three months, it shall be the duty of the postmaster-general to cause a suit to be commenced against the person or persons so neglecting or refusing; and if the postmaster-general shall not cause such suit to be commenced within six months from the end of every such three months, the balances due from every such delinquent shall be charged

to, and recoverable from, the postmaster-general." The clear inference from this provision is, that until such default the postmaster-general shall not be chargeable with such balances; but they are to be deemed debts due to the public. His default does not change the nature of the debt, but gives a right to the government to charge him with a personal responsibility by way of penalty. But his personal responsibility does not exonerate the principal or his sureties. If a recovery is had against them, it is for the benefit of the government. Suppose the postmaster-general were insolvent, would the government be confined to a remedy against him? The act does not intend to discharge the principal or his sureties, either as against the government, or the postmaster-general, but merely superinduces a collateral personal liability by his neglect of duty. What, then, is the point on which the defence rests? It is, that the neglect of a public officer to require payment of a public debtor within the time prescribed by law discharges the surety. No further answer need be given to this, than that the doctrine has been expressly overruled by the supreme court, in U. S. v. Kirkpatrick [supra]. In that case the comptroller of the treasury was required by law to sue for all quarterly balances due and unpaid by the collectors of internal taxes; and the court held, that the neglect to sue was no discharge of the sureties.

Without going more at large into the subject, my opinion is, that the defence is bad in substance, and if pleaded in the most regular manner, it could not avail the present defendant. The judgment must, therefore, be given in favour of the United States. Judgment accordingly.

Case No. 8,442.

LOCKE v. UNITED STATES.

[2 Cliff. 574.] [1]

Circuit Court, D. Massachusetts. Sept. Term, 1866.

NEW TRIAL—AMBIGUITY OF CHARGE—NO EFFORT TO EXPLAIN — APPEAL — REFUSAL TO GIVE INSTRUCTION — BILL OF EXCEPTIONS—WHEN EXCEPTIONS TAKEN—UNLAWFUL IMPORTATIONS—INVOICES.

1. Courts are not inclined to grant a new trial merely on account of ambiguity in the charge to the jury, when it appears that the complaining party made no effort at the trial to have the point explained.

[Cited in Flanders v. Tweed, 16 Wall. (83 U. S.) 516; Congress & Empire Spring Co. v. Edgar, 99 U. S. 659.]

2. When goods are purchased in a foreign country, for importation into the United States, and in quantity sufficient to load several vessels, under the act of March 3, 1863 (12 Stat. 737), an invoice executed in triplicate must be produced and exhibited to the American consul at or before each shipment, and where the importation is by rail, the same rule applies to each train of one or more cars laden with the dutiable goods.

3. Exceptions to the charge of the presiding judge, on the ground that the language employed was ambiguous, cannot be sustained when the complaining party had made no request at the time for a clearer statement of the views of the court, when the ambiguity was not of a character calculated to mislead the jury, and was understood by the appellate court.

[Cited in Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 299.]

[Cited in Sheff v. Huntington, 16 W. Va. 320.]

4. Importers cannot commingle lawful and unlawful importations in the same invoice, so that they cannot be distinguished, and be allowed to save any portion of the goods from forfeiture.

5. Refusal by the court to grant instructions as prayed is not error, unless the instructions requested were themselves correct, and needful to enable the jury rightly to perform their duty.

6. The clerk's minutes contained the statement that the claimant excepted to certain rulings of the court, and that the bill of exceptions was sealed and placed on file, but in fact none such was ever allowed; but the claimant insisted that the rulings were open to comment by him, because apparent on the record. *Held*, that the statement in the minutes was of no avail to the claimant in the appellate court, unless the exception was seasonably reduced to writing and embodied in a regular bill of exceptions.

7. The concluding paragraph of exceptions was, that "the court would set their seal to the bill of exceptions containing the several matters proved and given in evidence, and the rulings, rejections, and directions of the judge." No particular ruling, direction, or rejection was specified. *Held*, that mere objections to evidence are of no avail in an appellate court, unless it appears that the party excepted at the time. Exceptions must be taken at the time; but if seasonably taken and reserved, they may be drawn out afterward.

[Cited in Ortiz v. State (Fla.) 11 South. 614.]

8. It cannot avail the excepting party in the appellate court where the record stated that he excepted to a certain deposition, leaving it to be inferred that he objected to its admissibility, but stating no ground of objection, and the caption of the deposition not being in the case.

9. Where special objections are taken to certain parts of the testimony of a deponent, but none to the ruling of the court, they were overruled.

10. Exceptions to the admissibility of certain evidence to contradict a witness, when no foundation for the contradiction had been laid, are of no avail in the appellate court, the record not stating that the complaining party excepted at the time to the ruling of the court below in admitting the testimony.

This was a libel of information, and the case came before the court on a writ of error to the district court of the United States for this district. The libel contained six counts, the substance of which was, that certain goods, wares, and merchandise were on the 1st of May, 1864, imported from the port of Quebec in Canada into the port of Island Pond in the state of Vermont, and that the agent of the owner on the 7th of May in the same year, at the custom-house in the latter port, did knowingly make an entry of the same by means of an invoice which did not contain a true statement of all the particulars in that behalf required by the act of congress approved March 3, 1863, entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy col-

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

lection of claims in favor of the United States, and for other purposes." Seizure was made on land, at Portland, on the 11th of July, 1864; and on the 27th of the same month the plaintiff in error [Samuel B. Locke] appeared and made oath that he was the sole owner of the goods described in the information, pleading at the same time two pleas in answer to the entire charge, namely: First, that the goods did not, nor did any part thereof, become forfeited in the maner and form as in the information was alleged; second, that if the invoice did not in all respects conform to the requirements of the act of congress, such omissions arose from inadvertence, error, and mistake, and not from any design to defraud the United States or to evade the payment of the legal duties.

Issue was joined, and on the 19th of January, 1865, the jury returned their verdict that the goods were forfeited as alleged in the libel. Accordingly, on the 1st of March of the same year, judgment of forfeiture was entered, and the claimant sued out the writ of error. Exceptions were also filed by the claimant, to the refusal of the court to instruct the jury as requested, and to several instructions which were given to the jury.

George F. Talbot, U. S. Dist. Atty.

E. & F. Fox and Milton Andros, for defendant.

CLIFFORD, Circuit Justice. Before proceeding to consider the questions presented in the exceptions, it becomes necessary to advert to certain provisions in the act of congress upon the subject, and to the facts of the case, in order that the real nature of the controversy may be understood.

Invoices of goods imported from any foreign country into the United States are required to be made in triplicate, and if the goods were actually purchased the invoices must be signed by the person owning or shipping the same; or if the goods were procured otherwise than by purchase, the invoices must be signed by the manufacturer or owner of the goods. Such invoices are also required, at or before the shipment of the goods, to be produced to our consul, vice-consul, or commercial agent, nearest the place of shipment, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects true; and if the goods are subject to ad valorem duty and were obtained by purchase, that the invoice contains a true and full statement of the time when, and the place where, the same were purchased, and the actual cost thereof, and of all charges thereon. They are also required to contain certain statements as to discounts, bounties, drawbacks, and the currency paid by the purchaser; and when the goods were obtained in any other manner than by purchase, the actual market value thereof at the time and place when and where the same were procured or manufactured, and if subject to specific duty, the actual quantity thereof, and that no different invoice of the goods has been or will be furnished to any one. 12 Stat. 737. The requirement also is, that the person producing the invoice shall at the same time declare to the officer the port at which it is intended to make entry of the goods. All these particulars appearing, as required in the section, it is then made the duty of the consul, vice-consul, or commercial agent, as the case may be, to indorse upon each of the triplicate invoices a certificate under his hand and official seal, stating that the invoice has been produced to him, with the date when produced, and the name of the person producing it, and the port at which it shall be declared to be the intention to make the entry. The same section contains a penal clause which provides that if any such owner, consignee, or agent of any such goods, shall knowingly make, or attempt to make, an entry thereof by means of any false invoice or false certificate of any such officer, or of any invoice which shall not contain a true statement of all the particulars so required, or by means of any false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatsoever, the goods or their value shall be forfeited. 12 Stat. 738.

More difficulty is encountered in stating the facts of the case, as the whole evidence, apparently, in the order it was introduced at the trial, is incorporated into the bill of exceptions. Such a practice is attended with serious inconvenience, and certainly finds no support either in the decisions of the supreme court, or in the standard treatises upon the subject. Only so much of the evidence given at the trial as may be necessary to present the legal questions raised and noted, should be embodied in the bill of exceptions in any case. All beyond that serves only to encumber the record and embarrass both court and counsel, as no fact tried by a jury can be otherwise re-examined in any court of the United States, than according to the rules of the common law. Zeller v. Eckert, 4 How. [45 U. S.] 297; Johnston v. Jones, 1 Black [66 U. S.] 220; Pennock v. Dialogue, 2 Pet. [27 U. S.] 15; 2 Tidd, Prac. 662; U. S. v. King, 7 How. [48 U. S.] 845. Cases may be imagined, where the embarrassment arising from conflicting testimony would be so great, that it would become the duty of the court to decline to re-examine the case, and to dismiss the writ of error. The present case, however, is not of that character, as there is not much conflict in that portion of the testimony which it will be necessary to consider, in determining the legal questions involved in the record. Goods, of the description mentioned in the information, filling fif-

teen merchandise cars, were imported by the claimant from Quebec into the United States, between the 22d of April, 1864, and the 3d of May following, and the evidence tends to show that all of the cars, except one, with the goods on board, arrived at Island Pond, in the state of Vermont, in the month of April of that year. The first car left Point Levy, opposite Quebec, on the 22d of April, and the last one on the 2d of May, and arrived at Island Pond on the next day. Much the larger portion of the importation consisted of chain cables, bar iron, scrap iron, and hoop iron; but the evidence shows that an invoice was presented to the American consul at Quebec, on the 23d of April of that year, wherein all the iron was described as "old chains and iron," and that it was therein rated at a uniform cost of $30 per ton. Being duly executed, and containing the proper declaration under oath, the consul granted the required certificates. The testimony also showed that the bar iron was stowed under the chains and scrap iron, and that the agent of the owner claimed that the whole should be admitted to entry as old scrap iron. Such claim was made after the cars arrived at Island Pond; but finding that the goods, or some of them, had been examined by the officers of the customs, he delayed making the entry, and that invoice was never presented. Sufficient goods to load one car had not come forward, and he prepared a new invoice, describing the iron as "bar iron, scrap iron, and old chains," increasing the quantity from eighty-eight to one hundred and twenty-five tons, but without any change as to the cost. Acting under representations that the goods had not been forwarded, the consul was induced, on the 2d of May of the same year, to cancel the first invoice, and to append the required certificates to the substitute. All of the goods were then at Island Pond, except one car-load, which remained at Point Levy, and went forward on that day. The agent of the owner knew that all the goods, except the one car-load, had arrived at the port of entry, because the conductor or person in charge of the cars at Island Pond had, at his request, opened some or all of them, and allowed him to examine the goods. The last car arrived on the 3d of May, and the agent of the owner, four days afterwards, made the entry in the custom-house at Island Pond, using the substituted invoice prepared by the owner or his agent, and certified by the consul after all the goods, except one car-load, had been imported into the United States, and had actually arrived at the port of entry. Enough of the testimony is presented in this statement, to exhibit the nature of the controversy, and to enable the court to test the accuracy of the instructions given by the presiding justice, and to determine whether there is any merit in the exceptions under consideration. Introductory to the instructions, the presiding justice told the jury that every shipment of goods from a foreign country, under the laws of the United States, should be accompanied by an invoice, and that, under the present law, such invoice must be made and certified by the consul of the United States, at or before the time of shipment. Having made that preliminary observation, he proceeded to instruct the jury in substance and effect as follows:—

1. That where the transportation is upon a railroad, the goods laden in every train of one or more cars, leaving the foreign port at the same time, must be considered a distinct shipment, and that the invoice required by the act of congress, must be presented by the importer at the time of the entry of such goods.

2. That if the jury found that the invoice by which the goods were entered, was made and certified after the arrival in the United States of all the cars, except one, then they were instructed that the invoice in the case was not the invoice authorized by law, and that no legal entry could be made by it; and that if the goods were entered by means of such an unlawful invoice, they were liable to forfeiture to the United States, if the entry was knowingly made by the use of such unlawful invoice.

3. That if any part of the goods arrived in the United States after the date of the invoice and declaration, and the invoice by which those goods were entered contained other goods belonging to previous shipments, and not distinguished from such other goods, then the invoice of such shipment was a false invoice, and subjected the goods, upon entry being made thereof, to forfeiture.

Undoubtedly the instructions are very inartificially drawn, but the foregoing statement, it is believed, expresses their substance and effect. Some of the forms of expression are ambiguous, but the instructions of the court must always receive a reasonable construction, and when so construed, it is not perceived that there is any such want of clearness as would mislead the jury. Courts are not inclined to grant a new trial merely on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the point explained. Castle v. Bullard, 23 How. [64 U. S.] 189. If the claimant supposed that there was any danger that the jury would be misled, he might well have asked that further and more definite instructions should be given; and if he had done so, and the prayer had been refused, this objection would be entitled to more weight. The correctness of the preliminary observations of the court, as applied to maritime shipments, cannot be doubted, and it is equally accurate as applied to shipments by a railroad, in a foreign country, when considered in connection with the subsequent instructions. Merchants often purchase goods

at one adventure, sufficient in quantity to load several vessels, but it is clear beyond doubt, that an invoice executed in triplicate in due form, as required, must be produced at or before each shipment, to the consul, and when so produced, must have indorsed thereon the required declaration. Those requirements attach to each shipment, and it is obvious that if it were not so, the revenue regulations might as well be repealed, as the contrary rule would open the door to every species of evasion and fraud. The same reasons require that the same rule should be applied to each train of one or more cars, laden with dutiable goods, purchased or otherwise acquired in a foreign country, and designed for importation under our revenue laws. Such shipments are subject to the same laws as importations in ships, and they must be governed by the same rules of construction.

Granting that to be so, then it is clear that the first instruction was correct, as the express words of the act of congress require, that an invoice in triplicate shall be produced to the consul at or before the shipment. The object of the provision was doubtless to afford protection to the revenue, but it is obvious that it would afford none, unless it be required that one copy of the invoice shall be presented to the consul at or before the entry. Adopt the construction that the shipper may forward his goods and procure his invoice afterwards, and the acts of congress and the regulations of the treasury department are of no avail. Argument, however, upon the point is unnecessary, as the language of the provision in the act of congress sustains the instruction in express words.

The closing paragraph of the second instruction is also the subject of complaint, but the criticisms, as the language is understood by the court, are without merit, and the objection must be overruled on that ground; and also for the reason that, it was the duty of the claimant, if he thought the language was ambiguous, to have requested a clearer statement of the views of the judge. The plain inference from the language reported is, that the judge intended to repeat the words of the provision on which the information is founded, and it is not doubted that it must have been so understood by the jury.

Objection is also taken to the third instruction, because it admits that the jury might find that the goods brought forward on the last car, which were accompanied by the substituted invoice, were forfeited, in case they found that the goods previously transported in the fourteen cars without any invoice, and before the substituted invoice was made, were contained in the same invoice, and in a manner that could not be distinguished. The theory of the United States is, that fourteen cars had been sent forward without any invoice, with the intention of defrauding the revenue, but that the agent, when he found the goods had been examined, apprehending difficulty, returned and procured the substituted invoice, and the evidence tends to sustain that view of the transaction.

Irrespective, however, of the evidence, I am of the opinion that the instruction is quite correct. Importers cannot commingle unlawful and lawful importations in the same invoice, so that they cannot be distinguished, and then be allowed to save any portion of the goods from forfeiture, because such an invoice is false, and subjects the goods to the consequences attaching to a false invoice.

Due exceptions were also taken to the refusal of the court to instruct the jury as requested by the claimant. He presented fifteen prayers for instructions, as appears in the transcript, and they were all refused by the court. Refusal to grant instructions as prayed is not error, unless the instruction itself was correct, and needful to enable the jury rightly to perform their duty. Some of the prayers for instructions were plainly correct as abstract propositions of law, but I am of the opinion that the instructions given by the court, were amply sufficient to enable the jury to determine the whole controversy. The substantial charge in all the counts, except one, was, that the entry was knowingly made by means of a false invoice, and that question was fully and clearly submitted to the jury in the charge of the court. The whole controversy turned upon that question, as involved in five out of the six counts. Where the instructions given by the court cover the whole controversy, and are sufficiently full to enable the jury to decide the entire issue between the parties, the refusal of the court to give other instructions is not error. Prayers for instruction applicable to the fourth count were presented and refused. But the objections to the rulings in that behalf were not much pressed at the trial, and if they had been they could not be sustained.

After verdict and before judgment, the claimant submitted a motion in arrest of judgment. The foundation of the motion as alleged, is certain defects in the information, which are presented in thirty-one points. The bill of exceptions was filed on the 19th of January, 1865, and the statement in the minutes is, that the motion in arrest was overruled on the 31st of March following. The clerk's minutes also state that the claimant excepted to the ruling of the court, and that the bill of exceptions was sealed and placed on file; but both parties agree that no such bill of exceptions was ever allowed. Repeated decisions of the supreme court have established the rule, that such a statement in the minutes is of no benefit to a party, unless he seasonably avails himself of the right to reduce the exceptions to writing, and procures it to be sealed by the judge presiding at the trial. Pomeroy v. Bank of Indiana, 1 Wall. [68 U. S.] 598; Thompson v.

Riggs, 5 Wall. [72 U. S.] 663. Conceding that there is no exception in this case, still the claimant insists that the point is open to him, because he claims that the ruling of the judge is apparent in the record, and refers to certain well-known cases which affirm the rule, that errors apparent in the record may be commented on without any bill of exceptions. But the error of the proposition consists in the fact that the ruling of the court is not apparent in the record. He insists that it is so, because it is so stated in the minutes; but the cases already referred to decide that such a statement in the minutes is of no avail in the appellate court, unless the same is seasonably reduced to writing, and incorporated into a regular bill of exceptions. Recurring to the record, it will be seen that objections to the admissibility of evidence, were repeatedly made by the claimant during the trial, which objections were overruled by the court, and in his printed argument he proceeds upon the ground that the rulings of the court in that behalf, are included in the excepting clause of the bill of exceptions.

The statement in the paragraph immediately following the instructions of the court is, that the claimant did then and there except to the aforesaid rulings and instructions of the court, as well as to the refusal of the court to give the instructions, as prayed for by the claimant. The better opinion is, that the reference in that paragraph is only to the rulings of the court in giving the instructions, and to the refusal of the court to grant the claimant's prayer for instructions. The request of the claimant, as stated in the concluding paragraph of the exceptions, is, that the court will set their seal to the bill of exceptions containing the several matters proved and given in evidence, and "the rulings, rejections, and directions of the judge." No particular ruling, rejection, or direction is specified, and there is nothing in the record by which the precise meaning of the excepting party can be ascertained. Mere objections to evidence are of no avail in an appellate court, unless it appears that the party excepted at the time. Exceptions must be taken at the time, but if seasonably taken and reserved, they may be drawn out afterward. Dredge v. Forsyth, 2 Black [67 U. S.] 568; U. S. v. Breitling, 20 How. [61 U. S.] 254; Phelps v. Mayer, 15 How. [56 U. S.] 160. Exception was taken by claimant during the trial, to the ruling of the court allowing a certain question to be put to the witness S. B. Locke, but the objection was not insisted on at the argument. The record also states in effect, that the claimant objected to the deposition of John S. Bowen, when offered by the district attorney, and the inference from the record is, that the claimant excepted to its admissibility, but upon what ground does not appear, and the caption of the deposition is not in the case. Special objection was also made to certain parts of the deponent's testimony which were admitted by the court, but no exceptions were taken to the ruling of the court. Complaint is also made of the ruling of the court in excluding certain parts of the deposition of James Reid; and the statement in the record is, that the claimant then and there excepted to the ruling of the court. The testimony rejected was offered to show that Reid, who, on the 2d of May, 1864, had sworn that the invoice was true, and that he was the owner of the goods, had previously sold them to the claimant. Strong doubts are entertained whether the testimony was material, but if so, it was properly rejected. Alfonso v. U. S. [Case No. 188]. The claimant also complains that the witness Charles S. Ogden was permitted to testify that Reid had assigned to him reasons for procuring the substituted invoice, different from those assigned in his testimony, when no foundation had been laid to admit any such contradiction. But the record fails to state that the claimant excepted to the ruling of the court. The best conclusion I can form, in view of the whole case is, that there is no error in the record.

Judgment affirmed.

Case No. 8,443.

LOCKETT v. HILL et al.

[1 Woods, 552;[1] 1 Cent. Law J. 149; 79 N. B. R. 167.]

Circuit Court, N. D. Georgia. Jan. 29, 1874.

MORTGAGES—POWER TO SELL—COLLATERAL POWER—REVOCATION—FRACTIONS OF DAY—POSSESSION BY MORTGAGEE — PURCHASE BY MORTGAGEE — BANKRUPTCY OF MORTGAGOR.

1. A collateral power, although irrevocable, expires with the life or bankruptcy of the appointor; otherwise is case of a power coupled with an interest.

[Cited in Johnson v. Johnson (S. C.) 3 S. E. 610.]

2. In Georgia a mortgage is merely a security for debt, and passes no title, estate or interest to the mortgagee. Therefore a power of sale in a mortgage is not, in Georgia, a power coupled with an interest, but is merely a collateral power.

[Cited in Patapsco Guano Co. v. Morrison, Case No. 10,792.]

3. It follows that, in Georgia, a power of sale contained in a mortgage cannot be executed after the mortgagor has been adjudged a bankrupt.

4. Courts will regard fractions of a day when it is necessary to ascertain which of two events first happened. Thus, where a power to sell mortgaged premises was made to the mortgagee, and a lease of the mortgaged premises to a third person was made at the same time, which lease was referred to in the power, the court noticed the fact that the lease was executed previously to the power, for the purpose of ascertaining whether the mortgagee had been actually put in possession of the mortgaged premises or not.

5. If a mortgagee acquire possession of real property after the expiration of a lease made by the mortgagor to a third person, and there is no

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

evidence that the property was rented to him by the mortgagor, he will, in Georgia, be a mere tenant at will or at sufferance.

6. The possession by a mortgagee of the mortgaged premises as tenant at will or at sufferance is not a possession of such dignity as will, in connection with a power of sale granted to the mortgagee, create a power coupled with an interest.

7. Where the power granted to a mortgagee to sell the mortgaged premises is limited to a specified time, if the mortgagee fail to execute it within that time, the power is forever gone.

8. A mortgagee with a power to sell cannot himself become the purchaser, either in severalty, joint tenancy or otherwise. The relations of vendor and vendee cannot thus be united in the same person. Thus, where a mortgage with power of sale was made to an individual, he could not execute the same by selling the mortgaged property to a firm of which he was a member.

9. A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity; and this, although the power may not be regarded as collateral, but as coupled with an interest.

10. This relation of trustee is not discharged by the bankruptcy of the mortgagor, but, upon the happening of such event, the trustee can no longer be held to account in a state court. The courts of bankruptcy possess a broad and comprehensive authority, sufficiently extensive to enable them, in such cases, to entertain jurisdiction over the rights of the parties, to take possession of the mortgaged property and administer it in accordance with the bankrupt law [14 Stat. 517].

In equity. Submitted on pleadings and evidence.

Mr. Ely, for Lockett, the mortgagee and complainant.

Mr. Hoge, the assignee, in pro. per.

Mr. Culberson and Mr. Conley, for both defendants.

ERSKINE, District Judge. This suit arises out of a mortgage given by Hill, in January, 1871, to Lockett. The bill states that Hill being indebted to Rust, Johnson & Co. (of which firm Lockett was a member), and in settlement and liquidation thereof, drew his draft on Burt, Johnson & Co., payable to his own order, for $7,451.75, and it was accepted by them and transferred to Lockett; and to secure its payment and in consideration of supplies and money, and to discharge a certain draft in favor of Ketchum & Hartridge, Hill executed the mortgage to Lockett on 1,625 acres of land and certain personal property, and which mortgage contained, among other stipulations, a power to sell the land on nonpayment. Lockett also alleges that he was placed in possession of the property, real and personal, on the 20th of December, 1871, and continued in possession until he conveyed the land under his power, on the 13th of December, 1873, for $4,875, to the firm (of which he was then a member) of Rust, Johnson & Co., and that he is still in possession of the personal property. He prays an injunction against Hoge, the assignee, to restrain him from selling any of the personal property, or interfering with any of the mortgaged property, real or personal; and asks for a subpoena against both Hill, the bankrupt, and Hoge; and the bill prays for "other and further relief."

There is an addendum to the bill—an offer to take the property at a fair valuation to be determined by the court, or to sell the personal property by virtue of his power, and account to the assignee for any surplus; or to surrender the property upon payment of his debt. The conveyance in mortgage from Hill, the bankrupt, to Lockett, the mortgagee and complainant, was executed on the 16th of January, 1871, by which he conveyed to Lockett a plantation in Dougherty county, in this state, containing sixteen hundred and twenty-five acres, also certain personal property on the land consisting of fourteen mules, all the stock of hogs, cattle, etc., wagons, carts and farming implements, and likewise the crops of corn, cotton and fodder to be raised on the place during the said year 1871; provided, nevertheless, if Hill shall pay on or before the 1st day of October, 1871, a certain draft accepted by Rust & Son, and all advances so made during the year for provisions, and shall save Lockett harmless on the Ketchum & Hartridge draft, and all costs, expenses and fees, then the deed to be void, else of full force. The mortgage further stipulates that if Hill shall fail to pay the draft accepted by Rust & Son, at the time and in the manner specified, and also the advances for the present year, then Rust & Son or Lockett shall have the right to foreclose said lien or mortgage on the growing crops and other personal property, in accordance with the statutes of this state. As to the real estate, it is further agreed that Lockett shall have the right to foreclose the mortgage upon the same, or to sell said plantation upon the most favorable terms practicable, either at public sale to the highest bidder, or at private sale, and to account to Hill, after paying off said debts, for the balance; and Hill constitutes and appoints Lockett his attorney in fact, ratifying his acts and doings in the premises, provided, nevertheless, that this power of attorney to convey and make titles shall not operate until after the first day of October next, 1871.

On the 20th of December, 1871, Hill and Lockett entered into a written agreement, under seal, reciting that Hill being indebted to Lockett in a large amount, and to secure the debt, as well as for other purposes, he, on the 16th of January, 1871, executed to Lockett a mortgage to certain property, real and personal, and being still indebted to Lockett in the sum of six thousand seven hundred and thirty-three dollars twenty-three cents with interest from the 1st of December, 1871, at the agreed rate of ten per cent. from said 1st of December until paid; and that, by said mortgage, Lockett had the right to sell the land therein conveyed, but the present not being considered a judicious time to make the sale, it is agreed that Lockett shall take possession of said property, real and personal, and shall have the right to rent the

plantation and the personal property in terms this day agreed upon between Lockett and one John La Roque, and that the rent shall be applied to the extinguishment of the debt due by Hill to Lockett; and that during the ensuing year (1872), Lockett shall have the right to sell all of the property, both real and personal, mentioned in said mortgage, consisting of the lands mentioned in the mortgage and personal property, this day turned over to La Roque, and apply the proceeds, firstly, to the balance due on the debt above mentioned in this agreement, and secondly, to the payment of the Ketchum & Hartridge draft (provided this draft has to be paid), and Lockett is appointed attorney in fact for Hill, with full power and authority to act as his attorney in fact and to make all needful conveyances.

On the 24th of October, 1873, Hill wrote Lockett that as he was unable to pay him, he might take all the stock, etc., on the land ("all of which is mortgaged to you") at a fair valuation, and credit the same on the debts. There is no evidence that this offer was accepted or rejected. Much was said during the argument as to whether Lockett ever took actual possession of the land and personal property. The evidence read is conflicting. It was, however, agreed by the instrument of December 20, 1871, that Lockett "shall take possession of the said property, real and personal, and shall have the right to rent and hire," etc. By a writing dated December 20, 1871, Lockett rented the "plantation of D. P. Hill," and the personal property thereon, for the year 1872, to La Roque for forty bales of cotton, to be raised on the place and delivered to him. One Blake filed an affidavit stating that he rented the plantation from Lockett for 1873, and paid him the rent, and regarded Lockett as the lawful owner and possessor of said plantation, and held the same as his tenant, and upon delivering the possession to Lockett, he put one White in possession. But he does not positively state that Lockett was at any time in actual possession of the land, and he makes no mention whatever of the personal property. Mr. Ely, solicitor and counsel for Lockett in this cause, swears that he was present on the plantation of D. P. Hill on the 20th of December, 1871, and that in his presence Hill delivered the possession of the plantation to Lockett, and all the personal property thereon. The bankrupt in his answer, read as an affidavit, denies that he ever, at any time, turned over the possession of the plantation and personal property to Lockett, but simply authorized him to exercise a supervisory control over the same, in order to protect and further defendant's interests in the way of making crops. He also denies that Lockett rented out the property for 1872 or 1873, but, on the contrary, he says that he rented out the plantation, stock, etc., to La Roque for forty bales of cotton for the rent; but intending that Lockett should have the rents and profits, he caused La Roque to execute the contract with Lockett instead of with himself. He further says that Lockett never gave him (Hill) leave to rent the place for 1873 to Blake, as his (Lockett's) agent; but that he himself rented it to Blake, without obtaining the consent of any one, except that of Blake; but let Lockett collect and retain the rents due by Blake for 1873.

On the 3d of December, 1873, Hill filed his petition in bankruptcy, and was adjudged a bankrupt by Register Black. On the 9th Lockett was, on petition of the bankrupt, restrained from selling the mules, wagons, etc., enumerated in the mortgage; and Edward F. Hoge was appointed assignee of Hill on the 20th; but on the 13th, intermediate the filing the petition in bankruptcy and the appointment of the assignee, Lockett sold the land, in fee, to Rust, Johnson & Co. (the mortgagee himself being the company), for $4,875, by a warranty deed, executed in the name of Hill, the mortgagor and bankrupt. The deed of conveyance is signed and sealed as follows: "D. P. Hill, (L. S.) by B. G. Lockett, attorney in fact." Hill, in his answer, swears that this land cost him $16,225 before the war. On the 2d of January, 1874, Lockett instituted the present suit, and by consent, the court granted an order restraining the assignee from selling the personal property until argument could be had on the prayer for injunction, etc. Lockett, by counsel, insisted that by virtue of the power of sale, inserted in the mortgage of January 16, 1871, and in the power of sale in the agreement of December 20, 1871, and by the power of attorney contained in each of these instruments, appointing him attorney in fact to sell, convey and make all needful conveyances, and by the authority given him in the latter instrument to take possession of all the mortgaged property, real and personal, he had a power coupled with an interest, and therefore a perfect right to convey the fee as he had done, and authority to make an absolute sale of the personal property notwithstanding Hill was then a declared bankrupt; and that no part of this property, real or personal, is assets of the bankrupt's estate.

On the part of the assignee it was contended that all said real and personal property is assets of Hill's estate, and that it passed to him by deed of assignment for distribution among the creditors of the bankrupt, under the bankrupt act of 1867 and its amendments. And for the bankrupt it was urged that he, being the head of a family, is under the first section of the seventh article of the state constitution of 1868, and the state law of the same year (Code, § 2002), entitled to a homestead in said mortgaged land to the value of $2,000 in specie, and exemption in the personal property to the value of $1,000 in specie.

It is a rule too well settled to need the citation of authorities, that a collateral pow-

er, although in many instances irrevocable by the principal, expires with his life or bankruptcy, but it is otherwise when the authority or power is coupled with an interest; for in the latter case it is not extinguished by the death or bankruptcy of the appointor; it survives and may, as a general rule, be executed in the name of the person in whom it was placed. Venerable authority on questions of this nature says that if a person clothed with a power hath at the same time an estate in the land, the power is not collateral because it savors of the land. Hardr. 415. And the supreme court of the United States, by Chief Justice Marshall, in Hunt v. Rousmanier, 8 Wheat. [21 U. S.] 203, said: "What is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing."

Does the power now in question answer the definition given in Hardres, or the equally accurate description given by the supreme court? Had Lockett, at the time when the power was executed, a vested interest or estate in the mortgaged property? Was the power conferred conjoined with an estate, held by Lockett, in the thing itself? "A mortgage in this state is only a security for a debt, and passes no title." Code, § 1954. Avoiding unessential matters as far as may be, and matters collateral to the questions for decision, I will quote from or refer to the construction given to this statute by the state supreme court, as found in the reports. In Davis v. Anderson, 1 Kelly, 176, Warner, J., in delivering the opinion of the court, said that "a mortgage in this state is nothing more than a security for the payment of the debt; and the title to the mortgaged property remains in the mortgagor until foreclosure and sale, in a manner pointed out by the statute." * * * "Under our law the legal title to the mortgaged property remains in the mortgagor until after foreclosure and sale." And the interpretation given by that learned judge has been followed from that day to this. See the reports, passim. In Scott v. Warren, 21 Ga. 408, McDonald, J., said: "In England and in some of the states of the Union, when the condition is broken, the estate is so absolutely vested in the mortgagee that he may maintain ejectment and recover the premises. This is not the case here. In this state a mortgage in its inception is nothing more than a security for the payment of money, and it so continues to be, and nothing more, after the breach of the condition; therefore, creates a lien only, and not an estate." And this court, in U. S. v. Athens Armory, April term, 1868 [Case No. 14,473], said: "A mortgage in Georgia is only a security for the debt; the title to the property remains in the mortgagor." This is fully settled as a rule of property by a series of state adjudications, and when such is the case the federal courts adopt the decisions of the state courts.

It has been nearly a century and a half, if my researches are correct, since powers of sale, in conveyances in mortgage, were first known to the courts in England. And notwithstanding their validity has been supported in courts of equity, and they have at least impliedly become a part of the jurisprudence of that country, yet as late as 1825, Lord Chancellor Eldon, in Roberts v. Bozon, mentioned in 1 Pow. Mortg., 9, 13, characterized them as extraordinary and of a dangerous nature.

The first reported case in our own country, which I have been able to find on this subject, is Bergen v. Bennett, 1 Caines, Cas. 19. This is a bill to redeem on the ground that the power to sell, contained in the conveyance in mortgage, became extinct on the death of the mortgagor. The court for the correction of errors held that the authority to sell was a power coupled with an interest, and dismissed the bill. I will quote portions of the language used by Kent, J., who gave the opinion of the court, and which embody the principal reasons for holding that the power in the mortgage was a power coupled with an interest: "But when power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. * * * The power now in question answers exactly to this definition (Hardr. 415) of a power with an interest, because the mortgagee has, at the same time, a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, and never had, any estate whatever." Wilson v. Troup, 2 Cow. 195. This was also a bill to redeem. It was held by the court, as had previously been done in Bergen v. Bennett, supra, and Wilson v. Troup, 7 Johns. Ch. 25, that a power of sale contained in a mortgage is a power with an interest. And the court of errors intimated the opinion that a power of sale inserted in a mortgage was in the nature of a power appendant to the land. A power appendant is where a person has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession during the continuance of the estate to which the power is annexed; as a power to tenant for life, in possession to make leases. Co. Litt. 342b, notes 2, 8, 9 (Harg. & B.). And Sutherland, J., in Wilson v. Troup, 2 Cow. 195, said: "Now, the power of a mortgagee to sell is a power to create or acquire to himself the equitable estate in the land during the continuance of the legal estate conveyed to him by the mortgage."

The validity of the clause of a power of sale inserted in a mortgage has been, as already remarked, established in the courts of chancery at Westminster (Coote, Mortg. 128 et seq.) and also in New York, and indeed in nearly all the states. In New York and in other states the mode of enforcing these power of sale mortgages is in a greater or less degree guarded by statutes, against irregularity and abuse. Such enactments are highly commendable, for it may be borne in mind that the mortgagee holds the antagonistic and anomalous position of creditor and trustee united in himself, and it must often transpire that the time, the place and the manner of selling will present questions of difficulty and importance to the parties. In New York, for example, there must be six months' notice in the Public Gazette before the mortgagee can sell under the power of sale. See Jackson v. Lamson, 17 Johns. 300. With these remarks, I will proceed to ascertain whether, under the statute law of this state, and the construction which it has uniformly received by the state supreme court, a power of sale contained in a conveyance in mortgage, executed in this state, is a power coupled with an interest. Directing attention to the cases which have been cited on the subject of a power of sale in a conveyance in mortgage, it will readily be perceived that the decisions of the courts of England and New York, founded on the legal fact that to create a power combined with an interest, the donee must have at the time of the creation of the power a vested estate in the land or thing. Such power may be classed as an appendancy, and the power must have an estate to conjoin with it and nourish it. When this is not the case, the power is simply collateral and ends, at farthest, with the life or bankruptcy of the donor.

In England and in several of the states, including New York (and in the latter state at least where the decisions above noted were made), ejectment may be maintained by the mortgagee against the mortgagor on his failure to pay the money at the time stipulated. Whereas, in Georgia, no ejectment or other possessory action on breach of the condition by the mortgagor has been recognized as a part of its jurisprudence. The rule of evidence is, that the plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the infirmity of the claim of the defendant. So, too, the claimant, to support his action of ejectment, must be clothed with the legal title to the lands. In Reed v. Shepley, 6 Vt. 602, it was resolved that in an ejectment a mortgagor cannot dispute the title of the mortgagee. Thus, in England and in New York and other states of the Union, upon the delivery of the ordinary conveyance in mortgage, an estate or interest passes to and vests in the mortgagee, and such estate being then vested in him, it is sufficient in law upon which to raise a power coupled with an interest; and the estate or interest in the land or thing being in the mortgagee at the time he is clothed with the authority, the estate supports the power and they stand united.

So far as my information extends, the common law doctrine, even in its modern and modified form, in relation to conveyances in mortgage, has never met the sanction of the supreme court of this state. Here the rights of parties to these securities for debts, from beginning to end, are regulated and enforced solely by the principles of equity; the very language of the statute is the rule in equity. "A mortgage," says the Code (section 1954), "in this state is only a security for a debt and passes no title." As already observed, the state supreme court, in Davis v. Anderson, supra, said that the title remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute. And McDonald, J., in Scott v. Warren, supra, said: "Here a mortgage in its inception is nothing more than a security for the payment of the money, and it so continues to be, and nothing more, after the breach of the condition. The mortgage, therefore, creates a lien only and not an estate; and the mortgagee in relation to the mortgaged property stands on the same footing as any other creditor." And this view of the law of mortgages in Georgia was approved by Lumpkin, J., in delivering the opinion of the court in Elfe v. Cole, 26 Ga. 197.

Numerous other cases, containing like views, might be cited, but it is deemed unnecessary to do so. Counsel for complainant read the case of Robenson v. Vason, 37 Ga. 66, as affirming and adopting as a rule of decision the doctrine of the courts in Westminster and New York. In Robenson v. Vason [supra], the main question before the court was, whether an injunction which had been granted at the instance of the mortgagor to restrain an innocent assignee of the notes and mortgage from selling the property under a power of sale, given to the mortgagee, his heirs and assigns, was properly dissolved? Warner, C. J., for the court, held that it was. The chief justice, in the latter part of his opinion, said: "As a general proposition the power to mortgage would seem to include in it a power to authorize the mortgagee to sell in default of payment. Wilson v. Troup, 7 Johns. Ch. 32. In this case there is an express power given by the mortgagor to the mortgagee or his assigns to sell the mortgaged property on default of payment upon giving thirty days' notice." I have perused the extended statement of the case made by the reporter, and have not discovered one word in it, nor in the opinion of Chief Justice Warner, which says or indicates, in the remotest manner, that the authority to sell was a power connected with an interest, and I respectfully hazard the remark that under the facts of that case, as they appear in the report, it could not be a point for decision. The mortgagor was before the court in pro-

pria persona, and not a declared bankrupt. But notwithstanding the power from the mortgagor to the mortgagee and his assigns was not coupled with an interest, yet it may have been, and probably was, given for a valuable consideration, and consequently, in contemplation of law, irrevocable, but would cease with the life or bankruptcy of the mortgagor. Walsh v. Whitcomb, 2 Esp. 565; Hunt v. Rousmanier, supra. "These powers are not ordinary powers operating by means of limitation or use, but trusts declared on the legal estate in the mortgagee." Hil. Mortg. (3d Ed.) 138.

I am of opinion that the power of sale contained in the mortgage, or that inserted in the agreement of December 20, 1871, was not, in either instance, under the statute laws of this state or the decisions of the state supreme court, that power which is known in legal language as a "power coupled with an interest." Adverting to the synopsis of the bill, etc., in a former part of this opinion, in which is embodied the substance of the mortgage of January 16, 1871, and agreement of December 20, 1871, it will be seen that the authority to foreclose, as to the personal property, on default of payment was given to Rust & Son or to Lockett; and the power to foreclose as to the land, or to sell it if the condition was broken, was given to Lockett. It will be remembered that the mortgage conferred no power to sell the personal property; that authority was given by the agreement. If the authority inserted in the mortgage was a power combined with an interest, it must have been based upon a vested estate in Lockett. He did not foreclose the mortgage upon either the personal or real property, or sell the land after the first of October, 1871 (and which act a proviso in the mortgage authorized him to do if Hill did not pay the money at the time appointed), or before the 20th of December, 1871, on which day the "agreement" was executed. This instrument says Lockett shall take possession of the land and personal property mentioned in the mortgage and rent the same to La Roque, "on terms this day agreed upon between Lockett and La Roque," and it is also stipulated that Lockett "shall have the right during the ensuing year (1872) to sell all of the real and personal property this day turned over to La Roque." If the power in the mortgage to sell the land after the first of October, should the debts not then be paid, was a power linked with an interest, regranting it by the agreement of December 20, 1871, was notional and superfluous, unless it had previously become extinct by efflux of time or otherwise, and the language of the agreement does seem to indicate that it had at that period been extinguished. As just mentioned, it is provided in the agreement that Lockett shall take possession of the mortgaged property, real and personal, and rent and hire the same to La Roque, and Lockett is given the right, during the ensuing year, to sell all of said land and personal property.

Courts disregard fractions or divisions of a day unless it be necessary to ascertain which of two events first happened. And I think it is proper to apply the exception here. It is plain, from the language used in the agreement, that Lockett, before the execution of the agreement, had agreed to rent and hire the mortgaged property to La Roque, and that it had been turned over to him—transferred; these were accomplished facts, effected anterior in time to the delivery of the agreement, though done on the same day. The words are not that Lockett is in possession, but that he shall take possession, etc. In the contract of lease for the mortgaged property made between Lockett and La Roque, it is rented for the ensuing year, 1872, as the "plantation of D. P. Hill." La Roque acknowledges himself as the tenant of Lockett, and signs the lease; Lockett does not sign it. Ely, in his affidavit, says that Hill, on the 20th of December, 1871, delivered the possession of the plantation and all the personal property thereon to Lockett. Hill swears that he never did turn over the possession to Lockett. If the possession was turned over to Lockett on that day—and I express no opinion on the weight of the evidence—the conclusion is that it must have been subsequent, in time, to the execution of the agreement, and consequently after the property had been turned over to La Roque, the lessee. The agreement provides that "Lockett shall have the right during the ensuing year" (1872) "to sell all the real and personal property this day turned over to La Roque." And Hill bestows on Lockett full power to act as his attorney, and to make all needful conveyances. No time was specified in the agreement for the termination of the possession; therefore the law of this state construes it to be for a calendar year. Code, § 2290. The agreement, as mentioned already, gave him the right during the ensuing year to sell all the real and personal property turned over to La Roque. This power he did not execute during 1872. And, as he must have known the certainty of his own term, he ought to have availed himself of his power to sell the property indicated in the agreement during its continuance; and whether the right to sell within the time named was a naked authority, revocable at the pleasure of the principal, or was a power irrevocable by the grantor, and consequently current until his bankruptcy, or a power coupled with an interest, is here an inquiry of no legal consequence. The right to sell the entire property during the ensuing year was suspended by Lockett beyond the limitation clause in the agreement, and being once suspended by his own voluntary act, it is, in my judgment, gone forever. But as the power of sale was

merely cumulative, it would not bar a foreclosure. Furbish v. Sears [Case No. 5,160]. "If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of five years; for this is in the nature of a condition annexed to the grant." Moore, 882.

Lockett alleges that Hill, as his agent, rented the property to Blake for the year 1873. Hill says he rented it to Blake himself, but allowed Lockett to receive the rent, to be applied in discharge of the debt due him. Blake avers that he rented the plantation from Lockett for 1873, paid him the rent and surrendered the place to him, and he put White in possession. Lockett says he has been in possession of all the mortgaged property from the 20th December, 1871, until he sold the land, shortly after the bankruptcy of the mortgagor, and is still (2d January, 1874) in possession of the personal property. Let it be conceded that Lockett was in possession, though there is no evidence in the record that Hill rented him the property for 1873, so then he must have been in as a tenant at will or at sufferance. The possession as a tenant at will, or at sufferance, would not be of that dignity and nature which could be engrafted on a power in a mortgage in fee so as to make it a power coupled with an interest; it would not bring the power within the definition given in Hardres, or by Chief Justice Marshall, of a power coupled with an interest.

If the power of sale given to Lockett was what I have ruled it to be, a collateral power, then it became extinct, at farthest, on the bankruptcy of Hill, nine or ten days prior to the sale of the land by Lockett. But if it was really a power united with an interest, then it survived his bankruptcy, and Lockett could (were it not for reasons which will be explained presently) have conveyed the property in his own name, but not, as he adventured to do, in the name of Hill, who was at the time civiliter mortuus—at least he was incapable in law to execute a deed of conveyance. And assuming the power conferred to be of the latter kind, still Lockett could not purchase this land himself, either in severalty, joint tenancy, or otherwise; he could not be vendor and vendee; the characters are inconsistent. Michoud v. Girod, 4 How. [45 U. S.] 502; Griffin v. Marine Co., 52 Ill. 130

The remaining question which I shall now consider—and it is a question of importance in this case—springs from the record. Let the fact be yielded that the power granted by Hill, the mortgagor, to Lockett, the mortgagee, was a power connected with an interest, and consequently not revoked by the bankruptcy of Hill, nor shall I presume it to have been lost previously by the laches of Lockett, the donee, in not selling the property within the time limited, could he, by virtue of such power of sale, convey the land to himself or any one else, after Hill had been adjudged a bankrupt under the provisions of the bankrupt act of 1867, unless the sale was made by the order and authority of the district court? Now, although Lockett may have, by a clause in the mortgage or agreement, received a power coupled with an interest, yet, after all, he would be but a trustee for Hill, the mortgagor, his heirs or assigns; for neither the mortgage, the agreement, nor the power (even if coupled with interest) invested him with an absolute and indefeasible estate in the property which is the subject of this controversy; and as agent or trustee for the mortgagor, his heirs, etc., a court of chancery could compel him to account for the rents and other fruits of the mortgaged property. Did the bankruptcy of Hill discharge or in any manner lessen the responsibility of Lockett as trustee? Surely not. True, when Hill became a bankrupt, Lockett was no longer liable to account directly to him; for the moment he filed his petition in the district court under the bankrupt act, all his estate, of every kind and description, in possession or in action, came by the mere operation of the bankrupt law into the possession of that court, and under its immediate control; and no state court, nor person can interfere with the possession except by permission of this court. In re Steadman [Case No. 13,330]. It is declared by the first section of the bankrupt act, that the jurisdiction of the United States district courts, acting as courts of bankruptcy, shall extend "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." Thus it will be seen that the congress of the United States has conferred on the bankruptcy courts a broad and comprehensive authority, sufficiently extensive for those courts to entertain jurisdiction over the respective rights of the parties in and to the property, real and personal, which was mortgaged by Hill to Lockett, and to cause it to be administered in accordance with the bankrupt law. Hill, the bankrupt, appears on the face of the bill as a party defendant; but whether he is a proper party need not now be inquired into; he appeared and responded to the allegations and charges in the bill.

The prayer for the writ of injunction is refused; and the order previously granted

restraining the assignee from selling the personal property is hereby set aside. Ordered accordingly.

Case No. 8,444.

LOCKETT v. HOGE.

[The case reported under above title in 9 N. B. R. 167, is the same as Case No. 8,443.]

LOCKHART, In re. See Case No. 729.

LOCKHART (ATWOOD v.). See Case No. 642.

Case No. 8,445.

LOCKHART et al. v. HORN et al.

[1 Woods, 628.] [1]

Circuit Court, S. D. Alabama. April Term, 1871.[2]

FEDERAL COURTS—CITIZENSHIP OF PARTIES—DISMISSAL AS TO SOME—COURTS OPEN DURING WAR—STATUTE OF LIMITATIONS — BARRED CLAIM — STAY LAWS — DEPOSIT IN CONFEDERATE TREASURY.

1. The United States circuit court has no jurisdiction of a cause in which the complainants, and a part only of the defendants, are citizens of the same state, although such defendants voluntarily appear and answer without objecting to the jurisdiction.

[Cited in Sheldon v. Keokuk Northern Line Packet Co., 1 Fed. 792; Fisk v. Henarie, 32 Fed. 423.]

2. In such a case, the citizenship of the parties being disclosed by the bill, and no objection to the jurisdiction being made in limine, complainants may dismiss their bill as to the obnoxious defendants, and hold it as to the others.

3. The fact that civil war was raging in Alabama and other states, from the date of the act of secession in 1861, to the close of hostilities in 1865, is not sufficient ground for suspension of legal remedies and acts of limitations as between citizens of the Confederate States, the courts of the state having been open to all citizens of the Confederate States, and there being no law to prohibit them from resorting thereto.

4. Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, the courts are not allowed the discretion to decide when, and when not, the statutes of limitation are in operation, as between its own citizens only.

5. A law or ordinance which revives a claim already barred by the statute of limitations interferes with vested rights, and is unconstitutional.

6. All transactions, judgments, and decrees which took place in conformity with existing laws in the Confederate States, between citizens thereof during the late war, except such as were directly in aid of Rebellion, are good and valid; but those in aid of the Rebellion are void.

7. A deposit by an executor of a large sum of money, belonging to the estate, in the Confederate States depository, was a direct contribution to the resources of the Confederate States government, and the executor was refused a credit therefor in the settlement of the estate.

8. Where an executor might have collected the assets of the estate in good money before the war, but failed to do so, he was not allowed to discharge the balance found due from him, by payment in Confederate treasury notes.

In equity. Submitted on pleadings and evidence for final decree.

John T. Morgan, Wm. Boyles, and James W. Lapsley, for complainant.

L. Gibbons, S. J. Cumming, and T. H. Price, for defendant.

BRADLEY, Circuit Justice. The complainants, Sarah A. and Narcissa Lockhart, are daughters of John Horn, deceased. The defendants are his only son, John A. C. Horn, and his three other daughters, Frances L. Bryan, Eliza P. Nabors and Mary McPhail, and their husbands, and the administrator of Rebecca Horn, widow of the deceased.

The bill is filed for two objects: First. To contest the validity of the will of John Horn, deceased, admitted to probate in Marengo county, the 13th of September, 1858, at the instance of John A. C. Horn, executor and principal devisee. Second. To recover from said John the distributive share of said complainants in the estate of their father; or in case the will be not broken, to recover from him the balance due them as legatees under the will. The complainants are residents of Texas; the defendants are all residents of Alabama, except Mary McPhail and her husband, Wm. McPhail, who reside in Texas. The relief sought is sought entirely against John A. C. Horn; but the other defendants are made parties, because they have an interest in the estate. Wm. McPhail and wife, though not served with process, have voluntarily appeared and put in an answer admitting the truth of the statements made by the bill, and praying a decree for Mary McPhail's share of the estate. The first aspect of the bill is founded on a statute of Alabama, which, after prescribing the mode in which a will may be propounded and contested, enacts that any person interested in a will, who has not contested it as provided by the act, may, at any time within five years after the admission of the will to probate, contest its validity by bill in chancery. The complainants allege that they did not contest the will when it was admitted to probate; and as to the limit of five years for filing the bill, they plead the Civil War, and the laws passed in suspension of the statutes of limitation.

The leading facts, as they appear by the pleadings and evidence, are as follows: John Horn, of Marengo county, Alabama, died March, 1858, leaving a large estate in lands, negroes and personal property; and leaving a widow and six children. Some time about May, 1857, the deceased, John Horn, made a will, which was in existence up to a short time prior to his death. His son, John A. C. Horn, alleges that it was fraudulently purloined and destroyed, either during the decedent's illness or after his death; the daughters allege that their fa-

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

[2] [Affirmed in 17 Wall (84 U. S.) 570.]

ther voluntarily cancelled and destroyed the will before his death. Soon after the death of John Horn, his son procured himself to be appointed administrator ad colligendum, and, by petition in the probate court of Marengo county, set up a paper which he alleged to be a true copy of John Horn's will, with allegations as to its spoliation, etc., and praying that it might be established as his will. The widow and all the children residing in Alabama were duly cited to appear and show cause why the alleged will should not be admitted to probate. As the complainants and McPhail and wife resided in Texas, a notice of the time and place set for the hearing was duly published in a newspaper, as authorized and required by the laws of Alabama. By these laws, any party in interest who wishes to contest a will offered for probate must file in the court allegations in writing, stating the grounds of contestation. Rev. Code, § 1953. It appears, from the record of the proceedings, that two of the daughters, Frances R. Bryan and Elizabeth P. Dumas, afterwards Nabors, in their proper persons, and Mary McPhail with her husband Wm. McPhail, by their attorney, appeared and contested the probate. It does not appear that the others made any legal contestation. The cause was tried by a jury according to the laws of Alabama, and the will was established by their verdict and the judgment of the court on the 13th of September, 1858, and, on the 22d of November following, letters testamentary were issued to John A. C. Horn, as the executor. By the will thus established, the homestead plantation of 720 acres was given to John A. C. Horn, after his mother's decease, and a smaller tract of 208 acres was directed to be sold, and the proceeds divided equally amongst the daughters. The residue of the estate, after charging the daughters with certain advances made to them by the testator in his lifetime, was to be equally divided between all the children. The widow repudiated the will and claimed her dower.

On the 29th of December, 1858, by order of the court, a division of the slaves of testator, seventy-eight in number, was made between his widow and children, by commissioners appointed for the purpose, and upon a valuation then made, the daughters being charged with the respective advances named in the will as made to them in their father's lifetime. They severally, with their husbands, receipted for the slaves which were assigned to them in this division. Wm. A. Lockhart gave a receipt for his wife, as follows: "Received of John A. C. Horn, executor of John Horn, deceased, the following slaves, to wit: (giving their names and values), which is in full of my distributive share of the negro property of said John Horn, deceased, in the division of the same, the commissioners having charged me with $1,400, the amount of the advance mentioned in the will of the said John Horn, deceased. W. A. Lockhart, Agent for S. A. Lockhart. Attest: E. R. Showalter." A similar receipt was given by Narcissa Lockhart and her husband, who was then living. At the same time the executor made payments of money to the daughters, which were duly receipted for. The receipt given by Wm. Lockhart was as follows: "Received of John A. C. Horn, executor of John Horn, deceased, two thousand and eighty dollars, in part payment of my claim in the estate of John Horn, deceased, this January 10, 1859. W. A. Lockhart, Trustee of S. A. Lockhart." A similar receipt of the same date and amount was given by Narcissa Lockhart and her husband. In October term, 1859, of the same probate court, Jno. A. C. Horn, the executor, filed a partial account of his administration, including his sales of property and the said division of slaves. Due notice of exhibiting the account was published as required by the laws of Alabama, and William Lockhart and his wife, Charles J. C. Lockhart and Narcissa, his wife, William McPhail and his wife, and Frances L. Bryan, contested the account as to various items thereof. A decree was finally made on the 21st of May, 1860, by which it was declared that the executor had in his hands for distribution $10,783.50, proceeds of the land to be sold and divided among the daughters, and $5,159.21, proceeds of personal property, to be divided among the widow and children in accordance with the will, specifying the amount payable to each. By this account it appeared that Charles Lockhart and Narcissa, his wife, were indebted to the executor a small sum, he having already made them a payment as before stated, and that there was due from him to Wm. Lockhart and Sarah, his wife, $608.09 over and above the payments made to them. This sum was paid, and Wm. Lockhart gave a receipt for the amount, as follows: "Received of Jno. A. C. Horn, executor of the last will and testament of John Horn, deceased, six hundred and eight dollars and nine cents, in full of the amount decreed by the probate court of Marengo county, in May, 1860, in favor of my wife, Sarah A. Lockhart, and myself, in partial settlement made by said John A. C. Horn under said will, May 26, 1860. (Signed) W. A. Lockhart. (Witness) G. W. Colton."

In August, 1860, and January, 1861, citations were issued at the suit of the daughters, or some of them, to call the executor to a final account. There was still a balance in his hands due from James B. Craighead, the purchaser of the real estate, devised for the benefit of the daughters. It had been sold on the 8th of January, 1859, on a credit of twelve months, for $10,400, of which $6,240 had been paid in good money by the purchaser, Craighead, and included in the partial account settled in May, 1860. But there was still a balance due of $4,160 besides interest.

Craighead died, according to Horn's testimony, in June, 1859. His wife took out letters of administration on his estate. By the laws of Alabama, an administrator cannot be sued until after six months from the grant of letters of administration, and judgment cannot be rendered until the expiration of eighteen months therefrom. The whole sum became due in January, 1860, and suit could have been immediately brought and judgment could have been obtained by the month of January, 1861. But the executor did not bring suit, and did not collect the balance until October, 1862, when he was obliged to take Confederate notes worth at that time only about thirty-six cents to the dollar. Of these he received the sum of $5,075.20 in satisfaction of the debt. He kept this money and other money of the estate received in Confederate funds in his hands until March, 1864, when under laws then existing, he deposited $7,900 thereof, as executor, in the Confederate States depository office at Selma, Alabama, and received a certificate entitling him to Confederate States four per cent. bonds to that amount. The receiving of the money by Horn, as executor, in Confederate notes, and the investment of said notes in Confederate bonds, were in strict accordance with laws passed by the legislature of Alabama in November, 1861, and November, 1863, whilst that state was engaged in civil war with the United States. In May, 1864, the final accounts of the executor were passed in the probate court after due publication of notice, and he resigned his executorship in accordance with the laws of Alabama. The final decree recites the fact, that it appeared that the executor had invested the moneys of the estate in his hands in four per cent. Confederate bonds, and approved and confirmed the same, and directed the several shares of the widow and children of the deceased to be paid to them in said bonds. The amount due to the complainants, according to the decree, was, to Wm. Lockhart and Sarah A., his wife, $1,295.78, and to Chas. J. Lockhart and Narcissa, his wife, $1,209.19.

Upon this case the following questions arise: 1. The first question is, as to the jurisdiction of the court. Two of the defendants, McPhail and wife, are of the same state with the complainants. Is that fact fatal to the jurisdiction, these defendants having voluntarily appeared and answered and not having objected to the jurisdiction, and no objection of that kind being taken until the present time, the fact of their residence in Texas, however, appearing in the bill itself? Were this an original question, I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. It certainly would not under the constitution. The case would still be a controversy between citizens of different states. But the strict construction put by the courts upon the judiciary act is decisive against the jurisdiction; and I am bound by it. Nevertheless, the case is such that the complainant may dismiss his bill as to the obnoxious defendants and hold it as to the others. I will permit him to do so. This should be allowed in all cases where the objection is not made in limine. In this case I do not regard McPhail and wife as absolutely essential parties. The suit is really a suit against John A. C. Horn. Whether the plaintiffs are successful or unsuccessful will make no difference as to the rights of McPhail and wife. They cannot contest the will, for they have once done so. If the complainants succeed in breaking the will they may, perhaps ultimately participate in the advantages of it, if such is the law of Alabama. But it will be their good fortune rather than their right. Any rights which they may have will be unprejudiced by the result of the suit. I will therefore allow the complainants to dismiss the bill as to them.

2. The next question relates to the limitation of five years. The will was admitted to probate on the 13th of September, 1858; this suit was instituted the 15th of November, 1867—a period of nine years, two months and two days; too late by four years, two months and two days, unless the statute was suspended by some law or other cause. The complainant relies on several grounds for a suspension of the limitation: First, the fact that civil war was raging in Alabama and other states from January 11, 1861, when the act of secession was adopted, to the close of hostilities and the restoration of order in the summer or fall of 1865. I do not agree that this was a sufficient ground for the suspension of legal remedies and acts of limitation as between the citizens of the Confederate States, any more than it would be as between citizens of states which adhered to the Federal government. It is a fact that the courts of Alabama were open to all the citizens of the Confederate States, and there was no law to prohibit them from resorting thereto. Were statutes of limitation of the several states, or of any of them, suspended during the war of 1812, because the British forces occupied part of our territory, or because the war was raging in portions of the country? Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, it would be giving to the courts too large a discretion to allow them to decide when and when not the statutes of limitation are in operation as between their own citizens only. This being a question as to the general effect of a war on remedies and statutes of limitation, I do not feel that I am bound by the decisions of the supreme court of this state.

The next ground relied on by the complainants for a suspension of the statutes is the ordinance of the 21st September, 1865, passed by the constitutional convention assembled at Montgomery under the proclamation of President Johnson, by which it was declared that

in computing the time necessary to create the bar of the statutes of limitation and non-claim, the time elapsing between the 11th of January, 1861, and the passage of that ordinance should not be estimated. Suppose the acts of this convention to have been valid as laws until abrogated and repealed (for which many reasons may be urged), still the whole period of five years had already run when this ordinance was passed; and the effect of it, as applied to this case, was to revive a claim already extinct. This would be to interfere with rights already vested, and would be an unconstitutional application of the law.

The remaining ground for supposing that the limitation of the statute was suspended is the act of congress of June 11, 1864 (13 Stat. 123), by which it is enacted in substance, that whenever during the existence of the Rebellion, resistance to the laws or interruption of the ordinary course of judicial proceedings prevented the prosecution of an action, the statute of limitation should not run. But this statute has in no case been construed to apply to a case arising between citizens of the same section of a country; and if it may ever be so applied, I think it cannot be in this case. For it is not true that the proceedings of the courts here were so interrupted as to prevent the prosecution of suits therein by citizens of any of the Confederate States except for brief periods of time. I am not referred to any other laws affecting this question.

In my judgment, therefore, the statutory limitation for bringing this suit as a means of contesting the validity of the will of John Horn, had expired when the bill was filed, and as to that portion of the relief sought, the bill must be dismissed.

I am further of opinion that the complainants by their own acts were estopped from filing a bill for that purpose. After the will was admitted to probate, they twice received, without objection or protest, dividends of the property of John Horn, founded on the directions of his will, and gave to John A. C. Horn, as executor thereof, acquittances therefor. In this they recognized the will, and recognized John A. C. Horn as the executor thereof, and they cannot now come into a court of equity without any allegation of fraud or concealment, or newly discovered evidence and claim to have the will set aside.

3. But the other ground of relief still remains, namely, the claim of the complainants against the executor for the balance of their legacies. I see nothing in the case to question the accuracy of the amounts found due to the complainants by the decree of May, 1864. The question is whether the defendant can exonerate himself by paying those amounts in Confederate bonds, in accordance with the decree. As a general rule, in my judgment, all transactions, judgments and decrees which took place in conformity with existing laws in the Confederate States between the citizens thereof during the late war, except such as were directly in aid of the Rebellion, ought to stand good. The exception, namely, of such transactions as were directly in aid of the Rebellion is a political necessity required by the dignity of the United States government, and by every principle of fidelity to the constitution and laws of our common country. By this rule the present case must be judged. And by this rule the deposit of the $7,900, money of the estate, in the depository of the Confederate States at Selma, cannot be sustained; it was a direct contribution to the resources of the Confederate government.

The defendant then must be considered chargeable with the Confederate treasury notes which he so deposited. And the next question is, whether he can discharge himself by paying the legacies in such notes? It will be remembered that the greater part of that balance in his hands had become due in January, 1860, and he does not show us when the remainder became due. It is fair to suppose, therefore, that it all became due as early as that date. He could not have obtained judgment against Craighead's estate until January, 1861, it is true. But it does not appear that he could not have collected the money by the exercise of proper diligence without suit. And if he had brought suit and perfected his judgment by January, 1861, he would still have been in time to have collected the amount due in good money. The complainants were urging him to proceed as early as August, 1860. He was cited to settle up his account, and the citation was repeated in January, 1861.

I cannot but regard the executor as liable for the balance due in lawful money, with interest to the present time. He has not shown sufficient excuse for not collecting the funds of the estate before the war commenced. Had he shown such an excuse, I should have felt bound to charge him only with the value of the funds at the time when he received them, with a reasonable allowance of time for making a settlement.

It may be urged that the decree of the probate court made in May, 1864, is conclusive on the question of the executor's diligence in the collection of the money due the estate. But a careful examination of that decree shows that this question was not passed upon by the court. By the laws then existing, an executor was exonerated by investing his funds in Confederate bonds. Horn having thus invested the funds in his hands, the court did not deem it necessary to look farther, but decreed him to be within the protection of the statutes. That decree, as before shown, cannot avail him in this case. Had the court decided the question of diligence, I should have deemed its decision on that point conclusive.

A decree will be made for the amount found to be due the complainants by the settlement in May, 1864, with lawful interest thereon to the present time.

Affirmed by the United States supreme court. See Horn v. Lockhart, 17 Wall. [84 U. S.] 570.

[NOTE. The appeal was taken by the defendant John A. C. Horn. Mr. Justice Field delivered the opinion of the court. The decision of the circuit court being in favor of the appellant upon the question of the five-years limitation, that question was not considered. The dismissal of the appeal as to the two defendants who were residents of Texas was sufficient to obviate the objection to the jurisdiction of the court. Upon the question whether the investment by the executor of money belonging to the estate in Confederate bonds, and the decree of the probate court approving the investment, is a sufficient answer to the suit for an account, he said: "It would seem that there could be but one answer to this question. The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war then waged by them against the government of the United States. The investment was therefore a direct contribution to the resources of the Confederate government. It was an act giving aid and comfort to the enemies of the United States; and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the Confederate government, could make such a transaction lawful." 17 Wall. (84 U. S.) 570. The case was again heard in the circuit court upon exceptions to the master's report, filed by Frances L. Bryan and Elizabeth T. Nabors. Decrees were entered in favor of both of the defendants. Case No. 8,446. Subsequently these two defendants brought actions at law against the surety on the executor's bond. There were pleas of statute of limitation and demurrers to the pleas by the plaintiff. The demurrers were sustained. Case No. 2,064.]

Case No. 8,446.

LOCKHART et al. v. HORN et al.

[3 Woods, 542.] [1]

Circuit Court. S. D. Alabama. June Term. 1877.

EXECUTOR—SETTLEMENT OF ESTATE—STATUTE OF LIMITATIONS—CONFEDERATE STATES' BONDS—FINDINGS OF MASTER.

1. A bill in equity was filed in the circuit court by certain legatees of a testator against the executor and other legatees, as defendants, to compel a settlement of the estate and a distribution of its proceeds among those entitled thereto. A final decree in accordance with the prayer of the bill was made establishing the amount due the complainants, and ordering its payment and allowing the legatees who were defendants to propound their claims by petition. In accordance with the decree, two of the defendant legatees filed petitions propounding their claims: *Held*, that the running of the statute of limitations against them was suspended by the filing of the original bill.

2. The only effect of a decree pro confesso is to enable the case to be proceeded with ex parte against the defendant as to whom it is taken. Unless followed by a final decree, it settles no rights.

3. An executor is not discharged from the payment of interest on a principal sum found due from him by the probate court, by showing that he invested the money in Confederate bonds and received no interest, if the investment was made under such circumstances as did not relieve him from the payment of the principal.

4. The presumptions are in favor of the findings of the master. They will not be disturbed, unless shown to be erroneous.

5. It is not according to equity practice to institute upon a petition filed after final decree a new train of pleadings. The only purpose to be subserved by such a petition is to bring the claim of the petitioner to the notice of the court or master.

Heard on exceptions to master's report upon the petition filed by Frances L. Bryan and Elizabeth P. Nabors. The original case was a bill filed in this court on February 15, 1867, by William Lockhart and Sarah Lockhart his wife, and Narcissa Lockhart, two of the heirs and legatees of John Horn, deceased, against John A. C. Horn, as executor of said John Horn, and as one of his heirs and legatees, and Leonidas L. Bryan, and Frances L. Bryan, Belton O. Nabors and his wife Elizabeth P. Nabors, Wm. McPhail and his wife Mary McPhail, heirs and legatees of said John Horn, deceased, and against John D. Alexander as surety on the bond of John A. C. Horn, as executor of John Horn, and as the administrator of Joseph M. Alexander, who was also a surety on the bond of John A. C. Horn, as administrator ad colligendum, and against S. S. King as the administrator of N. B. Leseuer, who was also a surety on Horn's bond. The bill sought to set aside the probate of the will of said John Horn, deceased, but was chiefly for a settlement and distribution of the estate of said John Horn in the hands of John A. C. Horn, as executor. The prayer of the bill was that the will of John Horn, deceased, be set aside, and that his estate be settled and distributed without reference thereto, etc., or if the will is not set aside, that John A. C. Horn, as executor, be held to account with complainants and the other legatees and devisees under the same, for his execution thereof, and that it be referred for an account, and that a decree be rendered against Horn and his sureties for whatever sum the said John A. C. Horn shall be found to be in arrears with the estate of John Horn, deceased. The prayer further was "that the court will take full and entire jurisdiction of the settlement of said estate of said John Horn, and proceed to distribute the same to all persons entitled thereto under the law as the same may be determined by this honorable court, and that all accounts and equities subsisting between said John A. C. Horn and other persons entitled to said estate growing out of his administration of the same, to be fully and finally adjusted and settled." McPhail and wife answered that John A. C. Horn had never accounted to Mary McPhail, and asked a settlement and decree for her share. John A. C. Horn answered fully, and decrees pro confesso were taken against all the parties, including Frances L. Bryan and Elizabeth P. Nabors. On the final hearing the bill was dismissed as to McPhail and wife, and so much of it as related to the setting aside and invalidating the will of John Horn was also dis-

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

missed. The court then decreed: "It is further ordered, adjudged and decreed that the defendant John A. C. Horn do pay to the complainants respectively (that is, to the two Lockharts), in the lawful money of the United States, the several amounts which were adjudged to be due to them by the decree of said probate court, made on the second day of May, 1864, together with lawful interest thereon from said date to the date of this decree (naming the specific amounts found by the decree of 1864); and it is further ordered, adjudged and decreed that the remaining defendants be authorized to make application for such order and relief as they may be entitled to ask on the principles of this decree," etc. A decree pro confesso was taken against John D. Alexander on the original bill on the 14th January, 1870, but the same was never made absolute; and no decree was made against him in the final decree.

This decree of the circuit court was affirmed by the supreme court of the United States on appeal; and the decrees in favor of the Lockharts fully paid off and satisfied. The case in the circuit court is reported in [Case No. 8,445], and in the supreme court in 17 Wall. [84 U. S.] 570. After the mandate of the supreme court came down on April 1, 1874, Frances L. Bryan, Elizabeth P. Nabors and McPhail and wife filed their petition in this court asking the court to grant them leave to present and establish their claims against said John A. C. Horn and John D. Alexander and the other sureties on the bond of John A. C. Horn, for the amounts ascertained to be due them respectively by the decrees of the probate court of Marengo county of May, 1860, and May, 1864. To these petitions John D. Alexander, as an individual and as administrator of Joseph M. Alexander, filed demurrers setting up the statute of limitations of six years against both decrees. He afterwards also filed answers setting up the statute of limitations to all the petitions, and to the petition of Frances L. Bryan that she has been paid in full. The petitions and claims of F. L. Bryan and Elizabeth P. Nabors were referred to a master with instructions to hear the parties and take further evidence, etc. McPhail and wife's petition was not referred, the chancellor considering that they did not come within the words "remaining defendants" who were given leave to make application under the decree. The whole case arising on the petitions was considered by the master, and the petitioners claimed the balances due by the decrees of May, 1860 and 1864. The master held, against the objection of Alexander, that the reference embraced as well the decree of 1860 as that of 1864, and stated the account as though the decree of this court re-opened all the settlements in the probate court. He, therefore, reported as due Mrs. Nabors, on the decree of the probate court of May, 1864, the sum of $2,506.30, including interest. He reported as due Mrs. Bryan on the settlements made by Horn in the probate court in May, 1860, and May, 1864, with interest, after deducting all credits allowed to Horn, with interest, the sum of $4,729.12. Exceptions were filed to the master's report by Mrs. Bryan, by Horn, and by Alexander. The exceptions are noticed in the opinion of the court.

John T. Morgan, Wm. Boyles, and James W. Lapsley, for petitioners.

John Little Smith, Thos. H. Herndon, and S. J. Cumming, for Horn and Alexander.

WOODS, Circuit Judge. So far as the petition of McPhail and wife is concerned, it must be dismissed, because by the terms of the decree it was only to the parties remaining after the dismissal of the bill as to McPhail and wife that the privilege was given to make application for such order and relief as they might be entitled to ask, on the principles of the decree. The exceptions filed by Alexander to the report of the master on the claims of Mrs. Bryan and Mrs. Nabors, are based on the ground that they are barred by the limitation of six years prescribed by paragraph six, of section 2901 of the Revised Code of Alabama, cannot prevail. The provision of the statute referred to is as follows: "Actions against the sureties of executors, administrators or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done, or omitted, by their principal, which fixes the liability of the surety," must be brought within six years. Alexander claims that his liability arose from this fact, only that he was the surety on the bond of Horn as executor; that the default of Horn dates from the decree of the probate court against him, rendered in 1864, and that, as the petitions of Mrs. Bryan and Nabors, in this case, were not filed until April, 1874, their claims are barred by the statutory provision aforesaid. But it seems clear that the running of the statute was interrupted by the filing of the original bill in this case, on the 15th of November, 1867. The bill was filed, in effect, for all the distributees of the estate. It prayed "that said pretended will be set aside, etc., and that the defendant John A. C. Horn might be held to full and just account for all property and money, rents and accumulations of said estate, with those persons entitled to distribution and inheritance thereof. Or, if said will is not set aside, that said John A. C. Horn, as executor thereof, be held to account with orators and the other legatees and devisees under the same, for his execution thereof," etc.

The court, by its decree, dismissed so much of the bill as assailed the validity of the will of John Horn, and adjudged that the defendant John A. C. Horn pay to the complainants the sums found to be due to them respectively by the decree of the pro-

bate court of May 2, 1864, and reserved the right to the remaining defendants, who are now these petitioners, to make application for such order and relief as they might be entitled to ask on the principles of the decree. As soon as this decree was finally affirmed by the supreme court of the United States, these petitions were filed. It cannot be possible that while this bill was pending, seeking to call this defendant Horn to account to all the legatees under the will of John Horn, a part of said legatees being complainants, and a part defendants, to the bill, that the statute of limitations was running against those who happened to be defendants. It is even immaterial whether the petitioners whose application is now under consideration, were complainants or defendants. The bill inured to their benefit, and it was so decreed by the court. In the case of Payne v. Hook, 7 Wall. [74 U. S.] 425, the supreme court says: "A court of equity adapts its decree to the necessities of each case, and should the present suit terminate in a decree against the defendant, it is easy to do substantial justice to all the parties, and prevent a multiplicity of suits by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation." That is what has been done here. No new parties have been made—no new liabilities suggested. The only purpose of the application of these petitioners is to ascertain the amount due them, on the principles of the decree made on the original bill. The language of a decree in chancery must be construed with reference to the issue which is put forward by the prayer for relief, and other pleadings, and which thus show what it was meant to decide. Graham v. La Crosse & M. R. Co., 3 Wall. [70 U. S.] 704.

To allow the defendants to the original bill to claim that, while the litigation was proceeding against them in the main cause, the statute of limitations was running against all the distributees who were not complainants in the bill, is not founded on any sound theory of the statute. But while Alexander cannot set up, successfully, the statute of limitations, there is another ground suggested in his brief, on which he can resist the rendition of any decree against him in favor of either Mrs. Bryan or Mrs. Nabors, and that is, that there is no decree rendered against him in the main suit. The circuit court rendered a decree against John A. C. Horn, but none against Alexander. The decree against Horn was appealed from, and affirmed by the supreme court. That is an end of the main cause. There was no decree absolute against Alexander in the main cause. For some reason which does not appear, the court did not hold him liable upon the case made by the original bill, and the decree pro confesso against him. The effect of the decree pro confesso against him was simply to enable the case to be carried on as to him ex parte. Frow v. De La Vega, 15 Wall. [82 U. S.] 552. After the affirmance of the decree of the circuit court by the supreme court, the case, as far as it concerned Alexander, was just as effectually disposed of as if the bill had been dismissed as to him. Now the petitioners, Mrs. Bryan and Mrs. Nabors, are authorized to make application for such order and relief as they may be entitled to ask on the principles of the decree in the main cause. That decree held Horn liable, but discharged Alexander. The petitioners are, therefore, entitled to ask a decree only against Horn, for such sums, respectively, as they may show themselves entitled to. They have no remedy against Alexander, because the court, in the main cause, made no decree against him. As soon as the case got beyond the reach of amendment by the affirmance of the decree of the circuit court, Alexander was effectually out of court, and the petitioners could have no relief against him, save by a new suit. Whatever decrees, therefore, are rendered in favor of the petitioners, must be against Horn alone.

It remains to consider the exception filed by Horn to the master's report. The first exception is to the allowance of interest on the decrees of May 21, 1860, and of May 2, 1864, in favor of Mrs. Bryan. But the decree in the main case allowed interest against Horn, in favor of the original complainants. The opinion of the court was that the investment made by Horn, as alleged in his answer, of the funds of the estate in Confederate States' bonds, and their deposit by him with the probate judge, was no payment, and did not effect the discharge of Horn from his liability. He still owed the amount of the decree of the probate court, and was, of course, liable to the payment of interest thereon. The fact which Horn alleges, by affidavit, that he received no interest, does not excuse him from the payment of interest. He was chargeable with interest from the date of the decrees until they were paid. He cannot excuse himself from the payment of interest by showing that he invested the fund in Confederate bonds, from which he received no interest. Such an investment does not discharge the principal, as this court has already decided, and it does not, therefore, discharge the interest. It is claimed, as an additional reason why no interest should have been allowed Mrs. Nabors, that the will of John Horn provided that if she should die childless the bequest to her should go to her brothers and sisters, and her present or future husband should have no part in it. It is, therefore, insisted by Horn that he could not, with safety, pay the money to Mrs. Nabors or into the probate court, until she had secured the same to the parties entitled there-

to, in case she died childless. No reason is perceived why he could not have safely paid the fund into the probate court. Such a payment would have exonerated him completely. He failed to do this. He kept the money himself, and he is, therefore, properly chargeable with interest.

Exception is taken by Horn to the allowance by the master, to Mrs. Bryan, of $2,700, the amount of the decree of May 21, 1860, because that decree had been settled and closed by a proceeding by her and her husband, in the probate court of Marengo county, Alabama, and the appeal therefrom to the supreme court. The proceeding of Mrs. Bryan and her husband, as appears by the report of the case in 42 Ala. 496, was a motion made to the probate court in 1867, to revise and amend the decree of 1860. The supreme court decided that, after the final settlement in 1864 by the executor of the estate, the jurisdiction of the probate court ceased, and that the party's remedy, if he had any, was in chancery. This, clearly, cannot be considered as a final disposition of the rights of Mrs. Bryan, under the decree of 1860. The master disallowed the claim of Horn against Mrs. Bryan for board for herself and children, and of the sum of $276 paid Modawell. These disallowances of the master seem to be sustained by the evidence. At all events, the presumption is in favor of the conclusions of the master, and nothing has been advanced to convince the court that the master has erred in these disallowances. They will not be disturbed unless shown to be erroneous. The same remarks apply to the exceptions filed by Mrs. Bryan.

The result is, that all the exceptions taken by Horn to the report of the master, and also the exceptions taken by Mrs. Bryan, must be overruled. There will be decrees entered in favor of Mrs. Bryan and Mrs. Nabors, against John A. C. Horn, for the sums found due to them respectively. The petitions, so far as they concern Alexander, will be dismissed. It may be well to add, that the taking of decrees pro confesso, on the petitions filed by Mrs. Bryan and Mrs. Nabors, and the filing of answers to such petitions, setting up objections to the claims made in the petitions, was an unnecessary and improper procedure. It is not the practice in equity, after final decree, to institute a new train of pleading. The only purpose to be subserved by filing petitions is to bring the claim of the petitioners before the master. All objections to the relief sought by the petition should be made before him.

[NOTE. This case was subsequently heard upon actions at law brought by Frances L. Bryan and Elizabeth T. Nabors against the surety on the executor's bond. There were pleas of the statute of limitations and demurrers by the plaintiffs to the pleas. The demurrers were sustained. Case No. 2,064.]

Case No. 8,447.

LOCKHART v. ROSS.

[Cited in Tunstall v. Worthington, Case No. 14,239. Nowhere reported; opinion not now accessible.]

Case No. 8,448.

LOCKINGTON v. SMITH.

[Pet. C. C. 466.] [1]

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

WAR—ALIENS RESIDENT IN COUNTRY—POWER TO ARREST — REGULATIONS — PLEADING AT LAW—MATTERS SUBSEQUENT TO PLEA—FORMAL OBJECTIONS.

1. Powers of the president of the United States, under the act of congress relative to alien enemies, [1 Stat. 577]. This act having authorised the president to direct the confinement of alien enemies, necessarily conferred all the means for enforcing such orders as he might give in relation to the execution of those powers.

2. The marshals of the several districts, are the proper officers to execute the orders of the president, under the act relative to alien enemies.

3. It is to the department of state, that a reference must be made for the official acts of the president, in relation to such public measures as are not immediately connected with the duties of some other department.

[Cited in brief in Collins v. State, 8 Ind. 351.]

4. The president may direct some other department to make known such measures as he may establish.

5. After the president had established such regulations as he deemed necessary in relation to alien enemies, it was not necessary to call in the aid of the judicial authority, on all occasions to enforce them, and the marshal could act without such authority.

6. By the provisions of the law, congress intended to make the judiciary auxiliary to the executive in effecting its great objects; and each department was to act independently of the other, except that the former was to make the ordinances of the latter the rule of its decisions.

[Cited in Re Spangler, 11 Mich. 323.]

7. A plea, which states matters which occurred subsequent to the institution of the suit, is bad on demurrer.

8. When objections, merely formal are stated as causes of demurrer, the party taking them is entitled to the benefit of such exceptions, when they are well founded.

At law.

WASHINGTON, Circuit Justice. This is an action of assault and battery, and false imprisonment, to which the defendant has put in four special pleas of justification. The first sets forth in substance, that at the time when the alleged wrongs were committed, viz. on the 9th of October, 1813, the defendant was marshal of this district. That war had been declared by the government of the United States against the United Kingdom of Great Britain and Ireland, which had been duly proclaimed by the

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

president. That in conformity with an order of the president, requiring the subjects of the enemy residing within the United States to report themselves to the marshal of the state in which such aliens resided, the plaintiff, on the 18th day of July, 1812, reported himself to the defendant as an alien and a subject of the king of the United Kingdoms, &c. and a merchant; and the plea avers, that the plaintiff at the time when, was an alien enemy subject of the said king, aged above twenty years, residing in the state of Pennsylvania within forty miles of tide water, engaged in commerce, and was not naturalized, nor had he made application to any court of the United States to be naturalized. The plea then proceeds to set forth sundry orders issued from the department of state, by the directions of the president, of which public notice was given; as also certain instructions to the respective marshals, issued from the same department, and also from that of the commissary general of prisoners, by order of the president, the most material of which are as follows: The order of the 23d of February, 1813, required all alien enemies residing within forty miles of tide water, forthwith to apply to the marshal of the district in which they resided, for passports to retire to such places beyond that distance from tide water as should be designated by the said marshal; which order was accompanied by instructions to the marshals, of the same date, requiring them to take into custody and convey to the place assigned to them, all those to whom the said order had reference, who were engaged in commerce, and who did not immediately conform to said order. Also the instructions of the 12th of November, 1813, requiring the several marshals to offer for execution to every alien enemy within their respective districts who had been or might be thereafter removed from the vicinity of tide water, a parol of honour in a prescribed form; and if refused, commanding them to place every alien enemy so refusing, forthwith in close confinement; also, a subsequent order of the 17th of the same month, instructing the marshals not to liberate any person imprisoned under the above order of the 12th, without the special order of the commissary general. The plea then proceeds to aver, that on the 13th of March, 1813, the plaintiff received from the defendant a passport to retire to Reading, a place beyond forty miles from tide water, to which place he did retire, and remained there for some time, but that he afterwards left it contrary to the above regulations, and was found by the defendant at large in the city of Philadelphia; and being required by the defendant to return to Reading, which he refused to do, the defendant gently laid his hands on the plaintiff in order to take him into custody, that he might be conveyed to Reading; and that for this purpose the defendant necessarily imprisoned the plaintiff in the debtors' apartment, the usual and lawful place of confinement for persons taken into custody by the marshal under the authority of the United States.

The plea then states two unsuccessful attempts of the plaintiff to obtain his discharge, under writs of habeas corpus, the one issued by the chief justice of Pennsylvania, and the other by the supreme court of that state, and proceeds to aver, that the defendant, on the 20th of November, 1813, in obedience to the above recited order of the 17th of the same month, tendered to the plaintiff the parol of honour therein prescribed, which the plaintiff refused to execute; in consequence whereof the defendant held the plaintiff in confinement until the 19th of April, 1814, when he signed the parol and was discharged.

The second plea resembles the first, except that it omits to mention the writs of habeas corpus; and it sets forth an order issued from the department of the commissary general, by the directions of the president, dated the 19th of April, 1813, instructing the several marshals, in any case where an alien enemy should declare his adherence to the enemy and a disposition to support their interest, or who should attempt to disturb the confidence reposed in their government by the citizens of the United States, to place him immediately in close confinement. This plea then avers that the plaintiff at different times, before and during his confinement, was chargeable with actual hostility towards the government of the United States, and with other crimes against the public safety, by declaring his adherence to the enemy, and by declaring his intention to escape from his said restraint and to join the enemy; and by declaring that he corresponded with the subjects of the enemy, and had intercourse with them; whereupon the defendant, having the warrant of the president therefor, gently laid his hands on the plaintiff, and then and there arrested and confined him in the debtors' apartment aforesaid, and there continued him until the 19th of April, 1814, when he signed a parol to return to Reading, when he was discharged.

To the two first pleas demurrers have been filed, and various causes assigned; the whole of which may be included under the following heads: First, that the act of congress of the 6th of July, 1798, respecting alien enemies, did not authorise the president to direct the restraint or confinement of such persons for any other purpose than that of removing them from the United States; and that the orders of the president could give no authority to the marshal to confine an alien enemy, unless the marshal was also armed with a special warrant from the president for the removal of such alien from the United States. Second, that if the president had a power to order alien enemies to be confined for any other purpose, still such order must have been made by

some public act of his own, and under his seal, of which the orders issued from the department of state, and from that of the commissary general, are no evidence. Third, that the marshal was not justified in arresting and confining the plaintiff without the sanction of the judicial authority, under the second section of the above act of congress. The fourth objection is to the form of these pleas.

Issues in fact are joined on the third and fourth pleas, and need not be noticed at this time. The three first heads of objection to the defence asserted by these pleas, were so fully discussed, and, to my mind, so satisfactorily decided by the chief justice of the supreme court of this state, upon the habeas corpus obtained by the plaintiff, that I deem it unnecessary to go at large over the same ground, but I shall content myself with a brief expression of the reasons upon which my opinion is founded.

First, the power of the president under the first section of the law, to establish by his proclamation or other public acts, rules and regulations for apprehending, restraining, securing, and removing alien enemies, under the circumstances stated in that section, appears to me to be as unlimited as the legislature could make it. He alone is authorised to direct the conduct to be observed on the part of the United States towards such alien enemies, and to prescribe the manner and degree of restraint to which they should be subject; to declare in what cases, and on what terms, their residence should be permitted, and to provide for the removal of those whom he should not permit to remain in the United States, and who should refuse or neglect to depart; and, to avoid all doubt as to the extent of his power, he is authorised in general and unqualified terms, to establish any regulations which he should think necessary in the premises, and for the public safety. There is not, I think, the slightest ground for the argument, that every restraint or confinement of an alien enemy is unauthorized by this law, unless it be made with a view to his removal from the United States. If this be the true construction of the act, it would follow that, however dangerous it might be, under any supposed circumstances, for alien enemies to quit the United States, possessed of information useful to the enemy, and detrimental to this nation, they must nevertheless be either sent away, or be suffered to go at large, protected spies in the service of the enemy, and possibly in the vicinity of their armies and navy. That the legislature intended to confine the government to the choice of one of these alternatives, when a middle and safe course was at hand and evidently in its view, is not to be presumed; nor can such a construction, in my opinion, be fairly made from the words, or from the professed object of the law. It would narrow the meaning of expressions as unqualified as could well be employed, contrary to reason and the most obvious policy of the law. It seems perfectly clear, that the power to remove was vested in the president, because, under certain circumstances, he might deem that measure most effectual to guard the public safety. But he might also cause the alien to be restrained or confined, if in his opinion the public good should forbid his removal. If then the president was authorized to direct the confinement of alien enemies, without intending to remove them, I am of opinion that the powers vested in him, necessarily conferred all the means of enforcing his orders; and since it would be absurd to suppose that the president could personally enforce his own decrees, it follows that he might direct others to do it; and what officer of the government could, with so much propriety, be clothed with this authority, as the marshals of the several districts? The third section of the law applies to the single case of a removal from the United States, in which case the marshal, by the express provisions of that section, is to act under the warrant of the president: But, in all other cases coming within the provisions of this law, the authority of the marshal to carry into execution the regulations and orders of the president, is implied in the power conferred on the president to establish these regulations.

Second. The next objection to the substantial merits of the defence, is, that the orders issued from the department of state and from that of the commissary general, are not to be considered as the public acts of the president. The department of state is one of the organs of the executive branch of the government, established for the purpose of facilitating and conducting the operations of that branch, so far as the duties assigned to it extend. The business of that department is by law to be conducted in such manner as the president may direct. It is to this department that a reference must be made, for the official acts of the president in relation to those public measures which he may establish, and which are not more immediately connected with the duties of some other department. This has been the general practice of this branch of the government, and is fully warranted by law. Nevertheless, the president for the more easy and expeditious discharge of his executive duties, may direct some other department to make known the measures which he may think proper to establish. They are equally his acts, whether they emanate from the department of state, or from any other department. This much I have thought proper to say upon the general question, independent of the aid to be derived from averments in the pleading. For, in this case it is to be observed, that the pleas expressly aver that the orders and instructions issued from the department of

state, and from that of the commissary general, were the orders and instructions of the president, communicated by those departments, respectively, and these averments are acknowledged by the demurrer to be true. There can therefore be no ground for the argument that the president had no authority to delegate his powers to the department just mentioned; because, in fact, he has not done so. As to the necessity of a seal, to give validity to the orders of the president, it is I think a sufficient answer, that there is no law or usage which requires it.

Third. It is, in the next place contended, that after the president has established such regulations as he may think necessary, the judicial authority must in every instance be resorted to to enforce them, and that the marshal can act only under such authority. Such a construction would, in my opinion, be at variance with the spirit as well as with the letter of the law, the great object of which was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge. It was certainly proper, and, in many cases it might be highly beneficial to the public safety, to vest in the judiciary a power to enforce the ordinances of the president, in every case which should be regularly brought before it. But to bring this power into action, there must be a specific complaint against some particular individual, and a regular hearing of each case must be had. If no person will take upon himself the task of becoming an informer, at all times and under any circumstances an unpleasant one, is the public safety to be jeoparded, however imminent the president may know the danger to be? Certainly, this never could have been the intention of the legislature. If only judicial interference can be resorted to, it is most obvious that the means are altogether inadequate to the end for which the law meant to provide. But how can a construction so narrow as that contended for, consist with the unlimited powers conferred on the president? If he could not direct the marshal to confine alien enemies who should refuse to retire to any place which might be designated, or who should declare their adherence to the enemy, and a disposition to support their interests, can it be said that he possesses the power to direct the conduct to be observed on the part of the United States towards alien enemies, and the manner and degree of their restraint, and to establish any other regulations he might think proper in the premises, for the public safety? If he is confined to regulations which require the interposition and aid of the judiciary to give them effect, then this restriction of his authority must be deduced by mere construction from expressions as unqualified as the legislature could have used. I do not feel myself authorised to impose limits to the authority of the executive magistrate which congress, in the exercise of its constitutional powers, has not seen fit to impose. Nothing in short, can be more clear to my mind, from an attentive consideration of the act in all its parts, than that congress intended to make the judiciary auxiliary to the executive, in effecting the great objects of the law; and that each department was intended to act independently of the other, except that the former was to make the ordinances of the latter, the rule of its decisions.

Fourth. The principal objection assigned as cause of demurrer to the form of these pleas, is, that they are redundant, immaterial, and not traversable; the first plea, in stating the several applications of the plaintiff to be discharged on habeas corpus, and matter which occurred after the commencement of this action;—the second plea, in stating matters which occurred after the commencement of the action. These objections are, I think, well founded. The habeas corpus, and the proceedings consequent thereon, are totally immaterial and irrelevant to the matter in issue. Whether the plaintiff was discharged under them or was remanded, could neither justify or criminate the defendant, who is called upon to answer for an unlawful arrest and imprisonment of the plaintiff. If he acted without legal authority, the decision of the judge upon the writ of habeas corpus could not justify him. This objection however, is applicable only to the first plea. But both pleas are chargeable with the objection, that matter is pleaded which occurred after the commencement of the suit, which is, of course, immaterial, and could not be traversed. This action was brought, returnable to the April term of 1814, and the process was served on the 7th of December, 1813, preceding, and both pleas state, that on the 19th of April, 1814, the plaintiff gave his parol when he was discharged, and returned to Reading, where he continued until the end of the war. The second plea in particular alleges, that both before and during the plaintiff's confinement, he was chargeable with actual hostility towards the government of the United States; and it aims to justify the continuance of his confinement under the order of the 19th of April, 1813, issued from the department of the commissary general. Now it was clearly immaterial whether after this action was commenced, the defendant was or was not justified in holding the plaintiff in confinement. That was a matter which the jury could not inquire into if it had been traversed, and consequently it was improperly made a part of the pleas. It is not pleasant to decide causes on objections merely formal; but, when they are stated specially as causes of demurrer, the party is

entitled to the benefit of his exceptions, when they are well founded. Demurrer allowed.

LOCKMAN (UNITED STATES v.). See Case No. 15,620.

Case No. 8,449.

LOCKWOOD v. COMSTOCK et al.

[4 McLean, 383.] [1]

Circuit Court, D. Michigan. June Term, 1848.

PARTNERSHIP—DISSOLUTION—NOTE GIVEN BY ONE—OLD DEBT—AUTHORITY TO SETTLE ACCOUNTS.

1. After the dissolution, neither partner by any note in writing, can bind the partnership, even for a debt contracted by it. And in this view, a note is a new contract; though it be given to pay a debt of the firm.

[Cited in Conklin v. Ogborn, 7 Ind. 555; Gardner v. Conn, 34 Ohio, 192; Woodson v. Wood, 84 Va. 487, 5 S. E. 279.]

2. An authority to one party to settle the accounts of the firm, collect and pay its debts, does not authorize the individual to give a note in the name of the late firm.

[Cited in Woodson v. Wood, 84 Va. 487, 5 S. E. 279.]

At law.

Sedgwick & Campbell, for plaintiff.

Mr. Hand, for defendant.

OPINION OF THE COURT. This is a motion for a new trial, reserved for a full bench. The suit was brought by plaintiff, as indorsee of two promissory notes, dated September 1st, 1839, against defendants, as makers, under the firm of Charles Bissell & Co. It was in evidence, that the firm was dissolved October 29th, 1838, of which payees had personal notice, prior to the making of the notes. They were given for a debt due by the firm, by Bissell, without any authority from Comstock to use the partnership name. The following advertisement of the dissolution of the partnership was published, in the "Daily Advertiser" of Detroit, a paper of general circulation, October 31st, 1838: "Dissolution." "The co-partnership heretofore existing under the firm of Charles Bissell & Co., is this day dissolved by mutual consent. The business will hereafter be continued by Charles Bissell, who is duly authorized to settle all demands in favor or against said firm." "Detroit, October 29th, 1838. Signed, Charles Bissell, H. H. Comstock."

It is argued, 1. That the dissolution of the partnership put an end to the power of Bissell to use the partnership name. Bell v. Morrison, 1 Pet. [26 U. S.] 370; Atwood v. Gillett, 2 Doug. [Mich.] 205; Story, Partn. 458, 472–474; Gow, 253, 254.

2d ground. That the terms in which the dissolution was announced to the public, did not authorize Bissell to use the name of his former partner. The question is well settled in this country that, after the dissolution of a partnership, the partnership name can not be used, by either partner in the creation of a new contract. That power existed during the partnership, but its dissolution terminated it. The name can not be used in giving a note for a debt due by the late firm. For that would be a new contract, variant from that which was entered into, during the partnership. This power to use the name of Comstock was clearly not given in the notice of dissolution. It authorized Bissell, who continued the business, "to settle all demands in favor of or against said firm." But it did not authorize him to use the name of his late partner, in entering into a new contract. To settle, was to ascertain the balance due, and pay it, but not to give a note or any other obligation. The motion for a new trial is granted.

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

LOCKWOOD (DE MILL v.). See Case No. 3,782.

Case No. 8,450.

LOCKWOOD et al. v. The GRACE GIRDLER.

[N. Y. Times, March 30, 1864.]

District Court, S. D. New York. 1864.[1]

COLLISION—BETWEEN SAIL VESSELS IN EAST RIVER—INEVITABLE ACCIDENT.

The libelants [John W. Lockwood and others] were owners of the yacht Ariel, which was run into by the Grace Girdler on August 5, 1863, in the East river, off the foot of Stanton street. The vessels were both beating down the river with the wind to the eastward of south. They had just run out their long tacks, running from the Long Island shore to near the foot of Stanton street, where both went about. The Ariel went about first, and was a little to the leeward of the Girdler. Both vessels were then on their short tacks, the Ariel being a little in advance. As she began to make headway, she discovered a ferry-boat coming up the river, to avoid which she luffed and was brought into the track of the Grace Girdler, and the collision took place.

Mr. Black, for libelants.

Beebe, Dean & Donohu, for respondents.

Before SHIPMAN, District Judge.

HELD BY THE COURT: That the witnesses do not materially differ, except as to the distance from the docks at which it took place, and the speed of the Girdler. That the Girdler having just gone about, and having but little headway on, it was not in her power to have luffed so as have avoided the Ariel. No collision could have taken place but from

[1] [Affirmed by circuit court; case unreported. Decree of circuit court affirmed by supreme court in 7 Wall. (74 U. S.) 196.]

the untoward circumstance that the ferry-boat was passing across the track of the vessels just as they had gone about. The luffing of the Ariel was necessary to avoid the ferry-boat, but it unfortunately brought her across the track of the Grace Girdler at a moment when she had no power to avoid a collision. That the collision must be considered an inevitable accident.

Libel dismissed, with costs.

[NOTE. The libelants appealed to the circuit court, which affirmed this decision. Case not reported. From the decision of the circuit court they appealed to the supreme court, where the decision was again affirmed. Mr. Justice Swayne delivered the opinion of the court. He considered that from all the testimony in the case it is a fair presumption that the accident was inevitable. He said: "Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances,—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view, the safety of life and property." But if the accident was not inevitable, the learned justice considered the Ariel to be in fault, or at least there is doubt. He says: "Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen." 7 Wall. (74 U. S.) 196.]

LOCKWOOD v. The JEWESS. See Case No. 8,412.

LOCKWOOD (RICHARDSON v.). See Cases Nos. 11,786 and 11,787.

Case No. 8,451.

LOCKWOOD et al. v. WALKER.

[3 McLean, 431.] [1]

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

LANDLORD AND TENANT—PARAMOUNT TITLE OF LANDLORD.

A stranger who obtains possession through a tenant, though by purchase of the land, cannot dispute the landlord's title.

[This was an action at law by Doe ex dem Lockwood and others against Leicester Walker.]

Ewing and Hart, for lessors of plaintiff.

Mr. Squires, for defendant.

OPINION OF THE COURT. The plaintiff proved that Garret Smith leased the premises in controversy, from the ancestor of the lessors of the plaintiff; and that, while in possession, he sold them to Walker, the defendant. The lease to Smith having expired, the defendant claimed under his purchase.

THE COURT instructed the jury, that as the entry was under Smith, the tenant of the lessors, the defendant, Walker, could not dispute the plaintiff's title, and that, consequently, they must find for the plaintiff. The verdict was accordingly so rendered.

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

LOCOMOTIVE BOILER (UNITED STATES v.). See Case No. 15,621.

Case No. 8,452.

LOCOMOTIVE ENGINE SAFETY TRUCK CO. v. ERIE RY. CO.

[10 Blatchf. 292; [1] 6 Fish. Pat. Cas. 187; 3 O. G. 93; Merw. Pat. Inv. 440.]

Circuit Court. S. D. New York. Dec. 30, 1872.

PATENTS — PILOT WHEELS IN LOCOMOTIVE ENGINES—INFRINGEMENT—ACT OF MAY 4, 1858—JURISDICTION.

1. The claim of the letters patent granted to Alba F. Smith, February 11th, 1862, for an "improvement in trucks for locomotives," namely, "the employment, in a locomotive engine, of a truck or pilot wheels, fitted with the pendent links, o, o, to allow of lateral motion to the engine, as specified, whereby the drivers of said engine are allowed to remain correctly on the track, in consequence of the lateral motion of the truck, allowed for by said pendent links, when running on a curve, as set forth," is a claim for the use in, and the combination with, a locomotive engine, (that is, a structure having, at its rear end, not a swivelling truck, but non-swivelling driving wheels, with axles rigidly attached to the body of the engine,) of a swivelling pilot or leading truck, provided with pendent links, to allow the forward part of the engine to move laterally over the truck, when the truck and the driving wheels are not together in a straight track, whereby the forward part of the engine can move onward in a line tangent to a curve, while the axles of the driving wheels are parallel, or nearly so, to the radial line of the curve, and the axles of the truck wheels also become parallel to the radial line of the curve, because the truck is made to swivel around the king-bolt, by the action of the rails on the flanges of the truck-wheels.

2. The nature of the invention covered by such claim, explained.

3. Such claim is not anticipated by the patent granted to Bridges and Davenport, May 4th, 1841, for an "improvement in railway-carriages," although such patent shows the use, at each end of a railway-car, of a swinging bolster, in a truck swivelling on a king-bolt, the body of the car being connected to the truck-frame by pendulous links, from which such body is hung, whereby a lateral motion of the truck is permitted, independently of the body of the car.

4. Nor is such claim anticipated by the patent granted to Kipple and Bullock, December 20th, 1859, for an "improvement in car-trucks," although the mode of operation of the Kipple and Bullock truck, per se, in a car having a like truck at the other end, is the same, for all the purposes of the truck itself, that it is in a structure which has driving wheels at the other end.

5. Nor is such claim anticipated by the patent granted to Levi Bissell, August 4th, 1857, for an "improvement in trucks for locomotives."

6. The arrangement of Bissell, explained.

7. The combination of Smith was patentable, because it produces a new mode of operation, and new results, in the structure as a whole, although

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 292, and the statement is from 6 Fish. Pat. Cas. 187.]

the truck used by Smith was old, and, as respects itself, in swivelling and in having a lateral movement, operates in the same way as it did in the car which had two of such trucks.

8. The fact that Smith's patent is granted for an "improvement in trucks for locomotives," and that the truck he uses was old, and that his invention is really an improvement in locomotives, forms no objection to the validity of the patent.

9. Under a bill alleging an infringement by making and using the patented invention, the allegation is sustained by proof of using alone.

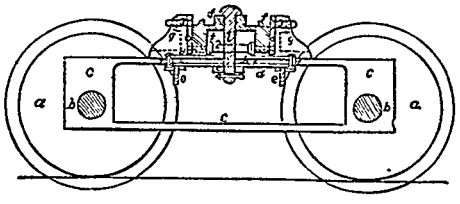
[Cited in Butz Thermo-Electric Regulating Co. v. Jacobs Electric Co., 36 Fed. 197.]

10. The 1st section of the act of May 4, 1858, (11 Stat. 272,) which provides, that a suit not of a local nature, brought in a district in a state containing more than one district, against a single defendant, shall be brought in the district in which the defendant resides, does not apply to a case where the single defendant is a corporation created by such state.

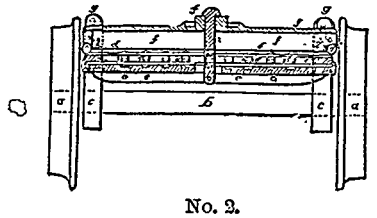
[Cited in Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 407; East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co., 49 Fed. 612.]

[Final hearing on pleadings and proofs.

[Suit brought upon letters patent [No. 34,377] for "improvement in trucks for locomotives," granted Alba F. Smith, February 11, 1862.



No. 1.

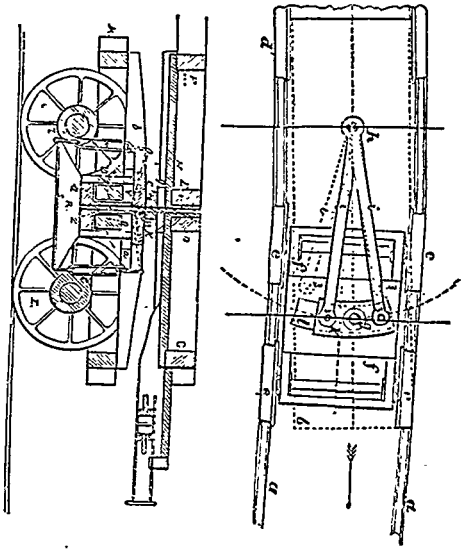


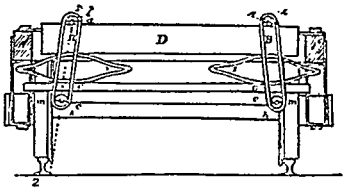
No. 2.

[Figure 1, in the above engraving, represents a vertical longitudinal section of complainant's truck, as shown in the letters patent. Figure 2 represents a transverse section of the same; d is the center cross-bearing plate or platform, made of two thicknesses of iron plate, riveted together, and embracing the upper bars of the frame c. At the end of said plate, e e are cross-bars, beneath the said double-bearing plate d, to strengthen the rivets; f is a bolster, made of a flanged bar, through the center of which the king-bolt i passes. The king-bolt also goes through an elongated opening in the plates d, so as to allow of lateral motion to the truck beneath the bolster. The king-bolt also serves as a connection to hold the truck to the engine. The bolster F is suspended from the side-pieces g g, of the frame, by means of pendent links o o, which links are shown in the engraving, No. 2, by dotted lines.

[A further description of the structure and mode of operation will be found in the opinion of the court.

No. 3. No. 4.





No. 5.

[Figure 3 represents the Davenport & Bridges truck, as shown in their patent.

[Figure 4 shows the arrangement for securing lateral motion, in the Levi Bissell patent.

[Figure 5 represents the Kipple & Bullock truck, showing the arrangement of pendent links to permit lateral motion.][2]

C. F. Blake and C. M. Keller, for complainant.

C. A. Seward, for defendant.

BLATCHFORD, District Judge. This suit is founded on letters patent granted to Alba F. Smith, February 11th, 1862, for an "improvement in trucks for locomotives." The specification describes the invention as an "improvement in trucks for locomotive engines." It says: "Several laterally moving trucks have been made and applied to railroad cars. My invention does not relate broadly to such laterally moving trucks, but my said invention consists in the employment, in a locomotive engine, of a truck or pilot wheels provided with pendent links,

[2] [From 6 Fish. Pat. Cas. 187.]

to allow of a lateral movement, so that the driving wheels of the locomotive engine continue to move correctly on a curved track, in consequence of the lateral movement allowed by said pendent links, the forward part of the engine travelling as a tangent to the curve, while the axles of the drivers are parallel, or nearly so, to the radial line of curve. In the drawing, I have represented my improved truck itself. The mode of applying the same to any ordinary locomotive engine will be apparent to any competent mechanic, as my truck can be fitted in the place of those already constructed, or the same may be altered, to include my improvement." The truck has four wheels, on two axles, and a frame made in the usual manner of the frame of an ordinary locomotive truck. It has a centre cross bearing plate or platform, made of two thicknesses of iron plate, riveted together, and embracing the upper bars of the frame; and a bolster, made of a flanged bar, through a hole in the centre of which the king-bolt passes. The king-bolt also goes through an elongated opening in the bearing plate, to allow a lateral motion to the truck beneath the bolster. At the same time, the king-bolt is a connection, to hold the truck to the engine. The bolster takes the weight of the engine in the middle, and is itself suspended at the ends of bars attached to the moving ends of the pendent links, which are attached by bolts, at their upper ends, to brackets on the frame. The distance between the bars, transversely of the truck, is slightly more than that between the bolts, so that the pendent links diverge slightly. The specification says: "When running upon a straight road, the engine preserves great steadiness, because, any change of position, transversely of the track, in consequence of the engine moving over the truck, or the truck beneath the engine, is checked by the weight of the engine hanging upon the links, and, in consequence of their divergence, any side movement causes the links on the side towards which the movement occurs, to assume a more inclined position, while the other links come vertical, or nearly so. Hence, the weight of the engine acts with a leverage upon the most inclined links, to bring them into the same angle as the others, greatly promoting the steadiness of the engine in running in a straight line. As the pilot or truck wheels enter a curve, a sidewise movement is given to the truck, in consequence of the engine and drivers continuing to travel as a tangent to the curve of the track. This movement, and the slight turn of the whole truck on the king-bolt, not only causes the truck wheels to travel correctly on the track, with their axles parallel to the radial line of the curve of track, but also elevates the outer side of the engine, preventing any tendency to run off the track upon the outer side of the curve. Upon entering a straight track, the truck again assumes a central position, and, in case of irregularity in the track, or any obstruction, the truck moves laterally, without disturbing the movement of the engine. I do not claim laterally moving trucks, nor pendent links, separately considered." This claim is: "The employment, in a locomotive engine, of a truck or pilot wheels, fitted with the pendent links, o, o, to allow of lateral motion to the engine, as specified, whereby the drivers of said engine are allowed to remain correctly on the track, in consequence of the lateral motion of the truck, allowed for by said pendent links, when running on a curve, as set forth."

The proof shows that the defendants have used, in this district, an engine, built by them at Dunkirk, in the Northern district of this state, which has four flanged driving wheels, and contains the invention claimed in Smith's patent. The issue is as to the novelty of the invention. In order to determine this question, it is necessary to clearly see what invention is claimed in Smith's patent.

He does not claim laterally moving trucks, that is, trucks with laterally swinging bolsters. Nor does he claim pendent links, by themselves. Laterally moving trucks, applied to railroad cars, which had at each end one of such trucks, free also to swivel around a king-bolt, which connected the car to the truck, and passed through the centre of the swinging bolster, which was the centre of the truck, were old. The specification so admits. But, Smith's invention, as claimed, is for the use in, and the combination with, a locomotive engine, (that is, a structure having, at its rear end, not a swivelling truck, but non-swivelling driving wheels, with axles rigidly attached to the body of the engine,) of a swivelling pilot or leading truck, provided with pendent links, to allow the forward part of the engine to move laterally over the truck, when the truck and the driving wheels are not together in a straight track, whereby the forward part of the engine can move onward, in a line tangent to a curve, while the axles of the driving wheels are parallel, or nearly so, to the radial line of the curve, and the axles of the truck wheels also become parallel to the radial line of the curve, because the truck is made to swivel around the king-bolt, by the action of the rails on the flanges of the truck wheels.

In going around a curve with a locomotive engine, the axles of the two pairs of driving wheels tend to assume a parallelism to that radius of the curve which is equidistant between the two axles. If the pilot truck has no lateral swing to its bolster, but merely swivels on the king-bolt, the tendency of the action of the truck wheels, on a curve, is to force the king-bolt into a position over the centre of the track. That action is resisted by the body of the engine, and, to accomplish it, the driving wheels must be

twisted out of their proper position, and must slip and grind on the rails. The reason of this is, that a line drawn longitudinally through the centre of the engine, at right angles to that radius of the curve which is equidistant between the two axles of its driving wheels, will not strike the king-bolt at the centre of the track, unless the driving wheels are so caused to slip. Hence, it was customary, with a pilot truck which only swivelled, and had no lateral swing to its bolster, to make the front driving wheels without flanges, so that they might slide sidewise. But, the antagonism is reconciled, by allowing the king-bolt and the forward end of the engine to move laterally, so as to keep in a line substantially at right angles to the axles of the driving wheels, and outside of the centre of the track, the king-bolt being no longer controlled, in its position, by the truck, and there being no twisting of the driving wheels out of position.

Another feature, developed in the use of the pendent links, is pointed out in the specification, which is, that, on entering a curve, the outer side of the engine, as the truck moves inward laterally under it, is elevated, so as to counteract any tendency to run off of the track on the outer side, by the centrifugal action, and, as the mode of hanging the links causes the link on the outer side to assume a more inclined position, while the other link becomes more nearly vertical, the weight of the elevated engine acts to steady the engine, and restore it to a position midway between the rails, on returning to a straight track. This feature of the links also acts to keep the engine steady, when on a straight track.

The patent granted to Bridges and Davenport, May 4th, 1841, for an "improvement in railway carriages," shows a swinging bolster, in a truck swivelling on a king-bolt, the body of the car being connected to the truck frame by pendulous links, from which such body is hung, whereby a lateral motion of the truck is permitted, independently of the body of the car, the sidewise motion being checked by springs in the truck. But, the specification of that patent does not suggest the use of such a truck in any other structure than a car having one of such trucks at each end, and two king-bolts. Nor did it, or the use of two of such swinging bolsters in a car, suggest, from 1842, to 1862, the combination of such a swinging bolster truck with a locomotive engine, for the purposes set forth in Smith's specification.

In the truck described in Smith's specification, the side springs of Bridges and Davenport are dispensed with, the divergence of the pendent links being used, instead, to check the sidewise movement. This precise construction of divergent links is shown in the patent granted to Kipple and Bullock, December 20th, 1859, for an "improvement in car trucks." Their use has the tendency to elevate the outer side of the car on a curve, and the tendency to steady the body of the car through its weight on the links that are most inclined, and the tendency to limit the lateral movement, without using side springs. But, although the mode of operation of a Kipple and Bullock truck, per se, in a car having a like truck at its other end, is the same, for all the purposes of the truck itself, that it is in a structure which has driving wheels at the other end, yet the moment the truck swivelling on a king-bolt is taken out of the other end of the structure, and driving wheels take its place, the mode of operation of the structure as a whole becomes different from the mode of operation of the structure with the two swivelling trucks. This is conceded by the expert for the defendants, and is quite manifest. The mode of operation becomes such as is described in Smith's specification, and no such mode of operation exists in the structure with the two trucks. Moreover, the existence of the Kipple and Bullock patent, and the use of cars each with two of their trucks, does not seem to have suggested, before the invention of Smith, the use of one of such trucks, as a pilot truck in a locomotive engine, to obviate the well-known difficulties in using the engine on a curve.

The only other pre-existing invention brought up to affect the novelty of the Smith invention, is the patent granted to Levi Bissell, August 4th, 1857 [No. 17,913], for an "improvement in trucks for locomotives." Bissell's truck is shown used under the forward part of a locomotive engine. It has a provision designed to allow a lateral motion to the truck, independently of the motion of the body of the engine, and a provision to cause the forward part of the engine to mount up an incline, towards the outer side, in a curve, and thus check the sidewise movement, and to descend, by its gravity, to the normal position, on resuming the straight track. The specification of Bissell's patent says, that the object of his invention is, "to retain the truck with the axles always at right angles to the rail, whether on a straight or curved track, and prevent the truck swinging around on its centre pin, in case of meeting with any obstruction, and to make the curvature of the rail the means for turning the truck so that the axles are parallel to the radial line of the given curve, in which position they are retained firmly until the direction of the track again changes." The specification then points out the difficulties, in the use of locomotive engines on curves, with the ordinary pilot truck, resulting in a "constant sidewise sliding motion on the rail," in consequence of the driving wheels being forced in a line deflected from that of a cylindrical forward rolling motion, and in a constant bearing of the truck to the outer side of the curve, and in the tendency of the engine to go off the track, "particularly in case a broken rail or

obstruction occurs, when the truck swivels around on its centre pin." It then proceeds: "I, therefore, construct my truck in such a manner that the axles of the driving wheels shall be on the line of, or parallel to, the radial line of the curve, so as always to have a direct forward propelling motion, and not strain or wear the rail or flanges of the wheels, and so that two or more pairs of drivers can be fitted with flanges. Consequently, the centre line of the locomotive, in going around the curve, travels as a tangent to the centre of the drivers, and, to accommodate the curve, I fit the truck or forward wheels in such a manner as to allow of a transverse motion, the said truck swinging laterally upon an axis of motion, h, located centrally between the centre of the drivers and truck, (or slightly forward of the same,) so as to give a slight tendency to the truck to run to the inner side of the curved track. Thereby, the axles of the truck wheels are parallel (or nearly so) to the radial line of the curved rail, and the engine runs around any given curve without much more strain, either on the wheels or the track, than would occur on a straight railroad; and, at the same time, there is no chance for the truck to turn on its centre pin, by any obstruction coming in contact with the wheels, and the wheels will pass over a broken rail, and not be displaced, unless all four wheels are simultaneously unsupported, and, even then, the wheels and truck, being set correctly to the angular position with the drivers and the curvature of the track, will continue to move in the correct direction, and pass over any obstacle or broken rail, and attain the uninjured part of the track; and, in running on a straight track, the truck is held correctly in position, and will run over quite considerable obstruction without being turned aside. In running on either a straight or curved track, one of the truck wheels often breaks off, and the truck swivels around on its centre pin in consequence, and throws the engine off the track; but, with my device, one wheel, or even the two wheels on the opposite sides diagonally of the truck, might break off, and still the truck would not run off, because its position is set, and it has no axis of motion around which it could swing, when injured as above stated, or when meeting a broken rail or any obstruction, but is given a direct forward propulsion; and, in all cases, the axles of my wheels have only a strain and torsion due to the difference of length between the outer and inner rails, instead of a strain due to the binding of the flanges of the wheels, from the diagonal position of the axles, in addition to the above named strain; hence, axles so often break when running around a curve. With my engine, the friction on the rails, in running around curves, is avoided, and I am enabled to maintain a nearly uniform speed, without any unusual strain or wear on any parts." The specification of Bissell then describes the construction of his apparatus, with references to drawings. It says that the centre pin, (which is the king-bolt in the centre of the truck,) in his arrangement, "changes its character from a centre of motion, simply to that of a draft block or pin, while the centre of motion is thrown back to the point h, which is slightly forward of the centre between the drivers." There is, at the centre of the truck, a block, whose longest direction is across the track, and whose longest sides are parts of circles, of which h is the centre, or, as the specification expresses it, "curved from the centre h." There is a similar curved slot in the top plate of the truck frame, which slot is sufficiently long to allow of the lateral movements of the truck, when the locomotive is on a curve of the smallest radius that it ever has to travel over. The curved block might, it is stated, be bolted directly to the under side of the engine, and the curved slot would bring the axles of the wheels parallel with the radial line, or nearly so; but, to allow an easier motion to the parts, the blocks may be prevented from turning by radius bars leading to the centre h. The patentee states, however, that he prefers that the radius bars should be attached to the truck frame, so as to cause the truck to swing on the centre h, in which case the curved block may be made use of, or the centre pin be fitted to move in a curved slot. He then describes the arrangement and use of the inclines before mentioned, to check the lateral motion.

It is apparent, that the truck, in Bissell's locomotive, has no swivelling motion around its centre pin or king-bolt, that is, around the centre pin in the centre of the truck, which connects the truck with the engine. Bissell expressly states, that such centre pin loses its character as a centre of motion, and becomes simply a draft block or pin, and that the centre of motion of the truck, that is, its only centre of motion, is thrown back to the point h, outside of the truck. He further says, that, although his truck has a centre pin, it has "no axis of motion around which it could swing." It has only a motion in the arc of a circle, of which the pin h, located between the truck and the driving wheels, is the centre, such motion being a swinging motion of the whole truck across the track. It follows, inevitably, that the position of the pin h regulates the position of the axles of the truck relatively to the track, and that the absence of free swivelling in the truck around its centre prevents the action of the rails on the flanges of the truck wheels from regulating the position of such axles on a curve. When the pin h is equidistant between the centre between the axles of the driving wheels and the centre between the axles of the truck wheels, the axles of the truck wheels may, on a curve, be in their proper position, that is, parallel to a radius of such curve half way between such axles. But, that is not true in reference to any oth-

er position of the pin h; and, even when the pin h is in that position, the axles of the truck wheels can never be in such proper position, when the engine is entering a curve, or leaving a curve, or changing from a curve in one direction to a curve in another direction, because, the position of such axles depends on the position of the pin h with reference to the track, and the driving wheels control the position of the pin h. A geometrical demonstration shows, that, if the pin h be equidistant from the centre between the axles of the drivers and the centre between the axles of the truck wheels, the axles of the drivers and the axles of the truck wheels will, when they are all on the same curve, be in their proper positions; that, if the pin h is not thus equidistant, one or the other set, or both sets, of axles will, on the same curve, be in a wrong position; that, when the drivers are on a curve, and the truck wheels are on a straight part of the road, the pin h can never be in such a position as to allow the axles of the truck wheels and the axles of the drivers, all of them, to be in their proper positions; and that this holds equally true when the truck wheels are on a curve and the drivers are on a straight part of the road, and, also, when the truck wheels are on one curve and the drivers are on another curve. The action of the drivers, through the pin h, is to twist the truck wheels on the track, and control the position of their axles, in correspondence with the direction of the longitudinal centre line of the engine.

In the engine of Smith, the truck wheels and the drivers can, at all times, when the engine is on a curve, and when it is entering a curve, and when it is leaving a curve, and when it is passing from a curve in one direction to a curve in another direction, take their proper positions respectively, without either being controlled or interfered with by the other. The reason for this is, that the truck, in the Smith engine, has a swivelling motion on its king-bolt, and also admits of the swinging motion, across the track, of the engine over the truck, or the truck under the engine. Neither of these motions affects the other. If either motion interfered with the other, the same result would follow as in Bissell's engine, and the position of the drivers would, at times, control the position of the axles of the truck wheels. But, with Smith's arrangement, the track alone controls the position of the axles of the truck wheels, and, therefore, they assume their correct position on any track, straight or curved, and on any form of curve, and whether the drivers are on a straight track with the truck wheels, or on the same curve with the truck wheels, or on a straight track while the truck wheels are on a curve, or on a curve while the truck wheels are on a straight track, or on one curve while the truck wheels are on a different curve. This is a result not attained in Bissell's engine, and it results from the fact that the arrangements and modes of operation of the two structures are different. The truck wheels, in Smith's engine, are never twisted on the track, and the direction of the longitudinal centre line of the engine does not affect the position of their axles.

It results, from these considerations, that, in the engine, as a whole, the Smith arrangement of truck is not merely an equivalent for the Bissell arrangement of truck; because, when the former is substituted for the latter, the resulting structure has a different mode of operation and produces results which the other structure cannot produce. The thing to be looked at is the combined and mutual action of the drivers and the truck wheels, for that was the problem which both Bissell and Smith were trying to solve. Smith's claim is, substantially, a claim to the combination with the drivers, of a truck arranged as he describes, allowing of the lateral motion described, and securing the proper position of the drivers on the track, on curves. That combination is not found in Bissell's engine.

It needs no argument to show, in view of the foregoing considerations, that there was a patentable novelty in the combination which Smith made in his engine, although the truck which he employed existed before, as the Kipple and Bullock truck. The combination produces a new mode of operation, and new results, in the structure as a whole, although the truck, as respects itself, in swivelling, and in having a lateral movement, operates in the same way as it did in the car which had two of such trucks. It was not apparent, without experiment, that the use of a swinging bolster swivelling truck, in an engine, would relieve all the difficulties attendant on the use of driving wheels on curves. If it had been, Bissell would have adopted the truck of Bridges and Davenport, instead of resorting to the contrivance he made. Hence, what Smith did was not, as is urged, merely to apply an old contrivance, in an old way, to an analogous use.

It is urged, that Smith's patent is void, granted, as it is, for an "improvement in trucks for locomotives," because, although he may have invented a combination of the truck with a locomotive, yet he invented no improvement in the truck, but used the truck of Kipple and Bullock; that the invention of such combination is the invention of an improvement in locomotives, or of a new locomotive, or of an improved locomotive, or of a combination of truck and locomotive; and that the patent is void as a patent therefor, because it is not granted as a patent therefor, but is granted as a patent for an "improvement in trucks for locomotives." In this connection, reference is made to the fact, that, in his specification, Smith says, that figure 1 of his drawings is "a plan of my truck;" and, also, that, "in the drawing, I have represented my improved truck it-

self;" and, also, that "my truck can be fitted in the place of those already constructed." The body of the specification speaks of the invention as an "improvement in trucks for locomotive engines." The statute required that the patent should contain a short description or title of the invention, correctly indicating its nature and design. This patent substantially conforms to the statute. As a truck to be used in a locomotive engine, the truck Smith describes as to be employed, is an improvement on Bissell's truck employed in an engine. Smith's invention is an improvement in the use of trucks in locomotive engines, an improvement in the use, for locomotives, of trucks. It is a new and useful improvement; and the class of inventions to which it belongs, the class which embraces its nature and design, is that of trucks for locomotives, trucks used in locomotives. The claim is, to the employment, in a locomotive, of a truck constructed in a certain way, and producing a certain result, in the action of the drivers, on a curve. The title in the patent does not require that the claim should be one to an invention in respect to the truck per se. The expression, "my truck," in the specification, has reference, obviously, when the statement of the nature of the invention, and the claim, are considered, to the truck which Smith describes as the one he was intending to use in the engine, to produce the results specified. The patent, therefore, is not open to the objections thus urged.

The answer sets up, that the larger portion of the road of the defendants, and of the operations thereon conducted, is not within the jurisdiction of this court; that all of the engines built by them, which are alleged to infringe the Smith patent, were constructed by them at Dunkirk; that the use of said engines is largely confined to the western division of their road; and that such construction and larger use were not, and are not, within the jurisdiction of this court. It is contended, for the defendants, that, as the bill avers that they "have constructed and built, and caused to be constructed and built, and are now using, trucks for locomotives, constructed in accordance with, and containing and embodying," the invention patented by Smith, and that the plaintiffs "have reason to believe that they will continue to make and use the same," and that the defendants refuse to pay the plaintiffs any profits which they have realized from "such unlawful making and using," and, as the bill prays that the defendants may be decreed to pay to the plaintiffs the profits which they have made "by reason of such unlawful manufacture and use," and may be enjoined "from making, constructing and using trucks for locomotives constructed substantially in accordance with" the patented invention, the bill is based on the making and using, in the conjunctive; that its frame is such, therefore, that, if the plaintiffs cannot, under it, recover for the making, they cannot for the using; that they cannot, in this suit, recover for the making of the only engine proved to have been made or used by them, containing the invention patented, because, although such engine is proved to have been used in this district, it is proved to have been made in the Northern district of this state; that, by the 6th section of the act of April 3, 1818 (3 Stat. 415), the original jurisdiction of this court is confined to causes arising within this district, and is declared not to extend to causes of action arising within the said Northern district; that the cause of action arising out of the making of such engine is, therefore, not within the jurisdiction of this court; and that, as the bill is founded on the making and using, there can, consequently, be no recovery whatever under it, on the evidence as to the one engine.

I do not think these views are sound. They overlook the fact, that the bill avers that the defendants refuse "to desist from using" the invention patented; that the grant, in the patent, is of the right "of making, constructing, using, and vending to others to be used;" that an infringement may be committed by making, or constructing, or using, or vending to others to be used; that an allegation, in the bill, of making or using, would be bad pleading; and that an allegation of making and using, is proved, to all intents and purposes, by proof of using alone. Indeed, the allegation, in the bill, that the defendants have "constructed and built, and are now using, trucks for locomotives constructed in accordance with, and containing and embodying" the patented invention, is, by no means, an allegation which necessarily implies that any of the structures which are used by the defendants were built by them, or that any of the structures which were built by them are used by them. It may as properly be read, that they have constructed infringing structures, and that they are, also, using infringing structures.

Under this bill, therefore, the plaintiffs, having proved an infringement by the use, in this district, of the engine referred to, are entitled to a decree for an accounting by the defendants in respect of all infringements committed in this district, by making or using, or vending therein; and to an injunction against making in this district, and against using therein, and against vending therein. If the plaintiffs desire to proceed for an account and an injunction in respect of infringements in the Northern district, they must proceed by bill filed there. The defendants are suable in the circuit court for that district, their legal existence, under their incorporation by the state of New York, being co-extensive with the territorial limits of that state.

The 1st section of the act of May 4, 1858 (11 Stat. 272), which provides, that "all suits

not of a local nature, hereafter to be brought in the circuit and district courts of the United States, in a district in any state containing more than one district, against a single defendant, shall be brought in the district in which the defendant resides," has no application to this case. Although this suit is one not of local nature, that is, is what, if it were a suit at law, would be a transitory action, yet the act has no application to a case where the single defendant resides as fully in all the districts in the state as in any one of them. A corporation, if it can be properly said to "reside" at all, resides in all the districts of the state creating it. It is doubtful whether the act applies to corporations.

A decree will be entered in accordance with the foregoing directions, with costs to the plaintiffs.

[For other cases involving this patent, see Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Case No. 8,453, and note.]

Case No. 8,453.

LOCOMOTIVE ENGINE SAFETY TRUCK CO. v. PENNSYLVANIA R. CO.

[1 Ban. & A. 470;[1] 6 O. G. 927; 31 Leg. Int. 324; 6 Leg. Gaz. 324; 1 Wkly. Notes Cas. 16.]

Circuit Court, E. D. Pennsylvania. Oct. 1874.[2]

PATENTS—PILOT TRUCK FOR LOCOMOTIVE ENGINES—EVIDENCE OF INTENTION TO ABANDON INVENTION—EXPERIMENTAL USE OF INVENTION.

1. The complainant's patent, was, for the combination of a locomotive engine, with a pilot truck, having a lateral motion by means of a swinging bolster and pendent links, and having also a rotary motion around the king-bolt, at its centre. The evidence showed, that prior to the invention, passenger cars, each having two of the same trucks, had been used, both trucks rotating freely on their respective centres around the king-bolts: *Held*, that the truck used in combination with an engine, the hindmost or driving wheels of which are rigid, produced a new and useful result, different from the result produced by the use of two of the trucks upon a passenger car, in that the drivers of the engine move on a curved track with less grinding or sliding, and the friction is greatly diminished: *Held*, also, that the invention was not a mere double use or aggregation of two devices acting independently of each other; and, that the invention was not anticipated by the use of the trucks on cars, and was patentable.

[See note at end of case.]

2. The combination claimed in complainant's patent, of a locomotive engine with a pilot truck having a lateral motion by means of a swinging bolster and pendent links, and having also a rotary motion around the king-bolt at its centre, is not anticipated by the invention previously patented to Levi Bissell, of a combination with a locomotive engine of a pilot truck fitted to allow lateral motion by means mechanically equivalent to the sliding bolster and pendent links, but incapable, when in combination with the engine, of rotating on a king-bolt at its centre, the centre of rotation being a pin in the rear of and outside the frame of the truck.

3. Imperfect and crude descriptions of an invention, imparted to others by the inventor, at a time when he did not have a complete conception of the invention for which he subsequently obtained his patent, are no evidence of an intention to abandon it.

4. Experimental use of an invention, although made in public, from necessity, is not a public use, and is no evidence of abandonment.

5. The complainant's patent, granted to Alba F. Smith, February 11, 1862, for an "improvement in trucks for locomotive engines," construed and *held* valid; and, that it was not anticipated by letters patent, granted to Davenport and Bridges in 1841, nor by the improvement subsequently made by Kipple and Bullock, for which a patent was granted to them December 20, 1859.

[3] [Complainants, assignees of the letters patent granted February 11, 1862, No. 34,377, to Alba F. Smith, for "improvement in trucks for locomotive engines," filed their bill, complaining of an infringement by defendants, and asking an injunction and account. The defences were: (1) Want of patentability; (2) want of novelty; (3) abandonment to the public; and (4) forfeiture by reason of public use with the patentee's consent for over two years prior to his application for a patent. It was proved that trucks substantially the same as that described in patentee's specification had been patented, and in use upon eight-wheel cars long prior to this invention. Letters patent to Levi Bissell, No. 17,913, dated August 4, 1857, were relied upon as an anticipation of the use of such a truck upon a locomotive engine.

[Under the 3d and 4th defences it was shown that in 1853—eight years before his application for a patent—Smith communicated to several persons his idea of combining the old and well-known swivelling truck with a locomotive, and that three years before the application he had tried the combination upon an engine on the Hudson River Railroad, and kept it successfully in use for several months. Changes, however, were made in the details of the invention, after this trial, and it was hence contended that the use had been experimental merely. There was no controversy as to infringement.

[Keller and Blake (with whom was Hollingsworth), for complainants, cited Hussy v. McCormick [Case No. 6,948], and Yale & G. Manuf'g Co. v. North [Id. 18,123],—upon the issue of patentability. Mellus v. Silsbee [Id. 9,404]; Pitts v. Hale [Id. 11,192]; McCormick v. Seymour [Id. 8,726]; Winans v. Schenectady & T. R. Co. [Id. 17,865]; and Jones v. Sewall [Id. 7,495],—upon the issue of abandonment and public use.

[C. Biddle and Mr. Latrobe, for defendants, cited Hailes v. Van Wormer [20 Wall. (87 U. S.) 353]; Tucker v. Spalding, 13 Wall. [80 U. S.] 453; Stimpson v. Woodman, 10 Wall. [77 U. S.] 177; Northwestern Fire Ins. Co. v. Philadelphia Fire Extinguisher Co. [Case No. 10,337]; and Curt. Pat. § 56.]

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

[2] [Reversed in 110 U. S. 490, 4 Sup. Ct. 220.]

[3] [From 1 Wkly. Notes Cas. 16.]

STRONG, Circuit Justice. It is indispensable, at the outset of this case, to have a clear apprehension of the device or improvement, for which the patent was granted to Alba F. Smith—the patent which, it is alleged, the defendants have infringed. The invention is denominated by the patentee, in his specification, "an improvement in trucks for locomotive engines," and in the description of the drawing, he calls it a plan of his truck. His language is: "In the drawing I have represented my improved truck itself. The mode of applying the same to any ordinary locomotive engine will be apparent to any competent mechanic, as my truck can be fitted in the place of those already constructed, or the same may be altered to include my improvement." But, though this seems to indicate that, in the mind of the patentee, the thing invented by him, or at least the principal thing, was an improvement in trucks, the state of the art when this alleged invention was made, as well as other parts of his specification, and his claim, make it quite clear, that the patent must be construed as embracing nothing more than a combination; or, in other words, the employment, in a locomotive engine, of a truck for pilot wheels, framed in the manner described, and capable of specified operation. That constituent of the combination, called a truck, is particularly defined. Its peculiarities are pointed out, and thereby it is distinguished from other trucks, which might have been, and some of which had been, used in locomotive engines. But the truck so described was an old device, I think, well known and in common use long before the Smith patent was granted. This has been established, in my opinion, beyond doubt, by the evidence relative to the state of the art.

In 1841, a patent was granted to Davenport & Bridges, for an improvement in railway carriages, especially eight-wheel carriages, having two trucks, one at each end of the car, and each truck connecting a set of four wheels. The improvement consisted, mainly, in constructing each truck with a swinging bolster, located centrally between the axles. Upon this bolster the car rested, and was connected with it by a king-bolt passing through its centre. The bolster was sustained by pendent links at or near each end of it, suspended upon two iron bars resting on the truck frame, and having their lower extremities connected. The links, and the bolster sustained by them, were thus allowed to swing transversely to the track, limited, however, in the extent of their play, by springs set on each side of the king-bolt, at a suitable distance from it. The objects and effects of this device were to allow, in addition to free rotation of the truck around the king-bolt, a lateral movement of the truck under the car, when running upon, into, or out of a curved track, or at other times, and also to relieve passengers in the cars from the sudden jars caused by the sideway movement of the flanges of the wheels against the track rails. This improved truck appears to have been applied extensively to eight-wheel cars, generally, if not always, at each end of the car. It was, however, said in the specification of the patentees, that one of the truck frames of such car (an eight wheel) might have their invention applied to it, but that, when applied to two of them, at opposite ends of the cars, there was a combined action of the two, which tended to straighten the line of draft, in a train of cars, when running on a curve of the railway.

It does not appear that any truck, exactly like that described in the Davenport & Bridges patent, was ever applied to a locomotive engine, or any car, in which the driving or hindmost wheels are rigidly attached to the body of the car or engine, and are incapable of rotating under the body. Nor was the truck, in all respects, like the truck employed in the Smith combination, though it made a near approach to it. It was not essential to it, that the pendent links should be divergent. But the truck was so constructed as to allow lateral motion, and swivelling on the king-bolt, and, in the improvement subsequently made by Kipple & Bullock, for which a patent was granted to them on the 20th of December, 1859, divergency of the links was an essential part. In that improvement, while the swinging bolster and the pendent links were employed, as in the Davenport & Bridges invention, the side springs were dispensed with, and the links were constructed so as to diverge outward from the bars on which they were suspended. The links were thus fitted, to restrain the lateral movement of the bolster, and, correspondingly, of the car resting upon it—whether the tendency was to move toward the right or the left—and to keep the car within the limits of the space over which the links were allowed to vibrate. The use of divergent links had also a tendency to bring back the superincumbent car to a central position between the wheels, for, as one of the links became more inclined, the other necessarily assumed a more vertical position, thereby raising the ends of the bolster next the outer rail of the track. Thus, the car, resting on the bolster, was compelled, by any lateral movement of the truck, to move up an inclined plane, in a direction opposite to the lateral motion, and, consequently, its weight was ever forcing it downward toward the central line between the rails. This improved truck was undoubtedly the same, in all essential particulars, as that employed by Smith in his combination.

I think, also, it has been proved in this case, that pilot trucks, having beams or bolsters swinging on links, spread at the base, so that the lower ends pointed outward, and swivelling on the centre king-bolt, had been made and used before even the Kipple & Bullock invention. They appear to have been used on both the Vermont Central Rail-

road and the New York and New Haven Railroad before May, 1852, and on the Connecticut River Railroad as early as July, 1856. It is, therefore, very evident, that there is nothing in the truck, employed by Smith, that was originally invented by him—nothing for which a patent could have been legally granted to him. But if there were, neither the truck, as such, nor any improvement in it, is claimed in his specification, as his invention. It is in effect disclaimed. Though he calls it his truck and his improvement, evidently he means the truck or improvement which he uses in his combination. His language is: "Several laterally moving trucks have heretofore been made and applied to railroad cars. My invention does not relate, broadly, to such laterally moving trucks; but my said invention consists in the employment, in a locomotive engine, of a truck or pilot wheels, provided with pendent links to allow of a lateral movement, so that the driving wheels, of a locomotive engine, continue to move correctly on a curved track, in consequence of the lateral movement allowed by said pendent links, the forward part of the engine travelling on a tangent to the curve, while the axles of the drivers are parallel, or nearly so, to the radial line of the curve." Such, also, almost in totidem verbis, is the language of the only claim made. It is true, the specification describes minutely the truck which the patentee calls his, with its swinging bolster, diverging pendent links, and with its centre and elongated opening for the king-bolt; but, in view of the other parts of the specification, the description must be regarded as merely an identification of the peculiar truck which he proposed to employ in combination with a locomotive engine.

It must, then, be concluded, in view of the history of the art, and of the specification itself, that the invention patented to Smith was not a pilot truck having an improved construction, nor any improvement in a truck. Nor was it, I think, merely a combination of a truck with a locomotive engine, even though the truck should be capable of lateral movement; but it was the combination with, or the employment in, such an engine, of a truck fitted with divergent pendent links to allow lateral motion, and having the properties and capacities of the peculiar truck described in the specification. Capability of lateral motion, obtained through the agency of a swinging bolster and pendent links, or some equivalent therefor, was undoubtedly essential to the truck; but, I think, this was not all that was essential. The different devices described, were intended to accomplish a purpose, which was declared to be to allow the drivers of the engine to remain correctly on the track, in consequence of the lateral motion of the truck, allowed for by the pendent links, when running on a curve, as set forth. This is part of the language of the claim, and in describing the operation of his improvement, the patentee says: "When running upon a straight road, the engine preserves great steadiness, because any change of position transversely of the track, in consequence of the engine moving over the truck, or the truck beneath the engine, is checked, by the weight of the engine hanging upon the links O, O; and, in consequence of their divergence, any side movement causes the links, on the side toward which the movement occurs, to assume a more inclined position, while the other links come vertical, or nearly so; hence, the weight of the engine acts, with a leverage, upon the most inclined links, to bring them into the same angle as the others, greatly promoting the steadiness of the engine, in running on a straight line. As the pilot or truck wheels enter a curve, a sidewise movement is given to the truck, in consequence of the engine and drivers continuing to travel at a tangent to the curve of the track; this movement, and the slight turn of the whole truck on the king-bolt, i., not only causes the truck wheels to travel correctly on the track, with their axles parallel to the radial line of the curve of the track, but also elevates the outer side of the engine, preventing any tendency to run off the track upon the outer side of the curve. Upon entering a straight track, the truck again assumes a central position, and, in case of irregularity in the track, or any obstruction, the truck moves laterally without disturbing the movement of the engine." From this it appears, plainly, that the combination intended to produce the results desired, was of a locomotive engine with a pilot truck, capable, not only of lateral motion, but also of rotation around the king-bolt at its centre. Swivelling on the king-bolt, as well as lateral motion, was, therefore, of the essence of the invention. Such, I think, is the true and reasonable construction of the patent.

That the combination, if an original device of Smith, was patentable, can hardly admit of question. Conceding, that the truck used by him, was in all essential particulars, old, that it was the same as Davenport & Bridges' truck, or that of Kipple & Bullock, it had never before been employed in a locomotive engine, unless so employed by Levi Bissell, to whose patent I shall presently refer. It had been used under eight-wheeled passenger cars, and, perhaps, under eight-wheeled freight cars; but, in all those, both trucks were allowed to swivel freely on their centres around a king-bolt. When applied to a locomotive engine or a car, the hindmost wheels of which are rigid and cannot swivel, while the operation of the truck is precisely like its operation when under a passenger car, a new effect, upon the movement of the engine, is produced. The drivers, or rear wheels, move on a curved track with less grinding or sliding, and the friction is greatly diminished. It is not, then, the case of a mere double use, nor the aggregation of two

devices acting independent of each other, but the production of a new and useful result.

I come, next, to what appears to me the most important and difficult question in the case, in regard to which my mind has not been free from doubt. Was the combination described and claimed by Smith novel, when invented by him? His patent is dated February 11, 1862, and the application for the patent was made on the 10th day of July, 1861. The defendants contend, that prior to both those dates, and before Smith had devised his combination, as patented to him, a combination, substantially the same, had been completed and brought into use by Levi Bissell, and they have given in evidence a patent granted to Bissell on the 4th day of August, 1857. That patent was surrendered in 1864, and a reissue was granted to these complainants, as assignees of Bissell, which, of course, must be regarded as a patent for the original invention. That invention, as described by the patentee, was, in substance, a combination with a locomotive engine, of a pilot truck, framed to allow lateral motion. Like the invention claimed by Smith, it was not the application, to a locomotive, of any kind of a pilot truck. The patentee particularly described the distinctive features of the truck he proposed for the combination, while preserving capacity for lateral motion, he dispensed with a swinging bolster and pendent links, and substituted for them a curved sliding beam or block, sliding in a curved groove or slot in the top plate of the truck frame. The general direction of this slot was across the track, and the curve, both of the slot and of the sliding beam, corresponded with an arc of the circle, the centre of which was a fixed point behind the truck, and slightly forward of the centre, between the drivers of the engine. This arrangement of the sliding beam in the curved slot, admitted lateral motion of the truck under the locomotive, and the tendency to too great vibration of the engine, on the truck, was limited by inclined planes fitted into the bottom of the slot at each end, and the block on the sliding beam surrounding the bolt which passed through its centre. "The position of the inclines," said the specification, "is such, that the blocks, n, n, rest in the lowest part of the double inclines when the engine is on a straight track, and, on coming on a curve, the inertia of the engine (tending to move in a straight line and cause the truck flanges to mount the outer rail), is expended in going up the inclines, o, o, as the truck moves laterally toward the inner part of the curve, and, on coming on to a straight line, the blocks descend by gravity to the bottom of the inclines, and the engine is prevented by gravity from acquiring a sidewise or oscillating motion." Other devices were pointed out for attaining the same results, namely, the allowance of lateral motion, and, at the same time, making use of the weight of the engine to restore it to its normal position, when the truck has been moved laterally under it.

I think the sliding beam, the block, and the inclined planes, may well be regarded as but mechanical equivalents for the swinging bolster and the pendent links—certainly when the links are made to diverge. But there were other features in the truck of Bissell which must be noticed. A primary object which he had in view, was "to prevent the truck from swivelling around its centre in case of meeting with any obstruction." The patentee pointed out the difficulties and dangers attending the running of locomotive engines on curves with the pilot truck previously in use. His language was: "There is still a rigid straight line from the centre of the truck to the centre of the axle of each pair of drivers, and this cannot be exactly in the centre of the track which is curved. This fact contributes, with the tendency of the machine to move forward in a straight line, to push the truck outward. The truck is constantly, by this means, borne to the outer side of the curve, and the engine has a tendency to go off in the direction of the arrow in the drawing, i. e., beyond the outside of the curve, particularly in case a broken rail or obstruction occurs, when the truck swivels around on its centre pin, throwing the locomotive off the track." He then proceeded to set forth how he proposed to remove these difficulties and dangers. "I construct my truck," said he, "in such a manner, that the axles of the driving wheels shall be parallel to the radial line of the curve, passing through a point between them, so that the drivers have a direct forward propelling motion along the rails, and do not strain or wear the flanges, and so that two or more pairs of drivers can be fitted with flanges. The central line of the locomotive in going around the curve, travels in a position tangential to the curve at a point between the drivers, and fit the truck wheels in such a manner as to allow the truck a tranverse motion. This is equivalent to a bending of the locomotive, the said truck swinging laterally upon an axis of motion, located centrally between the centre of the drivers and the centre of the truck, or slightly forward of the same, so as to give a slight tendency of the truck to run to the inner side of the curved track." He then detailed the effects which he claimed for his arrangement, and added: "At the same time, there is no chance for the truck to turn on its centre by any obstructions coming in contact with the wheels. The wheels will pass over a broken rail, and not be displaced, unless all the wheels are simultaneously unsupported, and even then, the truck, being set correctly in an angular position with the drivers, will continue to move in the correct direction, and will pass over any obstacle or broken rail, and attain the uninjured part of the track. In running on a straight track, the

truck is held correctly in position, and will run over quite considerable obstructions, without being turned aside. In running an ordinary engine on either a straight or curved track, one of the truck wheels sometimes breaks off, and the truck swivels around on its centre pin in consequence, and throws the engine off the track. But, with my invention, one wheel, or even two wheels, on opposite sides of the truck, might break off, and still the truck would not run off the track, because its position, relatively to the body of the locomotive, is firmly maintained." And, in his description of his drawings, the patentee said of the centre pin, that is, the bolt connecting the engine with its sliding beam: "It is the centre pin, which, in my arrangement, changes its character from a centre of motion to that of a draught block or pin, while the centre of motion is thrown back to the point h, which is slightly forward of the centre between the drivers." Once more, after reiterating some of the results of his arrangement, he said: "By reason of the above facts, and also of the further fact that I compel the truck to swivel around the centre, meaning the centre of motion in the rear of the truck frame, in proportion as the truck and the body move sidewise relatively to each other, I cause the angular position of the truck to conform to the conditions required on a curve, and also steady the truck in running both on curves and straight lines, so that obstacles may be run over, and wheels or axles may fail, without allowing the truck to assume a false position."

I make but one other quotation from the specification. In describing his mode of attachment of the truck to the locomotive, he said: "The block k (that is, the curved block or beam, curved from the centre h, and sliding in the curved slot), might be bolted directly to the under side of the engine, and the curved slot would bring the axles of the wheels, e, e, parallel with the radial line, or nearly so; but, to allow an easier motion to the parts, the said block k, may be prevented from turning by radius bars i, to the centre h. I, however, prefer that said radius bars i, should be attached at 3, 3, to the frame, so as to cause the truck to swing on the centre h, in which case the block k, may be made use of, or the pin (king-bolt), be fitted to move in a curved slot, as shown in the drawing."

I have made these large extracts from Bissell's specification, in order to show, what I think, in view of them, must be apparent, that whatever else he may have planned, it was essential to his invention, that this truck, when in combination with a locomotive engine, should be incapable of swivelling on a king-bolt at the centre of the truck or within its frame. Such, undoubtedly, was his purpose, and, that purpose, his devices, I think, fully accomplished. Whether the locomotive was attached to the truck by being bolted rigidly to the curved block, or sliding beam, or bolster, which was compelled to move in a curved slot, of which the point h, behind the truck frame was the centre, or whether the block was prevented from turning by the radius bars holding it to that centre, or whether the radius bars were attached to the truck frame, it seems to me, that, rotation of the truck around any bolt or point at its own centre or within its frame, was rendered impossible. The truck in its entirety had a centre of rotation at the point h, and, that there can be but one centre of rotation, is confessedly true.

A very earnest and ingenious argument has been addressed to me, and enforced by the exhibition of drawings and a model, in order to convince me, that, in fact, the combination of Bissell did allow some swivelling of the truck around the bolt through the sliding beam. I have given to the argument, the drawing, and the model careful consideration, but I have not been convinced by them. There is a change of position of the bolt, as there is of the block through which it passes when the block slides in the curved slot or grooves, for the bolt slides with the block, but the block does not rotate around the bolt, and, therefore, the truck, of which the block is a part, cannot. It is true the bolt might be forced to turn very slightly on its own axis, as it is in the model exhibited to me, and thus give an apparent slight rotation of the truck around the bolt. This might be done by carrying the bolt through the curved block and the curved groove or slot, and then attaching its lower end to another slide below the groove in the cross plate, the under slide being constructed to move directly across the frame in a rectangular slot, instead of a curved one corresponding with the slot above it. The swivelling, even then, would be almost imperceptible; but such was not Bissell's arrangement. He devised another centre of rotating motion for the entire truck, and gave no intimation that his arrangement permitted the truck to swivel around two centres of rotation.

The result of this examination of Bissell's patent, then, must be the conclusion that his invention was the combination with a locomotive engine of a pilot truck, fitted to allow lateral motion, but incapable, when in combination with the engine, of swivelling on a king-bolt at its centre. Place now, side by side with this, the Smith invention, and, to my mind, it becomes plain, that the combinations of the two inventors, were substantially different. As has been seen, Smith's was the combination of a locomotive with a truck, capable, not only of lateral motion, but also of free rotation around the king-bolt at its centre. Lateral motion was common to both, but free swivelling around a centre within the frame of the truck was essential to one, while the impos-

sibility of it was essential to the other. Practically, therefore, the elements of the two combinations were not the same. The operations of the trucks, were unlike, when they were brought into combination with the engines, and in such combination they may well be regarded essentially different trucks.

And not only so, but different results were obtained from the combinations, alike in the working of the trucks, and of the locomotives, as well as in their concurrent action. While travelling upon a straight track, or on a curve, the radius of which is constant or invariable, there is no appreciable difference in the working of the Bissell and the Smith arrangements. But, when the locomotive is on a straight track, and the pilot truck is on a curve, or vice versa, or in passing from one curve into a reverse curve, there is a very important difference, for in either of the three cases last mentioned, the position and the direction of the truck axles depend, in Bissell's combination, upon the position of the pin in the rear of the frame of the truck, which is made by him the centre of rotation, and the position of that pin is controlled by the locomotive. Necessarily, therefore, his truck wheels are twisted on the track by the drivers acting through that pin and the radius bars, or through the curved block moving in the curved slot around the pin as a centre. On the other hand, Smith's truck wheels are never twisted on the track, for the track, alone, controls their position and the direction of their axles. Swivelling, as the truck does, on its own central king-bolt, the axles and wheels are unaffected by the direction of the longitudinal centre line of the engine's motion. Of course they assume a correct position, and with the lateral movement, allow the drivers to remain correctly on the track.

I dwell no longer upon this part of the case. I have said enough to show that the truck employed by Smith, is, when in combination with a locomotive engine, a substantially different truck from that employed by Bissell; that its mode of operation is different, and that a new and useful result is obtained thereby. And, if so, it follows that the patent granted to Smith is not invalid for want of novelty in the invention. The combination is not claimed to have been anticipated by any other than Bissell.

I come now to the consideration of another objection to the Smith patent, which was elaborately urged during the argument. It is, that the invention was abandoned by the patentee, or permitted by him to be in public use, more than two years before his application for a patent. This is, in fact, a double objection, but it may well be considered as one.

It appears from the testimony of Smith himself, that, in the year 1853, when in New York, he went on one occasion with a Mr. Bridges and Mr. Bissell to the rotunda of the Merchants' Exchange, to examine a contrivance exhibited there for preventing the disastrous effects of the breaking of railroad axles. In the rotunda they found a complete model, on a small scale, of a railroad car, and of a track having a curve and a reverse curve, with the novel invention attached, to show the operation. While there, Smith took occasion, having permission from the owner of the model, to illustrate his views of the proper construction of locomotives, having swivelling trucks with swinging bolsters. What his views were, the evidence does not show. But this testimony, it has been argued, is proof that he then dedicated or surrendered his invention to the public. I cannot think so. I cannot see, that it shows he then had any complete conception of the invention for which he subsequently obtained his patent, and, if he had, the conception was not embodied. For aught that appears, his idea may have involved some changes in the locomotive itself—some new mode of construction to adapt it to the use of swivelling trucks with swinging bolsters. He may then have contemplated a truck swivelling on a centre outside of its frame, like the one which Bissell subsequently employed. And, whatever his view may have been, very clearly, it was not a perfected invention, which could then have been patented, and, consequently, there was no invention capable of abandonment. I think, it would be going unwarrantably far, were I to hold, that what took place at the Merchants' Exchange, amounted to a dedication, to the public use, of the invention, which he claimed in 1861, and for which he received a patent.

There is, however, other evidence, upon which the defendants rely, to establish their allegation of abandonment. According to Smith's testimony, the history of his invention was this: In 1856, he was general superintendent of the Hudson River Railroad, and, in the fall of that year, or early in 1857, he described his truck to Mr. Buchanan, who was then the master machinist of the road, and illustrated its operation by chalk sketches. At that time, at his suggestion, and under his direction, an engine with the truck was constructed. It was completed, on the 16th day of September, 1858, was put upon the road and tried. Manifestly, it was an experimental thing. Neither Smith nor Buchanan had full confidence in it. It was first tested without a train, and then with freight and slow passenger trains. These trials seem to have suggested modifications, and two other engines were constructed, in another shop of the company, and delivered in July, 1860. Into these, several changes were introduced, suggested by observation of the working of the first. Two other engines were built and delivered in the spring of 1861, in which other changes were made, and it was not until their construction, that the invention was considered perfected. Very soon afterwards, the application was made for a patent. Such is the testimony of Smith, and it is fully con-

firmed by that of Buchanan. There is a little conflict in the testimony, respecting the time when the first engine was constructed. I do not regard it as of importance. It is impossible to see, in all this, evidence of abandonment. It was correctly said by Justice Clifford, in Jones v. Sewall [Case No. 7,495], to be settled law, that the mere forbearance to apply for a patent, during the progress of experiments, and until the party has perfected his invention, and tested its value by actual practice, affords no just grounds for presuming an abandonment. Kendall v. Winsor, 21 How. [62 U. S.] 328; Agawam Co. v. Jordan, 7 Wall. [74 U. S.] 607. It is true, an express relinquishment of an invention to the public is not indispensable to an abandonment. It may be inferred from long delay, unexplained, or from acts of the inventor inconsistent with any other theory, but it cannot be presumed from mere delay to apply for a patent, when the inventor is all the while perfecting the invention and testing its merits.

Nor has it any bearing upon the case, that Smith's experiments were made in public, and that his experimental engines were run upon a railroad—that was, a public highway. Thus only could the invention be tested. There is an obvious distinction between a public use, or a use by the public, and an experimental use in public. In many cases, it has been decided, that a use in public for test or experiment, is not such a public use as was contemplated by the act of congress, nor such a use as can be held evidence of dedication to the public. The Nicholson pavement case was notably one.

It has not been contended, and, certainly, in view of the evidence, it ought not to be, that the Smith invention was in public use, or on sale, with his consent, more than two years prior to his application for a patent. It appears to have been used on the Old Colony Railroad, in April, 1859, but there is nothing to show that such use was allowed by Smith, or that he knew of it.

My conclusions, then, upon the whole case, are as follows: 1. The combination claimed by Alba F. Smith, and described in his specification, was a patentable invention. 2. The patent granted to him on the 11th day of February, 1862, is not void for want of novelty of the invention. The invention had not been anticipated. 3. There is no sufficient evidence that the patentee abandoned the invention. 4. The patent is not invalid because the invention was in public use, or on sale, with the allowance of the inventor, more than two years before his application for the patent.

The only question that remains, is, whether the defendants have been guilty of infringement. In regard to this there is no controversy. An infringement is very clearly proved. I shall, therefore, order the injunction prayed for in the bill, and decree an account, etc. Let a decree be prepared accordingly.

[NOTE. In pursuance of the order of the court, a master was appointed to state an account of the profits realized by the defendants through their infringement of complainants' patent, and to assess the damages caused thereby. Following the rule laid down in Mowry v. Whitney, 14 Wall. (81 U. S.) 620, and finding that the defendants had received no gains by reason of the infringement, and that the case was one for damages only, the master reported such damages to be $89,644. Exceptions to this report, filed by the defendants, having been overruled (2 Fed. 677), they prosecuted an appeal to the supreme court. Here the evidence and arguments in the whole case were reconsidered, and the court, the opinion of which was delivered by Mr. Justice Gray, weighing the reasons assigned for sustaining Smith's patent in the opinion of the court below (principal case), was unable to escape from the conclusion that the application of the old truck to a locomotive engine neither was a new use nor produced a new result. 110 U. S. 490, 4 Sup. Ct. 220.

[For another case involving this patent, see Locomotive Engine Safety Truck Co. v. Erie Ry. Co., Case No. 8,452.]

Case No. 8,454.

LOCOMOTIVE ENGINE SAFETY TRUCK CO. v. PENNSYLVANIA R. CO.

[See Case No. 8,453].

LOCUST MOUNTAIN COAL & IRON CO. (BRETTAUGH v.). See Case No. 1,846.

LODEMIA, The (HOLMES v.). See Case No. 6,642.

Case No. 8,455.

In re LODER et al.

[3 Ben. 211;[1] 2 N. B. R. 517 (Quarto, 162); 2 Am. Law T. 106; 1 Am. Law T. Rep. Bankr. 159.]

District Court, S. D. New York. April 23, 1869.

REGISTER'S FEES AS ASSIGNEE.

Where bankrupts surrendered their property to a register, and thereafter, by order of the bankruptcy court, custodians were appointed and were directed to sell certain goods at retail, paying over the proceeds to the register daily, which was done during twenty-five days, in which time $15,000 was so received by the register: *Held*, that the register was entitled to be paid $5 a day, under section 47 of the bankruptcy act [of 1867 (14 Stat. 540)], and the percentage on the $15,000 allowed to assignees by section 28.

[Cited in Williams v. Merritt, 103 Mass. 187.]

In this case, a register in bankruptcy applied to the court, on petition, stating that, the bankrupts [Loder Brothers] having surrendered all their property to him, on his application two custodians were appointed to take possession of and sell certain goods at retail, paying over to him all proceeds of sales; that the custodians had, during twenty-five days, paid over to him $15,000, which he had deposited, from time to time; and that he had drawn checks for the payment of expenses and otherwise for the carrying

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

on of the business. On this petition the register applied to the court to fix his compensation.

By I. T. WILLIAMS, Register:

[The petition of Isaiah T. Williams, one of the registers of this court, to whom was referred the above entitled case, respectfully shows unto this court, that he is in doubt as to the items and amount of fees to which he is entitled as such register. He, therefore, in pursuance of the rules and practice of this honorable court, submits the following facts, and craves the advice and judgment of the court: The bankrupts, on the 19th day of March, 1869, surrendered all their property and assets to the register, who thereupon certified the case to the court, requesting the appointment of two custodians of said property (the same amounting, as it is said, to several hundred thousand dollars), with directions to take possession of and sell certain goods at retail over the counter, for cash or otherwise, to act in the premises as such custodians under the direction of the register, handing over to him daily all sums received by them, to be by him deposited to his credit as such register. That such order was made by this court, and that he has ever since, under such order, acted, for and over twenty-five days, and has received upwards of fifteen thousand dollars for sales of property, and deposited the same from time to time, and has drawn checks for the payment of expenses and otherwise for the carrying on of the business. That the duties so devolved upon the register have been of a very responsible character, occupying a considerable portion of his time. That the compensation of five dollars per day, allowed by the act for register's fees, under a special order, together with the percentage allowed to an assignee by the act, will not compensate him for the labor actually performed, to say nothing of the responsibility thus devolved upon him. What the register is in doubt about is, his right to charge the percentage described in the act as the compensation of an assignee for similar services. The language of the section is that "the assignee shall be entitled to," &c. But who is the assignee? Clearly any one who obtains title with the actual possession (as in this case by surrender to the register), who afterwards assigns the estate to a successor when chosen or appointed. There may be two assignees, the one after the other, and each entitled to his percentage. I do not see why the register is not just as much entitled to it as any assignee he could appoint. If he cannot get compensation for this service, it should not be devolved upon him. It is devolved upon him by construction of the act. He should be paid, then, by a similar construction. Respectfully submitted.][2]

[2] [From 2 N. B. R. 517 (Quarto, 162).]

BLATCHFORD, District Judge. I allow to the register, in the above matter, a compensation of $5 per day, for the twenty-five days, under section 47, for his employment under the special order, as custodian of the surrendered property, as register. As a further compensation, in respect of the $15,000 realized by him from the sales of goods, I allow to him, for the custody of that money, $250, that sum being arrived at by computing, on the $15,000, the rate of percentage allowed to assignees by section 28, on moneys received and paid out by them. An order will be entered accordingly, the whole sum, $375, to be payable out of the assets of the estate.

[This case was again heard upon the certificate of the register as to the proof of a debt. Case No. 8,456.]

Case No. 8,456.

In re LODER.

[4 Ben. 125;[1] 3 N. B. R. 655 (Quarto, 162).]

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

PROOF OF DEBT—PROMISSORY NOTE.

1. A proof of debt, founded on a promissory note, is defective if it does not set forth the consideration of the note, and whether any payments have been made on it.

[Cited in Re De Metz, Case No. 3,781.]

2. The register, to whom a proceeding in bankruptcy has been referred, is not bound to file a deposition for proof of debt, taken and certified to before another register, which does not appear to him to be in conformity with law; but, if an issue of law or fact arises thereupon, he should adjourn it into court, under section 4 of the bankruptcy act [of 1867 (14 Stat. 519)].

[In the matter of Benjamin H. Loder, a bankrupt. For prior proceedings, see Case No. 8,455.]

In this case, the register certified two questions to the court. A deposition for a proof of debt was transmitted to him by another register. The debt was a promissory note, but the consideration of the note was not stated in the deposition, nor was it stated whether any, and, if any, what payments on it had been made. The register considered the deposition defective, and returned it for amendment. The creditor claimed that the register was bound to receive the deposition and file it, of course, and he also insisted that the deposition was sufficient, under the 22d section of the bankruptcy act. The register thereupon certified to the court the two following questions: (1) Was the deposition sufficient, without setting forth the consideration of the note, and without stating whether any, and, if any, what payments on it had been made? (2) Is the register, to whom the matter has been referred, bound to receive and file a deposition for proof of debt, taken and certified before another register, whether the same shall appear to him to be in conformity with the law or otherwise?

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

By the Register:

[I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify, that in the course of proceedings in said cause before me, the following questions arose pertinent to the said proceedings: The bankrupt filed his petition in this court on the 27th of January, 1870. On the 19th of April, instant, four depositions for proof of debt, by Charles McMonagle, against the bankrupt's estate, were transmitted to me by another register. The debt in each was alleged upon a promissory note of Benjamin Loder, payable to the order of the firm of Loder Brothers & Co., of which the bankrupt was a member, and indorsed by them, which, upon the maturity thereof, on the 4th of January, 1870, was presented for payment, which payment was refused, whereof the bankrupt's firm had due notice. The consideration was not stated, nor was it stated whether any and what payments had been made, wherefore I considered them defective and returned them for amendment. It was thereupon claimed, on behalf of the creditor, that the register who took the proof had certified their sufficiency, and that the register in charge of the matter could not review or reject, but must receive and file them of course. It was also insisted that the depositions were sufficient and fully met the requirements of the 23d section of the act.][2]

BLATCHFORD, District Judge. The first question is answered in the negative.

The second question is answered in the negative. The register, acting as the court, is, under section 22, to reject all claims not duly proved, but, if an issue of law or of fact is raised and contested thereon by any party to the proceedings, the course prescribed by section 4, in regard to adjourning the question into court for decision by the judge, must be pursued.

[Other questions arising in these proceedings were decided in Cases Nos. 8,457–8,459.]

Case No. 8,457.

In re LODER.

[4 Ben. 305;[1] 4 N. B. R. 190 (Quarto, 50).]

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

DISCHARGE OF BANKRUPT—PRINCIPAL DEBTOR—ENDORSER.

1. A firm, one member of which was B. H. L., had been adjudged bankrupt. One B. L., at the request of the firm, subsequently became the owner of substantially all claims against the firm, and had agreed to indemnify them against all claims which existed against them at the commencement of the proceedings. The firm had endorsed the notes of B. L., for his accommodation, which notes he had used in purchasing the claims against the firm, and he had agreed to indemnify them against any liability on those notes, they transferring to him all the assets of the firm. On June 14th, 1869, the bankruptcy proceedings against the firm were discontinued, and the assignee in bankruptcy was directed to convey to them the assets in his hands; and, on June 15th, the firm conveyed such assets to B. L., and he by the same instrument agreed to indemnify them as above stated. On the 28th of January, 1870, B. H. L. was, on a petition filed by him, again adjudged a bankrupt, and in time he applied for his discharge. All the debts proved against him, except one, consisted of the notes of B. L., above mentioned, endorsed by the firm. The creditor who proved the other claim, filed a consent to the bankrupt's discharge, but such discharge was objected to on the ground that his assets, of which there were none, were not equal to fifty per cent. of the claims proved, on which he was liable as principal debtor, and that the assent in writing of a majority in number and value of the creditors to whom he was liable as principal debtor, had not been filed: *Held*, that, on the evidence, the endorsements of the notes of B. L. by the firm, were contracts independent of their indebtedness to their creditors, and were made for his accommodation; and that such creditors, in taking the notes so endorsed, extinguished the original indebtedness of the firm, and substituted the notes for it, so that such endorsements could not be regarded as contracts to pay the original indebtedness of the endorsers.

2. Under the 19th section of the bankruptcy act [of 1867 (14 Stat. 525)], an endorser does not become liable as a principal debtor, by the mere fixing of his liability as endorser.

[Followed in Re Duff, 4 Fed. 520.]

3. None of the contingent liabilities spoken of in the 19th section of the bankruptcy act can be regarded as liabilities of a principal debtor, within the 33d section, until they have been put in judgment, or undergone some other change than merely becoming absolute and fixed, in contradistinction to being contingent. A discharge must be granted.

[Cited in Corbett v. Woodward, Case No. 3,223; Gay Manuf'g Co. v. Gittings, 3 C. C. A. 422, 53 Fed. 48.]

[These were proceedings in bankruptcy against Benjamin H. Loder. See Case No. 8,456.]

Thorndike Saunders, for bankrupt.

Albert Matthews, for creditors.

BLATCHFORD, District Judge. Prior to the 14th of June, 1869, Lewis B. Loder, Cyrus W. Loder and Benjamin H. Loder, copartners, under the firm name of Loder, Brothers & Co., had been adjudged bankrupts by this court. On that day an order was made, discontinuing the proceedings in the matter of such bankruptcy, and directing the assignee to convey to the said bankrupts all of their estate in his hands, with certain specified exceptions. On the 15th of June, 1869, the assignee made such conveyance by a proper instrument. Prior to that time, one Benjamin Loder had, at the request of the said bankrupts, and by purchase, become the owner of substantially all the claims which existed against them at the time of the commencement of such proceedings, and had agreed with them to indemnify them against the payment of all lawful claims which existed against them at such time. The said bankrupts had, in their said firm name, endorsed the promissory notes of Benjamin

[2] [From 3 N. B. R. 655 (Quarto, 162).]

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

Loder, for his accommodation, which notes, so endorsed, he had used in purchasing the claims, which he had so purchased, and he had agreed to indemnify them against any liability on such notes. In consideration of those premises, the said bankrupts had agreed to transfer to him all the assets of their said firm. They made such transfer by an instrument executed by them on the 15th of June, 1869, and Benjamin Loder, by the same instrument, agreed to indemnify them against the payment of all claims which existed against them at the time of the commencement of the said proceedings, and against any liability on the said endorsements.

On the 28th of January, 1870, the same Benjamin H. Loder was, on a petition filed by him on the preceding day, again adjudged a bankrupt by this court. He now applies for his discharge. Numerous debts have been proved against his estate. All of such debts except one consist of the said notes of Benjamin Loder, endorsed by the said firm of Loder, Brothers & Co. The one excepted debt amounts to the sum of $400, and is due to an attorney at law for services. He has duly filed his written consent to the discharge of the bankrupt, but no other creditor has filed such consent. The contingent liability of the endorsers of the said notes, on their contracts, has become absolute and fixed. Objections to the discharge of the bankrupt are filed, on the ground that his assets (of which there are none) are not equal to fifty per centum of the claims proved against his estate, on which he is liable as the principal debtor, and that the assent in writing of a majority in number and value of his creditors to whom he has become liable as principal debtor, and who have proved their claims, was not filed in the case, at or before the time of the hearing of the application for discharge.

It is urged, on the part of the opposing creditors, that the bankrupt, although an endorser on the notes, is a principal debtor, within the meaning of the statute, to the holders of such notes; that, in endorsing the notes, the bankrupt was contracting to pay his own debt; and that, at all events, he became a principal debtor when his contingent liability became absolute and fixed.

It is established, I think, by the testimony in the case, that the endorsements, made by the firm, of the notes of Benjamin Loder, were contracts independent of their indebtedness to their creditors, and were made for his accommodation solely, and that such creditors, in taking the notes so endorsed, extinguished the original indebtedness of the firm and substituted such notes for it, so that such endorsements cannot be regarded as contracts to pay the original indebtedness of the endorsers. The only question for decision is, whether the bankrupt is, within the statute, liable as a principal debtor in respect of such endorsements. If he is, he is not entitled to his discharge.

A sensible construction must be given to the second clause of the 33d section of the bankruptcy act, as amended by the act of July 27th, 1868 [15 Stat. 227]. That clause requires, as a condition precedent to a discharge in this case, the assent in writing of a majority in number and value of the creditors of the bankrupt "to whom he shall have become liable as principal debtor, and who shall have proved their claims." The 19th section provides that no debts shall be proved against an estate, except those specified in that section. That section provides, that a claim against a bankrupt as drawer, endorser, surety, bail, or guarantor, may be proved after his liability shall have become fixed. It cannot be proved before that time. Until that time, it is not regarded as a debt due and payable, or even as a debt existing, but not payable until a future day, so as to be provable under the first paragraph of the 19th section. Now, as a claim against an endorser cannot be proved till the contingent liability of such endorser has become fixed, it follows, that if, by the fixing of such liability, the endorser becomes liable as a principal debtor, within the meaning of the 33d section, the words, in that section, "to whom he shall have become liable as principal debtor and," have no force or meaning as applicable to the liability of an endorser, and might as well have been omitted. Fixed liability makes the claim provable. Otherwise, it is not provable. Fixed liability makes a liability as principal debtor. The whole idea is expressed by the provability. To require the assent of a creditor who has proved his claim in respect of the fixed liability of an endorser, covers the whole idea, if, by the fixing of such liability, the endorser became liable as a principal debtor. But if, by the fixing of such liability, and thus making the claim provable, the debtor does not necessarily become liable as a principal debtor, there is a scope for the operation of the words, "to whom he shall have become liable as principal debtor and." The same views apply to the other contingent liabilities named in the 19th section—drawer—surety—bail—guarantor—bound for the debt of another person. There is, therefore, no soundness in the view, that the fixing of the liability of an endorser makes him liable as a principal debtor, within the meaning of the 33d section, when he otherwise would not be.

Although the liability of an endorser, from being contingent, becomes absolute and fixed, it does not thereby become the liability of a principal debtor. When it is put into the shape of the judgment of a court, the liability on such judgment be-

comes the liability of a principal debtor. But, until then, it is, under the 19th and 33d sections of the act, the fixed liability of an endorser, and not the liability of a principal debtor. The maker of the note is the principal or chief or primary debtor. The endorser is the secondary debtor, liable only on the default of the maker after demand of payment and due notice thereof. Such default and notice fix the liability of the endorser, but it still remains the liability of an endorser. It cannot be established without showing how it became fixed, and it must thus necessarily be shown to be the liability of an endorser.

It is manifest, I think, that none of the contingent liabilities or contingent debts spoken of in the 19th section, whether those of drawer, endorser, surety, bail, guarantor, obligor for the debt of another person, or whatever else, can be properly regarded as liabilities of a principal debtor, within the 33d section, until they have undergone some other change than merely becoming absolute and fixed, in contradistinction to being contingent.

It follows, that a discharge must be granted notwithstanding the specifications filed, and one will be granted when the register shall have certified conformity, in the usual form.

[See Case No. 8,458.]

Case No. 8,458.

In re LODER.

[4 Ben. 328.] [1]

District Court, E. D. New York. Oct., 1870.

DISCHARGE—PRINCIPAL DEBTOR—ENDORSER.

Where the discharge of a bankrupt was opposed by creditors, holding notes of a third party endorsed by the bankrupt, on the ground that his discharge was not assented to by a majority of his creditors, under the 33d section of the bankruptcy act, as amended by the act of July 27, 1868 [15 Stat. 227]: *Held*, that the bankrupt was not a "principal debtor" to such creditors within the meaning of the act, and that, as the discharge of the bankrupt was assented to by a majority of his creditors, in number and value, excluding the holders of such endorsements, he was entitled to his discharge.

[Cited in Re Badenheim, Case No. 716.]

[In the matter of Lewis B. Loder, a bankrupt. See Case No. 8,457.]

BENEDICT, District Judge. Lewis B. Loder, a bankrupt, moves for his discharge, under the provisions of the bankruptcy act. The discharge is opposed by certain of his creditors, who constitute a majority in number and value of the creditors who have proved claims, and who rely upon the 33d section of the act, amended by the act of July 27, 1868, as the foundation of their opposition.

The claims of these opposing creditors are all of one description, namely, the endorsement by the bankrupt of promissory notes made by a third party, duly protested, and notice of non-payment duly given, so as to fix the liability of the endorser.

The bankrupt contends that such endorsements do not constitute him a principal debtor to the holders of the protested notes, within the meaning of the 33d section as amended, and that he is entitled to his discharge, upon the written consent of a majority in number and value of the claims proved, excluding the claims of the contestants.

I am of the opinion, that the position taken by the bankrupt is correct. When the whole scope of the bankruptcy act is considered, it appears quite manifest, that it was not the intention of the act, to require of the debtor, as a condition to his discharge, the consent of creditors whose debts arise solely out of his endorsement of the notes of a third party. The words "principal debtor," as used in the 33d section, are to be taken in their ordinary legal acceptation, and do not include such an endorser.

The liability of an endorser, is secondary to that of the maker, who is the principal debtor, and the character of the obligation remains unchanged, notwithstanding it may have become fixed by demand, and notice of non-payment.

Accordingly, I am of the opinion, that the bankrupt is entitled to his discharge.

[For further decisions in Re Loder, see Case No. 8,459.]

Case No. 8,459.

In re LODER et al.

[2 N. B. R. 515 (Quarto, 161); 2 Am. Law T. Rep. Bankr. 87.] [1]

District Court, S. D. New York. April 20, 1869.

BANKRUPTCY—ASSIGNEE.

A person residing without, but having a fixed place of daily business within the judicial district, will be appointed assignee in a proper case.

[In the matter of Lewis B. Loder, Cyrus W. Loder, and Benjamin Loder, bankrupts. See Case No. 8,458.]

By I. T. WILLIAMS, Register: I hereby certify that there were thirty-five claims proved before me at the adjourned first meeting of creditors, held on the 15th day of April instant. That of these creditors twenty-one were present and voted. That each creditor voted for two assignees. That Lyman A. Jacobus had nineteen votes, John G. Davis had sixteen, Oscar Varet had two, Jeremiah Colby had four, and John Sedgwick had one. The vote being so largely in favor of Jacobus and Davis, both in number and amount, they

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

[1] [Reprinted from 2 N. B. R. 515 (Quarto, 161), by permission. 2 Am. Law T. Rep. Bankr. 87, contains only a partial report.]

were declared to be elected, none doubting such election. It subsequently appeared that said Jacobus resides in Brooklyn, and out of the judicial district. It being suggested by the attorney for the bankrupts that, under the circumstances, the court might see fit to order a new election, the register submits the facts that they may be known to the court when the names of the assignees so elect shall be presented for confirmation. Respectfully submitted.

BLATCHFORD, District Judge. Has Mr. Jacobus a fixed and permanent business in New York City, and a place where he does business there daily? Report the facts as to this.

By I. T. WILLIAMS, Register: Pursuant to the direction hereon endorsed, I hereby further certify that the said Jacobus has a fixed and permanent place of business in the city of New York, to wit: at No. 139 Duane street, in said city, where he carries on business as an importer.

BLATCHFORD, District Judge. I will appoint Mr. Jacobus and Mr. Davis assignees, which will cure every difficulty.

Case No. 8,460.

LODGE v. LODGE et al.

[5 Mason, 407.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1829.

WRIT OF ATTACHMENT — WHERE RETURNABLE — PRINCIPAL AND AGENT.

1. Under the statute of Massachusetts of 1823 [3 Laws Mass. p. 62, c. 142], giving relief against fraud to second attaching creditors, it is not necessary, that the second attachment should be returnable to the same term of the court as the first attachment.

[Cited in Gumbel v. Pitkin, 124 U. S. 148, 8 Sup. Ct. 386.]

2. Quaere, if the plaintiff must, in all cases under that act, sign and make oath to his petition, to be admitted to defend against the first attachment, or if it may be done, if he is abroad, by his agent.

This was an action of assumpsit [by Adam Lodge against Adam Lodge and trustees]. No appearance having been entered for the defendant, Hubbard for William Brown, an alien and resident abroad, and a creditor of the defendant, made application by petition to be permitted to defend the suit, under the Massachusetts statute of the 21st of February, 1824 (St. 1823, c. 142). The petition stated, that the petitioner had commenced a suit returnable to the next term of this court, and that the present suit was, in the belief of the petitioner, fraudulent, and the petition was verified on oath by his agent.

Sumner, for plaintiff, resisted the application, contending, that the case was not within the statute, the writ not being returnable to this term. He also contended, that the petitioner only could file the petition, and make personal oath thereto, and that it was not competent for an agent to file it or make the oath.

STORY, Circuit Justice. The statute of 1823 (chapter 142), entitled "An act to prevent fraud in the attachment of real or personal estate," provides, "that in all cases where the same estate, real or personal, has been attached on mesne process in two or more suits, that the plaintiff or plaintiffs in any suit, after that in which the first attachment shall have been made, may petition the court whereto the writ shall be returnable, on which such first attachment shall have been made at the return term of such court, or at the next term thereof, if such suit shall still be therein pending, and not afterwards, for leave to defend against such first suit, in like manner as the party therein sued could or might have done."

The question is, whether it be indispensable to entitle a second attaching creditor to maintain such a petition, that the writ in his suit should be returnable to the same term of the court, as that of the first attachment. This is a remedial act, and if the words of it admit fairly of two interpretations, one of which will enlarge, and the other restrict, its beneficial operation, it is the duty of the court to adopt the former. But we do not think there is any ambiguity in the act. Jurisdiction is given to the court, to which the first attachment is returnable, at the return term or the next term after to entertain the petition. But nothing is said as to the return term of the second attachment. All, that is required, is, that there should be a second attachment. But it is said, that there cannot be any proof of the second attachment, except by the return of the writ to the court, to which it is returnable, and then it is record proof; for until then there is no pendency of the suit. The argument is not well founded. For certain purposes a suit is, or may be, deemed pending, only when it is entered of record in the proper court. But it is far from being universally true, that it cannot be considered as pending before the return term for any purposes, or that the writ may not be proved to exist as a virtual authority for an attachment before that period. When a writ is returned, the proper proof comes from the record. When it is not yet returned, and cannot be, the existence of the writ, and its proper service may be proved by the production of the writ itself. What would be the situation of officers, if such proof were not admissible? This court sits only twice a year. The marshal may arrest the body, or make an attachment of property, and according to the doctrine contended for, he would, if sued for such act by any party before the return term, be unable to defend himself upon trial, however lawful his act might be. The law involves no such inconvenience. An attachment, when it has not yet become matter of record, is

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

still an attachment, and may be proved by any proper evidence in pais for all purposes, and by all parties having an interest therein.

It is unnecessary to decide the second point, because, if the argument be well founded, it furnishes a good ground, why, in this case, as the plaintiff is an alien and abroad, that a continuance should be allowed to enable him personally to sign the petition, and take the oath according to the second section of the statute.

And we are accordingly of opinion, that the case be continued for this purpose, not meaning, however, to express any opinion as to the validity of the objection.

LODGE v. STODDART. See Case No. 12,561.

LODGE (UNITED STATES v.). See Case No. 15,622.

Case No. 8,461.

In re LODI LAND & LUMBER CO.

[5 Sawy. 286.] [1]

District Court, D. California. Oct. 28, 1878.

INJUNCTION—JURISDICTION.

This court has no jurisdiction on a petition accompanied by affidavits to restrain the enforcement of a judgment rendered by a court of competent jurisdiction against the bankrupt, on the ground that it was obtained by collusion and fraud; nor has it authority on such petition to set aside that judgment, and to inquire and determine what sum, if any, is in fact due from the bankrupt.

J. Desbeck, for assignee.

L. W. Elliot and G. W. Byers, for Sewell and others.

HOFFMAN, District Judge. It may be that in a regular proceeding in equity, the assignee might be able to obtain a decree setting aside the judgment recovered by Sewell as procured by fraud and collusion between himself and the representative of the company. But that judgment was rendered by a court having jurisdiction of the parties and the subject-matter of the suit. It remains unappealed from and unreversed. If assailable now, it is only on the ground that it was fraudulently obtained, and that fraud vitiates the most solemn judgments. No bill in equity to obtain this relief has been filed. A mere petition accompanied by affidavits has been presented to the court, with a prayer that the plaintiff in the judgment may be restrained from availing himself of it. To this the latter has replied by affidavits positively denying the imputed frauds. What is the true state of facts it is not easy to determine. But I am unable to see how, on a mere petition accompanied by affidavits, I can grant an injunction to be continued indefinitely, and which virtually nullifies and sets aside a final judgment obtained in a court of competent jurisdiction.

The assignee does not, in his petition, ask that the plaintiff in the suit in the state court may be restrained from enforcing his judgment until he shall have an opportunity to satisfy it. The interposition of this court is not asked to prevent a sacrifice of the property levied on. The ground stated for the relief asked is, that no sum whatsoever is in fact due from the bankrupt to the judgment-creditor; and that his judgment was obtained by the fraudulent connivance of the representative of the bankrupt corporation. On the strength of these allegations, and the affidavits in support of them, it is asked that the judgment-creditor be enjoined from enforcing his judgment. No further proceeding seems to be contemplated.

If the injunction be granted, the petition will be functus officio. It is not a bill in equity to set aside a judgment as obtained by collusion and fraud; it prays for no relief except an injunction. The representative of the corporation, who is alleged to have colluded with the judgment-creditor, is not made a party to the proceeding, or served with any order to show cause; and the petition seems to be framed on the idea that the court can, on affidavits, proceed to try not only the question whether the judgment was fraudulently obtained, but also the question as to the amount, if any, really due the judgment-creditor. I know of no provision in the bankrupt act which confers upon the court jurisdiction in a proceeding of this nature to inquire into and determine these issues.

LOEB, In re. See Case No. 1,057.

LOEB (BAILEY v.). See Case No. 739.

LOEB (HAVEMEYER v.). See Case No. 6,227.

Case No. 8,461a.

LOEWENSTEIN v. BIERNBAUM et al.

[8 Wkly. Notes Cas. 163; 9 Reporter, 402.] [1]

Circuit Court, E. D. Pennsylvania. Feb. 27, 1880.

EQUITABLE JURISDICTION — WRIT OF NE EXEAT — REV. ST. 1875, P. 136, § 717.

1. A writ of ne exeat cannot be issued unless the defendant designs quickly to depart from the United States.

2. Circumstances where the writ will be granted discussed.

3. Quaere, whether the district judge sitting as a circuit judge can issue the writ.

Sur motion to issue writ of ne exeat; and motion to quash said writ. The bill, filed Feb. 24, 1880, by Loewenstein against Marcus Biernbaum, his wife, his brother Henry

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

[1] [9 Reporter, 402, contains only a partial report.]

Biernbaum, and his brother-in-law Abraham Mausbach, set forth: That the complainant had obtained a decree against Biernbaum, a resident of Philadelphia, in a suit against the latter in common pleas No. 4, requiring Biernbaum to pay him the sum of $21,118.10; that upon the entry of this decree, Biernbaum, with his wife, had changed their residence to the city of New York; that a fi. fa. had issued upon the decree, and was returned nulla bona. The bill averred that M. Biernbaum's co-defendants had conspired with him to convey and transfer all of his property, without consideration, in fraud of the plaintiff's rights, and to enable Biernbaum in reality to retain the control of his property while evading execution on his debt to the plaintiff, and particularly that he had fraudulently conveyed valuable real estate in Colorado to the defendant, Abraham Mausbach, who was his confidential clerk, who immediately reconveyed this property to Biernbaum's wife, in whose name it then stood. The bill further averred that Mausbach was a resident of Colorado, and if casually here would immediately depart the jurisdiction, unless restrained by a writ of ne exeat, which process, amongst other relief, the bill prayed. The bill was served upon Abraham Mausbach, whereupon the plaintiff, having filed an affidavit stating these facts, moved for the writ of ne exeat to issue.

A. Sydney Biddle, for the motion to issue writ.

BUTLER, District Judge. The provision in the Revised Statutes (Rev. St. 1875, p. 136, § 717), requires that the suit should be begun before the writ shall be granted.

The bill has been filed, and Mausbach served.

BUTLER, District Judge. The language of the act is that "writs of ne exeat may be granted by any justice of the supreme court in cases where they might be granted by the supreme court, and by any circuit justice or circuit judge in cases where they might be granted by the circuit courts of which he is a judge." A strict construction would probably authorize the circuit justice, Judge Strong, or the circuit judge, Judge McKennan, only to issue the writ, and not the district judge, even though the latter be sitting as a judge of the circuit court.

The act, being remedial, cannot be construed in a way which would deprive the plaintiff of all substantial benefit. Moreover, in the case of Union Mut. Life Ins. Co. v. Kellogg [Case No. 14,373], Cadwalader, district judge, granted a writ of ne exeat.

BUTLER, District Judge. Has notice been given of this application?

No; because that would probably defeat the object of the motion.

THE COURT. Upon the authority of the case of the Union Mut. Life Ins. Co. v. Kellogg, in which Cadwalader, district judge, sitting alone, issued the writ, I will make the order requested, with leave to the defendant to move to quash the writ upon notice to the plaintiff's counsel.

The writ was accordingly issued and served upon the same day; whereupon—

R. P. White (G. H. Earle, Jr., and Byron Woodworth, with him), for defendant Mausbach, moved to quash the writ.

A discussion of the merits is immaterial, for Rev. St. U. S. 1875, § 717, provide that "no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge, granting the same, that the defendant designs quickly to depart from the United States." The allegation here is merely that the defendant intends to withdraw from this district, but not from the United States.

(The order and writ in the case of Union Mut. Life Ins. Co. v. Kellogg were here produced in court, and it appeared that both provided that the defendant therein should not go beyond the limits of the Eastern district of Pennsylvania.)

BUTLER, District Judge. Unless this language in the statute be explained, the writ must be quashed. Though I had the statutes before me in issuing the writ, and adverted to the first sentence of section 717, Rev. St. U. S. 1875, the second sentence escaped my observation. The point is unexpected; and in view of the decision of Cadwalader, J., supra, I will discharge the defendant upon his giving bail in $2,000 to appear on February 27, before the court.

On February 27 the case was called for argument.

A. Sydney Biddle, for plaintiff. The language of the statute cited by counsel for the defendant certainly restricts the power of the court to cases where the defendant designs quickly to depart from the United States. The point was overlooked in view of the decision in the Union Mut. Life Ins. Co. v. Kellogg [supra]. The statute was similarly overlooked by Cranch, circuit judge, in Patterson v. McLaughlin [Case No. 10 828], in which case defendant was restrained by ne exeat from leaving the District of Columbia to settle in Maryland. The language of the Revised Statutes is substantially the same as that of the act of March 2, 1793, c. 22, § 5 (1 Stat. 334), which was passed long prior to the decision by Cranch, J. The language of the statute is, however, plain, and we admit that the writ must be quashed.

THE COURT (BUTLER, District Judge, orally). When the motion to issue the writ was made, I felt a doubt as to my power to issue it, founded upon the first sentence of section 717, Rev. St. U. S. 1875. It may be said that the district judge, though sitting as circuit judge, is not designated by the act, which defines the power of the court to issue the writ. I will not say that this doubt would have prevented my issuing it, but I may say that I had a shadow of doubt as

to my authority. I issued the writ, however, without adverting to the second sentence of the same section, though I had the act before me, upon the authority of the case before Cadwalader, J. It is now frankly conceded by counsel that the language of the act does not authorize the writ. This renders it unnecessary to examine the merits of the case. It may be, indeed, doubted whether if the court had jurisdiction, the case is one which calls for this extraordinary remedy. The defendant here is alleged to have rendered himself liable to the plaintiff, by aiding Biernbaum, the plaintiff's creditor, to fraudulently convey his property. But Mausbach is not represented as now holding any of the defendant's property, it being averred that he has conveyed that of which he is alleged to have fraudulent possession, to Mrs. Biernbaum. The writ issues where the plaintiff has a plain demand against the defendant. It may be that the property in controversy will be recovered by the plaintiff, and then his claim against Mausbach would be but nominal. I do not put the decision upon this ground, but merely say that the case would be one of great doubt, even if the question of jurisdiction were not decisive. Writ quashed.

NOTE. As to the want of power of a U. S. district judge to issue a writ of ne exeat, see Gernon v. Borcaline [Case No. 5,367]. In the early history of Pennsylvania, writs of ne exeat provincia were frequent. Rawle, Eq. 40, 44. The subsequent instances in which it has been issued by a state court are very few. It is believed there are but two reported cases, viz.: Torlade v. Barrozo, 1 Miles, 385, and Dransfield v. Dransfield, 6 Phila. 143. In the latter case it was said that "our act to abolish imprisonment for debt confines this class of cases within a very narrow compass." See Brightly, Eq. Jur. p. 611; 3 Daniell, Ch. Prac. 1801, note. For cases in New York and other states, see note to Adams, Eq. *360. For form of writ, affidavit, and order, see 3 Daniell, Ch. Pl. & Prac. pp. 1812, 2180, 2326.

Case No. 8,462.

LOEWENSTEIN et al. v. MAXWELL.

[2 Blatchf. 401.] [1]

Circuit Court, S. D. New York. July 1, 1852.

CUSTOMS DUTIES — APPRAISEMENT OF VALUE OF IMPORTED GOODS.

1. Under the 16th section of the act of August 30, 1842 (5 Stat. 563), appraisers must, in valuing importations, adopt the real market value of the goods abroad in cash, and not their value in a depreciated paper currency.

[Cited in Dutilh v. Maxwell, Case No. 4,207.]

2. Goods purchased in Austria were invoiced and entered here in florins at their specie value. The appraisers here valued the goods according to the nominal value of the florin paper currency, which was eleven per cent. less than its specie value: *Held*, that the appraisement was erroneous, and should have been made in florins at their specie value.

3. In such a case, a protest against the additional valuation found on such appraisement, and a claim to enter the goods according to the invoice and actual cost, is a sufficient protest, without a specification as to how the appraisement was made to exceed the true value of the goods.

4. Such an erroneous appraisement is not conclusive on the importer as to the dutiable value of the goods.

This was an action [by Moritz Loewenstein and Carl Loewenstein against Hugh Maxwell, collector of the port of New York] to recover back duties and a penalty, paid under protest. It was tried before BETTS, District Judge, in December, 1851. A verdict was rendered in favor of the plaintiffs for $2,000, subject to the opinion of the court upon a case to be made, and subject to adjustment at the custom house. The facts were these: The plaintiffs imported 150 bales of rags from Trieste to New York. The invoice was dated Vienna, April 3d, 1849. The valuation of the goods at Agram was taken as the invoice price, and was made in florins at their specie value, namely, forty-eight and a half cents, in United States currency, per florin. The actual legal currency of Austria, at the time, was the paper florin, which was then depreciated eleven per cent. below the specie value of the florin. The total invoice value was 7,169.9 florins. The government appraisers raised the valuation to 9,064.47 florins, paper currency, and, on appeal by the importers to merchant appraisers, they raised the value to 10,339.02 florins, paper currency. The appraised value exceeding the invoice price more than ten per cent., an additional duty, amounting to $83.15, and a penalty of $1,028 were imposed by the collector, and were both of them paid by the plaintiffs, under the following protest: "We herewith protest against the additional valuation of the U. S. appraisers and merchant appraisers, and twenty per cent. penalty charged on the within 150 bales rags, claiming to enter the same according to the invoice and actual cost, but pay the same to get in possession of the goods."

Elias H. Ely, for plaintiffs.

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

BETTS, District Judge. There seems to be no just exception to the sufficiency of the protest in this case. The claim of the importers was, that the invoice expressed the true value of the goods in specie and the amount paid for them in cash, and that the appraisers should, in valuing the goods here, be governed by the real market value abroad in cash. The custom-house officers adopted a different rule, and proceeded upon the idea that the invoice was made up in the nominal currency of Austria, and that the entry was also in paper florins, and not according to the specie value of the goods. In that view, the public appraisers and the merchant appraisers would properly rate a higher valuation to the entry than the one given by the importers; but the testimony shows that both classes of appraisers well under-

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

stood at the time that the paper denomination of the florin in Austria was higher than its actual value, and that a buyer disbursed no more in market, on the purchase of goods, than specie prices. For this reason, we think the appraisements erroneous.

The 16th section of the act of August 30, 1842 (5 Stat. 563), directs the actual market value or wholesale price in the principal markets of the country from which goods are imported, to be adopted as fixing their import value (with certain additions not affecting this case). The collector cannot substitute for the actual market value a fictitious value, expressed in a spurious currency. In the United States, during the suspension of specie payments, commodities were bought and sold under the nominal denomination of currency; but the paper dollar was not a measure of actual value or true price, and had to be rectified by the specie standard before it could be employed for that purpose. So in respect to the Austrian florin. Congress requires duties to be paid in specie, and, if foreign invoices are made up in a base currency, unless, on appraisement, the importations are rated at their specie value, prices will be fixed above the actual market value or cost price abroad, and more than the ad valorem duty authorized by law will be exacted of the importer.

The evidence clearly proves, in the present case, that the paper florin of Austria was, at the time of the purchase of these goods, at a discount of eleven per cent. Goods invoiced and entered at 10,000 florins would, if valued in the paper currency, be necessarily subject to duty on 1,100 florins beyond their foreign cost and market value, and thus the express provisions of the act of congress would be contravened.

We think that the protest sufficiently apprises the collector of the grounds of objection to the appraisals. It asserts that the valuation is beyond the actual cost; and it is plain, upon the proofs, that the appraisers made the valuation on the assumption that the invoice was made up in paper florins and did not exhibit the cash prices paid for the goods. We do not think that, under these circumstances, it is necessary for the importer to specify in what particular manner the appraisement was made to exceed the true value of the goods. Whether the error arose from ignorance of the state of the foreign market, or from a mistake in computing, or from a misapprehension of the value of the currency in which the prices were expressed, the collector would be apprized by the notice that the sum reported by the appraisers did not truly represent the actual market value or wholesale price of the articles in Austria, and the importer would have complied with the requirements of the statute.

Nor is it made a question on the part of the United States, that the protest did not fully notify the collector that the goods were only liable to duty on their cash value, and that he had improperly imposed it on a paper valuation of them. The defence is placed upon other and higher grounds: (1) That there is not sufficient proof of any depreciation of the florin; and (2) that the appraisement is conclusive against the importers as to the dutiable value of the goods.

The court is, by the terms of the case, made to render the same judgment upon the facts, as ought, upon the evidence, to have been given by the jury; and, in our opinion, the proofs are clear and satisfactory that the florin, at the time the goods were purchased in Austria, was depreciated eleven per cent. As, on all the evidence, the valuation was made by the appraisers on the assumption that the importers invoiced the goods in the paper currency, and that they must be appraised at their nominal value in that currency, the appraisement does not become conclusive against the plaintiffs, it resting wholly on an arithmetical calculation which did not justify the basis of duties adopted by the defendant.

Moreover, according to our understanding of it, the agreement, in the case made, on which the verdict was rendered, submitted it to the court to have the adjustment made at the custom-house now, as it ought to have been made at the time of the entry and appraisement.

Whether judgment is to be rendered for the plaintiffs for any sum must depend upon such re-adjustment. The invoice and entry must, on such re-adjustment, be regarded as having been made up in the specie value of the florin, and either the invoice must be raised to the paper value of the florin, or the appraisal must be reduced to its specie value. If, on such adjustment, it is found that the entry was not below the actual value, (with the addition of the charges directed by the statute,) judgment must be entered for the plaintiffs for the increased duties imposed because of the difference in value, and also for the amount of the penalty, together with interest from August 5th, 1849, the time when the same were paid, and for costs. But, if it shall appear that duty was not imposed on an amount beyond the value expressed in the entry, (together with the legal charges,) judgment must be entered for the defendant as to that part of the demand. And, if it further appears that the difference in value between the entry and the appraisal so corrected exceeds ten per cent., then judgment must further be entered in full for the defendant, with costs.

Case No. 8,463.

LOEWIG GUSTAVUS v. The COLUMBUS.

[See Case No. 3,042.]

LOFT (ADAMS v.). See Case No. 61.

LOFTON (TATUM v.). See Case No. 13,766.

Case No. 8,464.

In re LOGAN.

[Cited in Miller v. Jones, Case No. 9,575. Nowhere reported; opinion not now accessible.]

Case No. 8,465.

LOGAN v. The AEOLIAN.

[1 Bond, 267.] [1]

District Court, S. D. Ohio. April Term, 1859.[2]

MARITIME LIENS—PILOT'S LIEN — PART OWNER—SEAMEN'S LIEN FOR WAGES — ASSIGNABILITY—PARTIES PLAINTIFF—SATISFACTION OF CLAIMS—SURPLUS.

1. It is well settled that the master of a steamboat or vessel has no lien for wages.

2. It does not, however, impair the lien of a pilot for wages, that when the boat or vessel was in port the pilot was recognized and officiated as master.

[See note at end of case.]

3. The acceptance of a draft drawn by the clerk of a boat in payment of a claim importing a maritime lien, which draft was never paid, is not a waiver of such lien.

4. The clerk of a steamboat, who has an interest of one-half in the boat, has no lien for wages.

5. The lien of seamen for their wages, being a personal privilege for their protection, is not assignable; and the assignee buying these claims for wages on speculation can have no standing in a court of admiralty.

[Cited in The Champion, Case No. 2,583; The Napoleon, Id. 10,011. Cited contra in The Sarah J. Weed, Id. 12,350; The Emma L. Coyne, Id. 4,466.]

6. Where it appears from the evidence that the names of the seamen are used in the libel as claimants for wages, and that they had assigned their claims, and that the assignee was the sole party in interest, the libel in the names of the seamen will be dismissed.

7. After satisfying the allowed claims for wages out of the proceeds in the registry, the surplus, if any, will be applied pro rata to the payment of the other claimants.

[Cited in The Lady Boone, 21 Fed. 733.]

[This was a libel for wages by Linus Logan against the steamboat Aeolian.]

Mills & Hoadly, for libellants.

Lincoln, Smith & Warnock, for interveners.

CHARGE OF THE COURT: The original libel in this case was filed by Logan, asserting a claim against the steamer Aeolian for wages as pilot. A number of other claimants have intervened for wages, supplies, advances, etc. An interlocutory order has been made for the sale of the boat; a sale has been effected, and the proceeds are in the registry. The claims filed exceed the amount of these proceeds. A reference has been made to a commissioner to inquire into and report upon the nature of these claims; whether liens or not, and if liens in what rank or privilege they are to be viewed. The commissioner has reported on the matters referred to him, to which exceptions have been filed by different parties in interest. And these exceptions present the questions for the decision of the court. The commissioner has reported the claim of the libellant (Logan) for wages as pilot, as a valid maritime lien. This is excepted to on the ground that Logan acted in the double capacity of master and pilot, and has no lien for services in either. As master, the law is well settled; he has no lien for wages. His contract with the owners is on their personal credit, and not on the credit of the boat. While the reason and justice of this principle has been doubted by some, it seems now to be the settled law in this country. But the claim of Logan is not for wages as master, but as pilot. It is clearly proved that his employment on the boat was as pilot, and not as master. He performed faithfully and satisfactorily the duties of pilot when the boat was running, and while in port acted as master. There was no one known or recognized as master—there was no one strictly authorized to act in that capacity—but when Logan was not at the wheel, by common consent, he acted as such. This does not deprive him of his lien for wages as pilot. His claim must, therefore, be allowed, to be satisfied pro rata with others having the same priority of lien. The claim of Jenks, Winchell & Co., amounting to $300, is disallowed by the master, on the ground that they dealt with the clerk of the boat on his individual credit, and not on the credit of the boat. The facts in relation to this claim are that this firm are warehouse keepers, and that merchandise had been left with them for shipment on this boat, on which there were charges to be paid before the property could be shipped. Jenks, Winchell & Co. were liable for these charges. They consented, at the request of the clerk, to ship the property on the boat, and to take the draft of the clerk, instead of the cash—a draft on a bank in Iowa. This draft was not paid, and their debt is still due.

There can be no question that the claim of these parties is substantially a claim for an advance by them, for the benefit of the boat, for which they have a lien, unless they have waived it by the acceptance of the draft. The doctrine at common law is that a promissory note or draft, given for a pre-existing debt, does not extinguish the debt, and that the creditor, if the note or draft is not paid, may proceed on the original consideration. And this principle is recognized as applicable to maritime liens. The lien is not discharged by a draft or note for the claim, unless it clearly appears from the evidence that it was intended by the parties to have this effect. This principle was distinctly laid down by Judge Story, in the case of The Chusan [Case No. 2,717]. There is no reason for the inference that Jenks, Winchell & Co. re-

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

[2] [Modified in Case No. 4,504.]

ceived the draft as a full discharge of their lien on the boat; especially in view of the fact that the clerk who made it was pecuniarily irresponsible, and wholly unable to pay the claim, in the event of the non-payment of the draft. I have, therefore, no hesitancy in holding there was no waiver of their lien, and that it is next in priority of lien to the claims for wages. The report of the commissioner adverse to the claim of Alfred W. Hall for $1,061.13, for wages as clerk of the boat, is affirmed. It is in evidence that in March, 1858, Hall purchased an interest of one-half in the boat, and that his claim for wages covers the time in which he was so interested. And it does not affect the question that he had executed a mortgage of his interest, which has never been foreclosed. He was the legal owner of an interest of one-half in the boat at the time this libel was filed. And as part owner, it is clear, he can have no lien for wages as clerk. It would be strange, indeed, that being a part owner, and as such liable in personam for the debts of the boat, he could have a lien, equal in priority to the just claims of others for wages earned. No authority has been cited sustaining such a doctrine, and it is presumed that none can be found. The claim of Hall is therefore rejected.

There are twelve seamen, who have joined in a claim for wages. It is in evidence, however, that they have sold and transferred their claims to Henry Wiche, who bought them on speculation at a heavy discount, and that this claim is prosecuted for his benefit, and that the seamen have no interest in it, although their names are used in this proceeding. It is clear that Wiche, the real party, can have no standing in a court of admiralty. A maritime lien for wages is in the nature of a personal privilege, for the protection of seamen, and is not assignable in the sense of transferring to an assignee the benefits of such personal privilege. In this view, the libel as to these seamen must be dismissed. The report of the commissioner in favor of the interveners for supplies, repairs to the boat, and money advanced for expenses, is affirmed. If, after paying the claims allowed for wages in full, out of the fund in the registry, there is sufficient to pay in full the other allowed claims, the fund will be so applied. If there is not enough for this purpose, the residue will be applied pro rata to the other claimants.

[On appeal to the circuit court the decision of this court, in allowing the master wages as pilot while he was receiving pay as captain, was reversed. Otherwise the decree of this court was affirmed. Case No. 4,504.]

LOGAN (LEAVITT v.). See Case No. 8,173.

LOGAN (SANDERS v.). See Case No. 12,295.

LOGAN (UNITED STATES v.). See Cases Nos. 15,623 and 15,624.

Case No. 8,466.

LOGANSPORT GAS LIGHT & COKE CO. v. KNOWLES et al.

[4 Chi. Leg. News, 75.]

Circuit Court, D. Minnesota. Oct. Term, 1871.

ACTION ON FOREIGN JUDGMENT—PROOF OF ARTICLES OF ASSOCIATION—SERVICE OF SUMMONS.

1. There is nothing in the laws of Indiana requiring an original certificate or articles of association to be filed in the office of the secretary of state. The word "duplicate," although sometimes used to express an original repeated, usually signifies a copy or transcript of an instrument, and this ordinary definition of the word is to be given to it in the Indiana statute.

2. The copy was certified to by the recorder of the county when filed, and accompanying it is a certificate of the secretary of state, that it is a correct transcript of a certified copy in his office, and this is sufficient to allow it to be introduced in evidence although not authenticated in accordance with the act of congress of 1804 [2 Stat. 298], as that act does not exclude every other mode of authentication. When a copy of an instrument is certified to by the officer whose duty it is by law to keep the original on file in his office, it must be received as evidence of the original.

3. The court comments upon the manner of serving summons in several of the states and in the federal courts, and holds, under the statute of Indiana, that the service of the summons in question was sufficient.

[This was an action by the Logansport Gas Light & Coke Company against Alfred H. Knowles and others on a judgment obtained in a state court of Indiana.]

Cornell & Bradley, for plaintiff.
Bigelow, Flandrau & Clark, contra.

NELSON, District Judge. A jury trial is waived, and in accordance with the act of congress, a stipulation being on file, the court proceeds to try the issue. This is an action on a judgment obtained in the circuit court of Cass county, Indiana, on the 13th day of December, 1870, for the sum of seven thousand eight hundred and fifty dollers. The plaintiff, after introducing a copy of the articles of association with the certificates of the recorder of the county and the secretary of state attached, produced a certified copy of the record in the suit in the state court, showing all the proceedings down to the final judgment, and rested. The summons as appears in the record is as follows: "The State of Indiana. To the Sheriff of Cass County: You are hereby commanded to summon John M. Bain, Alfred H. Knowles and Thomas Harvey to appear in the Cass circuit court on the second day of the next term thereof to be held in the court house in Logansport, on the fourth Monday in February, 1866, then and there to answer the complaint of the Logansport Gas Light and Coke Co. Amount demanded $3,000. And of this summons make due return. Witness the clerk [Seal] and seal of said court this 18th day of September, 1863. Horace M. Bliss, Clerk." The return of the sheriff was in the following words:

"I do hereby certify that I served the within writ on the 19th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey personally, by reading the same to them; and I further certify that John M. Bain cannot be found in my bailiwick. John Davis, Sheriff Cass Co., by James Stanley, Deputy."

The defendants interpose several objections to the reception of the copy of the articles of association as proof of incorporation, and also to a recovery upon the record introduced.

I. They urge that the copy of the articles of association has not been properly filed and recorded under the law of Indiana so as to create the plaintiff a corporation. I think this objection is not tenable. The plaintiff, when the articles of association were signed, was required by the law to "file the same in the office of the recorder of the county, which shall be placed on record, and a duplicate thereof in the office of the secretary of state." This it has done, but it is claimed by the defendants that the duplicate filed in the office of the secretary of state was a certified copy, and not a duplicate original. There is nothing in the law passed for the incorporation of companies, requiring an original certificate or articles of association to be filed in the office of the secretary of state. 2 Rev. St. Ind. c. 60. The word "duplicate," although sometimes used to express an original repeated, usually signifies a copy or transcript of an instrument, and in my opinion this ordinary definition of the word is to be given to it in this chapter.

II. The defendants further urge that the copy offered is not authenticated so as to permit its reception as evidence. The copy has been certified to by the recorder of the county when filed, and accompanying it is a certificate of the secretary of state that it is a correct transcript of a certified copy in his office. True, it is not authenticated in accordance with the act of congress of 1804, but I do not understand that this act excludes every other mode of authentication, or abrogates any principle of evidence previously established. It is the settled rule that when the copy of an instrument is certified to by the officer whose duty it is by law to keep the original on file in his office, it must be received as evidence of the original. [U. S. v. Percheman] 7 Pet. [32 U. S.] 53. The copy offered here is indorsed with such a certificate and is admissible under the above rule.

III. The defendants make the further objection that the record of the judgment does not show that the service of the summons was made within the jurisdiction of the sheriff by whom it was made. The proof of service of process issued by any court, or any notice required to be served, can be made by a certificate of the sheriff, when served by him, and it is not necessary for him to state the time and place of service. 2 Rev. St. Ind. § 292, p. 96. Section 34, p. 35, enacts that the summons shall be issued by the clerk, under the seal of the court, and directed to the sheriff, and shall notify the defendant of the action commenced, the parties thereto, and the court where pending. By section 35 the summons may be served personally upon the defendant, and section 36 provides that no summons, or the service thereof, shall be deemed insufficient if there is sufficient substance about either to inform the party served that an action is instituted against him in court. These provisions, it seems to me, fully answer the objection raised as to the jurisdiction of the court, which rendered the judgment sued upon, over the persons of the defendants.

IV. The defendants also claim that there should be no recovery, because the record shows that the only summons pretended to have been served upon the defendants was one claiming $3,000, and that judgment was rendered for a greater sum. The complaint of the plaintiff, which sets forth in detail the cause of action against the defendants, claims damages in the sum of ten thousand dollars, which is an amount larger than the judgment obtained; and under the peculiar practice in Indiana it appears that the summons, though issued out of and under the seal of the court, is regarded as a mere notice to the defendants that a suit has been instituted. By section 1, p. 341, 2 Rev. St. Ind., it is enacted, "that in all proceedings * * * in civil actions the following forms may be used, and are sufficient," etc. Form No. 37, for "summons," is the same as set forth in the record introduced, without a demand for damages. I think this section, and the form given, in connection with section 35, p. 35, gave the court complete jurisdiction to render such a judgment as they have done, for there can be no controversy about the jurisdiction over the subject matter involved in the suit.

Under the Code practice in some of the states a return of a sheriff, upon service of the summons, such as was made in this case, would not be good. The statutes of both New York and Minnesota enact that in case of service by the sheriff the "certificate shall state the time, place and manner of service." In the federal courts, under the statute conferring jurisdiction, it has been held necessary for the marshal to set forth in his return upon process, when the service took place [Allen v. Blunt, Case No. 215], but in Indiana a return in the form set forth in the record is good; so in Ohio and Iowa. 3 Ind. 316; 11 Ind. 346; 13 Ind. 536; 16 Ohio, 371; 7 Iowa, 42. In Indiana, also, upon failure to answer, the court may hear the proof, and in actions founded on a contract, assess the damages, and render judgment; and the relief granted to the plaintiff, if there be no answer, is limited only by the relief demanded in the complaint. 2 Rev. St. Ind. § 380, p. 123. In view of these provisions of the Indiana statutes, I think the plaintiff is entitled to judgment for the amount claimed in its complaint, to wit, eight thousand two hun-

dred and sixty dollars and ten cents, with costs to be taxed.

[From this judgment the defendants moved for a new trial. Motion denied. See Case No. 8,467, and note.]

Case No. 8,467.

LOGANSPORT GASLIGHT & COKE CO. v. KNOWLES et al.

[2 Dill. 421;[1] 5 Chi. Leg. News, 230.]

Circuit Court, D. Minnesota. Jan. 30, 1873.[2]

DEBT ON JUDGMENT OF A SISTER STATE—HOW FAR RECITALS IN RECORD CONCLUSIVE.

Where, in an action on a judgment recovered in a sister state, the record showed the issuing of the summons, and the return of service thereof by the sheriff upon the defendant personally, *held*, that the defendant could not, when called as a witness, contradict the record, and show that he was not personally served with the summons.

[Cited in note to Hood v. State, 56 Ind. 263.]

[See note at end of case.]

This was a suit upon a judgment obtained in a circuit court of the state of Indiana against Knowles and Harvey. A complaint was filed against John W. Bain, Knowles, and Harvey, on the 18th day of September, 1865, for the February term of said court in 1866. A summons was issued on that day, and the judgment record recites, "That on the 15th day of March, 1866, being the 16th judicial day of the February term, the defendants, Knowles and Harvey, though each three times called, come not, but herein wholly make default; and the plaintiff now shows to the court, by the return of the sheriff of Cass county upon the writ of summons issued in this behalf, that said Knowles and Harvey were duly served with process to appear in the action, more than ten days before the present term of this court," etc. The return of the sheriff endorsed on the summons is in these words, to-wit: "I do hereby certify that I served the within writ on the 19th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey, personally, by reading the same to them; and I further certify that John W. Bain cannot be found within my bailiwick. John Davis, Sheriff Cass County; by James Stanley, Deputy." The record further states, after several continuances, that on the 13th day of December, 1870, the court, "hearing plaintiff's proofs and allegations herein, doth find that the defendants, Alfred H. Knowles and Thomas Harvey, are indebted to the plaintiff in the sum of seven thousand eight hundred and fifty dollars ($7,850)," etc. On the trial in this circuit, the defendants were offered as witnesses to prove that they had not been served personally with process. An objection to this offer was sustained, and the plaintiff finally obtained judgment. [Case No. 8,466.] A motion for a new trial is now made by the defendants.

Cornell & Bradley, for plaintiff.

Bigelow, Flandrau & Clark, for defendants.

NELSON, District Judge. The only point which will be considered upon the motion for a new trial, based upon a bill of exceptions in this case, is that wherein it is alleged the court erred in not permitting the defendants, who were offered as witnesses, to contradict the judgment record, which record states the fact of a personal service of the summons upon both of the defendants by the sheriff, and contains a copy of the summons, and of the return of the officer. All of the facts necessary to give the Indiana court jurisdiction of the persons, and of the subject matter, are fully stated in the record.

The defendants' counsel claim that the question raised being a jurisdictional one, they have the right to contradict the fact of a personal service of process, although it is so stated in the judgment record. The constitution of the United States (article 4, § 1) declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and congress may, by general laws, prescribe the manner in which such acts, records, and proceedings be proved, and the effect thereof." By authority of this section, congress has enacted that, "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law and usage in the courts of the state from whence the said records are or shall be taken."

I have had some difficulty in satisfying my mind as to the extent to which it was intended to give effect to the judgments of sister states by this act of congress. The authorities are conflicting upon the subject, and there is no adjudication of the supreme court of the United States in a case like the one in hand. True, there is a statement in the case of Shelton v. Tiffin, 6 How. [47 U. S.] 163, which would seem to foreshadow the opinion of the court at that time, that a personal service of process, or personal appearance in court and waiver of process, when contained in the record, cannot be controverted; but in Christmas v. Russell, 5 Wall. [72 U. S.] 305, it is said that "they (judgment records of sister states) are open to inquiry as to the jurisdiction of the court and notice to the defendant." In the state courts there is great confusion upon the subject. The case of Starbuck v. Murray, 5 Wend. 148, is the leading one relied upon to sustain the position taken by the defendants' counsel, and seems to have been followed very generally in the New York courts. The rea-

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

[2] [Reversed in 19 Wall. (86 U. S.) 58.]

soning of Judge Marcy in this case was criticised and rejected by the late Justice McLean (see Lincoln v. Tower [Case No. 8,355]), and by the supreme court of the state of Michigan (see Wilcox v. Kassick, 2 Mich. 165); but in many of the states it has been followed and approved. In order to properly understand the decision given in Starbuck v. Murray, it is necessary, in my opinion, to examine the law and practice existing at that time in the state of New York in regard to the manner of making up the judgment record; for this practice undoubtedly influenced the court in its decision. It will be found, upon examination, that, by the practice in the courts of that state, the attorney of the prevailing party prepared the judgment record out of court, after the suit had terminated; and the entries were made by him, and not by a particular officer in court. The supervision of the court over the whole course of action was not required by this practice, and the entries, therefore, in a judgment record were such as the attorney saw fit to insert, although by a fiction everything was supposed to be entered in open court. See Grah. Prac.; Burrill, Prac. tit. "Judgments in General," etc. There was very good reason, therefore, for permitting a defendant in a suit upon a judgment rendered in the courts of that state to contest any jurisdictional fact, even to the extent of contradicting the statement of personal service of process, or any fact which showed jurisdiction of the person. The record in all its parts was the act of the attorney, and did not bear the impression of absolute verity. It is true this case (Starbuck v. Murray), goes to the full extent of deciding that, notwithstanding the record, any jurisdictional fact may be inquired into; but to my mind it is clear that Judge Marcy had in view the practice with which he was most familiar, and what he said had reference to the status of judicial records similarly situated to those of the state of New York.

The authorities compiled by Mr. Bigelow in his excellent work on "Estoppel," seem to me to justify the conclusion laid down by him, viz.: "If the allegations in the record as to jurisdiction could not be disputed in the sister state, they must be conclusive throughout the Union," and "We should state the rule to be, that where the record contains an allegation of specific facts sufficient to constitute jurisdiction, parties and privies are estopped to deny the jurisdiction in a suit for the same cause of action, unless the record would be inconclusive in an action upon the judgment in the state in which it was rendered." Bigelow, Estop. p. 237, and preceding title, "Foreign Judgments in Personam." In Indiana, this record would be conclusive between the parties without doubt. 23 Ind. 628; 2 Blackf. 108. A case on all fours with the one at bar has been decided in that state, upholding the conclusiveness of the judgment of a sister state, where the record alleges personal service of summons. Westcott v. Brown, 13 Ind. 83, explaining Boylan v. Whitney, 3 Ind. 140, cited by defendants' counsel. See, also, Roberts v. Caldwell, 2 Dana, 512; 3 Gilman, 197.

The defendants, therefore, in my opinion, are not entitled to a new trial. Motion denied.

[NOTE. On a writ of error, this case, so far as it concerned the defendant Alfred H. Knowles, was brought before the supreme court. Mr. Justice Bradley, delivering the opinion of the court, remarked that the defendant had a perfect right to prove that he had never been served with process, and that the Cass county circuit court, Ind., never acquired jurisdiction of his person. A venire de novo was awarded. 19 Wall. (86 U. S.) 58.]

LOGS OF.

[Note. Cases cited under this title will be found arranged in alphabetical order under the quantity or number of logs; e. g. "Logs of Cedar. See Two Hundred and Sixty-Eight Logs of Cedar, Case No. 14,295."]

Case No. 8,468.

The LOLA.

[6 Ben. 142.] [1]

District Court, E. D. New York. June, 1872.

SEAMAN'S WAGES—AGREEMENT OUTSIDE THE SHIPPING ARTICLES—DURESS.

1. The shipping articles are not conclusive evidence of the contract of a sailor with the ship.

2. Effect must be given to an agreement by the shipping agent, made at the time the sailor signed the articles, and understood by the sailor to form part of the agreement, but not embraced in the articles.

3. A seaman signed articles in New York, on board a British vessel, for a voyage to Dunkirk, at $40 a month. At the time, it was stated to him that the voyage would end in New York. On the arrival of the vessel at Dunkirk, the seaman was discharged and reshipped at $20 a month. On the return of the vessel to New York, he left her, and brought suit for his wages: *Held*, that the agreement by the seaman was that the voyage should end in New York; that the subsequent agreements made by him, were made under duress, and were not binding on him; that he had the right to leave the vessel on her return to New York, and was entitled to be paid at the rate of $40 a month.

The libellant in this case alleged that he shipped on board the Lola, in New York, at the rate of $40 a month, for a voyage to a port in Great Britain, thence to a port in the Mediterranean, and back to New York; that the vessel sailed from New York to Dunkirk, in France, where the master wrongfully discharged him, but offered to reship him for $20 a month, which he accepted under duress; that the vessel sailed from Dunkirk to Swansea, where he signed articles at $20 a month, and after he had signed them learned that they were articles for a voyage to New York, and back to a

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

port in Europe; and that the vessel then came to New York, and there the libellant left her, the voyage for which he originally shipped being completed. And the libellant claimed to recover wages at $40 a month, for the voyage. The owners of the ship denied the agreement first alleged, and set up that the libellant shipped in New York, and signed articles for a voyage to Dunkirk only, and was there paid off, and discharged, and reshipped and made the other agreements alleged by him, and that his leaving the ship in New York, where he did, was a desertion, which forfeited all wages due him.

Henry Morris, for libellant.
Goodrich & Wheeler, for claimants.

BENEDICT, District Judge. I have no doubt as to the proper decision to render in this case. The question to be determined first, is, what was the contract made by the libellant, when he shipped in New York. The shipping articles are not the sole evidence of that contract, for effect must be given to an agreement by the shipping agent, made at the time when the articles were signed, and understood by the seamen to form part of the contract, where such agreement is clearly proved. Statements, representations and agreements made with seamen by shipping notaries, when the articles are signed, bind the ship, and that without reference to the instructions which the captain has given the notary. When the ship owner allows a shipping agent to employ a crew for him, he holds out to the seamen, that the shipping agent has authority to bind the ship by the contract which he makes. So, whatever was the bargain made in this case, between Ferris, the shipping agent, and this man, at the time of the shipment in New York, that binds the ship.

Now that bargain is proved not only by the libellant, but also by the landlord. They both say that the bargain was that he should go on a voyage, which they describe, which voyage was to end in New York, and at $40 a month wages. I see no reason to doubt this evidence. The landlord has been examined in court, and appears reliable, and says that he asked the shipping agent himself what the voyage was, and was told that it ended in New York, in which the landlord simply did his duty by the sailor. This contract is not denied by Ferris, the shipping master, who gave his evidence with very proper frankness. He says that he don't recollect what he did say, and cannot swear that he didn't make the contract which the libellant swears to. There is no improbability in the statement of such a contract, because Ferris says such understandings were common in this class of vessels. There would be improbability in any other understanding, because this man had a family here, and he had shipped several times out of this port, and would not be very likely to make a contract to be left in a foreign and strange port. The rate of wages is consistent with the libellant's story, for although cooks were shipped at thirty-five dollars a month, yet it is quite clear from Ferris' statement that they were shipped at from $35 to $40, and this man got $40. That the agreement was as the libellant states, is further clearly indicated by the way the man acted when the captain proposed to discharge him in France. He was quite excited about it, and cried, and applied to the mate to induce the captain not to leave him there. It is manifest that when he shipped he never thought of being left in that place.

The talk about incompetency in the case amounts to nothing. The captain took the man through the whole voyage as cook and steward, and offers no proof of any neglect of his duties. The captain says he did not like him—and quite likely he did not like him as well at $40 a month as he would have at $20. He was satisfied with him at that rate. It is said the man expressed himself as thankful to continue in the ship at the reduced wages. Of course he was, because the captain had threatened to use the power which he possessed, to leave him behind in a strange place, and he, of course, made no subsequent complaint, and when asked, signed new articles at $20 a month, without objection.

But these subsequent articles amount to nothing. They were all executed under duress in law, and do not bind the seaman. The contract which he made when he shipped for the voyage which he performed is the only contract binding upon him; and when he completed that voyage in New York he had a right to leave the ship and demand his wages, at the rate which I find upon the evidence the ship agreed to pay him, namely, $40 a month.

Let there be a decree for the libellant for the wages at $40 a month, less any payments made to him.

LOMAX (FRAZIER v.). See Case No. 5,072.
LOMBARD (AMERICAN WHIP CO. v.). See Case No. 319.

Case No. 8,469.

LOMBARD v. BAYARD.

[1 Wall. Jr. 196.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1848.[2]

LIEN OF JUDGMENT IN CIRCUIT COURTS — DUTIES AND COMPENSATION OF AUDITORS—RATES OF PROFESSIONAL CHARGES.

1. The lien of a judgment in this court is coextensive with the district, and is not confined to the county of Philadelphia merely.

[Cited in Cropsey v. Crandall, Case No. 3,418; Ludlow v. Clinton Line R. Co., Id. 8,600; Ward v. Chamberlain, 2 Black (67 U. S.) 438.]

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[1] [Reported by John William Wallace, Esq.]
[2] [Affirmed in 9 How. (50 U. S.) 530.]

2. The compensation of auditors is regulated not only by the labour which they have, but also by the amount of money to be distributed.

[Cited in Kelley v. Richardson, 69 Mich. 476, 37 N. W. 535.]

3. In this case the court speaks of the considerations which may properly influence professional charges.

The defendant's real estate, situate in Lancaster county, Pennsylvania, having been sold on an execution from this court in favour of Lombard, the plaintiff, a question arose between him and some other parties, junior incumbrancers, in the county court of Lancaster, where the lands are situate, as to who was entitled to take the money. Lombard contended that the judgment of this court was co-extensive, as an incumbrance, with the Eastern district of Pennsylvania; a position which, if true, would give the money to him, Lancaster county being within the district, and he the oldest incumbrancer. The Lancaster county creditors, on the other hand, contended that a judgment in this court was similar in its effects with a judgment in any of the state courts, and that it bound no lands out of the county where it was entered. The matter being referred, according to the Pennsylvania practice, to an auditor to report upon, that gentleman decided that the lien of this court's judgment was co-extensive with the district, though this embraces several counties besides that of Philadelphia, where the court sits. One exception, the first, was to his decision on this matter.

In the argument upon it, which was conducted by Mr. Penrose, Mr. Harris and Mr. B. H. Brewster in favour of the exception, and by Mr. Rawle and Mr. J. M. Read in favour of the report, a good deal of speculation was had about the origin of liens from judgments. It was admitted, however, that whencesoever the effect came, judgments had been liens in Pennsylvania ever since 1700 (1 Smith, Laws, 7, and notes), in which year an act of the state legislature made lands liable to sale on execution. It was admitted also that by the law of the state in 1789, when this court was constituted, a judgment in the supreme court of the state was a lien co-extensive with the state itself. Ralston v. Bell, 2 Dall. [2 U. S.] 158; White v. Hamilton, 1 Yeates, 183. It was also admitted that an act of the state legislature, April 4th, 1798, limiting the lien of judgments to five years, had been considered as applicable to judgments in this court, though the act was passed many years after this court was organized. Upon this last admission, the counsel for the exceptant grounded the strong point of their argument. The state, in the year following that when the last mentioned act was passed, enacted [3] that "no judgment rendered in the supreme court or in the circuit courts (of the state,) shall be a lien on real estate, excepting in the county in which such judgment shall be rendered." And the counsel for the exceptant contended that as this court had conformed to the state law concerning the duration of judgments, it was equally bound to conform to it when settling their extent; a position which it was supposed derived force from the testimony of Mr. Francis Hopkinson, lately the clerk of the court, who stated that from 1831 to 1846, during which term he had held office, it had never been customary to send for searches here when the land to be sold did not lie in Philadelphia county.

The counsel on the other side contended that the act was merely intended to prevent the evils which might arise from applying the established law about the lien of judgments to the system of state circuit courts, which that act established.

GRIER, Circuit Justice. In the conclusion to which the court comes as to the extent of the lien, we assume the following points, without attempting to fortify them by arguments or authorities:

1st. That the lien of judgments in the courts of the United States does not result from any direct legislation of congress on that subject.

2d. That under the judiciary act of 1789 [1 Stat. 73], which ordains (section 34) "that the laws of the several states shall be regarded as rules of decision at common law in courts of the United States," these courts have uniformly adopted the principles of state policy and jurisprudence on the subject of the lien of judgments, so far as the same were applicable, treating them as rules affecting real property and its transmission, whether by descent or purchase. This doctrine is fully recognized by implication in several acts of congress touching this subject. Acts May 19, 1828, § 2 [4 Stat. 281], and July 4, 1840, § 4 [5 Stat. 393].

3d. That from the earliest history of Pennsylvania to the present time, judgments have been considered as liens upon land; and this not by adoption of the statute 13 Edw. I. c. 18, commonly called the "Statute of Westminster II.," or "statute of elegit" (Allen v. Reesor, 16 Serg. & R. 11), nor by virtue of the statute 2 Geo. II., but because from the first settlement of the colony, or at least since the year 1700, "all lands and houses whatsoever," were "liable to sale upon judgment and execution obtained against the defendant, the owner, his heirs, executors," &c. Act 1700.

4th. That in 1789, when the circuit courts

[3] Act March 20, 1799, "to enable the justices of the supreme court to hold circuit courts within this commonwealth." It established a circuit court in each county of the state except Philadelphia; each county to have a clerk, &c.; gives an appeal from each circuit to the supreme court in banc, and after the decision there requires the record to be returned below.

of the United States were established, the law of Pennsylvania was settled both by judicial decision and act of assembly, recognizing the doctrine (Act 21st March, 1772; 1 Smith, Laws, 389) that a judgment of a court of record bound the lands of the debtor situated within the territorial jurisdiction of the court for an indefinite period of time. Thus a judgment in the court of common pleas, whose jurisdiction by mesne process extended over a single county, was a lien on all the lands within that county only, and not over the state, although testatum executions might issue to any county. But judgments in the supreme court bound lands over the whole state. Ralston v. Bell, 2 Dall. [2 U. S.] 158; White v. Hamilton, 1 Yeates, 183.

5th. That the act of assembly, April 4, 1798, § 2, limiting the lien of judgment to five years unless revived by scire facias, has been considered as a rule of property binding on this court, and therefore adopted by it, although passed subsequent to 1789. Thompson v. Phillips [Case No. 13,974]. It results as a necessary conclusion from these admitted principles that the lien of a judgment in this court, in 1789, was co-extensive with the state, which was then the boundary of its jurisdiction by mesne process. But while this position is conceded, it is contended also that this court is bound to conform to the legislation of Pennsylvania since 1789, limiting the extent of the lien of a judgment in the same manner as we have already adopted it with regard to limitation of time; and the act of assembly, March 28, 1799, § 14, limiting the lien of judgments in the circuit and supreme courts of Pennsylvania to the county where they were rendered, is relied on as exhibiting the policy of the state on this subject, and constituting a rule which this court is bound to adopt. It is not necessary to decide, nor are we willing to concede, that if the legislature had enacted in direct terms that the lien of judgments in this court should be limited to the county of Philadelphia, we would have felt bound to conform to the enactment. But admitting this point for argument's sake, we cannot see that the act of assembly relied on has any, or was intended to have any, application to this court. It is not the enactment of a general principle or doctrine affecting real estate or liens in general, or establishing the incidents and effect of all judgments in all courts. But this section was introduced to guard against a great inconvenience which might arise by the application of the well known doctrines of the law in relation to the lien of judgments to the new system of circuit courts established by that act. It is entitled "An act to enable the justices of the supreme court to hold circuit courts within this commonwealth." It establishes a circuit court to be held in each county of the state except Philadelphia. Each county to have a clerk, seal, &c. Gives an appeal to the supreme court in banc, and after the decision requires the record to be returned to the circuit court of the county, and execution to issue therefrom. Now, unless the act restrained the extent of the lien of a judgment in each of these forty county circuits to the limits of its territory, it was most probable that in consonance with the previous decisions of the supreme court touching the subject, the lien of a judgment in any one of these numerous courts would have been construed to affect lands over the whole state. This would have been not only a great inconvenience, but an intolerable evil, as purchasers would have been compelled to search for liens, not merely in the court of common pleas of the county where the land lay, and the supreme court, but in some forty or fifty others. To remedy this evil, the section of that act was introduced which is now under consideration. It enacts, that "from and after the last day of December term next, no judgment rendered either in the supreme court or any of the other said circuit courts, shall be a lien on real estates excepting in the county in which such judgments shall be rendered; and that every testatum execution shall be a lien upon lands and tenements only from the time of the delivery thereof to the sheriff, who is directed to endorse the precise time of receiving the same, and shall certify forthwith a transcript thereof, together with the day and time of such testatum execution coming to his hands, in and to the office of the clerk of the circuit court of the county in which such lands or tenements shall be, &c. &c." It needs no argument to show that this act annuls no established doctrine or principle, and sets up no new one which must bind all courts as a rule of property, and that it applies only to a peculiar system of courts then first established. It could not be intended to affect the lien of judgments in this court, nor can we adopt it according to its letter if we would. The evil guarded against is not incident to this court. Our jurisdiction is not bounded by the limits of a county, nor have we this multitude of places of holding our courts and keeping our records. We issue no testatum executions within this state. Counties, says Lord Coke, are parts of the kingdom into which the whole realm is divided for the better government thereof. Every of them is governed by a yearly officer called a "sheriff." The county is hence called his bailiwick. It is called "comitatus a comitando"; for as much as men of one county do not accompany together with men of another county at county courts, towns, leets and other courts, &c. As divisions of territory and jurisdiction for facility of the administration of justice by the tribunals of each state they are wholly unknown to the circuit courts of the United States, whose county is the state or district subject to their respective jurisdictions. The county or bail-

iwick of the marshal is the district. This court is not the circuit court of Philadelphia county, but of the Eastern district of Pennsylvania. The enumeration of counties in the act of congress constituting it is but for facility of designating its boundary.

So far as any general principle can be elicited from this act of assembly, affecting the doctrine of the lien of judgments which this court can apply it is no more than this: That the lien of judgments shall be co-extensive with the original jurisdiction of the court in which they are entered, that is the territory within which their mesne process runs, as distinguished from writs of execution. The adoption of this principle would limit the lien of our judgments to the Eastern district of Pennsylvania. But on this subject we are not without precedents establishing the position we have taken. The case of Shrew v. Jones [Case No. 12,818], is in point. An act of the legislature of Indiana, passed in 1824, limits the lien of judgments in the circuit court of that state to the counties in which the judgments were entered. And it was contended in that case as in this, that judgments in the circuit court of the United States should be subject to the same rule. But it was decided by Mr. Justice M'Lean, that this act could not apply in the manner contended for to judgments rendered in that court. "Effect," says he, "must be given to the provisions of this law, so far at least as they are adapted to the organization of this court. If the rules of the proceeding by the circuit courts of the state be followed by this court, effect is given to them without reference to the limited jurisdiction of these courts. The limits of the state in the exercise of the jurisdiction of this court are as the limits of the county to the local courts. The principles of the state law are adopted, but the instruments which give effect to these principles are necessarily different, and they are made to operate throughout a more extended jurisdiction. In Sellers v. Corwin, 5 Ohio, 400, the supreme court of Ohio decide that the lien of a judgment in the circuit court of the United States for Ohio was co-extensive with the territorial jurisdiction. The case of Koning v. Bayard [Case No. 7,924], in the circuit court of the United States in the Southern district of New York, and the case of Manhattan Co. v. Evertson, 6 Paige, 466, are to the same effect. Exception overruled.

This point being disposed of, a second exception was to the sum charged by the auditor for his services in the matter. Upon this part of the case it appeared that the parties had met informally three or four times before the auditor to agree upon and settle the exact state of some undisputed facts, but that no argument was had upon the point of law involved in the question of the lien; one of the counsel telling the auditor that he did not want anything but a pro forma report, so as to take the point of law before the court in the shape of an exception to the report, where it might be fully argued and settled.[4]

The auditor made a report of eighteen foolscap pages, in which he examined numerous authorities and stated his reasons for the conclusion to which he arrived; a conclusion which, as we have already seen, was confirmed by this court. He was a gentleman who had practiced with credit for several years at the country bar, and had recently established himself in this city, and his opinion, so far as the reporter could judge of it, was a very respectable production, in which the authorities were collected with a good deal of diligence. The fund in court was $60,333.80, and the auditor's charge, deducting his expenses, was about $225. The defendant had already paid $1,202 in costs, including a sum of $303.16 to the clerk for mere percentage.

Mr. Penrose, in behalf of the exception to the auditor's charge, contended that the charge was extravagant. The auditor was requested to confine himself to a pro forma decree merely. Counsel undoubtedly have a right to ask for such a decree; nor will the court impose upon suitors the expense of having cases decided by any tribunal but those regularly constituted courts of the country, which all are taxed to support, and by whose judgments all are willing to be bound. In the present case the defendant, having discharged legal costs amounting to more than $1,000, is compelled to pay $225 more—for what? An opinion of a private individual, of no authority nor value whatsoever to him or to any body. It is of no value to the court, who are bound to sit here, and have sat here, to listen to the argument of counsel on the point passed upon by the auditor, and to decide it exactly as if no report had ever been made. The auditor, finding that the sum was large, has gone into a voluminous disquisition, for no object, it would seem, but to give himself an apparent right to a large compensation. He was requested to state

[4]For the information of gentlemen not acquainted with the practice in Pennsylvania, it may be well to state that a portion of the duty of "auditors" usually is to make public advertisement in two newspapers of the fact of their appointments, and of the time and place of meeting, describing the property sold, and calling upon all persons interested in the proceeds of it to attend before them. They also usually procure from the different offices certificates of all incumbrances on the property, and, after making their report, send notices to the various parties or their counsel who have appeared before them, informing such persons that the report has been made, is ready to be seen, and requiring them if any exception is wished to be made, to except thereto within a certain time and in a certain way. The auditor collects and preserves the various evidences of this discharge of his duty, and for advertisements and searches sometimes pays money from his own pocket in advance.

the facts of the case, and to give a formal decree only. Now the magnitude of the sum in court is not a proper element for consideration in settling the auditor's recompense. His judgment is not made either more or less correct by that fact. But at any rate the sum was extravagant. It is well known that the most eminent members of this bar—among whom the auditor is not asserted to be—constantly give opinions on the most important points for sums varying from $10 to $50. In Fitzsimmons' Appeal, 4 Pa. St. 249, the charge of the auditor,—which was objected to by counsel,—was but $10. It is hoped, in short, that the court will lay its hand upon an abuse, which has been a grievous one in the inferiour courts of Philadelphia, and which, unless speedily arrested, will justify all the feeling which it has provoked. It has there already come to the condition which made Lord Eldon say of the English bankruptcy system in 1801 (6 Ves. Jr. 1) that there "is no mercy to the estate"; that "nothing is less thought of than the object of the commission," and to speak of it as "little more than a stock in trade for the commissioner, the assignees and the solicitor."

Mr. J. M. Read, for auditor, stated that this gentleman desired to refer himself entirely to the judgment of the court in the matter, and had nothing to reply to what had been said.

GRIER, Circuit Justice. That the auditor is entitled to a reasonable compensation for his services cannot be denied. The objection here is to the amount. On this subject generally, the supreme court of Pennsylvania remarks (Fitzsimmons' Appeal, 4 Pa. St. 248–250), very properly we think, that "the duties of an auditor are a necessary and often a very important part of the administration of justice. In the orphans' court the duties are in many respects similar to those of a master in chancery, and in the common pleas they are required to perform onerous and responsible services. Diligence, intelligence and discretion are required; and unless these essential qualities are present the actual labour expended will often be useless. . . . Unless suitable compensation is given, this useful function of the law cannot be fulfilled; for men of capacity and usefulness will not be found willing to expend their time for the benefit of others without some reward. Everywhere in the commonwealth courts have authorized and sanctioned a reasonable allowance; and unless that practice is continued, the interest of creditors, of widows and orphans, of executors and administrators, and indeed the entire public, which is always concerned in the intelligent administration of the laws, will suffer detriment."

The law has established no rate of fees to be allowed as compensation to auditors, masters in chancery, &c. Hence the court has no rule by which to measure the charge. The law could not well fix a standard that would be just in all cases: nor can the court. The services of men of learning, skill and experience in their professions are not to be rated like those of day labourers. It is a question of great delicacy for the court to be called on to judge of what is a proper compensation for them. The facts of the case, from their character, cannot be sufficiently brought, or very decently discussed before the court, nor the compensation tested by any certain rule; and this last point must generally be submitted to the candour and judgment of the members of a profession eminent, among all others, for honour and integrity.

It is said that gentlemen of the Philadelphia bar usually charge from $10 to $50 for an advice or opinion. This may be true in small matters of daily occurrence. But I think that few gentlemen of the bar in this city would prepare notices, see them correctly printed and duly published, would afterwards attend four days to meet the parties and their counsel, and then spend at least as many more in writing out a long, learned and elaborate opinion, in a case where many thousands of dollars were in contest, for any such compensation. Every gentleman of the bar well knows that there cannot be any one rule of charges in the nature of a horizontal tariff for all cases. Often, where the parties are poor and the matter in contest is small, counsel receive but very inadequate compensation for their exertion of body and mind; and for myself I know that for some of the most severe labour of my professional life I have been the least well paid. In other cases, where the parties are wealthy, and the sum in controversy large, they will receive a tenfold greater compensation for perhaps a tithe of the same labour. In some cases the whole sum in dispute would be poor compensation. In others, five per cent. of it will be very liberal. Hence, in all cases, professional compensation is gauged not so much by the amount of the labour, as by the amount in controversy, the ability of the party, and the result of the effort. And this is perfectly just.

In this case before us, if the sum to be disposed of by the auditor had been $1,000, one tenth of his present charge would be 2¼ per cent. of the fund, and yet it would have been a very inadequate compensation for several days of professional labour and investigation, to say nothing of the merely mechanical duties which all auditors have to perform alike, and which, though not requiring great ability, distract attention and employ time. In the present case the charge is considerably below the half of one per cent. upon the fund to be distributed. The labour, learning and professional character

requisite to perform the duty committed to the auditor in this case was tenfold of that required of the clerk for every service which he has rendered in the suit, and yet the law, by allowing him a percentage of a half of one per cent. on the money in court, has given him a sum nearly a third larger than that charged by the auditor. And he has had besides a fee for each particular service.

Seeing, therefore, that the fees and emoluments allowed by law to its officers, are estimated by a compound ratio one of whose multiples is the sum in controversy, as well as the actual labour bestowed, we cannot say that the charge of the auditor is so extravagant as to call for interference from the court.

The allegation that the case was not argued by counsel before the auditor, is no ground for lessening his compensation, since its only effect was to impose upon him the necessity of investigations which would otherwise have been made by the counsel. And the case is not altered by the assertion that he might have made a pro forma decree; since the nature of the reference and the order of the court imposed upon him the duty of examining the subject and reporting the result of his investigations to the court for its relief; a task which he has performed with learning and good judgment. Exception overruled.

[This case was taken up by writ of error to the supreme court, where the judgment of this court was affirmed. 9 How. (50 U. S.) 530.]

Case No. 8,470.

LOMBARD v. CHICAGO.

[4 Biss. 460.] [1]

Circuit Court, N. D. Illinois. Nov., 1865.

DUTY OF CITY IN PROTECTING NARROW COURTS—DEGREE OF OBLIGATION — DUTY OF PEDESTRIAN — CONTRIBUTORY NEGLIGENCE — MEASURE OF DAMAGES.

1. At excavations for admitting light at basement windows, in a narrow court, the city should require the owner to place guards as security against possible accidents; and it is negligence in the city to allow them to remain open.

2. The city, however, is not held to the same obligation as in a more public thoroughfare, and the passer-by must exercise due care, considering the character of the court and the purpose for which it was constructed.

3. If the plaintiff did not exercise that degree of caution which a prudent man ought under all the circumstances to have exercised, he cannot recover, even though the city was guilty of negligence.

4. The business occupation of the plaintiff is a proper element for consideration in computing the damages sustained by a personal injury; but the damages must be reasonable.

[This was an action at law by Josiah L. Lombard against the city of Chicago to recover damages for personal injuries caused by the negligence of defendant in leaving certain excavations unprotected.]

W. C. Goudy and D. W. Hazzard, for plaintiff.

D. D. Driscoll, for defendant.

DRUMMOND, District Judge (charging jury). A building had been constructed in Chicago on the corner of La Salle street and Couch alley. For the purpose of giving light to the basement, on the north side of the building, a small excavation had been made at each window, a few feet deep and a few feet wide. This had been left open for a long time. On the evening of the 9th of November, 1864, the plaintiff, in company with his brother, was proceeding through Couch Place when it was suggested by his brother that it was dark and muddy and that they had better turn back. In turning back, or immediately afterward, the plaintiff fell into one of these holes and suffered a very serious injury. The question is whether he is entitled to recover. The city is sued on the ground that it has been guilty of negligence in allowing these holes or areas to be thus left open, and that is the first question to be determined,—was the city guilty of negligence?

This is a mixed question of law and fact. It is conceded and proved that Couch Place was about twenty feet wide, and extended from Dearborn street to La Salle street; that the city exercised control over it as a public street. I do not think that it is material what we term it—whether Couch Place, or a street, or an alley. We know from the evidence what it is; that it is much narrower than the ordinary streets of the city, and that it is not, and cannot be, so much used as those streets; but, conceding that, it was subject to the control of the city, the city had exclusive care over it, and it was used for the passage of vehicles and of persons. It was then the duty of the city to have these holes properly guarded. The owner of the building constructed it by virtue of authority from the city, so far as he trenched on the alleys or streets, and it was the duty of the city to see that in the construction of the building there should nothing be done, and nothing so left, as in any considerable degree to impair the safety of the citizen; and it was the duty of the city to require on the part of the owner of this property that there should be some guards placed there as a security against possible accidents.

So that from what is conceded by the city, and what is proved beyond all doubt, the court is of opinion that the city has been guilty of negligence on its part in allowing these spaces to be left open in the way in

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

which they were. The law does not require anything impracticable or impossible in relation to alleys or streets. All that it requires is that the city should do what it can, with the exercise of the powers given to it, to render the passage of vehicles and of pedestrians reasonably safe and secure, and it cannot be pretended in this case but that it was in the power of the city to have these holes secured. I therefore think that the city was guilty of negligence in thus permitting these holes to be left open. I understand that is conceded by the counsel for the city.

Still it does not follow, although the city has been guilty of negligence, that the plaintiff can recover. It is necessary that the plaintiff should not have been guilty of any negligence which contributed to the accident or the injury, in order to entitle him to recover,—on this principle: that, where two parties or persons are guilty of a wrongful act, one of them who has contributed by his own wrongful act to the injury shall not come into a court of justice to recover for the injury. The question is whether the plaintiff was himself guilty of any negligence which contributed to this injury.

The night was dark, or darkness was coming on at the time of the accident; the streets were muddy, and there was no light in the alley. The proof shows that the city has not been in the habit of placing lights in these narrow passageways; at any rate, it had not placed public lamps in this passageway. I cannot say that if the accident happened in consequence of there being no lights in this alley, placed there by the city, the plaintiff is necessarily entitled to recover. I think he was bound to take the place as it existed at the time, as a narrow passage-way, made for the purpose for which it was constructed, and left open and in the condition in which it was at the time; and I understand that the counsel for the plaintiff substantially concede the truth of this proposition, that the same obligation did not rest on the city as to Couch Place as if it had been a more public street or thoroughfare.

It is difficult for us to precisely understand sometimes what is meant, when it is said that the plaintiff cannot recover in a court of justice if any negligence of his has contributed to the injury, where there is negligence on the part of the person against whom the action is brought; because it may be said, and is frequently said, that if the defendant had not been guilty of the negligence with which he stands charged the accident would not have happened. A man may go along a public street on the sidewalk in open day, and there may be an area left open for throwing in wood or for other purposes which may be lawful. It may be said that if the man should fall into that space he would not have fallen if it had not been left open, and yet it might be truly said in such a case, that in going along under the circumstances mentioned, he ought to keep his eyes open and ought to see where he is going, and if he should under such circumstances step into the area and sustain an injury, that he could not maintain an action. The meaning of it is simply this, that although the defendant may be guilty of negligence, still the plaintiff might be guilty of an act which a prudent man ought under the circumstances to have avoided.

The question so far as this point is concerned is this: Was the conduct of the plaintiff, under the circumstances of the case, that of a prudent man? Did he exercise that degree of caution which a prudent man ought to have exercised? In order to determine this, it is proper to take into consideration the condition of the alley, the fact that it was unlighted, and that he had means of reaching his point of destination by a public highway, a lighted street. If you shall believe that he did act as a prudent man, then, the city having been guilty of negligence, he is entitled to recover. If you shall believe that he did not exercise that care and caution which a prudent man ought to have exercised, then, although the defendant has been guilty of negligence, he cannot recover. This is a question of fact for you to determine under the directions and suggestions of the court.

If you shall believe under the evidence that the plaintiff is entitled to recover, the question is as to the amount of damages which you will award to him. There is no dispute but that the plaintiff has sustained a very serious injury; the knee bone was broken, has never entirely reunited, and according to the testimony of medical gentlemen never will, and he will be lame for life or he will never have the use of the left leg in the same degree as he has of the right, so that it may be said that he has sustained a permanent injury. If I understand him rightly, however, this has not impaired his general health further than what arises in all cases of this kind from what may be supposed to be the loss of vital power which occurs in any case of permanent injury. It is proper for you to consider the nature of the injury and the pain that he has suffered, the time that he was confined and unable to attend to his ordinary business, and the amount he has expended to physicians, nurses, and others. All these are proper elements to be considered by you in coming to a conclusion as to what he is entitled to at your hands, if he is entitled to any compensation. The rule of law is compensation according to the measure which the law gives, which is in dollars and cents merely.

If the plaintiff at the time had been engaged in any particular business which in consequence of this injury he was prevented from pursuing, then I think it would be proper for the jury to take that fact into consideration. For example, take the case of a mechanic or a professional man. If he is prevented by the injury from following his

ordinary avocation, be it mechanical or otherwise, then I think it is a proper consideration to be regarded in estimating the damages that ought to be given.

I will conclude what I have to say with one single remark: A party who comes into court under the circumstances of this plaintiff comes asking pecuniary compensation for the injury which he has sustained. In one sense, if we let our feelings take the reins, it might be truly said that no pecuniary compensation could ever be given for the loss of a limb or for a permanent bodily injury. There are some men whom no pecuniary temptation could to induce to sustain such a loss,—perhaps the majority of men. We must deal with this matter in the light of reason and experience. We must look not only to the injury which one party has sustained, but to the ability of the other to respond for that injury. If you allow the idea to be entertained that no mere pecuniary compensation would be adequate for an injury of this kind, you will see at once that you might be led so far that individuals never could respond in damages for the verdict which might be rendered. The result would be that cases of this kind would be discouraged by the courts. We must, therefore, come to some reasonable conclusion in these cases, or else they cannot be permitted to stand. It is right and just that where a party has been guilty of negligence, and the other party who asks the compensation has been guilty of none which has contributed to the result, that the negligent party should respond in damages, but it should be reasonable damages. I make these remarks for the purpose of operating as a caution upon the jury. You must recollect that the court and jury sit together in these cases, and although it is a question of fact for the jury, still the facts are given to the jury under the direction of the court as to the law. The court always exercises a supervisory power, even over the finding of a jury upon the facts.

Verdict for plaintiff and damages assessed at $4,000.

NOTE. A person may use a usual city street crossing, though covered for a drain, if the inhabitants use it for a crossing, and if he is thereby injured from its unsafe condition, which the authorities were authorized to obviate but did not, the city is liable. City of Champaign v. Patterson, 50 Ill. 61. A town having a traveled track sufficiently wide and suitable for all purposes of travel, and in repair, is not liable for injuries in consequence of a defective footpath in the highway fifteen or twenty feet from the traveled track, which the town had never worked or repaired, though the public foot travel had passed over it for thirty years. Whitney v. Essex, 38 Vt. 270. Cities and towns are under no obligations to light their streets. Randall v. Eastern R. Co., 106 Mass. 276. With reference to the question of contributory negligence, see Brady v. Chicago [Case No. 1,796], and notes thereto. Consult Whart. Neg. § 973, and Shear. & R. Neg. §§ 360, 383, 384, 415. Consult, also, Requa v. City of Rochester, 45 N. Y. 129.

Case No. 8,471.

LOMBARD v. McLEAN.

[4 Cranch, C. C. 623.] [1]

Circuit Court, District of Columbia. Nov. Term, 1835.

EVIDENCE—COPY OF ACCOUNT BOOKS.

Copies of plaintiff's account books are not evidence.

Assumpsit for balance of account; the plaintiff having been the defendant's [Cornelius McLean's] factor for the sale of glass.

Mr. Marbury, for plaintiff, offered the deposition of a witness taken in Boston, under the act of congress [4 Stat. 197], stating that an account, thereto annexed, was truly copied from the plaintiff's books; the entries in which, with some exceptions, were in the handwriting of the witness, and were true.

THE COURT (nem. con.) rejected so much of the deposition as related to the books and accounts, the original entries not being produced.

Verdict for the plaintiff.

LOMBARD (SCHOOL DIST. TP. v.). See Case No. 12,478.

Case No. 8,472.

LOMBARD v. STILLWELL.

PATENTS FOR INVENTIONS — INFRINGEMENT — INJUNCTION—DEFENDANT'S AFFIDAVITS.

[Cited in 1 Brightly's Dig. 457, to the point, that on a motion for an injunction in a patent case, it is not enough for the defendant to make oath that he manufactures under a patent granted to himself; he must support his right, by the affidavits of third persons.]

[Decided by KANE, District Judge. Nowhere reported; opinion not now accessible.]

Case No. 8,473.

LONAN et al. v. The C. H. NORTHRAM.

[1 N. J. Law J. 99.]

District Court, D. New Jersey. March 19, 1878.

NAVIGATION OF VESSELS.

1. As a result of rule 20 of the "Steering and Sailing Rules," in an action arising from a collision between a steamboat and schooner, the burden of proof is on the steamboat to show that the collision arose from the negligence or fault of the schooner.

2. It is the duty of steamers to keep out of the track of sailing vessels, but this does not absolve the latter from the exercise of the most vigilant caution.

3. By the law of the state of New York, steamers must keep near the middle of the stream in the East river, and where the steamer was out of such a course, and this was one of the concurring causes of a disaster (the schooner being also in fault for want of vigilance), *held*, the damage should be divided.

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

A proceeding in rem to recover damages alleged to have been sustained by the libellants' schooner, the B. F. Aumack, in a collision, August 21, 1876, with the steamboat C. H. Northram.

Muirhead & McGee, for libellants.
Grey & Benedict, for claimants.

NIXON, District Judge. In considering this case, it is to be observed that it was the duty of the steamboat to keep out of the way of the schooner, and that prima facie the steamboat is in fault, and is chargeable for the damages incurred. This was the rule announced by the supreme court in cases of collision between steam and sail vessels long before the adoption of the rules of navigation by the congressional act of April 29, 1864 (see section 4233, Rev. St.). St. John v. Paine, 10 How. [51 U. S.] 558; The Oregon v. Rocca, 18 How. [59 U. S.] 570; New York & V. Steamship Co. v. Calderwood, 19 How. [60 U. S.] 246; New York & L. U. S. M. Steamship Co. v. Rumball, 21 How. [62 U. S.] 383. The 20th of the "Steering and Sailing Rules" of said act, which provides that "if two vessels, one of which is a sail vessel, and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel," is the expression of the legislative approval of the justice and propriety of the rule. The collision of the vessels, the injury to the schooner, and consequent damage being admitted, it results from the above rule that the burden of proof is on the steamboat to show that the collision arose from the negligence, mismanagement, or fault of the schooner.

Two specific grounds of defence were set up in the answer: (1) That the schooner was negligent and in fault in not having a proper lookout. (2) That the schooner did not beat out her tack, but went about prematurely, and thus brought on the collision. (The judge finds the first point well taken, and holds that the notion that, as steamboats are bound by the laws of navigation to keep out of the way of schooners, there is no need for great caution and vigilance, is an erroneous one, and says): It is undoubtedly the duty of steamers, which are more absolutely under control than sailing vessels, to keep out of the track of the latter; but such a rule does not absolve the sail vessel from the exercise of a most vigilant caution. Rev. St. § 4233, Rule 24. (On the second point it is held that the schooner did not reasonably out her course, and that she largely contributed to the disaster by going about too soon.)

The first section of the act of the legislature of New York, passed April 12, 1848, to which no reference was made on the argument, but which I understand is still in force,—2 Rev. St. N. Y. (5th Ed.) 950,—requires all steamboats passing up and down the East river, between the Battery and Blackwell's Island, to be navigated as near as possible in the center of the river. The law has been invoked by the courts of admiralty and strictly enforced in a number of instances. The late Mr. Justice Nelson, in The Bay State [Case No. 1,149], in referring to it, says: "This law is peremptory. The masters of vessels are bound to obey it, and have no discretion except in cases of necessity. It is a mistake on the part of those navigating vessels in this harbor to suppose that they may manage the exercise of their own judgment and discretion in regard to the proper mode of navigation. If they disregard the statute, they do it at their peril. In such cases, they are not only guilty of a crime, according to the statute, but they must take the hazard of the consequences to their vessel, when so out of the proper track, and in an illegal course. * * *" Again, in The E. C. Scranton [Id. 4,273], the same learned judge applied its provisions to the case of a ferryboat, plying between Peck Slip and Williamsburgh,—a distance of more than a mile. * * * (In a review of the evidence, the judge holds that the steamboat was not in the middle of the stream.) I am of the opinion that the steamboat was also in fault in navigating the river so far from the middle of the stream; that her being so near the Brooklyn shore was one of the concurring causes of the disaster; and that, as is usual in such cases, the damages ought to be divided. A reference and division of damages ordered.

LONDON, The (KIEF v.). See Case No. 7,759.

LONDON (LANNING v.). See Cases Nos. 8,074–8,076.

LONDON & L. INS. CO. (BAYLY v.). See Case No. 1,145.

Case No. 8,474.

The LONDON PACKET.

[1 Mason, 14.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1815.[2]

PRIZE—PROOF OF REGULARITY OF CAPTURE—PROPERTY SHIPPED IN HOSTILE VESSEL — PRESUMPTION — RIGHT OF CONSUL TO CLAIM—NEW EVIDENCE AFTER APPEAL.

1. Where the captors have been guilty of irregularity, in not bringing in the papers, or the master of the captured ship, farther proof will be ordered.

2. Where property is shipped in an enemy's vessel, the presumption of its being enemies' property can only be repelled by strong and clear proofs of a neutral interest.

[Cited in U. S. v. One Hundred Barrels Cement, Case No. 15,945.]

3. Circumstances leading to condemnation.

4. The consul of a nation may claim on behalf of its subjects, in the absence of any authorized agent.

[Cited in Harrison v. Vose, 9 How (50 U. S.) 382; The Conserva, 38 Fed. 434.]

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

[2] [Reversed in 5 Wheat. (18 U. S.) 132.]

5. After an appeal, the court may allow evidence, not received in season to be made a part of the case, to be put upon the record de bene esse, with a memorandum of the fact.

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

This was a claim for a parcel of hides, shipped, as appeared by the bill of lading, on the 19th of June, 1813, at Buenos Ayres, on board of a British ship [the London Packet, Smith, master] bound to London, for account and risk of D. J. Marino, a Spanish subject, and captured by the private armed brig Argus, in August, 1813. In the district court, farther proof was ordered for the claimants [unreported], but before sufficient time had elapsed for procuring it, the captors pressing for a decision on the evidence before the court, and that being deemed insufficient to authorize condemnation, the property was restored. The captors appealed to this court, where the cause was first heard at the October term, 1814. From the evidence produced by the captors, it appeared that preparation for resistance was made on board of the British ship; but, upon being informed that the summoning ship was the United States brig Argus, the British commander surrendered to a supposed superior force.

Mr. Blake, Dist. Atty., for captors.

1. If resistance was not actually made, it was intended and prepared for. The mistake of the British commander alone prevented a battle. But it is not necessary for the captors to prove an actual resistance. The mere lading of goods by a neutral on board of an armed ship of the enemy is such an association for resistance, as will subject them to forfeiture. A much less co-operation is sufficient for this purpose. No distinction is to be made between public armed ships and letters of marque. They are equally commissioned by the government, and the latter are not less ships of war, for being also employed in commerce. But goods found on board of a public armed ship, are condemned as of course. No claim is ever given for them. Chit. Law Nat. 296–300; 2 Azuni, Mar. Law, 109, 145, 193–195, 201; Bynk. Law War, 100–112; Vattel, Bk. 3, c. 7, § 115; Id. p. 516. To ship goods on board of an armed ship of the enemy, whether public or private, is an interference with the acknowledged right of search.

2. By the fifteenth article of the treaty between the United States and Spain, the principle, "that free ships shall make free goods," is expressly recognised. The converse results of course. Spain confiscates the goods of neutrals found on board of enemies' ships. Upon the principle of reciprocity, therefore, which Spain has recognised (2 Azuni, Mar. Law, 193; 2 Valin, 233, 254, 255; Valin, Des Prises, tom. 2, 252, art. 7; D'Abreu, pt. 1, c. 8, § 6; Id. c. 9, § 17; Span. Ord. 1718, 1741), the same law is to be enforced against her subjects.

W. Sullivan, for claimant.

The question is simply, whether goods of a friend on board of an enemy's ship are subject to condemnation? The law of war makes no distinction between an armed and an unarmed ship.

1. By the law of nations, Spain, after the war, retained the right, which she before had, to transport goods, excepting contraband, for her colonies in British ships. 1 Azuni, Mar. Law, 8–10, 77, 85, 90; Chit. Law Nat. c. 4, pp. 108, 109.

2. The law of nations in no way impairs this right, nor does it restrict the neutral to unarmed ships. Vattel, bk. 3, c. 7, § 115, p. 407; 2 Azuni, Mar. Law, 193; Heinec. c. 9, § 3; Grot. lib. 3, c. 16, § 6; Huber. tom. 1, c. 9, § 1; Chit. Law Nat. 296–300.

3. If we look to the conventional law, we find that for several centuries, the goods of neutrals on board of enemy's ships have been recognised as exempt from forfeiture. 2 Azuni, Mar. Law, 109–145.

4. The United States, by their public acts, have repeatedly manifested, that the law is so understood and received by them. In all their treaties it has been their aim to enlarge the freedom of neutral trade, by communicating to the cargo the neutrality of the ship. It is to be supposed, that, in pursuance of the same system, they uphold the principle, that the neutrality of the goods is not affected by the hostile character of the ship. Accordingly we find, that wherever the opposite rule is intended to be adopted, an express provision is thought necessary. See Treaty with Holland, arts. 3, 5, 10, 11, and 12; Treaty of 1794 with Great Britain, art. 17; Treaty with Morocco, art. 3; Algiers, art. 3; Tripoli, art. 2; Tunis, art. 3; Prussia, art. 2; French Republic, §§ 15, 16.

5. The treaty with Spain, which has been cited on the other side, discovers the same solicitude to preserve and extend the rights of neutrals, and to secure the freedom of navigation. Articles 15, 16.

6. The ordinance of Spain also cited for the captors,[3] has not been enforced against us, nor can it be supposed, that it will ever be. No nation, but France and Spain, has ever

[3] The following is the passage alluded to, as we find it in the French translation of D'Abreu: "Sa majesté étant instruite, que les Anglois se saisissoient des effets de nos Espagnols trouvés à bord des vaisseaux Français et Hollandais, comme on pouvoit le prouver par plusieurs exemples, elle ordonna, en date du 12 Mai, 1741, que sans entrer dans des discussions sur le fondement, que leur prétention pouvoit avoir dans les traités, elle ne croyoit pas qu'ils eussent un juste motif de plainte; que les biens des Anglois trouvés à bord des navires Français et Hollandais, étoient traités comme ceux des Espagnols en mêmes circonstances; qu'aussitôt que les ministres de France et de Hollande auroient fait en sorte, que les Anglois respectassent les vaisseaux de ces deux puissances à l'égard des biens des Espagnols: sa majesté feroit examiner ce point des traités, afin que tout fût éxécuté avec l'égalité et la réciprocité convenable." Paragraph I, c. 9, § 17.

made such ordinances. 2 Valin, 252. The right of search is confined to neutral ships, and its object is the discovery of enemy's property. As to belligerent vessels, it can have no place, being merged in the general rights of war.

Mr. Dexter, in reply.

1. The goods of a friend found on board of an armed cruiser of the enemy, with or without actual resistance, are lawful prize. That neutral goods on board of an enemy's ship, are not, for that cause, subject to condemnation, is admitted as the general doctrine of the laws of nations. But this doctrine has qualifications and exceptions. There are many acts, by which the neutral may expose his property to be treated as that of the enemy. Among these must be the lading of his goods on board of an enemy's armed ship. He may, it is true, pass and repass, and transport his merchandise upon the ocean, as he might do before the war, subject only to the rights of the belligerent. But he invades these rights, when he employs the enemy to transport his property and to protect it by force. It is employing the commander and crew of the belligerent to resist the right of search, or, in other words, the right to know, with respect to every ship, whether she has enemy's goods on board. The moment the neutral places his property in a situation, where it is no longer open to examination and search, he departs from his neutrality, and his goods become confounded with those of the enemy. Nor does it make any difference, whether the armed ship be public or private. The latter, though employed in commerce, are completely vessels of war, possessing all the rights of such, and subject to the same rules.

2. Whether this general doctrine be true or not, yet if in fact there has been resistance, it comes within the principle of cases already decided and generally acquiesced in. Resistance made by the enemy, for the benefit of the neutral, is the same, as if made by himself. Was there then resistance in this case? It was certainly threatened, for the captured ship, having twelve guns, was in complete readiness to fire, and nothing but false information induced a surrender. This, in legal contemplation, was resistance. If the ship attempting search or capture be deterred by a threat of resistance, is not the belligerent as much impeded in the exercise of his right, as if he had been repelled or sunk? How much is necessary to make a combat? If the Argus had first fired, and the British ship had immediately struck, without firing a gun in return, it will not be denied, that this would have been a combat, and a reduction by a superior force. An assault is committed at common law, if an arm be but raised in menace. So between these ships, there was, on the part of the London Packet, an assault. Had the commander of the Argus fired, as he had a right to do, no doubt would have remained. The humanity, which made him omit this, ought not to place him in a worse situation.

3. The effect and meaning of the article in the treaty with Spain is, that the character of the ship determines that of the property. The stipulation that "free ships shall make free goods" is put as a part for the whole. The object was to avoid the inconvenience of search in all cases, whether for enemy's property on board of neutral ships, or for neutral property, in order to distinguish and save it, on board of hostile ships. If this were not the intention, the belligerent would make a concession without any equivalent. The passages read from Azuni and D'Abreu completely show, that the subject is viewed in this light by Spain. Certain it is, that there is a Spanish ordinance making neutral goods on board of enemy's ships lawful prize. D'Abreu, pt. I, c. 8, § 6; Ord. 1718. To reciprocate such a provision would be according to the common practice of nations. This is familiar in cases of salvage, which is only a particular instance under the general rule.[4]

After this argument, an order for farther proof was made by the court, upon the grounds which will appear in the following opinion:

STORY, Circuit Justice. The British ship London Packet was captured by the private armed brig Argus, Henry Parsons commander, on or about the 30th day of August, 1813, on a voyage from Buenos Ayres to London, and brought into Boston for adjudication. On the trial in the district court, the ship and all the cargo, excepting 6276 hides, was condemned as enemy's property. The hides were claimed by the Spanish consul as Spanish property, and were finally restored, after an order for farther proof. From this decree of restoration, an appeal has been interposed to this court. There were no invoices of the cargo brought in, but bills of lading only, and the master was released at sea, and put on board of another vessel. The preparatory evidence, therefore, is not of such confidential persons, as may be, and usually are, entrusted with the knowledge of the ownership of the property. There was also an irregularity in not bringing in all the papers found on

[4] The principal questions here argued have since been determined by the supreme court of the United States in The Nereide, 9 Cranch [13 U. S.] 388. It was there held that actual resistance by the master of an enemy's armed ship did not affect the property of a neutral shipper with forfeiture, unless such neutral shipper coöperated in the resistance. It appears, however, that Sir William Scott, about the same time, decided the same question in a contrary manner. The Fanny, 1 Dod. 443. The supreme court also, in the same case, decided, that the clause in the Spanish treaty, "that free ships make free goods," did not imply the converse rule, "that enemy's ships make enemy's goods"; and farther, that even if Spain applied the converse rule to the United States, the courts of the United States were not in such a case at liberty to apply the rule of reciprocity.

board of the ship at the time of the capture. Some of the papers, which are asserted to have been of a private nature, are shown to have been delivered back to the master; and we are left without any letters, or customary documents to explain the transaction of the voyage. It is not for captors to undertake to decide upon the materiality of papers, upon any opinion of their own. They are bound to bring in all the papers, and leave the court to decide upon their real character and consequence. If they conduct themselves in a different manner, it is at their own peril; and they must expect to receive no countenance or assistance from the court, in aid of their own irregularity. I make this remark from an anxious desire to preserve the utmost exactness in prize proceedings, in as much as they not only affect the rights of our own citizens, but involve the most important interests of neutral nations. It is equally due to our public character as a belligerent nation, and to the integrity of our courts administering prize law, to discountenance every abuse, and every irregularity, which shall justly have a tendency, in the opinion of foreign sovereigns, to bring into doubt our scrupulous respect for the rights of neutrality, which on other occasions we have so strenuously maintained. Under all the circumstances of this case, I shall confirm the order of the district court for farther proof, and postpone a decision until that can be brought in.

At the succeeding term (May, 1815) the counsel of the claimant moved the court farther to postpone the cause, upon the ground, that by reason of the difficulty of communication, no return had yet been received to the commission sent out under the order for farther proof.

Mr. Blake, Dist. Atty., opposed this, contending that the claim of the consul, being without authority from the shipper, was not such a claim, as would protect the property from the operation of the rule, inflexibly observed in admiralty courts, that condemnation passes after a year and day.

STORY, Circuit Justice, granted the postponement, observing that this case differed from those, to which the rule of a year and day applied. There had been a claim. A consul was authorized to claim in behalf of subjects of his country. It was admitted in other countries, and he should be sorry, if a different rule were to prevail here. It was also to be considered, that in this case, the captain had not been brought in, nor had all the papers. If they had been, a different case, perhaps, would have been exhibited.

At the present term, the farther proof having been brought in, the following decree was delivered:

STORY, Circuit Justice. The only question now before the court is, as to the proprietary interest of 6276 hides, claimed as the property of D. J. Marino, a Spanish subject, living at Buenos Ayres. The claim was ordered to farther proof in the district court, and after a considerable lapse of time, that proof has now been brought in. It establishes to my entire satisfaction the national character and domicil of the claimant, and that the hides were originally shipped by him. This however is but a very inconsiderable advance towards the establishment of the proposition, that the goods, during their transit, were at his risk, and on his account. The shipment was in an enemy's vessel, on a voyage to London, a port in the enemy's country; and under such circumstances a legal presumption arises, that it belonged to an enemy, which presumption can be rebutted only by clear and distinct proofs of a neutral interest. The sole paper found on board at the time of capture, touching this shipment, was a bill of lading, which declares the hides to be shipped on account and risk of the claimant, consigned to Don Antonio Daubana, and, if absent, to William Hieland. There were no invoices, or letters of advice, respecting this, or indeed any other shipment to any of the consignees. This is a most extraordinary circumstance, and scarcely to be accounted for upon any other supposition, than that there has been a subtraction and concealment of the ship's papers by the enemy's master, or by some other person. At all events, it called upon the claimant to offer the most explicit and decisive proofs of the integrity of his claim. And if the proofs should be doubtful, it could not but authorize the most unfavorable presumptions.

What then is the state of the farther proof now offered to the court? There is not any affidavit by the claimant, or his confidential agent or clerk, at the time of the shipment, of his interest in the cargo. This is the usual, and I had almost said the universal document, expected and required by prize tribunals. Its absence unavoidably throws a suspicion over the cause; and as it is wholly unaccounted for, it authorizes me to believe, that there has been a voluntary, if not a studied, omission on the part of the claimant. The only paper in support of the claim is a paper purporting to be a copy of an original letter, which accompanied the shipment. But it is not a little remarkable, that this document stands altogether naked of any attestations of genuineness by the claimant himself or by any confidential clerk in his counting-room, or by any comparison by a public officer of its contents with the original letter-book of the claimant. It is simply stated by a gentleman, calling himself the general attorney and conductor of the house of the claimant, to be a true copy. This may be true, and yet the paper, from which it is copied, might have been the spurious production of the same day. Something more was surely necessary to entitle it to credit. It ought at least to have been proved, when

the original was written, by what vessel it was transmitted to the consignee, and from what paper the present copy was made, with the other usual attestations of its genuineness, by persons conversant with the transactions at the time when the shipment was made.

Under such circumstances, I cannot say that the presumption arising from the shipment in an enemy's vessel is so far repelled, that restoration of the property ought to be made. I therefore decree condemnation of the hides, as good and lawful prize to the captors, with their costs and expenses.

After the above decree was pronounced, and an appeal entered therefrom, the claimant, stating that he was now in possession of the affidavit of Marino showing the property to be in him, prayed that the case might again be opened; at least so far as to make this evidence a part of it.

STORY, Circuit Justice, said, if the decision here were final, he should think it reasonable to open the case, and to examine the farther evidence; and after an appeal, he considered it competent for the court to allow the evidence to be placed on the record with a memorandum, that it was brought in after the appeal. An order was accordingly entered, that the affidavit be placed on file, and transmitted with the record to the supreme court de bene esse, subject to the order of that court.

[NOTE. At February term, 1817, this cause was heard in the supreme court, and upon the hearing ordered to further proof, with a direction to produce the original documents referred to in the proofs before the court. 2 Wheat. [15 U. S.] 371. Additional evidence was thereupon adduced, consisting of documents from the custom-houses at Buenos Ayres, of the testimony of the consignee in London, and the affidavit of Mr. Marino. These documents establishing satisfactorily the fact that the proprietary interest in the hides was at the time of shipment and of capture in the claimant, Mr. Justice Livingstone, delivering the opinion of the court, rendered a decree reversing the sentence of the circuit court, and restoring the hides to the claimant. In consideration of the captors' great expenses, however, caused by the delay of the claimant in producing evidence, it was ordered that the claimant pay to the libelants their costs and expenses in this suit. 5 Wheat. (18 U. S.) 132.]

Case No. 8,475.

LONERGAN v. FENLON.

[2 Pittsb. Rep. 115; 7 Pittsb. Leg. J. 266.]

Circuit Court, W. D. Pennsylvania. Feb. 22, 1866.

EQUITY—EVIDENCE—EFFECT OF RESPONSIVE ANSWER—ACT OF 1841—INSOLVENCY AND BANKRUPTCY DISTINGUISHED—COLLATERAL PROCEEDINGS AS TO VALIDITY OF JUDGMENT—SETTING ASIDE JUDICIAL SALE.

1. When the answer to a bill in equity is fully responsive, the answer will prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and other attendant circumstances which supply the want of another witness.

2. Contemplation of insolvency is not a "contemplation of bankruptcy," within the meaning of the act of congress of 1841 (5 Stat. 440).

3. A judgment creditor must have notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act, before his judgment can be assailed.

4. The validity of the judgment cannot be called in question in a collateral proceeding.

5. After the lapse of sixteen years from the date of the judicial sale under the judgment, a chancellor will not decree that it shall be set aside, at the instance of the vendee of the assignee in bankruptcy.

[This was a bill in equity by Grace Lonergan against James Fenlon to enjoin defendant from disposing of certain property claimed by plaintiff.]

C. W. Robb and Mr. Shaler, for complainant.

Geo. P. Hamilton, for respondent.

McCANDLESS, District Judge. This case comes before us upon bill, answer, and testimony. The bill charges, substantially, that Kennedy Lonergan was the owner of thirty lots of ground in the seventh ward of the city of Pittsburgh, purchased from Mrs. Sarah B. Fetterman, the whole consideration money of which was not fully paid. That, being an extensive railroad contractor, he became largely involved, owing to the inability of the Hiawatha Tennessee Railroad Company and the Little Miami Railroad Company to meet their liabilities to him. That on the 24th of March, 1842, he executed a judgment bond to John McDivitt for $3,000, and another to the respondent for $5,000, and that these were executed in contemplation of bankruptcy. That Fenlon advised him to take the benefit of the bankrupt law, and that to the prejudice of the general creditors. Fenlon, on 10th July, 1842, caused these bonds to be enacted to operate as liens upon the real estate so purchased. That the judgment to Fenlon was without consideration, and in fraud of the rights of creditors. That he caused these lots to be sold by the sheriff, and purchased the same for $2,010, when they cost Lonergan $7,250, and are now worth $20,000. That on the 20th of December, 1842, upwards of five months after the judicial sale, Lonergan filed his application in the district court of the United States for the district of Ohio, and was declared a bankrupt, and on the 4th day of February, 1843, he was discharged, and received his certificate as a bankrupt. On the 16th of December, 1852, nearly ten years afterwards, the assignee in bankruptcy, at public sale, and under an order of the proper court, sold these lots to the complainant for the sum of seventy-two dollars. The sale was approved, and a deed made to the vendee, the widow of Kennedy Lonergan. The bill does not charge, but it appears in the evidence, that Lonergan died in 1851. The complainant alleges that she is the owner of the lots in question, that she

has no adequate remedy at law, prays the court to decree the same to her, and that the respondent may be perpetually enjoined from disposing of the same.

To every material part of this bill the answer is fully responsive, and in such case the rule in equity is "that unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness, and other attending circumstances which supply the want of another witness, and thus destroy the statement of the answer, or demonstrate its incredibility or insufficiency as evidence, the answer must prevail," [Otis v. Watkins] 9 Cranch [13 U. S.] 343; 3 Greenl. 296.

Guided by this rule, let us examine the complainant's proofs. It is contended that the judgment to Fenlon was without consideration, and that he was particeps criminis in procuring its confession, to the prejudice of the general creditors of the bankrupt estate. The exhibits attached to the answer show that he was a meritorious creditor, and, from the testimony of McDivitt, it is clear that in everything connected with the execution of the bond, and its entry as a lien, Fenlon was comparatively passive. It was held by McDivitt for nearly four months, and then only entered upon advice from Lonergan that he could not get through with his difficulties. The second breach of this point made by complainant's counsel brings up the main question in this case. Was the judgment to Fenlon confessed in contemplation of bankruptcy, and at that date, had Fenlon notice of the intention of the bankrupt to take the benefit of the act? This is dependent principally upon what occurred at the execution of the bond, and to understand it properly we must eviscerate the testimony of McDivitt. He says: "The bonds were given to protect us against loss, in the event of his becoming insolvent and not being able to get through with his difficulties." When further interrogated, Mr. McDivitt says: "Mr. Lonergan may have expressed fears that he would have to do it (take the benefit of the bankrupt law), as he was a good deal frightened about the condition of his business then." All this took place at Cincinnati, where the witness was called by a letter from Lonergan to Fenlon, and in the contents of which both were equally interested.

Now, what is the construction adopted by the supreme court of the United States as to the expression in the act, "Contemplation of bankruptcy." They say, in [Buckingham v. McLean] 13 How. [54 U. S.] 168, that the word "bankruptcy" occurs many times in the act. It is entitled "An act to establish a uniform system of bankruptcy." And the word is manifestly used in other parts of the law to describe the legal status to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in this clause, to signify something quite different. It is certainly true, in point of fact, that even a merchant may contemplate insolvency, and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, the state of his affairs, and the disposition of his creditors are such that, when they have examined into his condition, they will extend the times of payment of their debts, and enable him to resume his business. A person not a merchant or banker, and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them would be a departure from sound principles of interpretation. The object of the provisos was to protect bona fide dealings with the bankrupt more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent on the part of the bankrupt as made the security invalid under the first enacting clause. And the language is: "Provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy or of the intention of the bankrupt to take the benefit of this act."

These facts, of which a bona fide creditor must have notice, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause; or, in other words, if it be enough for the debtor to contemplate a state of insolvency, it could hardly be required that the creditor should have notice of an act of bankruptcy or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security, must deprive him of its benefits, and consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid; and that we may safely take this description of the facts, which a creditor must have notice of to avoid the security, as descriptive also of what the bankrupt must contemplate to render it void.

At what time, then, had Lonergan contemplated an act of bankruptcy, or a decree adjudging him a bankrupt upon his own petition? He gave the bond on the 24th of March, 1842. He continued his business during part of the summer of that year. Not until July did he write to McDivitt to enter up the judgment, and in December following he filed his application for the benefit of the bankrupt law. During the nine months intervening between the execution of the bond and the filing of his petition, he may have been harassed, embarrassed, and

insolvent; but it does not follow that he contemplated an act of bankruptcy. What Cady relates as happening on St. Patrick's day, 1842, and the matters detailed by Thomas A. Lonergan, do not militate against this view of the case, although the latter witness was disingenuous enough to suppress his relationship to the parties, and the fact that he was but nine or ten years of age when the principal circumstances to which he testified occurred.

The testimony does not support the allegation of the bill, that the bond to Feulon was given in contemplation of bankruptcy, and, if it did, it fails to show that Feulon had notice of it. He is, therefore, clearly within the first and second provisos to the second section of the bankrupt law. Entertaining these views, it is unnecessary to reconcile the conflicting opinions as to the exclusive jurisdiction of the bankrupt court in a proceeding to ascertain the validity of this judgment. We hold that it cannot be assailed in a collateral action, and that this court is not the forum in which to test it. It remained undisturbed during more than seven years of the life of the bankrupt, and now, with the proofs before us, no chancellor would decree that a judicial sale, occurring under it sixteen years ago, should be set aside at the instance of the vendee of the assignee in bankruptcy.

Upon the whole case we are of opinion that the complainant is not entitled to the relief prayed for, and the bill is dismissed at the cost of complainant.

Case No. 8,476.

In re LONG et al.

[7 Ben. 141;[1] 9 N. B. R. 227.]

District Court, S. D. New York. Feb., 1874.

BANKRUPTCY — JOINT AND SEPARATE ESTATE — AGREEMENT BY ONE PARTNER TO PAY DEBTS OF FIRM.

1. A firm composed of two members was dissolved by agreement, one partner, L., taking the property and agreeing to pay the debts of the firm. The firm was afterwards put into involuntary bankruptcy. The assignee in bankruptcy received property which had been property of the firm, and also individual property of L., and debts were proved against the firm and also against L. individually. One creditor, M., filed proofs of debt both against the firm and against L., both founded in part on firm notes and in part on individual notes of L., but all given for goods sold by M. to the firm: *Held*, that, as the bankruptcy proceedings were against both of the copartners, as such, the provisions of the 36th section of the bankruptcy act [of 1867 (14 Stat. 534)] must apply, even though there was no joint property.

[Cited in Re Litchfield, 5 Fed. 50.]

2. The transfer of the firm property to L. having been made honestly and in good faith, upon a dissolution, and for a valuable consideration, and without any fraud or collusion between the partners to defeat the rights of the joint creditors, the joint property became, by the transfer, the separate property of L.

[Cited in Re Tomes, Case No. 14,084; In re May, Id. 9,328; In re Hamilton, 1 Fed. 812.]

[Cited in Warren v. Farmer, 100 Ind. 597.]

3. M. was entitled to be admitted to the list of L.'s separate creditors, and to share in dividends out of his separate estate. The cases of Howe v. Lawrence, 9 Cush. 553; Robb v. Mudge, 14 Gray, 534; and Wild v. Dean, 3 Allen, 579, criticised.

[Cited in Re Lloyd, 22 Fed. 90.]

[It is provided by section thirty-six of the bankruptcy act, that "where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners or any one of them, or on the petition of any creditor of the partners;" "the joint stock and property of the co-partnership, and also all the separate estate of each of the partners, shall be taken" on the warrant to be issued; and that "the net proceeds of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the same so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts."][2]

Prior to the 7th of December, 1869, the bankrupts, [Walter P.] Long and [Albert B.] Corey, were partners in trade. On that day they executed a written agreement, dissolving the copartnership from and after that date, and further agreeing, (1) that Corey should receive, as his share of the capital, business and good will of the late firm, the amount theretofore agreed upon by the parties; (2) that Corey thereby assigned to Long all his interest in all debts payable to the late firm, and all his interest in the property, effects, capital and good will of the late firm; (3) that, in consideration of provisions one and two, Long should pay all debts against the late firm, and hold Corey free from all claim thereon. On the 13th of January, 1870, Corey brought a suit in a state court against Long, in which a receiver was appointed of the property which had been the copartnership property of the late firm. On the 15th of January, 1870, the receiver took possession of such property. On the 22d of April, 1870, William Macfarlane, as a creditor of the bankrupts, as such co-

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

[2] [From 9 N. B. R. 227.]

partners, commenced proceedings in this court against them to have them adjudged involuntary bankrupts, whereon they were adjudged bankrupts on the 30th of April, 1870. Creditors of the copartnership proved debts, and elected William P. Buckmaster to be assignee, and the usual assignment was made to him May 25th, 1870. Under an order of the state court, the receiver delivered over to the assignee the property in his hands.

The assignee collected money from such property, and also money which was the separate estate of Long. In March, 1872, the assignee paid out of the proceeds of the property received from the receiver a dividend of four per cent. on the copartnership debts proved. Macfarlane, in his petition in bankruptcy, set forth as his claims against the copartnership, five notes of the firm and one of Long individually. On May 23d, 1870, he filed a proof of debt against the bankrupts as copartners, in which he included all those six notes, stating that they were given for merchandise sold by him to the firm, and on that he received the dividend of four per cent. In July, 1873, he filed a proof of debt against Long individually, including the same six notes, and seven others, and stating that Long had assumed to pay the indebtedness of the firm, and that thereupon the notes became the separate and individual indebtedness of Long to him. He credited the amount of the dividend received by him from the copartnership estate. Three individual creditors of Long proved claims against his separate estate, and on their application proceedings were taken to re-examine Macfarlane's proof of debt of July, 1873. It appeared that the agreement of December 7th, 1869, was never shown to any of the creditors of the firm, and that none of them had released Corey from the debts of the firm. Four of Long's individual notes were given to Macfarlane for goods sold by him to the firm before its dissolution. Macfarlane testified that, when they were given, Long told him that the firm was dissolved, and that he had assumed the debts, and would settle for them with his individual notes. The evidence also showed that, after December 7th, 1869, Long signed, in the name of the firm, and gave to Macfarlane, a note of the firm's for goods bought by the firm from Macfarlane prior to its dissolution, and for which no note had before been given. Long, in his testimony, expressed himself surprised to find he had given the four individual notes, and accounted for his doing so by saying that he could not tell how it happened, but supposed he did it hastily. Some of the merchandise bought from Macfarlane, for which such four notes were given, passed into the hands of the receiver. Some, but not all, of the property which the receiver took, and which passed from him to the assignee, was property which had been the property of the firm, and had passed to Long under the agreement of December 7th, 1869; but the receiver took also some goods which Long had bought in his own name. The assignee had in his hands some proceeds of the latter goods mingled with proceeds of goods which had been the property of the firm. But, as the parties, after all the testimony was taken, stipulated, in writing, that no dividend had been made out of funds arising from property which never belonged to the partnership, the court concluded that they were agreed to treat the proceeds of all the property which came to the assignee from the receiver as being the proceeds of property which had been the property of the firm and had passed to Long under the agreement of December 7th, 1869.

[2] [The assignee has realized from such property about $7,500; he has also now in his hands about $5,000 besides, which is confessedly the separate estate of Long. Creditors to the amount of $23,261.89, have proved debts against the co-partnership, such debts having all of them been created prior to December 7th, 1869. In March, 1872, the assignee paid a dividend of four per cent. on such co-partnership debts out of the proceeds of the property received from the receiver, there being at that time no other funds in the hands of the assignee, and no proof of debt having then been made except on debts originally incurred by the firm. Macfarlane, in his petition in bankruptcy, set forth as his claims against the co-partnership, five promissory notes made by the firm, dated, severally, September 25th, 1869, for $550 31; September 30th, 1869, for $586 16; October 31st, 1869, for $607 45; November 5th, 1869, for $602 31, and November 10th, 1869, for $602 31, and one promissory note made by Long, individually, dated November 13th, 1869, for $746 58. The five notes amounted to $2,948 54, and the six to $3,695 12. On the 23d of May, 1870, Macfarlane filed a proof of debt against the bankrupts as co-partners, claiming a debt of $8,531 52, with interest from December 6th, 1869, as the balance of an account annexed to the proof. The debit items in the account consist of debits for merchandise sold by Macfarlane to the firm, running from September 2d, 1869, to December 6th, 1869, and amounting to $10,307 51. Against this there are credits by seventeen notes, amounting to $10,277 48, and a deduction amounting to $30 03, in all, $10,307 51; all of the seventeen notes, except three, are debited against as protested notes; those three amount to $1,745 97, and with the $30 03, to $1,775 99; deducting this from the $10,307 51 leaves the $8,531 52. Copies of the six promissory notes before mentioned, for $550 31; $586 16; $607 45; $602 31; $602 31, and $746 58, are annexed to the proof, and the proof states that they were given for

[2] [From 9 N. B. R. 227.]

merchandise sold by Macfarlane to the firm. Such six notes are found on both the debit and the credit sides of such account. On the claim so approved, Macfarlane, on the 18th of March, 1872, received from the assignee a dividend of $349 21 out of the proceeds of the property so received from the receiver. Three individual creditors of Long (one of whom is Elizabeth H. Long) have proved debts against his separate estate to the amount of $5,650 16, such debts appearing by such proofs to have been incurred by Long alone, and not having been proved as debts against the firm.

[In July, 1873, Macfarlane filed a proof of debt against Long, individually, for $8,693-61, on thirteen promissory notes, being the six notes before mentioned, for $550 31; $586 16; $607 45; $602 31; $602 31, and $746 58, severally, and seven others, of which two are made by the firm, one dated November 17th, 1869, for $603 32, and one dated December 6th, 1869, for $589 13, and five are made by Long, individually and dated severally, November 24th, 1869, for $703 21; November 27th, 1869, for $693 42; November 30th, 1869, for $726 13; December 14th, 1869, for $498 65, and December 22d, 1869, for $509 38; the thirteen notes amount to $8,-018 36; of the thirteen, seven are made by the firm, amounting to $4,140 99, and six by Long, individually, amounting to $3,877 37; of the thirteen, the eleven, which are dated on or prior to December 6th, 1869, are set forth in the account annexed to the proof of debt of May 23d, 1870, the amount of the eleven being $7,010 33, of which seven are notes made by the firm, amounting to $4,-140 99, and four are notes made by Long, individually, amounting to $2,869 34. Three of the fourteen protested notes, debited in the account annexed to the proof of debt of May 23d, 1870, are not claimed in the proof of debt of July, 1873, being notes made by the firm and dated severally, October 7th, 1869, for $536 16; October 13th, 1869, for $492 52, and October 18th, 1869, for $492 51. Macfarlane, in his evidence, claims that these three notes are due to him but are lost. All of the notes were three months' notes. The proof of debt of July, 1873, sets forth, that on or about the 7th of December, 1869, Long assumed or agreed to pay the said indebtedness of the firm to Macfarlane, and thereupon the said indebtedness became, and was, and is, the separate and individual indebtedness of Long to Macfarlane. It would seem, from the proof, that the $8,693 61 included interest to the date of adjudication, April 30th, 1870. The proof credits the $349 21 as a dividend from the estate of the bankrupts. On the application of the three individual creditors of Long, before mentioned, proceedings have been instituted to examine Macfarlane's proof of July, 1873. Testimony has been taken thereon and the matter is now presented for decision.

[The agreement of December 7th, 1869, was never shown to any of the creditors of the firm, and none of such creditors have released Corey from the debts of the firm. Macfarlane testifies that he has not released Corey from liability to him on the indebtedness of $8,-531 52, and that he still holds Corey responsible for his share of it. The individual notes of Long for $746 58; $703 21; $693 42, and $726 13, are shown to have been given for goods sold to the firm by Macfarlane before its dissolution, and charged to the firm by him on his books. Those four notes, though dated in November, were given after December 7th, 1869, and covered the purchases for which no firm notes had been given. Macfarlane testifies, that when those notes were given, Long informed him that the firm was dissolved, and that he, Long, had assumed the debts, and would settle for them with his individual notes. I understand the evidence also to show that after December 7th, 1869, Long signed in the name of the firm and gave to Macfarlane the firm's note of December 6th, 1869, $589 13, for goods bought by the firm from Macfarlane prior to its dissolution and for which no note had before been given. Long, in his testimony, expresses himself surprised to find he had given the four individual notes, and accounts for his doing so, by saying that he cannot tell how it happened, but supposes he did it hastily. Some of the merchandise bought from Macfarlane for which such four notes were given passed into the hands of the receiver; some, but not all, of the property which the receiver took and which passed from him to the assignee, was property which had been the property of the firm and had passed to Long under the agreement of December 7th, 1869, but the receiver took also some goods which Long had bought in his own name. It would seem from the testimony that the assignee has in hands some proceeds of the latter goods mingled with proceeds of goods which had been the property of the firm. But as the parties, after all the testimony was taken, stipulated, in writing, that no dividend has been made out of funds arising from property which never belonged to the partnership, I conclude that they are agreed to treat the proceeds of all the property which came to the assignee from the receiver as being the proceeds of property which had been the property of the firm and had passed to Long under the agreement of December 7th, 1869.][2]

Long did not contradict the testimony of Macfarlane as to what he, Long, said when he gave his four individual notes to Macfarlane, but admitted that, after the dissolution of the firm he, Long, purchased goods on his individual order and account from Macfarlane, and said that he supposed he explained to Macfarlane that the partnership was dissolved, and that Macfarlane came to the store at various times after the dissolution and saw him, Long, doing business on his own

[2] [From 9 N. B. R. 227.]

account. After the 7th of December, 1869, Long, buying goods on his own account and in his own name, and selling some of them, deposited the proceeds in bank in his own name, mingled with the proceeds of sales of the goods which had belonged to the firm, and drew on such fund in bank to pay his individual debts and also debts of the firm.

On the foregoing facts, the following issues were certified for determination by the court: (1.) Does the fund received by the assignee from the receiver constitute, and is it to be treated and distributed as, a part of the separate estate of Long; or is it partnership property, to be applied, in the first instance, to the payment of partnership debts? (2.) Is Macfarlane, in respect to the debts originally incurred by Walter P. Long & Co., and afterwards assumed by Long, entitled to be admitted to the list of Long's separate creditors? (3.) Is Macfarlane, in respect to the debts originally incurred by Walter P. Long & Co., and afterwards assumed by Long, entitled to share in dividends out of Long's separate estate, equally with separate creditors? (4.) Is not Macfarlane, in respect to the individual notes of Long held by him, entitled to be admitted to the list of Long's separate creditors? (5.) If the second, third and fourth questions are answered in the negative, then is not the fund collected from the receiver to be applied, in the first instance, to the satisfaction of joint debts?

T. N. Bangs, for Macfarlane.

J. K. Hill and H. T. Wing, for the three individual creditors.

BLATCHFORD, District Judge. It is contended, for Macfarlane, that the effect of the agreement of December 7th, 1869, was to transfer to Long the title to the whole of the partnership property, free from any exclusive lien or equity in favor of creditors of the firm, the transfer not being coupled with any condition that the partnership property shall be applied by Long to the payment of the partnership debts, but there being only a personal agreement by Long to pay the debts of the firm and hold Corey free from them; that Corey, while changing the right of property in the partnership assets, intended, by the agreement, to substitute, for the protection of himself and of the creditors of the firm, Long's individual covenant to pay the partnership debts; that this covenant made Corey Long's individual creditor; that the assignee has succeeded to Corey's right of action on this covenant, and can enforce it to the extent of compelling Long's separate estate to perform such covenant equally with Long's other personal obligations; that the creditors of the firm, for whose benefit such covenant was made, have a right to enforce such covenant, either at law or in equity, in their own names; that the funds collected by the assignee from the receiver constitute a part of Long's separate estate; and that Macfarlane, in respect to his whole claim, less the dividend, is entitled to share, on an equal footing with the individual creditors, in dividends out of Long's separate estate.

It is contended, for the three individual creditors of Long, that the debts of the firm to Macfarlane were not, by the agreement of December 7th, 1869, converted into the separate debts of Long; that such agreement could not impair the liability of the copartners, or of either of them, to a creditor of the firm, without the consent of such creditor; that there is no evidence that Macfarlane accepted the individual liability of Long for the joint liability of the firm and of its members; that on the contrary, the copartners, as such, were adjudged bankrupts, on the application of Macfarlane, on a part of the debt in question, and he proved his claim on the whole thereof against the firm and its joint estate, and received a dividend thereon out of funds which all parties regarded at the time as funds of the copartnership estate; that, if the agreement of December 7th, 1869, is valid, the property of the firm which was transferred thereby became the separate property of Long, free from any claims of Macfarlane, as a creditor of the firm, and the funds received by the assignee from the receiver should not be treated as joint estate, or as applicable to the payment of joint debts, but should be applied, in the first instance, to pay the debts of the three individual creditors of Long, and any balance remaining should go to the creditors of the firm; that the second proof of debt of Macfarlane—that against Long alone—should be stricken out; that the claims of the three individual creditors of Long should be paid in full out of all the funds in the hands of the receiver, before making any distribution of the same to Macfarlane; and that, if that cannot be done, then the assets collected by the assignee from the receiver should be applied to the debts incurred by the firm, and the other assets in the hands of the assignee should be applied to the claims of the three individual creditors of Long.

The provisions of the insolvent statutes of Massachusetts (1838, c. 163, § 21, and 1860, c. 118, §§ 108, 109) are the same as provisions found in the 36th section of the bankruptcy act.

[2][In Howe v. Lawrence, 9 Cush. 553, two partners, Shaw and Gardner, dissolved their partnership, Shaw conveying to Gardner all his interest in the partnership property, and Gardner agreeing, in consideration therefor, to pay all the joint debts. Gardner subsequently went into insolvency, and a greater portion of the assets which went into the hands of the assignee was property which had been owned by the firm. Debts against the firm were proved against Gardner's estate, and private debts against Gardner were proved. The question arose, whether the

[2] [From 9 N. B. R. 227.]

separate creditors of Gardner should be paid in full and the balance go to the joint creditors of the firm, or whether all that part of Gardner's estate which had formerly belonged to the firm should go to the creditors of the firm, to the exclusion of the separate creditors of Gardner; or whether the entire estate should be distributed pari passu to the joint and separate creditors. Shaw was in insolvency, separately, in another country, and there was no property of the firm except what so passed to Gardner. The supreme court of Massachusetts in deciding the case hold, that where, on the dissolution of a co-partnership, the joint property is transferred to one of the firm and there is no fraud or collusion between the co-partners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith, upon dissolution, and for the purpose of closing the affairs of the partnership, such joint property thereby becomes the separate estate of the transferee; that the mere fact of the transfer does not affect the rights of the joint creditors; that the joint property, after its transfer to one of the co-partners, is as much within the reach of legal process by the creditors of the firm as if it had remained the property of the partnership; that beyond such right to seize the joint property on legal process, the creditors of the firm have not, before proceedings in insolvency, any control over the partnership effects, or any right to restrain their disposition; and that if such transfer is made honestly and for a valuable consideration, the property becomes separate estate, wholly free from any claims of the joint creditors. To sustain these principles there are cited, as authorities, Colly. Partn. §§ 174, 894, 903; Story, Partn. § 358; Ex parte Ruffin, 6 Ves. 127; Ex parte Fell, 10 Ves. 347; Ex parte Williams, 11 Ves. 3; Ex parte Rowlandson, 1 Rose. 416; Campbell v. Mullett, 2 Swanst. 575; Allen v. Center Valley Co., 21 Conn. 130, 137; Ferson v. Monroe, 1 Fost. [21 N. H.] 462, 469. The court also hold, that it not appearing that the property transferred to Gardner was conveyed to him mala fide, and in fraud of the rights of creditors, the joint creditors had no right to require that such property should be appropriated primarily to the payment of the debts of the firm; that Shaw, by transferring the joint property to Gardner, and taking the personal contract of Gardner for the payment of the joint debts, discharged any lien he had to enforce the application, after dissolution, of the partnership effects to the payment of the joint debts, and substituted therefor the agreement of Gardner, and, therefore, no lien or trust on the part of Shaw remained which could be enforced on the partnership effects for the benefit of the joint creditors; that under the peremptory provisions of the statute (Act 1838, c. 163, § 21), requiring the net proceeds of the joint stock to be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner to be appropriated to the payment of the separate creditors, the joint creditors of the firm could not be allowed to prove their debts against the separate estate of Gardner, and take dividends thereon pari passu with the separate creditors; and that if there was no joint estate, and no surplus of the separate estate after paying the separate debts, the creditors of the partnership could receive no dividend.

[In Robb v. Mudge, 14 Gray, 534, Train and Thayer being partners, Thayer assigned to Train, on the day of the expiration of the firm by limitation, all his interest in the property of the firm; and, in consideration thereof, Train, by the same instrument, agreed with Thayer to assume and pay all the debts of the firm, and to indemnify Thayer therefrom. Subsequently, Train individually went into insolvency, having a large individual estate, besides the property so conveyed to him. The creditors of the firm sought to prove their claims against the private estate of Train. The assignment of the assets of the firm to Train having been made in good faith, the court, on the authority of Howe v. Lawrence, held that such assets could not be treated as joint estate, or be applied to the payment of joint debts. It being urged that Train had, by the agreement, stipulated to assume and pay all the debts of the firm and indemnify Thayer therefrom, the court held that such stipulation gave no right to the creditors of the firm to treat Train as their separate debtor, and to prove against his private estate, because there was no evidence of any agreement or assent, on the part of such creditors, before the commencement of the insolvent proceedings, to accept Train as their individual debtor in lieu of the firm, and therefore there had been no conversion of joint debts into separate debts, and the case was not one of a conveyance of property in trust for the benefit of Thayer, or of creditors of the firm, but a transfer to Train for his own use, with a mere personal covenant by him to pay the debts of the firm. The court also held, on the authority of Howe v. Lawrence, that the creditors of the firm had failed to establish any right to prove against the separate estate of Train, on the ground that they were entitled to assert an equity against Train or his assets in the hands of the assignee, based on his stipulation in the agreement.

[In Wild v. Dean, 3 Allen, 579, Foss and Swett being partners, and owing firm debts, Swett purchased the interest of Foss in the partnership property, and executed to him a bond to pay all the debts of the firm. Subsequently the joint and separate estates of Foss and Swett were put into insolvency. After the warrant was issued, but before the first publication of notice, one Wild, the holder of notes made by the firm, gave a written notice to Foss and Swett severally, of his election to take Swett as his debtor

thereon, and to avail himself of the agreement by which Swett became bound to pay the firm debts. There was no joint estate. Wild sought to prove the notes against the estate of Swett. A distinction was attempted to be drawn between this case and that of Robb v. Mudge, on the ground that Wild had elected to take Swett as his sole debtor, and had given notice of such election before the time at which the statute required that a debt should be due from a debtor in order to be provable. But the court held, that it was not shown that Swett had agreed or assented that the joint debt should be converted into a separate debt on which he and his estate were liable, as upon a contract into which he had individually entered; that the debtor cannot convert a joint into a separate debt without the consent of the creditor, and the creditor can do no act to effect such conversion without the assent of the debtor; that the existence of a "separate debt" due to a creditor from one of two co-partners, which is necessary, under the statute, to entitle the creditor to prove against the estate of such one of two co-partners, is not proved by showing that the creditor holds a joint note of the firm, and that, on a dissolution of the firm, one of the firm stipulated with his co-partner to assume and pay all the joint debts, and the election of the creditor does not of itself operate to convert a joint into a separate indebtment, and there must be evidence of a promise, either express or implied, to the creditor, by such stipulating co-partner, to assume and pay the joint debt as his own private individual debt, so as to convert a joint into a separate promise; and that Wild could not prove his debt against the separate estate of Swett.

[The cases of Howe v. Lawrence, and Robb v. Mudge, are cited, with approval by the court of appeals of New York, in Dimon v. Hazard, 32 N. Y. 65.][2]

In Re Downing [Case No. 4,044], in Missouri, Downing and Emerson, being copartners, dissolved by consent, Downing purchasing all the assets of the firm from Emerson, and agreeing with him to pay all its liabilities. Eight months afterwards, Downing assigned all his assets, including those which came from the firm, to a trustee, for the equal benefit of all his individual creditors and the creditors of the firm. After that, Downing was adjudged a bankrupt, in Missouri, and the trustee turned over the proceeds of the assets to the assignee in bankruptcy. The copartnership, as such, was not adjudicated bankrupt. Emerson was adjudicated a bankrupt in Massachusetts. The creditors of the firm did not release Emerson from liability. Claims against Downing individually, as well as claims against him as one of the firm, were proved against his estate. After his voluntary assignment, and before he was adjudged a bankrupt, he delivered to each one of the creditors of the firm a written agreement, under seal, signed by him, reciting the dissolution of the firm, the conveyance to Downing of the assets of the firm, for a consideration given by Downing to Emerson, the agreement by Downing to assume and pay all the debts of the firm and hold Emerson harmless from the same, and then saying, "I have agreed to pay the debts and liabilities of said firm, as my own private individual debts, and the party with whom this agreement is made may now have debts and claims against said firm," and then going on to agree with the creditor, for value received of him, "that I individually, will pay, as my own private and individual debts, all and singular the debts, liabilities and claims against said firm of Downing & Emerson," held by the creditor. The question arose, whether the separate creditors of Downing should be first paid in full before the creditors of the firm should receive any dividends from the funds in the hands of the assignee. The district court ruled in favor of the separate creditors. The circuit court reversed the ruling. The view it took was, that, as the result of Downing's agreement with Emerson to pay all the liabilities of the firm, the creditors of the firm had the right, as between themselves and Downing, to treat Downing as individually liable to them on his promise to Emerson for their benefit, and could enforce such promise against him, in equity (citing 1 Pars. Cont., 5th Ed., 467, 468, and cases cited, and 2 Greenl. Ev. § 109, and cases cited); that such promise, on the election of the creditors of the firm to avail themselves of it, is cumulative to their other rights; that they need not release the firm in order to be able to obtain the benefit of such promise; that such creditors may assent to and claim the benefit of such promise at any time, either before or after the bankruptcy of the promisor; and that, while the parties made the firm's property the individual property of Downing, Downing superadded his individual liability to the existing liability to the creditors of the firm. But the court further held, that, even if the foregoing views were erroneous, the 36th section of the bankruptcy act only comes into operation when there are firm assets, and the bankruptcy proceedings are against the firm and each of its members; and that, as there was no joint property, and the bankruptcy proceedings were only against Downing, and not against the firm, all of the creditors of Downing, who had proved their debts, were entitled to share pro rata in the distribution of his estate, whether their debts were originally against the firm or against Downing individually.

In the present case, as the bankruptcy proceedings are against both of the copartners, as such, the provisions of the 36th section must apply, I think, even though there is no joint property. Whether they would not apply if the proceedings were against one copartner alone, as held by the court in Mis-

[2] [From 9 N. B. R. 227.]

souri, it is not necessary to consider. In Howe v. Lawrence, the insolvency proceedings were against one partner alone, and yet the court cite the statute as applicable. So, also, in Robb v. Mudge, the insolvency proceedings were against one partner alone.

On the authorities referred to, there can be no question, that, in this case, the transfer of the firm property to Long having been made honestly, and in good faith, upon a dissolution, and for a valuable consideration, and without any fraud or collusion between the copartners to defeat the rights of the joint creditors, the joint property became, by the transfer, the separate property of Long. The more difficult question is, what are to be considered "separate debts" of Long, to the payment of which the statute requires his separate estate to be first appropriated. There was no "joint stock or property of the copartnership" at the time of the commencement of the proceedings in bankruptcy, and none such passed to, or has come to, or is in the hands of, the assignee.

The 36th section draws a distinction between "the creditors of the copartnership" and the "separate creditors" of each partner. It also calls the former "joint creditors" and speaks of the debts due to them as "joint debts," while it speaks of the debts due to such separate creditors as "separate debts." It puts joint creditors and joint debts in antithesis to separate creditors and separate debts. This it does, although, necessarily, the copartners are jointly and severally liable to the creditors of the copartnership for the joint debts. This liability is recognized by the 36th section, because, after the separate estate of each partner has been appropriated to pay his separate creditors, the section does not direct the balance of such separate estate to be paid over to the partner, but directs it to be added to the joint stock for the payment of the joint creditors. It recognizes the liability of the separate estate for the joint debts, on the basis of a several liability of each partner for the firm debts, but it arbitrarily postpones such liability to the liability of the separate estate for the separate debts. It, therefore, seems to me, that, when the statute is to be construed with a view to see what are the separate debts which are first to be paid out of the separate estate, the separate debts spoken of must be regarded as being confined to debts which arise out of a liability other than, or in addition to, that resulting solely from a debt contracted by the firm.

In the present case, the debts to Macfarlane were contracted originally solely by the firm, for goods sold by him to the firm. What has occurred to make the liability of Long in respect to them a liability other than, or in addition to, that resulting from his having been a member of the firm when the debts were contracted?

The transaction of the agreement of December 7th, 1869, is relied on; and the covenant therein, on the part of Long, to pay all the debts of the firm, in consideration of Corey's agreement, and of Corey's assignment to Long of all Corey's interest in the assets of the firm, is alleged to have created, when assented to by Macfarlane, a separate liability on the part of Long, in addition to that resulting from his having been a member of the firm, to respond, as a separate debtor, to Macfarlane, for the debts of the firm to Macfarlane, and thus to have made Macfarlane, in respect of such debts, a separate creditor of Long, entitled to share in the separate estate of Long, in addition to his right to share, as a creditor of the firm, in any joint property there might be. This is the view taken in the Downing Case. The view of the supreme court of Massachusetts, in the cases before cited, is, that where the one partner sells out the firm property to the other, and takes the personal contract of the latter to pay the joint debts, he thereby deprives a joint creditor of any right to share, as a separate creditor of the latter, in his separate estate, in its distribution under the statute, although the latter agrees with the former to personally pay the joint debts, in consideration of the conversion of the firm property into such separate estate, unless the joint creditor assents to accept the latter as his individual debtor in lieu of the firm, and does so before the statutory proceedings are commenced, and unless, further, the latter, by an express or an implied promise, made to the joint creditor, promises to assume and pay the joint debt as his own private, individual debt, in such wise as to convert the joint debt into a separate debt on which he and his separate estate are to be liable as upon a contract entered into by him individually.

It is with hesitation that any court, in administering a provision of the bankruptcy act which is like in terms to one which is found in the insolvent law of Massachusetts, and has been adopted therefrom, and has been expounded by the highest court of Massachusetts, would venture to differ from the well considered decisions of that court in regard to such provision. But I find it impossible to concur in the view just stated as the view of that court. The view taken in the Downing Case seems to me much the more reasonable one, and to be more consonant with the equitable principles on which the bankruptcy act is to be administered. See, also, to the same effect, In re Knight [Case No. 7,880]. Long, by his agreement, not only agreed, as between himself and Corey, to pay all the debts of the firm, having received all its property, but put himself voluntarily into the position, as respected the creditors of the firm, of agreeing that such creditors might, if they chose, treat him as so liable individually, and in respect of all his separate estate, including what became such by the transfer, in addition to his liability as a joint contractor, and

in addition to Corey's liability for the joint debts. Neither of these latter two liabilities was, as respected the joint creditors, affected by the agreement. They could accept the additional individual liability of Long, while retaining the liabilities of both Corey and Long as contracting copartners, in like manner as they could have taken the individual indorsement by either of a promissory note made by the firm. The individual promise of Long could as well be made to Corey for the benefit of the creditors of the firm, as to each one of such creditors for his own benefit, especially when all the firm property, undoubtedly embracing some for the purchase of which the very debts in question were contracted, was being eo instanti transferred to Long for his individual benefit. Certainly, although the agreement was only between Corey and Long, and the firm creditors were not cognizant of it, it cannot be said that it ought not to be regarded as having been made for, and as enuring to, their benefit, when all the firm property was becoming the individual property of Long. Corey was not a mere stranger. He was a joint debtor with Long, and he and Long held joint property, and, in transferring the whole of the interest in such joint property to Long, and exacting an individual promise by Long to pay such joint debts, he was acting on a state of things in respect of which the joint creditors had quite as much interest as he had, that Long should fulfill such promise. Long received an adequate consideration for his promise. He has retained all the property, and the debts he assumed to pay are not paid. Why should the firm creditors be required to release the firm, or to release Corey as a member of the firm, in order to enjoy the benefit of such promise; and why should they not be allowed to elect to avail themselves of such promise as well after the commencement of the bankruptcy proceedings as before? The case seems to me to fall within the principles of those cases where a firm creditor, having also the individual liability of one of the firm in respect to the same debt, has been allowed to prove it against such individual as well as against the firm. In re Bigelow [Case No. 1,397]; Mead v. National Bank of Fayetteville [Id. 9,366]; Emery v. Canal Bank [Id. 4,446]; In re Bradley [Id. 1,772].

The issues certified must, therefore, be answered, as follows: The fund received by the assignee from the receiver constitutes, and is to be treated and distributed as, a part of the separate estate of Long, and it is not partnership property, to be applied, in the first instance, to the payment of partnership debts; and Macfarlane, in respect to the debts originally incurred by Walter P. Long & Co., and afterwards assumed by Long, is entitled to be admitted to the list of Long's separate creditors, and to share in dividends out of Long's separate estate, equally with separate creditors.

[Although the two individual notes of Long, dated after December 7th, 1869, are embraced in the second proof of debt, they form no part of the $8,531 52 mentioned in the first proof of debt, and are not set forth in the statement of account annexed to the first proof of debt, and as it does not appear that they were given for debts of the firm, I have not regarded them as involved in the questions now determined.] [2]

Case No. 8,477.

In re LONG.

[26 Leg. Int. 349; [1] 7 Phila. 578; 3 N. B. R. 66.]

District Court, E. D. Pennsylvania. May 14, 1868.

BANKRUPTCY—ASSETS OF THE BANKRUPT—SECRET TRUSTS—PREFERENCE — RESULTING INTEREST—RIGHT OF ASSIGNEE TO CONVEYANCE UPON PAYMENT—FULL DISCLOSURE—DISCHARGE.

1. A. failed in business, owning the fee in part, and the term, under a lease, of the other parts, of certain buildings in which the business was conducted, with an established good will, and owning, absolutely, all the personal property contained in the buildings. He had confessed three judgments,—one to B., a creditor; another to C., his aunt, an alleged creditor; the other to D., a creditor. Under friendly executions upon the judgments of B. and C., the leasehold and other personal property were levied on and sold for less than the amount of B.'s judgment. The purchaser at the sheriff's sale was E., a person in A.'s employment, who bought in pursuance of a previous arrangement with B. For the aggregate of E.'s bids, B., under this arrangement, took E.'s bond, the amount of which was credited on account of B.'s judgment. The understanding was that the business should afterwards be carried on in the same buildings in the name of E., through the agency of A., to secure to B. the payment of all that had been due to him, with interest, and subject thereto, for the benefit of A., or as he might direct. The business was conducted there accordingly, in the name of E., through the agency of A., to secure to B. the payment of all that had been due to him, with interest, and subject thereto, for the benefit of A., or as he might direct. The business was conducted there accordingly, in the name of E., for two years or more after A.'s failure, until the bond of E. to B. and the balance due on B.'s judgment were paid in full out of the avails of the business. E. then, at the request of A., transferred the leasehold and other personal property to C., who executed her bond to E., conditioned to indemnify him against outstanding liabilities incurred while the business had been conducted in his name. He continued in the service of A. in the same subordination as before. The consideration of the transfer to C., as expressed in it, was composed of the penalty of this bond of indemnity, and the amount of C.'s judgment against A. In the meantime, through the procurement of A., in order to carry into effect an understanding between him and D., a friendly execution upon D.'s judgment had been issued and levied on A.'s fee in the other part of the premises, and this part of them had been sold by the sheriff, and bought in by D., to whom it had been conveyed by a duly acknowledged sheriff's deed. Thereupon D. had, in pursuance of the same friendly understanding with A., made a complicated arrangement for the sale of this part of the premises to C., executing a lease to give her a

[2] [From 9 N. B. R. 227.]

[1] [Reprinted from 26 Leg. Int. 349, by permission.]

present right of possession, and an agreement entitling her to receive a conveyance upon payment of the price, by stipulated monthly instalments, designated as rent. The amount of these instalments covered that of D.'s former judgment. The purpose of this arrangement had been that the modified equitable interest thus vested nominally in C. should, for the secret benefit of A., be substituted for his former legal fee. C., having thus the nominal equitable ownership of part, and the nominal legal ownership of the rest of the property, executed a power of attorney to A. to carry on the business in her name. He so carried it on, without interference by her, for several years, until her death, when the power was renewed in like form by her administrator. Out of the avails of the business, A. made sundry payments in C.'s lifetime, in her name, to D., on account of the monthly instalments; and, after her death, continued the business in the name of the administrator. C. died insolvent. Her former judgment against A. was not in the inventory of her estate. Upon the settlement of it, he appeared, on the contrary, to have been her creditor. The inventory included the leasehold and other personal property which had been transferred to her by E. In the name of the administrator, a sale of them was made a year after her death for the purpose of closing the accounts of her estate. A.'s nominal agency for the administrator then ceased. The purchaser did not take possession, but the price was accounted for by the administrator, as if received. After this, A. continued in the possession and control of the property and business. At a later period, more than ten years after his failure, having still retained the possession and control, he became a petitioner for adjudication and relief in bankruptcy, under the act of 2d March, 1867. In the schedules accompanying his petition, the former judgment of C. was returned as one of his debts. The buildings, etc., and business, were not mentioned. This property, including the outstanding credits of the business and its good will, should have been available as assets of his estate in bankruptcy for the benefit of his creditors.

2. As to the leasehold and other personal property sold to E. under B.'s execution, if E. had acquired under it an absolute ownership, his transfer to C. would have vested a like absolute ownership in her, and the possession of A., as agent of such successive owners, would not have made the subjects of such possession liable to divestiture through A.'s bankruptcy. But the ownership of E. as purchaser under the execution, not having been absolute, this immunity of the subjects of his purchase subsisted no longer than the continuance of such ownership as he acquired. This was, in equity an ownership, defeasible on the payment of B.'s former debt out of the avails of the business. There was thus a resulting interest in A., whose former ownership was revested in him so soon as B. was thus paid. E.'s transfer to C. would, therefore, have been wholly inoperative without A.'s concurrence or participation. A. having in fact concurred and participated in it, the title of C., though in form derived from E. as the purchaser under the former execution, was, in effect, derived from a transfer voluntarily made by A. Therefore, assuming the validity of the alleged debt of A. to C., on which her judgment was confessed, and the consequent sufficiency of the consideration of A.'s transfer to her, it was not such a transfer as, after B. had been fully paid, excluded the application of the rule that a debtor's retention of possession renders his transfer ineffectual against creditors.

3. Quaere, whether the existence of the alleged consideration as between C. & A., should, without proof, be assumed as against the assignee in bankruptcy representing the creditors.

4. As to that part of the premises of which the legal fee was vested in D. under the proceedings upon his execution, he was bound by his agreement with C. to convey the same to her upon payment of the stipulated amounts; and the beneficial interest of the bankrupt in the agreement thus made in her name was sufficiently established to entitle the assignee in bankruptcy to demand the conveyance upon making such payment, or to entitle him to compel a sale, and receive the surplus after such payment.

5. Until a bankrupt has made full and sufficient disclosure, his creditors, or the assignees in bankruptcy, cannot be required to specify objections to his discharge, or definitely abide by their objections, which may have been specified.

This was a voluntary bankruptcy. The bankrupt [William W. Long] alleged that there was no assets. The principal objection to his discharge was the non-disclosure of his alleged ownership of certain buildings in Philadelphia, known as "Long's Varieties," and their contents, including a museum, with its pictures and curiosities, and a concert saloon and general restaurant, with its furniture, etc., and the fixtures and good will of the business carried on there. There was no dispute that in the early part of 1857, and previously, he owned this property. He had a leasehold of part, and the fee simple in the rest, and was absolute owner of all the contents of the buildings. He states in his examination that he is now carrying on the business conducted there, and that he has been engaged in one way or another in the same establishment for more than twenty years. In all the period, beginning in 1857, during which, he says, that he has not been the owner, the property has been entirely in his control. He states his possession to have been that of a mere agent for the persons who, he says, became successively the owners during this period. In the early part of 1857 he was insolvent or in embarrassed circumstances. Three creditors to whom he had previously confessed judgments appear to have had friendly feelings for him. The judgment of one of them, Mr. Tasker, was $5,000, borrowed money; the judgment of another, Mr. Lang,[2] was for a debt of $4,000; and the judgment of the other, Miss Walker, a sister of the bankrupt's mother, was for $6,282.57. There was no question that the debts to Mr. Tasker and Mr. Lang, respectively, had been contracted in good faith, and were wholly due. The bankrupt alleged, in one of the schedules accompanying his petition, that the judgment of Miss Walker was for money lent by her. But this allegation had no support except his own statement.

In the early part of 1857, when some of his creditors were pressing their demands, Mr. Tasker was influenced, by a feeling of kindness, to bring about, under an execution upon his judgment, a sheriff's sale of the leasehold, good will, and fixtures, and all the personal property, of the establishment known as "Long's Varieties." An ar-

[2] This gentleman's name has been sometimes written in the papers of the case undistinguishably from the name of the bankrupt, Mr. Long.

rangement for this purpose was made by Mr. Tasker with one Thomas Price, who was then in the service of the bankrupt. The arrangement was that the property should be bid in by Price, who was to pay no money, and had no means. Mr. Tasker, not desiring his own name to appear in the business, procured a person named Edmunds to receive a transfer of the judgment, so that the execution might appear to be levied for his use. Mr. Edmunds had no interest whatever in the proceeding, and figured in the business no longer than was necessary in order to give credit for Price's bids at the sheriff's sale.

The preliminary arrangements having been made, executions were issued on the judgment of Mr. Tasker, and on that of Miss Walker, and were both levied; the execution of Miss Walker immediately after Mr. Tasker's. The sheriff sold under both executions. Price bid in all that had been levied on, for an amount a little exceeding $4,000, which was credited on account of Tasker's judgment. The sheriff on 20th February, 1857, executed a bill of sale to Price, who, for the amount which had been thus credited on this judgment, gave his own bond to Mr. Tasker. Price took the nominal possession of the establishment. In his name, and professedly as his agent, the bankrupt carried on the business, which does not appear to have been interrupted. In the course of two years, more or less, Mr. Tasker was repaid the whole amount of his original debt; that is to say, the $4,000, or thereabouts, for which Price had given his bond, and the $1,000, more or less, which was the excess of the original debt above what Price had bid at the sheriff's sale. For several of the payments, amounting together to the latter sum, receipts were produced. As they are expressed, the payments were made by Price. For the remaining payments no vouchers were exhibited; nor did it appear by whom, or in whose name, these payments were made, but the inference from the whole evidence was irresistible that nothing was paid, under either head, from any other source than the avails of the business of the establishment. After Mr. Tasker's debt had been thus paid, he never asserted ownership or interest of any kind in himself.

The payments to Mr. Tasker, in addition to the current expenses, had caused a deficiency in the business conducted in the name of Price. The outstanding liabilities representing this deficiency were, as the bankrupt states, less than $3,000, but more than $2,000. The business itself, therefore, was profitable. On 22d April, 1859, Price executed a bill of sale to Miss Walker, the bankrupt's aunt, whose judgment against him for $6,282.69 has been mentioned. She paid nothing; but on the same day executed her bond to him in the penalty of $3,000, conditioned to pay all outstanding debts of the business, and to indemnify him, etc. The consideration of his bill of sale to her, as expressed in it, was $9,282.69, "being a judgment against William W. Long and a judgment bond"; that is to say, the judgment against him at her suit for $6,282.69, and her bond of indemnity to Price, of which the condition was $3,000. The transfer, was, on its face, an absolute one of all that he had acquired by the sheriff's sale. Price, on thus retiring from the nominal proprietorship, resumed or maintained his former position of a subordinate in the establishment, on weekly wages. Becoming, in the course of time, intemperate, he was discharged from it.

Soon after Miss Walker was substituted as the nominal proprietress, and an arrangement was made and executed in her name, as to that portion of the property of which the bankrupt had owned the fee. This arrangement was thus effected by Mr. Long, the bankrupt, with Mr. Lang, his creditor, who has been already named as the plaintiff in a judgment for $4,000. This creditor deposes that he does not remember that he ever saw Miss Walker at all in reference to the matter. He states that he is no longer a creditor of Mr. Long, that the debt "was made over from Mr. Long to Miss Walker"; that Mr. Long "transferred it to her"; and adds: "I changed the indebtedness upon Mr. Long's application. Accepted Miss Walker as my debtor instead of Mr. Long. Nothing was given me for the change. He was in trouble at the time, and would like to have it transferred to her." The records and papers in evidence explain this. The portion of the property which the bankrupt had owned in fee was levied on at the suit of Mr. Lang, and, in the due course of proceeding, sold, and bought in by Mr. Lang under his execution, and conveyed to him by a sheriff's deed regularly acknowledged. Afterwards, on 1st October, 1859, two papers, together constituting a single transaction, were executed between him and Miss Walker. They were, in form, a lease with an agreement for the sale of the property to her; but were, in effect, an equitable conveyance to her in fee, with immediate possession, charged with the payment to him of $6,000, as purchase money, in the name of rent, by monthly instalments of $50, to be computed from 1st January, 1860. How much has been paid on account of the $6,000 does not precisely appear. Receipts for 21 of the instalments, amounting together to $1,050, have been produced. Mr. Lang, the creditor, deposes that he does not think that as much as the interest on $4,000, the original amount of his debt, has been paid. Of the leasehold part of the property bid in at the sale of 1857, the rent appears to have been from time to time receipted for by the landlord as paid by Price during his nominal ownership, and as paid afterwards by Miss Walker. So the instalments of $50 of

purchase money of the other part of the property appeared to have been receipted for by Mr. Lang as paid by Miss Walker. That all these payments of rent, and payments on account of purchase money, were made out of the avails of the business of the establishment, appeared with no less certainty than as to the payments to Mr. Tasker. That they could have been derived from no other source was confirmed by evidence tending to prove that Miss Walker was not possessed of independent means of her own.

In the spring of 1859 she executed a letter of attorney, authorizing the bankrupt to carry on the business in her name. He continued to do so until she died, in May, 1865. He afterwards continued to do so as agent of her administrator, until the final disposition of her estate in the following year. It then appeared that she had been for many years insolvent. Her creditors received from her estate less than the fourth part of their debts. These debts had been assigned by the respective creditors to one Snyder, to whom the dividends were adjudged. There was a great arrear of interest upon the debts. One of her creditors, who, had thus transferred their demands to Snyder, was the bankrupt himself. He had held her note for $92, and as the interest accrued was $32, he must have held it for five years and three-quarters. In the course of the proceedings before an auditor, whose report of the final distribution of her estate was confirmed by the orphans' court, the bankrupt was examined generally as a witness upon any subjects which required explanation. It appeared that, besides his agency under the above-mentioned power as to the property in question, he had been her general agent, having the care and management of all her affairs and business. Her estate, at her death, was represented, in the inventory, to consist of the property in question, and nothing, or next to nothing, else. There was a public sale by the administrator in 1866, a year after her death, when everything, as he alleged, was finally disposed of. The person returned as the principal purchaser is named Beck. He has not been examined, and of his actual relations to the property there is no proof, except that he never took possession of anything, and that the bankrupt retained the possession, as he still does. In 1857, the bankrupt, in conversation with some of his creditors, professed a purpose to discriminate favorably between them and other creditors. In some such conversations he said, after the sale by the sheriff, that he was not less the owner than he had been before. He also, before and after the sheriff's sale, made statements which were, in effect, that, so far as a certain class of his creditors might afterwards be concerned, the sale was a sham.

The real estate, as to which the arrangement with Mr. Lang was made in the name of Miss Walker, has always been, and is now, assessed in the name of the bankrupt. The taxes for last year have not been paid. The bankrupt, in his examination, after stating that the collector had presented his bill for them, says: "I told him I had nothing to do with the payment of those taxes. I told him that I would pay them when I knew that I had a right to pay them. I meant there was an agreement that this property should revert to my aunt. This agreement has been broken, as you know. In the event of getting through the bankrupt court, and being able to make an agreement with Mr. Lang similar to that made with my aunt, I, of course, would pay them."

The bankrupt states that in January, 1860, nearly all his accounts and papers were burned by a fire in his bedroom; that the books of his business, to the time of his embarrassments in 1857, were then consumed; and that he had kept no books of account after that period. In the schedule annexed to his petition, he returned the judgment of Miss Walker for $6,282.69 as one of his debts, and other debts to the amount of about $19,000 (principal), including a judgment of Middleton & Bro. for $2.222.98. It was not among the specified objections to the bankrupt's discharge that he had returned Miss Walker's judgment as a debt; but the return of the judgment of Middleton & Bro., as a debt, was a specified subject of objection. They had sued him in the year 1858, and obtained this judgment. In the autumn of that year, an execution at their suit was levied upon the same effects, which, in the previous year, had been bought in by Price. Under the sheriff's interpleader act, upon a claim of property by Price, there was an issue in the usual form. Under a prior levy upon the execution of Birney, another judgment creditor, there had been a similar claim of property, and a similar issue. This issue with Birney was afterwards tried, and there was a verdict for Price. There was no trial of the issue under the levy. at the suit of Middleton & Bro. No execution appears to have been levied upon these effects at any time after the debt of Tasker had been fully discharged. There was no direct proof that after its discharge Middleton & Bro. threatened another levy; but, before the death of Miss Walker, the bankrupt called on them, and asked one of their firm what he would take for the judgment, saying that "he had somebody who would buy it." He was accompanied by a friend named Boone, who, after Miss Walker's death, became the administrator of her estate. Mr. Boone deposes that he bought the judgment of Middleton & Bro. from them in her lifetime for between $300 and $500, and sold it to her, taking for it her papers to its full amount, for which he received, after her death, his pro rata dividend from her estate.

The inventory of her estate contained neither this judgment of Middleton & Bro.

against the bankrupt, nor the judgment for $6,282.69 against him at her own suit. This judgment, at her own suit, formed, as has been stated, part of the consideration expressed in the bill of sale to her by Price in 1859, for his transfer to her of the personal property. This, if Price received the transfer for his own benefit, vested the judgment in him. If he received the transfer for the benefit of the bankrupt, the judgment was released or extinguished. That she did not consider him her debtor was apparent, because she gave her note, as has already been stated, for a small debt to him which she contracted not long after. This judgment, therefore, cannot have been part of her estate, and unless Price held it in his own right, which could not be pretended, was equitably released or extinguished.

The foregoing statement of the facts has been made from a phonographic note of the judge's review of them at the close of the hearing in court. The evidence of the proceedings under the administration of Miss Walker's estate, and its distribution, etc., was adduced at this hearing. All the other proofs had been made before the register in the course of compulsory examinations of the bankrupt and others, under the twenty-sixth section of the act of March 2, 1867 [14 Stat. 529], before his application for a discharge. He had not passed any examination at a public meeting of creditors. Upon his application for a discharge, notice of the time and place of an intended public meeting, at which he was to pass his last examination before the register, was duly given. The register held the meeting, and the bankrupt attended, but he was not examined at it, nor did he then make any further disclosure of his own motion than had been made under the former compulsory examination. This former examination contained no specific exposition of the causes of his insolvency, nor specific account of losses, except in part incidentally to his answers under compulsory interrogation. There was not any oath, in substance or effect, that he had fully and truly disclosed, when, how, to whom, and for what consideration his estate and effects, etc., had been disposed of, etc., except what had been parted with in the regular course of his business, or laid out in the ordinary expenses of living of himself and his family.

The examination and other proofs having been read; THE COURT suggested the following questions for argument: (1) If the case could properly be decided on the disclosures already made, and the other proofs adduced, and upon the objections to the discharge which have been specified, ought the discharge to be granted? (2) Has the bankrupt made sufficient disclosure to enable the court to decide whether he has "in all things conformed to his duty" under the act of congress? (3) Until such sufficient disclosure, can his creditors, or the assignee, be required to specify objections to his discharge, or to abide by their objections already specified? (4) Ought the case be recommitted to the register?

THE COURT expressed a desire to hear the counsel of the bankrupt upon the first, second, and third questions.

Mr. Parsons, for bankrupt, contended, upon the second and third questions, that as the bankrupt had undergone a rigorous examination by creditors, under the twenty-sixth section of the act, and they had received answers to all their inquiries, no further disclosure was necessary; that the assignee and creditors ought therefore to abide by the objections which had been specified; and that some of these objections were unsupported by evidence, and the others unfounded in law. Upon the first and principal question, Mr. Parsons said that as to the bankrupt's alleged interest in the real estate bought in by Mr. Lang at the sale under his execution, whatever might have been the effect of the papers afterwards executed between Mr. Lang and Miss Walker, and whether she had or had not the beneficial ownership, charged with what may remain due to Mr. Lang, this beneficial interest, if any, was not the bankrupt's, but was Miss Walker's, and, upon her death intestate, was vested, by descent, in persons of whom the bankrupt, as her nephew, could not be one, because his mother is living. As to the leasehold and other personal property, Mr. Parsons said that, under the transfer from Price to Miss Walker, she, in her lifetime, and her administrator since her death, and subsequently the purchaser from her administrator, had the same right and interest which Price had acquired as purchaser at the sale under the execution at the suit of Tasker; that, after a fair public divestiture of a debtor's property by a sheriff's sale under an execution, the retention of possession by the former debtor, as agent of the purchaser, and of any number of successive owners deriving title from and under him, could not be regarded as fraudulent against creditors, nor could it render the property liable to execution; and that, if not liable to execution, it had not passed under the assignment in bankruptcy.

The following opinion of the court is written out in part from the phonographer's report, and in part from notes by the judge. What he said upon the first point is reported without omission or abridgement.

CADWALADER, District Judge. Whether an assignee in bankruptcy can establish, against others, the facts which the bankrupt states on his examination, cannot be determined at a hearing like the present, upon objections to his discharge. As against himself, the truth of what he relates, where he has the means of knowledge, must be assumed. Its truth, where favorable to himself, should also be assumed, unless incredible or contradicted by proofs. Upon the

facts admitted and those proved, I see no reason to doubt that the property in question is vested in the assignee in bankruptcy. It is true that Mr. Tasker and Mr. Lang had power to do as they pleased with what they respectively bought in under their executions. Mr. Tasker had such power whether he bought in his own name or in that of Price. After the sale by the sheriff under Tasker's execution, the continuance of the former debtor in possession, as an agent of the purchaser, did not make the property liable to execution at the suit of other creditors. Unless it was thus liable to execution immediately before the commencement of the proceedings in bankruptcy, it has not passed under them to the assignee. In these respects, the law is correctly stated in the argument of the counsel for the bankrupt.

The proceedings under Tasker's execution were therefore effectual for their intended purpose. But what was this purpose? Did it take effect, and, if so, how? Had the bankrupt, for the eleven succeeding years, the possession and control of the property, simply as agent of the successive persons in whose names he has professedly acted as agent? Were they in succession absolute owners, both nominally and beneficially? Or had he, on the contrary, an immediate, or a resulting beneficial interest of his own? If the purpose had been to make an immediate absolute gift to him, the property would, under the present proceedings, be vested in the assignee in bankruptcy. This would have been their effect if an absolute bill of sale had been made by the sheriff to Mr. Tasker, and by Mr. Tasker to the bankrupt. It would not less have been their effect if the bill of sale to Price had been secretly for the absolute benefit of the bankrupt. There cannot, however, be a reasonable supposition that an immediate absolute beneficial interest was vested in the bankrupt in 1857. I say this, because Mr. Tasker was then, as yet, unpaid. The issue under the sheriff's interpleader act was doubtless rightly determined against the opposing execution creditor, because, when this creditor's levy was made, Mr. Tasker was still unpaid. But it by no means follows that, on the other hand, an absolute divestiture of the bankrupt's proprietorship was intended. If he had a resulting beneficial interest, or an interest which was at first conditional or qualified, and if the condition was afterwards fulfilled, or the qualification removed, the property became beneficially his own, and is now vested in the assignee in bankruptcy. Here the question is whether the arrangement with Mr. Tasker was not such that the bankrupt retained a debtor's privilege of redemption, with an ultimate beneficial interest in himself. If such was the arrangement, he became again the absolute beneficial owner so soon as Mr. Tasker was paid in full.[3] The evidence, I think, shows clearly that this was the case.

Before considering the proofs under this head, some remarks will be made upon the fact that a bond was taken by Mr. Tasker from Price for the amount bid at the sheriff's sale. This fact distinguishes the case from cases otherwise of the same kind, in which a defendant's property is bid in by an execution creditor who has no such new debtor for the amount of the price. In such cases there may be an honorary understanding between the former creditor and the former debtor that the latter may, notwithstanding the extinction of his legal ownership, redeem his former property by the payment of his former debt, or of so much of it as was bid at the sale. When such an understanding has been executed by payment and acceptance, the property will revest in the former owner, although the understanding was at first without consideration, and not binding. Moreover, where the performance or execution has been partial only, by payment and acceptance of a part of the former debt, the understanding, though at first only honorary, may, upon such acceptance, become binding. But until such execution, or partial execution, the former debtor's redemption of his former property depends, in ordinary cases, upon the mere benevolence of his former creditor. Though a privilege of redemption may have been accorded by word of mouth, or by writing unsealed, the concession is without consideration, and, like other gratuitous engagements, not binding while unexecuted. In the present case, the arrangement made with Mr. Tasker has been wholly executed, so far as he was concerned. The ultimate result, therefore, might here be the same as if no bond had been taken by him from Price. But the taking of the bond made a material difference in the primary relations of the parties. It was a sufficient consideration to bind irrevocably Mr. Tasker from the first to carry into effect any arrangement under which the bond may have been re-

[3] This proposition, resting, as it does, upon the simple foundation of common sense and common honesty, does not require the support of authority. But in Schott v. Chancellor, 8 Harris [20 Pa. St.] 199, Black, C. J., said: "If personal property is purchased at a sheriff's sale, and left with the defendant in the execution, and it appears that the defendant himself furnished the money which paid for it, who can doubt that it might be taken again on another execution against the same person? If the money was not furnished at the time, but paid afterwards, the case would be equally clear, as showing either that the pretended purchaser was a mere agent of the defendant, or else that a contract existed between them by which the title was to revert to the original owner when he refunded the price. Where the plaintiff in the execution is the purchaser at the sale, and he gives no credit for the proceeds, and afterwards receives full satisfaction of his debt in another way, there is still stronger reason for believing that the business was a sham from beginning to end."

ceived by him. However worthless may have been the personal security of Price in the money market, and it certainly was, in this respect, of no value, the consideration was nevertheless legally sufficient, whatever the arrangement may have been. This may simplify the case hereafter, when the effect, as to other creditors, of some of the subsequent occurrences will be considered. It will then be borne in mind that in the present case the privilege of redemption was not a mere honorary concession by the former creditor, but was a vested right of the former debtor, and not liable to derogation at the former creditor's option. Another more important effect of his taking this bond will also be mentioned hereafter.

In the meantime, the relations of the parties at the date of the bill of sale by the sheriff to Price may be defined very simply. Price was a trustee, first, for the security of Mr. Tasker, and, next, for the benefit of the bankrupt. The security to Mr. Tasker was for Price's bond of about $4,000, and for the balance of about $1,000 of the former judgment. The bankrupt's declarations, made in 1857, to certain of his creditors, are evidence against him that an absolute divestiture of his ownership, through the sheriff's sale of that year, was not intended. I am always very reluctant to attribute importance to what a man has said, or is supposed to have said, in private conversations. It is evidence which must be regarded often with suspicion, and almost always with caution. But evidence of this kind, when it is coincident, as here it is, with all the circumstances of a case which are in proof, cannot be altogether discarded. A remarkable coincidence may also be discovered in the bankrupt's own account of what, while the present proceedings in bankruptcy were pending, he said to a collector of taxes.

There is other evidence which is of a decisive character, that Mr. Tasker never acquired for himself, nor ever enabled Price to acquire, an absolute ownership, and that the sheriff's bill of sale to Price was a mere security. As to Mr. Tasker, he has never, since the debt was, many years ago, repaid, asserted any pretence of ownership or interest of any kind. But it may not be amiss to consider more particularly his relations to the property, and afterwards those of Price. If neither of them had an absolute interest, there must have been an ulterior beneficial interest in the bankrupt. If Mr. Tasker was to have been the absolute owner, he would not have been the creditor of anybody for the amount bid at the sheriff's sale; and, in that case, could not have taken, as he did take, the bond of Price for this amount. Here the act of Mr. Tasker, in taking this bond, is most important, if not conclusive. He took it, says the bankrupt, the same as mine. He cannot have relied upon the personal responsibility of Price, who was a person of no responsibility whatever. Mr. Tasker must have considered himself secured on the property of which the nominal ownership was in Price, and, to the extent of such security, interested in the business conducted in Price's name, by the bankrupt. The question, what was the extent of this beneficial interest of Mr. Tasker, is answered by his own acts, and those of the bankrupt, and of Price, and by the examinations of every one of these three persons under the present proceedings. The only purpose of the security was repayment of the debt. Therefore, when it was repaid out of the proceeds of the business, Mr. Tasker's interest wholly ceased.

Let us next consider more particularly the relations of Price. Had he any such present or ulterior beneficial interest as prevented the revesting of the bankrupt's ownership when Tasker's beneficial interest ceased? Had Price any independent interest whatever of his own? I think not. The question is not whether he might have had such an interest if matters had been so arranged with Mr. Tasker, but whether they were in fact so arranged. Moreover, it is altogether unimportant whether Price had a right to retain the legal title as a security till he should be indemnified against outstanding liabilities incurred by him in the course of the business. On his transfer to Miss Walker, in 1859, he received her bond conditioned for his indemnification in this respect. There is no reason to believe that the condition of this bond was ever broken. Nor is this a material inquiry. His previous right of retaining the legal title until thus indemnified was, in equity, not a proprietary interest, but, at most, a mere lien, or a right analogous to a lien.

Price, in truth, was, from first to last, a mere underling. If he wore, for a season or two, his employer's outer garments, he was dressed in them to play a part under his employer's orders; and, when it had been played out, was disrobed, and put back to his subordinate relation. Afterwards for bad habits or misbehaviour, he was turned out of doors by the same employer. This dismissal of Price from the establishment occurred some time after his bill of sale of 1859 to Miss Walker. At the date of that bill of sale there was of record a judgment for $6,282.69 at her suit against the bankrupt. The bill of sale states that this judgment was received by Price from her as a part of the consideration for his transfer to her. The instrument was thus in effect a transfer of this judgment by her to Price. Miss Walker's relation of creditor on the judgment was therefore ended. This explains the fact that she gave to the bankrupt her note for a debt of $92, afterwards contracted, and also explains the omission of the judgment for $6,282.69 from the inventory of her estate. Now, her transfer of this judgment to Price must have operated in

one or the other of two ways. It either substituted Price for her, making him the equitable plaintiff in the judgment, or else operated as an equitable release or extinguishment of the judgment. If Price had the beneficial ownership of what was thus exchanged for the judgment, there must have been such a mutuality of consideration as to make him the equitable judgment creditor. If, on the contrary, the beneficial ownership of the property which Price transferred to Miss Walker was in the bankrupt, the effect of the instrument was to vest the judgment in the bankrupt himself, and thus release or extinguish it. Of these two alternatives, the latter must be the truth, because, both Price and the bankrupt, in their examinations, depose that Price received no consideration except the bond of indemnity against outstanding liabilities. There is not the slightest probability that Price, if he had really been the bankrupt's creditor on a judgment for $6,282.69 would have suffered himself to be turned summarily out of the establishment, and never afterwards have asserted any adversary right as a creditor. The improbability is increased when we consider the terms and mode of the settlement with Messrs. Middleton, judgment creditors, to an amount comparatively small.

The conclusion is that Price, though once the nominal proprietor, never was a beneficial proprietor, in his own right, of what he transferred to Miss Walker. If so, Price could not, without the bankrupt's participation, transfer any beneficial interest to her. But the transfer may be considered as having been made with the bankrupt's participation; her letter of attorney to the bankrupt, and his acceptance of it, gave to Price's transfer to her the same effect as if she had received the transfer directly from the bankrupt. Here the question arises, what was the title thus acquired by her? It was undoubtedly a valid one, as between her and the bankrupt himself. But the question is, was it a valid title as against creditors proceeding adversarily. Whatever adverse rights of creditors might, before the proceedings in bankruptcy, have been enforceable under executions, are now concentrated in the assignee in bankruptcy. As between him and any party deriving title under Miss Walker, there are two objections to her title, either of them fatal to it. It will be remembered that I am at present considering, not her title under Mr. Lang to the real estate, but only her title to the leasehold and other personal property.

One objection is that no sufficient consideration passed from her to support the transfer to her as against creditors proceeding adversarily. It is not pretended that anything beyond the consideration expressed in the transfer made by Price passed from her. It fully appears that she invested no capital of her own in the business, and, indeed, that she had none to invest. The twofold consideration expressed was the judgment against the bankrupt and the bond of indemnity. That they constituted a valid consideration, as between the bankrupt and herself, is not a sufficient answer to the objection. Though the judgment were upon a voluntary bond, and no liability but a contingent one was ever incurred on the bond of indemnity, either of them was a sufficient consideration as between the parties. But very different is the definition of a consideration which suffices to sustain a debtor's transfer as against his creditors. As to the bond of indemnity, it was, in form, the assumption of a mere contingent liability. Independently of the form of the instrument, its manifest purpose was merely to insure payment of the debts of the establishment out of the future avails of its business. Then, as to the judgment, it is a rule of equity that, where an alleged purchaser asserts a right adverse to that of creditors, the burden of proof is on him to show that the consideration was for actual value. Recitals that it was for value in deeds, or other writings under which he claims, are not alone sufficient for the purpose. See 1 Atk. 62, and [Boone v. Chiles] 10 Pet. [35 U. S.] 211, 212. If this were not the rule, the consanguinity of the parties to this judgment, and the proofs tending to show that the aunt was not possessed of means of her own, conduce to the conclusion that the bond on which the judgment was confessed was not for a full and valuable consideration. At all events, it must be presumed to have been a voluntary bond, unless the contrary were very clearly proved. But in the present case, if a sufficient consideration were proved, the second objection would prove fatal. The objection is the continuance of the bankrupt in possession after the revesting in him of his former beneficial ownership through the discharge of Tasker's demands against himself and against Price. The publicity attributed to an involuntary transfer of personal property, under an execution fairly levied, prevents the application of the general rule that continuance of possession by a debtor, after a transfer of his property, is a badge of such fraud as renders the transfer voidable by his creditors, though it was a transfer for valuable consideration. The present case was within the exception, so long as any part of Tasker's demands were unpaid, but ceased to be within it so soon as they were fully discharged. Upon their discharge the general rule became applicable. It is unimportant whether they were finally discharged before the time of the transfer to Miss Walker. Price was to have retained the nominal ownership for the security of Tasker until their final discharge, and, as I understand the evidence, did not make the transfer to her until they were paid. They must, at all events, have been finally discharged very soon after it, if not before.

But if, when the transfer was made, a balance were still due Tasker, the effect was the same whenever afterwards the final discharge occurred.

If, after this had occurred, inquiry were made as to the true character of the possession, and a true answer were given, the inquirer must have learned that possession under the sheriff's sale of 1857 had ceased, and that the possession retained was under another title derived through a transfer which was neither public nor involuntary. The possession of the former owner, though he was constituted the agent of his aunt, who had received the transfer, was therefore a badge of fraud. Her title was void as against creditors, and under St. 5 Eliz., as expounded in Twyne's Case [3 Coke, 80], and many decisions in Pennsylvania, was thus void on the ground of constructive fraud, though no actual fraud were imputable, and though a valuable consideration had passed from her.

I have thus far said nothing as to Beck, the alleged purchaser from her administrator of most of the personal effects. This alleged purchaser has not been examined, nor has Snyder, who had, probably through the bankrupt, obtained assignments of the debts of her creditors, and to whom the dividends of her estate were awarded. We do not know whether money was actually paid by Beck, or actually received by Snyder. It is probable that no money passed, and that there was a mere exchange of receipts; but this, however it may have been, is unimportant. We know that the sale effected no change of actual possession or of apparent control. The control and possession have continued in the bankrupt as before.

Lastly, as to the real estate which was the subject of the arrangement made by the bankrupt, in Miss Walker's name, with Mr. Lang, who, under this arrangement, bought in this part of the property at the sale by the sheriff under his execution, it is quite certain that the moneys afterwards from time to time paid, in Miss Walker's name, to him on account of the agreement to purchase, were derived exclusively from receipts of the business of the bankrupt carried on as above in her name. His examination shows that he supposed the right of completing this purchase to have been forfeited by default in the payment of the monthly instalments of the price agreed upon, which were, in the writings, designated as "rent." This notion, that a forfeiture had resulted from such default, was a very natural mistake of a person ignorant of the principles and rules of equitable jurisprudence. The consequence of the mistake has, however, been a disclosure which would remove all doubt, if there had otherwise been any, that the interest under the agreement of purchase, though nominally his aunt's, was controlled by him, and beneficially his own, and that the right of redemption which he supposed forfeited was in himself. Let us now recur to this disclosure. The taxes were always assessed on this property in his name, and had been previously paid by him. Payment of those of the year before his bankruptcy having been demanded, we have his own statement of his answer to the demand, with his own explanation. He says: "There was an agreement that this property should revert to my aunt. This agreement had been broken, as you know. In the event of getting through the bankrupt court, and being able to make an agreement with Mr. Lang similar to that made with my aunt, I, of course, would pay them." I need not repeat that it was a mistake thus to suppose a new agreement with Mr. Lang necessary. I have already remarked that, on the contrary, the right of redemption, or of completing the purchase from him, which the bankrupt, through mistake, supposed to have been forfeited, still existed. The bankrupt's own statements, when this mistake of law is corrected, show that, in fact, as this right existed, the control of it was in himself. He cannot then have had such control of it as agent of his aunt, because her death in May, 1865, had revoked his previous nominal agency for her; nor had he the control as an agent of her administrator. The nominal agency for the administrator had ceased in May, 1866. The control of the right was thus in the bankrupt for the benefit of no other person than himself; in other words, it was his own. He continued thus to have it until the commencement of the proceedings in bankruptcy. If so, the equitable ownership subject to the payment of the balance due on account of the purchase money, and the right of completing the purchase, must be now vested in the assignee in bankruptcy, who, upon payment of such balance to Mr. Lang, with interest, may require a conveyance by that gentleman.

There is nothing to warrant a belief that any independent capital of the aunt was ever invested in the business conducted in her name by the bankrupt. The accounts of the administration of her estate show that for the year ending in May, 1866, after many deductions, including a so-called salary of himself, there was a profit, small, it is true, but still a profit, of the business of the establishment in Third street. There is evidence that the previous business, while carried on there in her name, had been profitable, except so far as embarrassments may have been incurred in it through the payments to Mr. Tasker, and afterwards to Mr. Lang, and possibly others, occasioned by pressure of the bankrupt's former creditors. We have seen that such a pressure by Messrs. Middleton may have either absorbed a part of the accruing profits, or involved her in a responsibility which the profits did not suffice to meet.

There can be no fair suggestion of supposed equities in favor of her estate against

the interests of the general body of the bankrupt's creditors, or fair suggestion of considerations of supposed hardship to her creditors. The hardship seems to be rather on the other side. If she chose to suffer herself to be involved in debts incurred in carrying on his business in order to cover it against his former creditors, those former creditors ought not, for this reason, to be postponed in the distribution of his funds to other creditors whose debts may have been afterwards contracted in her name. To what extent, if to any, her liabilities to the creditors to whom she died indebted were thus contracted, is, upon the proofs before us, altogether conjectural. On the distribution by the orphans' court of the estate called hers, these creditors have, since her death, received nearly $2,000 from proceeds of personal property of the establishment, in which, as I have said, no capital of her own appears to have been invested, and which, in truth, was not hers, but the bankrupt's. Upon a distribution of the same fund by this court in bankruptcy, the same creditors would not thus have received the whole of it. The most favorable view for them would have been to consider their demands against her as equitable debts of the bankrupt. Such of these debts as might appear to have been truly contracted in the course of the business conducted by him in her name, for his own benefit, would perhaps have been so considered, and, if so, would have been entitled to a dividend; but in such a dividend his other creditors would participate equally. So far as the parties to whom distribution was awarded by the orphans' court may have been distinctively her own creditors, they would have been excluded by this court from even a dividend. All such considerations of hardship, or of supposed equities and counter equities, are, however, out of place. They could not be entertained without a perversion of those principles of the law of debtor and creditor of which the application has been shown. The assignee does not appear to have as yet taken possession of the property, though it is not easy to surmise by whom, or for whom, possession, if demanded, could have been withheld from him. It certainly could not have been withheld by the bankrupt for himself, or for Price, or for the representatives of his aunt, nor does the assignee, though he seems to consider the possession withheld from him, appear to have instituted proceedings in equity, or at law, to recover it. Of this apparent remissness there may possibly be some explanation in the want of funds, and the unwillingness of parties interested to supply them. If so, whether the explanation suffices to excuse the assignee or not, the danger incurred by the bankrupt is increased, because the twenty-ninth section of the act of congress prohibits his discharge if he has been guilty of any fraud or negligence in the delivery to the assignee of property which ought to be available for the benefit of the creditors.

Heretofore the attitude of this bankrupt has, to all appearance, been that of hostility to his acknowledged creditors,—a hostility always unbecoming a debtor, but most especially unbecoming where, in asking a discharge, he alleges that he has absolutely no assets. Perhaps, however, this may not have been his true attitude. The appearance of it may possibly have been unavoidable from the course of the proceedings. It is to be hoped that he will, without further delay, promote the just interests of his creditors by placing the assignee in possession, and facilitating a profitable disposal by him of the property, including the good will, etc., of the business, and by accounting to him fairly for any money, etc., on hand, and credits outstanding at the commencement of the proceedings, and for all subsequent profits. If he shall do so, the question to be decided, in a future stage of the proceedings, may be whether all claim to a discharge has, for the causes of objection heretofore specified, been already forfeited so absolutely that a discharge cannot hereafter be granted.

As at present advised, if I were finally to decide the case upon the present evidence, I would refuse a discharge; but whether it is too late for him to retrieve himself by adopting the course which I have indicated is a point which may, perhaps, be reserved. I think that the proceedings have not reached the stage in which his creditors can be required to abide by the objections to his discharge which have been specified. The reason is that there had not been a sufficient examination or disclosure before the time appointed for a hearing in court upon his application for a discharge. Unless the counsel of the creditors desire to be heard on the fourth point, the case will be recommitted.

Neither the assignee nor any creditor urging an immediate final decision, this point was not argued; and the case was recommitted to the register.

Case No. 8,478.

In re LONG.

[9 N. Y. Leg. Obs. 73; 3 Am. Law J. (U. S.) 294; 8 Leg. Int. 10.]

District Court, S. D. New York. Jan. 8, 1851.

FUGITIVE SLAVE LAW—CONSTITUTIONALITY.

1. The act of 16th September, 1850 [9 Stat. 462], is constitutional, valid, and binding.

2. Examination of evidence as to identity of fugitive.

In the matter of Henry Long, claimed as a fugitive from service.

J. L. White and John Jay, for Long.

Geo. Wood, N. M. Western, and the United States District Attorney, for claimant.

JUDSON, District Judge. This proceeding has been brought into court in pursuance of

the act of congress of February 12, 1793 [1 Stat. 302], and an amendment of Sept. 16, 1850 [9 Stat. 462]. J. S. Smith, the claimant, is a resident of Virginia, and claims the restoration of Henry as a fugitive from his service. To reclaim to that service he has, under a valid power of attorney, caused the arrest of Henry by his authorized agent and attorney. An affidavit having been filed in court, a warrant issued, and the arrest made, Henry is now in custody of the marshal of this district, awaiting the determination of this matter. No questions have been raised in regard to the form or validity of the papers in the case. The claimant has produced his evidence in support of that claim; and the alleged fugitive, by his counsel, has produced such evidence as the counsel deemed proper, all of which has been heard and considered. Counsel, learned in the law, have discussed with great ability the questions involved in the case. And now it devolves on the court to decide these questions according to law and evidence. However important a cause may be to the public or an individual, no other rule can ever be adopted in the administration of justice. If evidence is to be weighed that must be done in even scales. If the law is to be interpreted, there must be no departure from the long established rules belonging to the code of the civilized world.

Before stating the question now to be determined, it may be proper to remark that, in the argument of the case, the learned counsel for the defence, who last addressed the court, did, with great frankness and candor, admit that the law of congress of Sept. 16, 1850, by virtue of which this case is now proceeding in the circuit court of the United States, is in no manner inconsistent with the provisions of the constitution. Or in other words, so far as this court and this cause are concerned, this law is constitutional, valid and binding. To this admission it may well be added that every judge of every court in the United States, having taken upon himself the oath to support the constitution, can by no possibility fail in the performance of that duty whenever a case falling within the law, supported by competent proof, is brought before him. To do otherwise would be a violation of known duty and a prostration of all laws, never to be required of any judge by a single individual of that community in which he may be called to act. These considerations and this admission supersede all necessity of discussing either the constitutionality of the law or its power over this court.

What remains then to be done in the present case? It is simply to inquire: 1st. Does Henry Long by the laws of Virginia owe service and labor to John T. Smith, the claimant? And, 2d, is Henry Long a fugitive from that service within the meaning and intent of the second section of the 4th article of the constitution of the United States, and within the meaning of the act of congress above mentioned. These questions of fact comprehend all that the court has to determine. The case is therefore brought down to a very narrow point; the common sense construction and weight of evidence may be alluded to as furnishing a guide for the mind. The means of knowledge, the integrity and standing of witnesses, the probability of the story related, the liability to mistake as to time, facts or circumstances connected with the case, these are all to be taken into the account in giving effect to the terminating of the case. To return to the first question, does the person arrested, according to the laws of Virginia, owe service and labor to the claimant? By the laws of Virginia slavery is tolerated. The constitution of the United States yields its sanction to that law, and since the organization of the government, the supreme court of the United States, in its numerous decisions, have upheld the right; therefore, no subordinate tribunals can now call it in question. In point of fact, then, how stands the case and the proof in regard to the person claimed? Dr. Wade, a citizen of Virginia, an intelligent witness, speaks of his own knowledge to this court, bearing testimony that Henry was born in his own immediate neighborhood, in the town of Christianburgh, Virginia; that his mother was a slave, owned by Mr. Anderson; that they were brought up together as boys and men; that he has always known him, and seen him in service as a slave; that this claimant married the daughter of Mr. Anderson; that after the death of Mr. Anderson, the mother and son passed into the hands of this claimant; and this witness adds, that he has now met Henry in New York, and in conversation with him, and in seeing him here in court, he knows him to be the same person, and positively swears to his identity as he would to his own brother. Dr. Wm. Parker, another citizen of Virginia, testifies that heretofore he has been in the habit of visiting John T. Smith, his brother-in-law, in Russell county, Virginia, and saw there in service as a slave the person here arrested; that at the instance and request of Smith, and as his agent, this witness had the letting of Henry in Richmond, Va., to the house of Haskins & Libby, as the slave of this claimant, and collected the wages, transmitting the same to his brother-in-law, Smith; that while so in service in Richmond, Henry was sick, more than once; and that he was his physician, attending him while sick, and sat up with him through the night; that at the request of Henry, he wrote to Henry's wife and master in Russell county. Two witnesses, masters of vessels sailing between the ports of New York and Richmond, have also testified that they have frequently seen this man at work in the store of Haskins & Libby during the time stated by Dr. Parker; that since that time they have seen him in this city, and seeing him here in court, identify him as the same individual.

The second question is, has Henry Long es-

caped from the service of John T. Smith? Dr. Parker testified that in Dec., 1848, Henry left Richmond; that he advertised him; that with diligent inquiry he could not be found there; and that since that time he has been found in New York. On the part of the claimant, it is insisted that this evidence should be deemed satisfactory proof, competent in law. On the other hand, the counsel for defence have introduced four witnesses, who testify that they saw Henry in the city of New York in November and December, 1847, January 24, 1848, and from that time down to the present. It is claimed on the part of the defence, that the alleged fugitive was not in Richmond at the time sworn to by Dr. Parker and the two ship masters. There is no necessary contradiction between the witnesses thus introduced. They only differ as to time. There is no doubt that these four witnesses have seen Henry Long in N. York, but as to the precise time they may be mistaken, and have substituted the year 1848 for 1849. For instance, the paper which bears date January 24, 1848, was undoubtedly written in 1849, for the witness declares that her father-in-law sailed for California in a particular ship which sailed in January, 1848, as she swears; when, in point of fact, the ship sailed in January, 1849. Then, as to the testimony of John Butler, he testifies that he saw Henry frequently; that Henry was a constant driver of a carriage from a particular street named by him; and that he often met him at a blacksmith's shop in Centre street. One of these witnesses testifies that Henry was a waiter at an hotel in New York; another one that he saw Henry with his waiter's garb and dress on board the Vanderbilt, all in the year 1848. If these things actually occurred in 1848, it would be an easy matter for Henry to inform his counsel where lived the owner of this coach he drove so long, whose was the hotel in which he waited, and who was the captain of the Vanderbilt in 1848, for whom he served; they would all have been here. This omission goes far to show that there may have been a mistake as to the precise time when Henry was first seen in New York, and an honest mistake too.

There is another remarkable omission which characterizes the defence. Are there two Henry Longs? I have heard of no such pretence, and if there be but one Henry Long, the question naturally presents itself here, is this man now present the Henry Long of Virginia, or is he Henry Long of New York? And if this latter, why are not his parents, his brothers, his sisters, his neighbors, his boyhood acquaintances, here to identify him, instead of John Butler? They would all rush to the court room, and tell us that this man is the Henry Long of New York, and a free man. This aspect of the case is one of singular importance.

These considerations lead the court to the inevitable conclusion that there is no real contradiction arising out of the evidence of the case, and that the two great questions of fact involved in the controversy are maintained upon satisfactory proofs competent in law. The consequence is that a certificate in conformity to the act of congress be now issued by the clerk of this court, for the surrender of Henry Long, as a fugitive from service and labor.

Case No. 8,479.

LONG v. CONNER.

[17 N. B. R. 540.] [1]

Circuit Court, S. D. New York. Dec. 5, 1877.[2]

BANKRUPTCY—ATTACHMENT BY SHERIFF—NOTICE OF BANKRUPTCY—LIABILITY TO ASSIGNEE—VALUE OF PROPERTY—JUDGMENT AGAINST ATTACHING CREDITOR.

1. A creditor began suit in the supreme court of New York against one Spaulding, and obtained from the court a warrant of attachment against the property of said Spaulding, as a non-resident, under which warrant the sheriff levied upon certain goods of Spaulding in New York; three days after the levy, an involuntary petition in bankruptcy was filed against Spaulding, in Massachusetts; thereafter, but before any adjudication, and before the election of any assignee in the bankruptcy proceedings, and before the sheriff had notice of such proceedings, an order for the sale of the goods, as perishable, was obtained from the state court, and the sheriff sold the goods under the said order; *Held*, that the sheriff was guilty of conversion in selling the goods, and was liable in damages to the assignee in bankruptcy subsequently appointed.

2. Where goods are held by a sheriff under an attachment under mesne process of less than four months' standing at the time of the filing of a petition in bankruptcy, the title of the assignee in bankruptcy subsequently appointed relates to the date of the filing of the petition, and dissolves the attachment and invalidates all proceedings under it subsequent to the filing of the petition, even though such proceedings be taken without notice of the bankruptcy.

3. An order by the state court, in the attachment suit, for the sale of the goods attached as perishable, is no protection to the sheriff, when such order is made after the filing of the petition in bankruptcy, though before adjudication.

4. The sheriff is liable to the assignee in bankruptcy for the true market value of the property on the day of the sale, and not merely for the amount realized at the sale.

5. In order to determine what was the market value, the jury can consider fair sales made at or about the time, or within a reasonable time subsequently.

6. The amount received at the sheriff's sale furnishes some evidence of value; but the jury are to consider that this may have been a forced sale; where no great length of time or great amount of advertising or notice to the general public was given, the jury are to determine whether this was a fair criterion of the actual market value.

7. The market value of the property, rather than any injury over and above the market value which the assignee or the original owner might have suffered, is the measure of damages.

8. The fact that the assignee in bankruptcy has already obtained judgment against the attachment creditor in a suit for damages for the same conversion, and has issued execution on the judgment, is no defense to a suit against the sheriff;

[1] [Reprinted by permission.]

[2] [Reversed in 104 U. S. 228.]

the judgment being still unsatisfied; an unsatisfied judgment against one of two joint tort feasors is no bar to an action against the other.

This was an action brought by William H. Long, as assignee in bankruptcy of Benjamin H. Spaulding, against William C. Conner, sheriff of the city and county of New York, for damages for the conversion of certain straw hats sold by the sheriff as perishable, under an order of the supreme court of the state of New York, in an attachment suit. The plaintiff had already recovered judgment against one Dickerson, the plaintiff in the attachment suit, for damages for the conversion of this property by reason of the sale in question; but the judgment was still unsatisfied.

Daniel H. Chamberlain and William B. Hornblower, of Chamberlain, Carter & Eaton, for plaintiff.

Robert S. Green and Henry W. Bookstaver, of Vanderpoel, Green & Cuming, for defendant.

SHIPMAN, District Judge (charging jury). The discussions of the learned counsel during the progress of the trial, and the interlocutory rulings of the court, must have made you familiar with the views of the law which the court entertains applicable to this case, and, therefore, it will not be necessary for me to detain you at any considerable length with a discussion of those views. It appears, from the uncontradicted evidence in this case, that on the 20th day of July, 1875, the defendant, who was then sheriff of the city and county of New York, attached, by a valid attachment, the goods which are described in the complaint, at the suit of one Mr. Dickerson, the goods at that time being the property of the defendant in that suit, one Mr. Spaulding. It further appears that on the 23d day of July, 1875, three days after the attachment, a petition in bankruptcy, praying for the adjudication of Mr. Spaulding as a bankrupt, was filed in the district court of the United States for the district of Massachusetts, within which district Mr. Spaulding was then a resident and a citizen; and that early in September, 1875, Mr. Spaulding was duly adjudicated a bankrupt by a decree of the district court for the district of Massachusetts; that subsequently an assignee was appointed, Mr. Long, who is the plaintiff in this case. And that the proper officer executed, on the 21st of September, 1875, a deed to Mr. Long, the assignee, of all the estate and rights of property of the bankrupt, in the usual form provided by the rules of the supreme court, and in pursuance of the act of congress [of 1867 (14 Stat. 517)], for that purpose. It further appears that on or about the 1st day of August, 1875, in pursuance of an order of sale issued by a justice of the supreme court of the state of New York, directing the sale of this property as perishable property, the sheriff sold these goods at public auction for the sum of one thousand one hundred and fifty-six dollars and fifty cents.

I am of opinion, gentlemen, that under and by virtue of the statutes of the United States, the sheriff was guilty of a conversion of this property on the 1st day of August, 1875, when he sold them at public sale, and that he is liable to pay to the plaintiff the true market value of the property on that date, with interest thereon from that day to the present time. And, furthermore, that the fact that the plaintiff has obtained an unsatisfied judgment against the plaintiff in the original suit is not a bar to his action against the sheriff.

The only question, then, for you to determine is, what was the market value of this quantity of straw hats on the 1st day of August, 1875? And for the purpose of ascertaining what was the market value, you can take into consideration fair sales made at or about that time, or within a reasonable time subsequently. You can take into consideration the amount that was received at the sheriff's sale. That is not conclusive, but it furnishes you some evidence of the value; and, upon the other hand, you are to consider that this may have been a sudden sale, or, as it is called, a forced sale, and that no great length of time or great amount of advertising or notice to the general public was given; that it was a forced sale, and therefore, you are to determine whether that was a fair criterion of the actual market value of the property at the time of the conversion. Inasmuch as the goods had been consigned previous to this date by the manufacturer in Massachusetts to the factor and consignee in New York, for sale, I am of the opinion that you are not to regard the injury to the plaintiff or to the owner arising from the detention and the subsequent sale, but that you are to look more particularly at the value of the property, and ascertain, as the measure of damages, the market value of the property, rather than the injury over and above the actual market value which the plaintiff or which the original owner might have suffered. In other words, to sum it up briefly, you are to find the true real market value of this property on or about the 1st day of August, 1875, and return the verdict for that sum with interest from that date to the present time, and specify in your verdict how much is the principal sum and how much is the interest.

Verdict of the Jury: We find for the plaintiff. Damages, principal, six thousand and seventy-seven dollars; interest, nine hundred and ninety-eight dollars and forty-eight cents; total amount, seven thousand and seventy-five dollars and forty-eight cents.

[Reversed in 104 U. S. 228. See, also, Case No. 8,480.]

Case No. 8,480.

LONG v. DICKERSON.

[15 Blatchf. 459; 7 Reporter, 172; 19 Alb. Law J. 136.] [1]

Circuit Court, S. D. New York. Jan. 14, 1879.

BANKRUPTCY—DISCHARGE—BANKRUPT IN CUSTODY—PROVABLE DEBT—SURETY ON BAIL BOND.

1. The body of D. was taken in execution, and he gave a bond with sureties for the liberties of the jail. Subsequently, he was adjudged a bankrupt and received a discharge from all debts provable against him on March 30, 1878. There had been no breach of the bond at the time the bankruptcy proceedings were commenced. D. then applied to the court for an order discharging him from custody, and discharging the sureties from liability on the bond: *Held*, that, under section 5067 of the Revised Statutes of the United States, the judgment on which the execution was issued was a provable debt, although the body of D. had been taken in execution, and was, therefore, discharged by the discharge.

2. The taking of the body in execution did not give a lien or security which could not be affected by the discharge.

3. The effect of the discharge was to release the judgment, and also the obligation of the sureties on the bond.

[This was a suit by William H. Long, the assignee of Benjamin H. Spaulding, against Alfred J. Dickerson. The case is now heard upon petition of defendant.]

Chamberlain, Carter & Eaton, for plaintiff.

Vanderpoel, Green & Cuming, for defendant.

BLATCHFORD, Circuit Judge. On July 20th, 1875, the defendant caused a warrant of attachment to be issued out of the supreme court of New York, against the property of Benjamin H. Spaulding, then a resident of Massachusetts. The warrant was levied by the sheriff of the city and county of New York, on property belonging to Spaulding. Afterwards, on August 1st, 1875, said property was sold by the sheriff, as perishable, by order of the court. Spaulding was adjudged a bankrupt by the district court of the United States for the district of Massachusetts, in September, 1875, on a petition in bankruptcy filed July 23d, 1875, and the plaintiff was appointed his assignee. In February, 1876, the plaintiff brought this suit, claiming that the levy and sale under said attachment and order constituted a conversion of the property by the defendant.[2] A judgment in favor of the plaintiff was rendered in this suit, against the defendant, November 3d, 1877, for $7,701. An execution on such judgment was issued January 30th, 1878, against the person of the defendant, by virtue of which the defendant was arrested on that day by the marshal of this district. On the same day, in order to be admitted to the liberties of the jail of the county of New York, the defendant, with two sureties, executed to said marshal a bond for said liberties, in double the amount of said judgment. On the 6th of April, 1878, the defendant was duly adjudicated a bankrupt by the district court of the United States for this district, and such proceedings were subsequently had in said district court, that, on the 26th of July, 1878, a certificate of discharge was granted to the defendant, whereby he was forever discharged from all debts and claims which were provable against his estate on the 30th of March, 1878, on which day the petition for adjudication was filed against him, except such debts as are by law excepted from the operation of such a discharge. The defendant now applies to this court for an order discharging him from custody under the execution against his person, and discharging the sureties on said bond from all liability thereon, and directing said bond to be delivered up and cancelled.

The defendant contends, that the debt, either as a judgment or as a claim for conversion, was provable in his bankruptcy proceedings; that, therefore, such debt is discharged by the discharge in bankruptcy, it not being one of the classes of debts which are not affected by a discharge; that no judgment remains as a basis for the execution; and that, consequently, the relief asked should be granted.

The plaintiff contends, that, during the whole course of the bankruptcy proceedings, the body of the defendant was in the custody of the law, under the execution, and the remedies of the plaintiff on the judgment were suspended and temporarily extinguished, so that he could not have proved the debt in bankruptcy; that, as the debt could not be proved, it was not discharged; and that the vested right which the plaintiff obtained through the execution and arrest, and the giving of the bond for the limits, cannot be affected by the discharge.

Under the bankruptcy act of April 4, 1800 (2 Stat. 19), the case of Champion v. Noyes, 2 Mass. 481, was decided. It was a scire facias, on a bail bond, against the surety. The bail was given in a civil action at common law, the effect of the condition of the bail bond being, that the defendant should satisfy the plaintiff's judgment, or surrender his body to be taken in execution, or that the bail should pay the debt. The surety pleaded in bar, that the principal was discharged in bankruptcy after the making of the bond; that the plaintiff's demand against the principal might have been proved in bankruptcy; and that the plaintiff obtained judgment before the certificate of discharge was allowed. The plea was held to be a good plea in bar. The court referred to the provision of section 34 of the act, to the effect, that no discharge of the bankrupt should extend to a partner, or to one held or jointly bound with the bankrupt, and said, that the bail, not being a partner with the bankrupt,

[1] [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 7 Reporter, 172, and 19 Alb. Law J. 136, contain only partial reports.]

[2] [For action against sheriff, see Case No. 8,479.]

nor jointly held or bound with him for the same debt, was not within the restricting clause of section 34. The court remarked, that the principal was discharged from the judgment, and that, were he in execution, it would be the duty of the court to discharge him from prison. The court further said: "The plaintiff having no longer any remedy against the principal, it would be unreasonable to permit him to proceed and make the bail absolutely holden to satisfy his judgment, which is now legally discharged. If the bail were already fixed, the plaintiff might justly consider them as his debtors on their own contract, and, the certificate having no retrospective effect as to the bail, they could derive no relief from it." It was shown that the bail had not become fixed.

There are some cases decided under the bankruptcy act of August 19, 1841 (5 Stat. 440). In Goodwin v. Stark, 15 N. H. 218, one Gillis, being under arrest on an execution on a judgment, executed, with the defendant and another surety, a bond to the plaintiff, conditioned to take the poor debtor's oath, or surrender himself, within one year. Before the expiration of the year, Gillis was discharged in bankruptcy, on a petition filed after the date of the bond. He did not take the poor debtor's oath, or surrender himself, within the year. The court held, that the sureties could not avail themselves of the discharge, in bar of their obligation. It observed, that it might admit of question whether Gillis himself was discharged by his certificate in bankruptcy from the obligation of the bond, the bond itself not being a debt, but an obligation with a penalty, for the performance of one of two acts; that it was not necessary, however, to decide whether the plaintiff had a right to require a performance of the condition of the bond, as against Gillis, after he had procured his discharge and certificate; that it was sufficient, for the purposes of the case, that the sureties could not avail themselves of the discharge, in bar of their obligation; that bail could not plead the bankruptcy and discharge of their principal, in their own discharge; that, that being so, a fortiori, the sureties in a bond like that under consideration could not be discharged by the discharge in bankruptcy of their principal, where a judgment had been rendered, the debtor arrested upon the execution, and security taken, not merely for his appearance to answer to an action, but that he should take the poor debtor's oath, or surrender himself at the jail at a certain time; that the defendant was not a surety for the debt within the provision of section 4 of the act, that no discharge of any bankrupt "shall release or discharge any person who may be liable for the same debt, as a partner, joint contractor, indorser, surety or otherwise, for or with the bankrupt," and the court was not entirely satisfied that it could have stayed proceedings in the suit, on an application for that purpose; and that how far the defendant was entitled to stand in a better situation than a surety for the debt need not then be considered.

The case of Dyer v. Cleaveland, 18 Vt. 241, was under the act of 1841. One Cleaveland was arrested December 5th, 1842, on an execution on a judgment, and on the same day he, with sureties, gave a bond, with a condition specifying that he was a prisoner for the sum named in the execution, and that he should not depart from the liberties of the prison, unless lawfully discharged. All the obligors were sued on the bond for a breach alleged to have occurred on the 2d of October, 1843. The defendants pleaded in bar, that Cleaveland was discharged in bankruptcy October 7th, 1843, on a petition filed December 14th, 1842. The court held the plea bad. The view of the court was, that, until a breach of the bond, there was no provable debt arising thereon; that the bond, though forfeited before the discharge was granted, was not forfeited before the decree of bankruptcy, which was made February 9th, 1843; and that, therefore, the bond was not a provable debt. The court say: "So long as Cleaveland remained upon the liberties of the jail yard, without departing therefrom, there was no debt or claim, arising from or out of the bond, which was provable under the bankrupt act, either against Cleaveland or his bail."

The case, also, of Kirby v. Garrison, 21 N. J. Law, 179, was under the act of 1841. The defendant was surety on a limit bond, given March 1st, 1841, conditioned that one De Witt should not depart from the prison limits. A breach of the bond was alleged. The defendant pleaded the discharge of De Witt in bankruptcy subsequent to the obtaining of the plaintiff's judgment; and also, that the breach did not occur until after such discharge. The pleas were demurred to. The court say: "De Witt was in custody in order to enforce the payment of the judgment obtained against him. The bond was conditioned to keep within the prison limits of the county, and its object was to retain him until the judgment should be satisfied, or until he should be discharged by due course of law. To coerce him to pay off and satisfy this judgment debt, was, then, the substance and intent of this bond. While so held, he became a certified bankrupt, and the judgment debt was discharged, except so far as any lien may have been saved under the proviso in the bankrupt law. * * * The object of the bond no longer existed when the debt had been discharged. If the debt was discharged and the judgment satisfied, to enforce the payment of which the bankrupt had been previously held in custody, for what purpose shall the bond be retained? * * * We are, therefore, of the opinion, that, if the pleas do not show a strict performance, in the words of the condition, yet that they

show a release by act of law, and that the discharge as a bankrupt may be set up as a bar to an action on the bond."

The case of Claflin v. Cogan, 48 N. H. 411, arose under the present bankruptcy act. A bond was given, with sureties, by one Cogan, in March, 1866, conditioned that Cogan should take the poor debtor's oath within one year, or surrender himself at the jail the next day after the expiration of the year. The bond became absolute, by a breach of its condition, in March, 1867. In March, 1868, Cogan was discharged in bankruptcy, in proceedings commenced November 14th, 1867. In a suit on the bond, the sureties pleaded the discharge. The plea was demurred to. The court held the plea bad, on the ground that the discharge in bankruptcy of the debtor after the bond had become absolute by breach of condition, could not avail the sureties as a defence. The express provision of section 33 of the bankruptcy act of March 2, 1867 (14 Stat. 533), now section 5118 of the Revised Statutes, was cited, that "no discharge shall release, discharge or affect any person liable for the same debt, for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise."

It is contended, for the plaintiff, that, so long as he had the body of his debtor in execution, he could not prove his judgment in bankruptcy. This does not appear to be a correct proposition. The judgment was, within the terms of section 5067 of the Revised Statutes, a debt "due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy," and, therefore, provable against the estate of the bankrupt. There is no provision of the statute, which declares that the holding of the body of the bankrupt in execution, when the bankruptcy proceedings are commenced, shall cause the judgment to be not due and payable, or to be not provable. Under section 5075, when the creditor has a lien on property of the bankrupt, his right to prove his debt is restricted; but the very creation of this restriction strongly implies that no security on the body of the bankrupt is to restrict the provability of a judgment. It may very well be, that, while the plaintiff held the body of the defendant in execution, he could not, aside from the bankruptcy statute, pursue further remedies against the property of the bankrupt; and that the taking of the body in execution would suspend the lien of the judgment on land, and postpone its priority of lien to liens created or rights acquired by others during the imprisonment. Jackson v. Benedict, 13 Johns. 533. But, under the express provisions of the statute, the judgment was and remained a provable debt, notwithstanding the taking of the body in execution. If provable, it was discharged, except so far as it might be necessary to keep it alive to secure rights which had become fixed and vested when the bankruptcy proceedings were commenced.

It is further contended, for the plaintiff, that, however it may be as to the judgment, the plaintiff acquired, by the execution and the arrest, a right or claim to the body of the defendant, as a pledge or security ad satisfaciendum; and that such pledge is a vested right, which is not affected by the discharge in bankruptcy and can be taken away only by express legislation. This view does not commend itself as satisfactory. The arrest of the body of the defendant does not give to the plaintiff a lien or security, in the sense in which a levy on property is a lien or security. The property may be sold and turned into money and that money may be applied on the debt. But the body is held only for the purpose of coercing the debtor to find money wherewith to pay the debt. The body cannot be sold to raise money, or used to earn money, for the benefit of the creditor. The view of the court in Champion v. Noyes, ubi supra, was, that, although the bond of the surety was, that the principal should satisfy the judgment, or surrender his body in execution, or that the surety should pay the debt, yet the principal was discharged from the judgment, so that, if in execution, he would be entitled to be discharged from custody, and, as the liability of the surety was not fixed at the time to which the discharge of the principal had relation, such discharge operated to release the surety. In the present case, there was no breach of the limit bond at the time the bankruptcy proceedings were commenced, and the liability of the sureties had not at that time become fixed. The discharge has relation to that time. In Kirby v. Garrison, before cited, the facts were like those in the present case, and it was held that the judgment was discharged, and that the sureties on the limit bond were released. In Claflin v. Cogan, the bond had become absolute, by breach of condition, before the proceedings in bankruptcy were commenced, and it was held that the sureties were not discharged.

As it is not alleged that there has been at any time any breach of the condition of the limit bond in this case, it is quite clear that the sureties on such bond would have a right to surrender their principal. It is said by the supreme court, in Beers v. Haughton, 9 Pet. [34 U. S.] 329, 358, that "the doctrine is clearly established, that, where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief, by entering an exoneretur, without any surrender." If the defendant were in close custody now on the execution, it would be the duty of this court to release him, on the ground that the judgment for which he was held was discharged. The limit bond in this case is, in effect, merely an incident of the execution. As there was no breach of the bond, the case is to be treated as if the defendant were in close custody on the execu-

tion, and the effect of the discharge in bankruptcy is to release the judgment and also the obligation of the sureties on the bond. The case is not within the restriction of section 5118, which provides that no discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, as joint contractor, surety or otherwise. The sureties in this case never assumed any liability for the original debt or for the judgment. Nor did they ever become liable on the bond, for any debt, for or with the bankrupt. The liability on the bond never became a debt, nor did the bankrupt, before the bankruptcy proceedings were commenced, become liable for any unliquidated damages arising out of the contract contained in the bond, nor was there any contingent debt or contingent liability, within section 5068.

In so far as the views announced in Goodwin v. Stark and in Dyer v. Cleaveland conflict with those above maintained, it is thought that they do not set forth the better rule. It results, from these considerations, that the application of the defendant must be granted.

LONG (FIFTH NAT. BANK v.). See Case No. 4,780.

LONG (HENDERSON v.). See Case No. 6,354.

Case No. 8,481.

LONG v. ONEALE.

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

Circuit Court, District of Columbia. Dec. Term, 1804.[2]

BOND—ALTERATION—INTERLINEATION—NEW OBLIGOR.

An interlineation of an appeal-bond, by inserting the name of a new obligor, and his executing the bond as a surety, without the consent of the other sureties, makes the bond void.

Debt on an appeal-bond—plea, non est factum.

On the trial, Mr. Key, for defendant [William Oneale], prayed the court to instruct the jury, "That if they should be satisfied, by the evidence, that the bond was signed, sealed and delivered by Mary Sweeny, and by J. T. Frost and the defendant, as her sureties, and was afterwards presented to Cornelius Coningham, (the justice who had rendered the judgment,) for his approbation and acceptance of the sureties, and was by him refused and rejected; and after which objection was interlined, without the license, privity, and knowledge of the defendant, by inserting the name of Lund Washington, as a co-obligor, who, on the following day, without the privity, knowledge, and consent of the defendant, signed, sealed, and delivered the bond, which was afterwards approved by the justice, then such interlineation and execution of the said bond, by the said Lund Washington, rendered it void as to the defendant, and the plaintiff cannot recover in this suit."

Mr. Key, who argued the cause for the defendant, cited the following authorities, viz.: Pigot's Case, 11 Coke, 27; Shep. Touch. 63, 67, 69; Markham v. Gonaston, Cro. Eliz. 626; Esp. 223, 224; Zouch v. Claye, 2 Lev. 35; Maryland v. Gantt, in the general court of Maryland (not reported).

Mr. Mason, for plaintiff, cited St. Md. 1791, c. 68, § 5, and Esp. 224.

CRANCH, Circuit Judge, was of opinion that the instruction prayed by Mr. Key ought to be given; but KILTY, Chief Judge, being of a different opinion, and FITZHUGH, Circuit Judge, being absent, the instruction was not given.

The defendant took a bill of exceptions, and upon a writ of error, the judgment was reversed by the supreme court of the United States. See 4 Cranch [8 U. S.] 60.

[NOTE. Mr. Chief Justice Marshall delivered the opinion of the supreme court, in which he said that "the judges did not all agree upon the same grounds, some being of opinion that the bonds were void by reason of the interlineation, and others that they were vacated by the rejection of them by the magistrate, and could not be set up again without a new delivery." The last point was not considered in the opinion rendered in the circuit court above.]

Case No. 8,482.

LONG v. ROGERS et al.

[6 Biss. 416.] [1]

District Court, N. D. Illinois. July, 1875.

TRUST DEED — SALE AT OLD COURT HOUSE DOOR AFTER CHICAGO FIRE—BANKRUPTCY OF SUBSEQUENT MORTGAGEE.

1. Where a trustee's sale was made after the Chicago fire of October 9, 1871, at the north door of the (old) court house, the place specified in the trust deed, a subsequent purchaser is not bound to look beyond the recitals in the regular trustee's deed.

[Cited in Stewart v. Brown, 112 Mo. 181, 20 S. W. 453.]

2. Bankruptcy of subsequent mortgagee is no objection to the execution of the power of sale in the prior incumbrance.

This was a bill to set aside a sale on a trust deed given by William H. Rogers to William H. King, to secure a certain indebtedness in the trust deed described. The facts in the case were undisputed. The trust deed was given by Rogers to King to secure an indebtedness, and subsequently the party borrowed of the Equitable Insurance Company $4,000, for which he gave a second trust deed to one Montgomery, upon the same security, the Equitable Insurance Company being the beneficiary in the second trust

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

[2] [Reversed in 4 Cranch (8 U. S.) 60.]

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

deed. By the fire of October 9, 1871, the Equitable Insurance Company was rendered insolvent, and on the 29th of September, 1871, a petition in bankruptcy was filed against it. At the time this petition was filed it held the $4,000 note. On the 29th of January, 1872, it was adjudicated bankrupt, and on the 27th of March, 1872, James Long was elected its assignee. Some time prior to this, default having been made in the payment of the interest on one of the notes, and the first trust deed becoming due, the trustee in the first incumbrance elected to foreclose, and advertised the property for sale under the provisions and powers contained in the trust deed. However, before the time for sale, according to the advertisement, (and the sale was to take place at the north door of the court house, in the city of Chicago) the fire came, and the court house was destroyed, so that nothing remained of it and of the north door of the same, except the ruins. The sale was afterwards made at the spot where that north door had stood, on the 2d of April, 1872, under a new advertisement, the courts having meanwhile moved to a new building on the corner of Adams and La Salle streets. Charles M. Smith became the purchaser of the property at this sale, for the amount of the trust deed and costs. The trustee then indorsed the notes as paid by the sale of the property in question, and delivered them over to Rogers, the grantor in the trust deed. Soon after the sale, Mr. King, as trustee, executed and delivered to Smith a trustee's deed, conveying all the right and interest originally conveyed to him under the trust deed. Within a short time after this conveyance to him, Smith borrowed of Trinity College the sum of $8,000, securing the same by a trust deed on this property, and subsequently the equity of redemption was conveyed to the other defendant, McIntosh, subject to this incumbrance. The bill in this case seeks to set aside the entire title conveyed by the sale: First, for the reason that the sale was void, for fraud and collusion between the parties; secondly, because it was not made in accordance with the terms of the trust deed; and, thirdly, because the Equitable Insurance Company, which held a mortgage on Rogers' equity of redemption in the property so sold, was in bankruptcy at the time the sale took place, and therefore it is sought to be void as against them, and those claiming under them.

Hoyne, Horton & Hoyne, for Long.
Herbert & Quick, for Rogers.

BLODGETT, District Judge. It is not disputed that Long, the assignee, did hold all the rights which the Equitable Insurance Company held by virtue of the Montgomery trust deed, which was the second one given. In regard to the first point, namely, that of fraudulent combination between Rogers, the mortgagor, and Smith, the purchaser, and Fisher, the holder of the note, I do not think the evidence sufficient to sustain the allegation or entitle the party to relief on that ground.

In regard to the second point, namely, that the sale was irregular because it was made at the ruins of the door of the old court-house, I am inclined to think that would be a good point if made at the time the sale took place. It would be good ground for stopping the sale before rights intervene, but I doubt if a purchaser would be absolutely obliged to take notice that the court-house was a ruin. Here is a trust deed with power to sell, and under its provisions a sale does take place, and a deed is given, in which it is recited that the sale was in due form and according to the terms of the deed. Under that, the person buying is clothed with a title, and thereupon he sells the property to another. Now, is it for a moment to be supposed that the other is obliged to look back to all the external facts connected with the sale, when his deed seems perfectly valid, and is in the regular form? I am inclined to think not, and I also think that the sale was made in pursuance of the terms of the trust deed.

I now come to the third point, namely, that the sale was void because the Equitable Insurance Company was in bankruptcy at the time. Now, the position of the company was simply that of mortgagee of Rogers' equity of redemption. That they held that, is clear, but it is clear also that he had the right to redeem from both the King and Montgomery incumbrance in which the insurance company was interested. Now, it has been held in several instances that when a bankrupt was the owner of the equity of redemption, and foreclosure proceedings were instituted after the bankruptcy, or an attempt was made to foreclose by a sale under a power in a trust deed, that the proceedings were void unless made with leave of the bankrupt court. Hutchings v. Muzzy Iron Works [Case No. 6,952]; In re Brinkman [Id. 1,884]. In this case, however, the company did not hold the equity of redemption vested in Rogers. The only interest the company held was as second mortgagee. King, by the power delegated to him under the first trust deed, was authorized to sell upon certain contingencies. These contingencies which so authorized him to sell had actually arisen and happened, and accordingly he proceeded to, and did, make the sale. The grantor to him was not in bankruptcy; he was capable of acting. Rogers was capable of paying off the debt,—at least nothing has been proved to the contrary; and, consequently, he was capable of acting. Now the ground upon which the courts have gone in the question above referred to is, that the grantor could not pay off the debt without leave of the court, and that therefore the proceedings were void, because of the invalidity

of the bankrupt to act. But here, in this case, King was not bound to take notice of the fact that the insurance company was the holder. I am inclined to think that, under the circumstances, he was not bound to suppose that he rested under any disability, and there was no privity of contract between him or Fisher and the bankrupt. They stood in no relation to the bankrupt, and had no right to take notice of the insurance company's position, and, inasmuch as there was no such privity between the parties, I do not think the sale was void. Besides, Trinity College and McIntosh had advanced large sums of money on the faith of their titles and the validity of the sale, and it seems to me that it would be going a great ways to set aside this sale to the detriment of innocent holders.

The bill will therefore be dismissed.

NOTE. The powers contained in a trust deed must be strictly construed, but under a power contained in a trust deed to sell at the north door of the court house in Chicago, it could be rightfully executed at the ruins of the north door of the court house, it having been destroyed in the interim by fire. Waller v. Arnold [71 Ill. 350]. See Gregory v. Clark [75 Ill. 485].

Case No. 8,483.

LONG v. SOULE et al.

[22 Int. Rev. Rec 344; 9 Chi. Leg. News, 33; 1 Cin. Law Bul. 282.]

Circuit Court, W. D. Michigan. Sept. 1, 1876.

DEVISE TO TRUSTEES WITH POWER TO SELL—DEATH OF ONE—EXECUTION OF THE POWER—JURISDICTION OF EQUITY — WHEN EQUITY WILL COMPEL EXECUTION—POWER — PURCHASER MAY COMPEL EXECUTION.

1. A devised lands to four trustees "to sell and dispose of the same at private sale, on such terms as to them shall seem meet;" one of the trustees died, and another removed from the state; a sale of the land to B was negotiated by the other two, with the assent of the one who was absent; B paid the agreed consideration, and it was distributed, in accordance with the terms of the will, among the legatees; the two resident trustees made a conveyance of the lands to B, all of the parties concerned supposing at the time that such a conveyance was a valid execution of the power. The trustees were discharged by the order of the court, and B subsequently—the bill in this case praying a specific performance of the contract of sale by the heirs at law (who were also legatees under the will) and their grantees—*held*, that if the non-execution of a power by trustees is occasioned by a misapprehension of the law, ignorance of the law must have been the sole occasion of the mistake, in order to defeat the interference of a court of equity; and if the case involves other facts which present a case for relief, equity is vigilant to lay hold of them in order to protect rights.

2. When a power is coupled with a trust which imposes upon the trustee the duty of executing it, equity will compel its execution in performance of the trust, when its aid is invoked by a person standing in a meritorious relation to the power.

3. In this case, all of the trustees having, in legal effect, negotiated the contract of sale, the purchaser who has performed the contract on his part, is entitled to the aid of the court to compel its completion on the part of the others.

[This was a bill in equity by Arthur B. Long against Benjamin Soule, Andrew B. Robinson, and Isaac Errett, surviving executors and trustees, and Charles E. Soule and others.]

Vosper & Wilson, for complainant.

Mitchell & Pratt, and John C. Blanchard, for defendants.

WITHEY, District Judge. Ambrose L. Soule, died in June, 1857, leaving a will by which he devised to the three first named defendants and Richard L. Robinson, his lands in trust, with direction to sell and dispose of at such time, and on such terms, as to them should seem meet, to pay debts and legacies. Richard L. Robinson died in 1864, and the three surviving executors continued to act. In October, 1868, complainant, by his agent, William J. Long, entered into negotiations with two of the surviving executors, Benjamin Soule and Andrew B. Robinson, for the purchase of the lands to which this suit relates, and agreed upon terms, paid part of the price, and gave notes secured by mortgage for the balance. The other executor, Errett, had previously removed from Michigan to Ohio, but frequently visited Ionia county, his former place of residence; had knowledge of the proposed sale, and, prior to the final agreement, in a conference with his co-executors and trustees, urged and approved of a sale being made to Long at the market price, leaving the price to be fixed by his co-trustees. He was subsequently informed of the terms of sale agreed upon and approved thereof. The two executors, Soule and Robinson, executed deeds to Wm. J. Long, who paid them $8,000 down, and gave his note, secured by mortgage, for $15,957.60. Errett, being absent, did not join in the deeds. William J. Long afterward conveyed to his father, the complainant, for whom he had bought the land, and who furnished the money to make the payment. The debts having been paid, the executors paid the $8,000 over to the legatees, according to their distributive shares, and divided the notes in the same manner. Subsequently, the legatees having negotiated a sale of the notes and mortgage, the executors assigned and transferred them to Mr. Ledyard, who paid the legatees for the same. The heirs and legatees were of age when the lands were sold to Long, except two, there being six in all living; most of them were present at the arrangement for the sale. The two minors had a guardian. All, or nearly all of them, approved or assented in one form or another to the sale. Complainant went into possession of the land, built lumbering camps, roads, banking grounds, and cut five or more millions feet of logs. In 1873 he sold and conveyed by warranty 160 acres of the land, on which has been erected a saw mill. He has duly paid all taxes, and as the notes and mortgage for

the deferred payments came due, paid them with accrued interest. In 1874, the executors resigned, as such, and were discharged by the probate court of Ionia county. About the same time the circuit court of Ionia county, on their own petition, discharged them as trustees. Three of the legatees afterward conveyed their respective one-sixth interest in this land to defendants, Norris and Wood, without consideration. The power given by the testator being to the executors jointly could not be executed by part of them. On this ground, mainly, the heirs of Ambros L. Soule, who are the surviving legatees under his will, set up claim of ownership to the lands in controversy. Complainant has brought this suit to compel a specific performance of what he claims to have been an agreement of sale, making the three executors, the legatees, the guardian, and Norris and Wood, defendants. All the parties in interest are therefore before the court.

In addition to the facts already stated, it appears from the pleadings and proofs that the two executors, Soule and Robinson, had been most active in managing the trust estate; the other, Errett, states, and this is not denied, that his "part in the administration of the estate was largely that of counsel; the details of the business were done by the other two." He also testifies, "I strongly urged the sale of these lands." "I was more in favor of it than the other trustees. After I moved away I used to often visit back." "I was in favor of selling these lands at their market value. I always considered the sale a good one. It met my hearty approval. I was in favor of selling to Long because I knew he was perfectly responsible. The trustees had frequently talked together about selling this land, and we all preferred to sell to Long because we knew he was responsible. All the trustees, and I believe all the heirs, had a meeting before we put the lands in market, in which the whole matter was canvassed, and it was determined by all parties to sell them." "We all determined upon a sale of the land at the market value. I left the other two to fix the price, as I had no personal knowledge of the land, and they had. I not only frequently returned to Muir on business and visits, but was having correspondence back and forth, so that I was kept posted as to what was going on. The sale of that land to Long was as fair a transaction as ever took place in the world." "I should have signed the deeds most cheerfully if I had been there, as I heartily approved of the sale, and have always, and am now willing to do so." The undenied facts are that all the trustees agreed that it was advisable to sell the land to Long; the two who were present at the final arrangement fixed the price at ten dollars per acre, and this was a fair price; the other executor subsequently sanctioned the terms agreed upon. The two executors present at the final arrangement represented to Long that they had been advised it was not necessary for the other executor to join in conveying, that they had sold and conveyed other lands without his joining, and that deeds executed by them would convey the legal title. Long never saw the will under which the executors were acting as trustees of the property, and took the representations of Soule and Robinson as to their authority to deed. He believed they could convey, they believed so, and it is admitted on all hands that the intention of all the trustees was to sell and convey to Long a perfect title. The parties acted upon that intention, and in pursuance of it: Long paying, and Soule and Robinson receiving $8,000 down of the purchase money, and notes secured by mortgage on the land for the deferred payments. Complainant went into possession, operated on the land for seven years without suspicion as to his title; paid the notes, and mortgage, and taxes annually. The legatees under the will received the entire proceeds of the sale. Soule and Robinson are pecuniarily irresponsible, and complainant cannot be restored to his former condition and rights.

The case presents, therefore, strong equities in favor of complainant, and we are brought to inquire, in view of the agreement to sell which we have stated, whether there is any rigorous rule of law that will prevent a court of equity granting the relief sought by this suit. It must be conceded that the deeds executed by the two trustees did not pass the legal title. The doctrine is that where two or more executors are vested with a power, they must all join in executing it, or if one is deceased, then the survivors, or such of them as have not effectually renounced the trust, must join in executing it. Perry, Trusts, §§ 493, 499, note 1; Id. 505. Defendants claim that the mistake and misapprehension which occurred is one of law and not of fact; that courts of equity never relieve against mistakes of law. They also claim that it is a case of the non-execution of a power by trustees, and not a defective execution thereof; that equity will not direct a power to be executed, though it will relieve against a defective execution. That the rule is as claimed in reference to a class of cases found in the books is not questioned; we do not doubt, on the other hand, but that the rule is stated too broadly on both points. If the non-execution of a power by trustees is occasioned by mistake or misapprehension of law, ignorance of the law must be the sole ground in order to defeat the interference of a court of equity; that is, if the case involves other elements of decision, equity is vigilant to lay hold of them to protect rights. The general rule undoubtedly is that relief sought upon the mere ground of ignorance or mistake of law, and in the absence of such special or peculiar circumstances as create exceptions,

will be refused. Hunt v. Rousmaier's Adm'r, 1 Pet. [26 U. S.] 15; Bank of U. S. v. Daniel, 12 Pet. [37 U. S.] 55; Wheeler v. Smith, 9 How. [50 U. S.] 81; Story, Eq. Jur. 116, 125, note 2; Id. 138, b, c, f. The truth is there ought to be no denial of relief from the application of any mere technical rule of law which would be a reproach to the law itself, and whenever technical rules of law are allowed to defeat the manifest justice and equity of a case, it will be found to rest upon policy and not principle.

Again, in a proper case, equity will enforce the execution of a power whether it be the case of a non-execution or a defective execution of the trustees' authority. If the execution of the power is left by the donor to the free will, and election of the donee whether to execute or not, courts will not compel the trustee to execute, but leave it where the donor left it, viz.: in the discretion of the donee, and will not overthrow the intention manifested by the party creating the power. Story, Eq. Jur. 170, 170a, and note 1, also section 169. But where the power is connected with a trust which imposes a duty on the trustee to execute the authority given to him, equity has always given effect to the power by compelling its execution in performance of the trust in favor of the persons standing in a meritorious relation to the power, such as creditors, purchasers, wife, and children. Also when the donee of the power has undertaken to execute it and by mistake does it imperfectly, equity will interpose to carry his very intention into effect in aid of creditors, purchasers, etc. Story, Eq. Jur., supra. It is said: "When there is a defect of substance in the execution of the power, such as the want of cooperation of all the proper parties in the act, then equity will not aid the defect." Story, Eq. Jur. 175. In a proper case this rule should be applied, as if two trustees without the concurrence of the third trustee should bargain and convey lands in execution of a power given to the three jointly, equity would not aid the defect, for if it should it would defeat the intention of the donor of the power.

The case we have to decide is quite outside of the rule last adverted to, because here Errett, the third trustee, not only urged the sale to Long, leaving the price to be fixed by his co-trustees, but after they had agreed upon terms of sale, sanctioned and ratified what they did. His subsequent ratification is in its legal effect, equivalent to his previous assent and co-operation.

Again, the authority given to the trustees to sell and dispose of the land, is not confined to the mere act of executing deeds of conveyance. On the contrary, making terms of sale with the purchaser, and accepting purchase money, are elements of a sale as essential as signing and acknowledging deeds. By those acts of the trustees, in which all three must be held to have cooperated in one way or another, contract obligations were raised which are binding upon them and those in privity, and operate as, so far a part execution of the power to sell, as that one standing in the meritorious relation to the power of purchaser, is entitled to invoke the aid of a court of equity to have the contract performed. The testator devised to the executors all his lands in certain localities, including those in controversy, and directed "them to sell and dispose of the same at private sale, upon such terms, and in such manner, and at such time or times as to them shall seem meet." They were thus vested with the title as trustees, with power to sell not only, but charged with the duty of executing the power of sale. If, now, they entered into an agreement, whether by parol or in writing, to sell these lands to Long, so that a contract obligation existed, they were bound by their agreement, as much as if, owning in their own right, they had made the precise arrangement shown by the facts of this case. This results from the fact that the power given to them was connected with a trust duty. So far as the heirs are concerned who are the legatees under the will, no fraud or injustice is done to them, if the sale is made effectual by conveyance. They get what the will provided they should have, viz., the proceeds of the sale. They are, therefore, without any equities whatever, touching these lands. As to complainant, it is manifest he cannot be restored to the situation he occupied when the contract was made, and whether there has been a defective execution or a non-execution of the power of sale, on the part of the trustees, he is entitled to the aid of the court and to the relief which he asks.

Inasmuch, however, as all the trustees operated in the act agreeing to sell, we think there was part execution of the authority to sell, and, therefore, a defective execution of the power in the omission to convey; but whether so or not, does not affect the result. Let a decree be entered in accordance with the rights of complainant as indicated by this opinion. The executors and trustees having resigned, and been discharged on their own petition, we suppose complainant will prefer, as he is entitled, to have the heirs decreed to convey.

LONG (UNITED STATES v.). See Case No. 15,625.

Case No. 8,484.

The LONG BRANCH.

[9 Ben. 89.] [1]

District Court, E. D. New York. March, 1877.

MARITIME LIEN—PRESUMPTION OF CREDIT — NECESSARY SUPPLIES—LIQUORS FOR THE BAR.

Where a part of a bill of supplies furnished to a vessel were liquors and other things, intended to be used in a bar, kept on board the vessel as part of a restaurant managed by the railroad company that was using the boat, and a libel was filed against the steamboat to enforce a lien for the whole bill: *Held*, that a lien upon the boat for the value of the liquors, where the evidence warranted the conclusion that the bar was no more than a convenient method employed by the owners for supplying the ordinary wants of the class of passengers transported on the boat, can be enforced.

See the case of The Metropolis [Case No. 9,503].

In admiralty.

BENEDICT, District Judge. This is an action to enforce a lien for supplies furnished to the steamboat Long Branch. The answer avers that at the time the supplies were furnished the vessel was owned by the New Jersey Southern Railroad Company, and that the supplies were furnished solely upon the credit of that corporation. Under the decision of The Plymouth Rock [Case No. 11,237], this vessel was a foreign vessel, and therefore subject to a lien for the supplies in question, which are admitted to have been furnished to and necessary for the use of the vessel, provided the articles were furnished upon the credit of the vessel. The facts bearing upon this question are similar to those proved in the case of the Plymouth Rock above referred to, and in accordance with that decision it must be held that the proofs are sufficient to sustain the averment of the libel that the articles were furnished upon the credit of the vessel, and not solely upon the credit of the railroad company. A point is made in this case that it appears that some of the articles were intended to be used in a bar kept on the steamboat, and were designated on the bills as for the bar, and that such articles are not within the denomination of necessaries for the vessel. I can imagine a state of facts that would not warrant holding that a lien upon the vessel is created by articles furnished to a bar maintained on the vessel. But upon the meagre facts here shown no distinction can be drawn between the articles to be used on the table at the restaurant and those used in the bar. The employment of the vessel in the absence of other proof warrants the inference that the bar was a part of the restaurant, and no more than a convenient method of supplying the ordinary wants of the class of passengers transported on the boat. Accordingly there must be a decree in favor of the libellants for the amount claimed, with interest and costs.

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

Case No. 8,485.

In re LONGEST.

[7 Biss. 477.] [1]

District Court, D. Indiana. July, 1877.

BANKRUPTCY—PROOF OF DEBT—THIRTY PER CENT. —CERTIFICATE OF CONFORMITY—DISCHARGE.

1. A creditor may come in at any time before the hearing of the petition for the bankrupt's discharge, prove his claim, and file objections.

2. The bankrupt is not entitled to his discharge unless assets have come to the hands of his assignee amounting to thirty per centum of all the claims proved at any time before the final hearing of the petition for discharge.

3. Certificate of conformity by the register is not conclusive upon the court.

Longest was a voluntary bankrupt. On December 11th, 1875, he filed his petition for his discharge, which was set down for hearing December 28th, 1875. When this petition was filed, no debts had been proved against his estate; but before the day set for the hearing, William S. Culbertson and other creditors proved their claims, and on the 28th of December, 1875, they filed objections to the bankrupt's discharge. One of the objections assigned was, "that the value of the assets which came to the hands of the assignee did not amount to thirty per centum of the claims proved against his estate." A certificate of conformity was filed with the clerk. The matter was referred to one of the registers of the court, who reported that no debts were proved against the bankrupt's estate previous to the filing of his petition for his discharge; that certain debts were proved after the filing of the petition for discharge, and before the hearing of the petition; that the assets did not amount to thirty per centum of the claims so proved; that, in his opinion, the certificate of conformity related to the state of things existing at the date of the filing of the bankrupt's petition for his discharge, and that debts subsequently proved ought not to be considered in determining whether the assets amount to the thirty per centum required by the bankrupt act [of 1867 (14 Stat. 517)].

William Farrell, for bankrupt.
Alexander Dowling, for creditors.

GRESHAM, District Judge. The act imposes no limitation whatever upon the proof of debt by a creditor. It is the rule, settled in this district and generally recognized, that a creditor, whose debt is not proved, has no standing in court, and so cannot be heard to object to the discharge of a bankrupt. But, as he has the right to prove at any time, it was held at an early day, and the practice

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

has been uniform, that he may prove his debt for the purpose of getting such a standing and filing objections. Up to the time of hearing, is there any restriction upon this right of the creditor to interpose any objection which the law allows, whether it is the insufficiency of assets, or any other objection? The ruling of the register in this case leaves that right as to all other objections but that of insufficiency of assets, unimpaired. Otherwise there could be no instance found in which a creditor could ask leave to prove his debt as the means of resisting a discharge. I presume it would not do to say that the report made by the register in return to the order of court, that the bankrupt had in all things complied with the provisions of the law, is conclusive as to that conformity. This report is a part of the machinery of the law to satisfy the mind of the court, and is only one of the means of ascertaining that the bankrupt's conformity has been such as to entitle him to his discharge. The silence of the creditors, after notice of the pendency of the petition for a discharge, is another means. But there is not the slightest reason to suppose that the court may not resort to other sources of information known to the law, and the chief one of these is, the specifications and proofs, if any, which an opposing creditor may offer.

But why admit objections generally, and refuse to hear that founded on the failure of assets? Simply because the report of conformity in that particular has been filed. The report is doubtless correct, and correct for the reason that, when the register makes his examination, he finds no proof of debt on his files.

If it is not intended to punish the creditor for his laches in filing and proving his claim, it is a harsh rule that would allow him to file his claim, and then deny him the fruits of that filing. Besides, it is difficult to discover any reason for allowing objections to be made in one instance and not in the other. The creditor is not under disability by the terms of the law, and is in time, I think, at any moment before the hearing. The bankrupt is not entitled to his discharge.

Case No. 8,486.

In re LONGFELLOW et al.

[2 Hask. 221; [1] 17 N. B. R. 27.]

District Court, D. Maine. Jan., 1878.

BANKRUPTCY—ASSETS—INCUMBERED LANDS—PAYMENTS—TO WHOM CHARGEABLE.

1. Assets from the sale of incumbered lands of a bankrupt should be applied to extinguish the incumbrances in the order of their priority.

2. When incumbrances have been paid upon a particular parcel of land for the benefit of subsequent grantees of different interests in the same, the sum so paid is chargeable, in the inverse order of alienation, to the most recently acquired interest.

Petition by assignees [of E. Longfellow & Sons, bankrupts] to be reimbursed out of the proceeds from the sale of incumbered lands for sums paid to save the same from forfeiture.

H. L. Mitchell, for assignees.

George Walker and William H. McCrillis, for claimants of the fund.

FOX, District Judge. This is a petition by the assignees that the sum of $4028, paid by them by leave of court from the general assets of the estate to redeem the right in equity of redeeming certain timber lands, may be repaid from the amount received from the sale of said lands, and now in the hands of the court.

The petition in bankruptcy was filed against the bankrupts, December 20, 1873, and at that time the lands in question, being a portion of township No. 4, in the Bingham lands in Hancock county, were subject to various incumbrances, the right of redemption being in the bankrupts.

Four of these incumbrances are alone involved in this investigation: I. A mortgage to Amos F. Parlin with covenants of general warranty, dated October 15, 1869, and recorded the same day. It is conceded by all parties that Parlin's rights under this mortgage are paramount to those of all other parties, and that he must first be fully paid from the proceeds of the land; nothing further need be said in relation thereto. II. A conveyance to Shaw Brothers, by deed of general warranty, of all the hemlock timber on the premises, dated April 15th, 1871, and recorded April 20th. III. A release and quit claim to Peters & Co., dated January 12, 1872, accompanied by a bond of defeasance on payment to them of the bankrupts' indebtment, and which together constituted and were equivalent to a mortgage of the premises.

Prior to the deed to Shaw Brothers, viz: On the 1st of December 1870, John Shaw attached, on a writ against the Longfellows, all their interest in the premises. This attachment was kept in full force, so that there was a lien upon the premises from the date of the attachment which accompanied the judgment, and a sale of all the right, title and interest of the Longfellows was made on the execution in Shaw's favor, December 20, 1873, subject to the right of redemption by the Longfellows, or their assigns, within one year from that date; if not so redeemed, John Shaw, who purchased this right at this sale, thereby acquired all the interests which the Longfellows had in the premises on December 1st, 1870, and Shaw Brothers and Peters & Co. lost all benefit and advantage by virtue of the conveyances to them after December 1st, 1870.

In August, 1874, the assignees commenced a bill in equity in this court against all of

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

these parties as well as certain others who claimed interests in the premises, to have their rights and the amounts respectively due to them ascertained and determined, praying for a sale of the premises in lots of 640 acres each, the proceeds to be deposited in court, subject to the rights and interests of the various parties.

It was averred that, by this method of sale, enough would be realized to pay all the incumbrances and leave several thousand dollars for the benefit of the unsecured creditors; but if the premises were sold as an entirety, subject to the various incumbrances, nothing would be realized for the benefit of the estate; each and all of the respondents protested against any sale of the premises which would in any way impair their security, or debar them from enforcing their just claim, or require them to receive any less amount than the sum justly due, or for any less amount than the legal and equitable lien thereon.

The parties not being able to agree upon the terms of sale, none was ordered until the final disposition of the cause, when the amount received was very much less than it would have been if a sale had been permitted according to the prayer of the bill in a reasonable time after it was filed, property of this description having greatly depreciated in value.

In December, 1874, prior to the expiration of the year for redemption, John Shaw notified the assignees, as well as Shaw Brothers and Peters & Co., that if the required amount to redeem was not paid to him before the year expired, he should, henceforth, insist upon his rights under the laws of Maine, and should claim the estate, and not allow either of the parties whose rights were acquired after December 1st, 1870, to redeem the property. Shaw Bros. and Peters & Co. were each ready and willing for their own purposes to redeem the premises from John Shaw, but were each unwilling that the other party should acquire John Shaw's title, being apprehensive that their own rights might thereby be endangered; and each party repeatedly applied to the assignees, urging them to redeem, as they held in their hands funds belonging to the estate sufficient for that purpose.

The assignees were alike unwilling thus to use these funds, excepting upon some agreement that it should be done for the common benefit of all parties interested, and in the course of the equity proceedings, as a charge upon the premises, to be refunded to the estate from the proceeds realized by a sale of the township. A petition was thereupon prepared by the assignees, somewhat loose and informal in its terms, which was presented to this court, December 8, 1874, for its sanction, representing that it would be for the best interest of the creditors to redeem the premises from the Shaw levy by payment of the amount due thereon. This petition was not filed under the provisions of general order 17, and the notice thereby required was not given; but it was rather in the nature of a proceeding in the equity cause, and notice was given only to the parties to said cause, as they were the only ones to be affected thereby.

Mr. McCrillis, counsel for Shaw Brothers, appeared with the counsel of the assignees before the court; and it was shown to the court that the counsel of Peters & Co., in their behalf, approved of the proceedings by the assignees that they should advance from the funds in their hands belonging to the estate the amount required, and the court thereupon, with the assent of all parties, authorized them to apply this amount for the time being for the benefit of the several parties interested in these premises, and to be benefitted by the removal of this incumbrance, all parties intending that, when the premises were sold, the amount should be restored to the general funds; that such was the purpose and intention of all these parties is manifest by the fact that the redemption was thus obtained at the intercession of Shaw Brothers and Peters & Co., and they thus became parties to, and approved of the plan, and requested the court to empower the assignees thus to use the funds of the estate.

If the redemption was only for the benefit of the unsecured creditors, the assignees had full authority to act in their behalf to redeem or not, as they saw fit, with the sanction of the bankrupt court, and parties who were interested in prior incumbrances could not in any way control such action of the assignees. Neither their assent nor their protest would avail to govern the assignees, if they were acting in behalf of the general creditors only; if the object and purpose of the assignees in redeeming the premises was merely for the advantage of the unsecured creditors, they would never have called upon Shaw Brothers and Peters & Co. to aid in the matter, appear before the court and request the court to authorize the assignees to redeem the property. The great interest they had at stake and their conduct throughout the affair should satisfy any one that they never contemplated the assignees were thus acting solely for the unsecured creditors; but the rather that they were making this advance temporarily from the funds in their hands as one step in the equity cause for the common benefit and advantage of all parties interested, to relieve from this incumbrance, the amount to be restored from the proceeds of the estate when realized.

Peters & Co. are the only parties who have derived any benefit from the redemption of the Shaw levy. If it had not been redeemed, they would have lost their entire claim in the premises; and by its payment their security has been saved, and a large amount, over and beyond that paid to Shaw, will be coming to them from the sale of the mortgaged estates, though not sufficient to satisfy their demand,

as the incumbrance was one which they necessarily must and would themselves have discharged, unless it had been done by the assignees at their request; and as they thus reap all the advantages therefrom, it would seem but equitable that they should allow the amount, which the assignees have thus appropriated for their sole benefit, to be returned from the proceeds of the sale of the premises to the fund from which it was thus withdrawn.

It is claimed in argument, that Peters & Co. might themselves have advanced the requisite amount to John Shaw, and have taken from him an assignment of his title, and that they would thereby have acquired an absolute title to the premises. If they, by so doing, could have acquired such a title, it is difficult to perceive what greater advantage they would have derived than they will have obtained by the assignees having paid the amount, if it shall be refunded to them from the proceeds of the sale. If Peters & Co. had paid it, they would have advanced just so much more money from their own means; they would have incurred this additional expenditure on account of the property, and in final settlement, after reimbursing themselves the amount paid by them to John Shaw, they would have realized no more than they will if the amount is repaid to the assignees.

But it cannot be admitted that a court of equity would have allowed Peters & Co., while a bill was pending for the adjustment and payment of all claims upon the property, by a purchase from Shaw to have acquired any absolute title under John Shaw to the exclusion of the assignees, or Shaw Brothers; if they had procured this title, the court in equity would have restricted the rights of Peters & Co. to a simple right of priority of payment, when the estate was sold, of the amount advanced therefor to John Shaw.

The assignees had by their bill in equity submitted to the court the determination of the rights in the premises of all parties, and had prayed for a license to sell the premises for the payment of these demands according to their priorities. The court, therefore, having the custody and control of the property with all parties present for a determination of their rights, would never have permitted one party, by acquiring any outstanding incumbrance, to defeat the purpose and object of the bill, and commit so gross a fraud upon all other parties by such a title acquired during the pendency of the cause. "Pendente lite nihil innovetur." It is also contended that Peters & Co. will be injured by the doings of the assignees, if they are required to allow this amount, as they are deprived of contribution from Shaw Brothers, whose title was also subject to John Shaw's claim for a proportion of the amount thus paid; but this, in my view, was not the true relation of these parties, as Shaw Brothers would not have been liable for contribution, if Peters & Co. had themselves redeemed the property from John Shaw.

The title of Shaw Brothers was to all the hemlock timber by deed of warranty, April 15, 1871, duly recorded. Peters & Co.'s title was subsequent, viz.: January 12, 1872, by quitclaim deed. Although John Shaw's title was prior to, and had precedence of both these parties, yet, as Peters & Co. acquired their title by quitclaim posterior to Shaw Brothers, it is well settled in this country, that, in such case, the parcel last sold is chargeable with the whole amount of the incumbrance, the rule being, that when lands subject to an incumbrance are sold to different parties at different times, those last sold are primarily liable to the payment of the incumbrance, which, although a lien on the whole, is chargeable on each parcel in the inverse order of its alienation.

I am aware that Judge Story in his Equity Jurisprudence (volume 2, § 1233a), questions this rule, and is of opinion that it is not in accordance with English authority; but his doubts have not been sanctioned by the American courts, with but one or two exceptions, and the rule is approved by a very large number of the most authoritative state tribunals. A few cases only need be cited. Wallace v. Stevens, 64 Me. 225; Lyman v. Lyman, 32 Vt. 79; Chase v. Woodbury, 6 Cush. 143; George v. Wood, 9 Allen, 80; Clowes v. Dickenson, 5 Johns. Ch. 235; [Courden's Estate, 1 Barr. (1 Pa. St.) 267].[2]

The same rule is laid down by the courts of New Jersey, Pennsylvania, Ohio, Georgia, Virginia, Alabama, Tennessee, Mississippi, and South Carolina. Any claim, therefore, by Peters & Co. for contribution from Shaw Brothers, would have been of no avail. And if Shaw Brothers had redeemed from John Shaw, they could have enforced their claim for the full amount paid against the interest of Peters & Co. in the premises, or have acquired a valid indefeasible title thereto.

The case, therefore, is simply this: The assignees for the benefit of all parties interested in the estate, while a bill in equity was pending for the determination of their rights and for a sale of the property, has, with the approval of the court in equity, removed an incumbrance from the property by applying the general funds in their hands to this purpose. The respondents, Peters & Co., would have paid the same amount from their own funds and discharged this incumbrance, if the assignees had failed to do it; and they are the only parties who have profited by the discharge of the incumbrance. The assignees now pray for a return of the amount so paid; and I hold that justice and equity require that the amount should be refunded. And it is so ordered.

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[2] [From 17 N. B. R. 27.]

Case No. 8,487.

LONGFELLOW v. LEWIS.

[2 Hask. 256.] [1]

Circuit Court, D. Massachusetts. Oct., 1878.

TROVER—POSSESSION IN THIRD PARTY WITH LIEN —WHO LIABLE—MOTION TO SET ASIDE VERDICT — CONFLICTING TESTIMONY — MOTION FOR NEW TRIAL—EFFECT OF DELAY IN DECIDING.

1. Trover will lie by the general owner of goods against another who had converted them to his own use, although a lien existed thereon in favor of a third party who had the immediate possession.

2. All persons aiding to deprive the true owner of his goods are liable for their conversion, whether they profit by the transaction or not.

3. The verdict of a jury will not be set aside when evidence has been given on both sides, and it is satisfactory to the court.

4. When a verdict has been rendered for the plaintiff, and a motion for a new trial has been filed, and thereafterwards the defendant has been summoned as the plaintiff's trustee before the motion was disposed of, the court will not delay judgment, as its action upon the motion must be considered as had on the day when the motion was filed.

Tort, by [Levi Longfellow] a citizen of Minnesota against [Marshall A. Lewis] a citizen of Massachusetts for a quantity of butter, alleged to have been converted by the defendant to his own use. A verdict had been rendered for the plaintiff, and the defendant moved for a new trial because the same was against law and evidence. After the motion had been filed, and before the same had been disposed of, the defendant was summoned as the plaintiff's trustee, and for that cause, when the motion was overruled, claimed that judgment against him should be delayed.

Seth J. Thomas, for plaintiff.

Edward Avery, for defendant.

Before CLIFFORD, Circuit Justice, and FOX, District Judge.

FOX, District Judge. This is an action of tort, brought by a citizen of Minnesota, to recover for a quantity of butter consigned by him for sale to one Warner, at Boston, in 1877. Warner received the butter, paid the freight, and stored the same with Walker, and died a day or two afterwards. J. M. Way was immediately appointed his administrator, and the butter was sold by Walker, who rendered to the defendant, a brother-in-law of Warner, an account of sales, and paid to him by check payable to his order the amount received for the butter, less expense of storage and commission. Evidence was introduced tending to show that the defendant had advanced Warner one thousand dollars under the pretence that it was to be sent to the plaintiff on account of this consignment, with the understanding that defendant was to have security upon the merchandise for this advance, and that after Warner's death, the defendant directed the sale to be made by Walker of the butter, and assisted in obtaining a purchaser.

The defendant testified that he gave no directions as to the sale, and did not assert any claim to the butter; but that he indorsed and delivered to Way, the administrator, the check received by him from Walker; and the jury were instructed that if they believed the testimony of the defendant, he was entitled to their verdict. They, however, found for the plaintiff for the full value of the butter, and the defendant now moves for a new trial.

The first objection is that, although the plaintiff was the owner of the goods, he was not in the immediate possession of the property at the time of the sale and conversion, as the possession was in Warner and his legal representatives, with a right to retain the same until payment of the freight and storage thereon. To maintain trover, the plaintiff must ordinarily have a right to the present possession of the goods, but an intervening right, by way of lien, will not deprive the general owner of this remedy against the wrong doer. 2 Greenl. Ev. § 640, note 2; Gordon v. Harper, 7 Durn. & E. [Term R.] 9; Nicolls v. Bastard, 2 Cromp. M. & R. 659; Rugg v. Barnes, 2 Cush. 591; Harvey v. Epes, 12 Grat. 153.

The defendant requested certain rulings that will hereafter be considered, which were refused. The jury were instructed "that, in order to hold defendant accountable in this action, they must be satisfied that he intermeddled with the property, exercised acts of ownership over it, and by his conduct aided to deprive the plaintiff of his property."

By rendering their verdict for the plaintiff under this instruction, the jury must have found that the plaintiff had been deprived of his property, and that this had been done by reason of defendant's interference and exercising acts of ownership over it. All who are concerned in such a transaction, thus interfering and dealing with the property of another, so that the same is lost to its true owner, are clearly accountable to him for its value, and are guilty of a conversion of the property.

It is said that, by this instruction, the intent of the tort-feasor is wholly ignored; that he may not have contemplated anything wrongful or injurious to the owner; but in such a case as the present, the intent is immaterial; the result is the gist of the action; the loss of this property to the plaintiff by the defendant's wrongful taking and disposing of the merchandise is without justification; and in such a case, without regard to the motive which prompted the act, the wrong-doer is responsible for the immediate consequences of such conduct, and is obliged to afford indemnity

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

therefor. A carrier, believing that a party who claims merchandise in its possession to be lawfully entitled thereto, may, with entire innocence, deliver the property to such claimant; but his motives and intentions, however honest, would not afford him any defense against the claim of the true owner of the property.

We are referred to the case of Metcalf v. McLaughlin, 122 Mass. 84. There, a teamster, at the request of a mortgagee, removed certain household furniture from No. 400 Shawmut avenue to No. 196 in the same street, and delivered the same to the mortgagee, and it was held to be no conversion. The possession of the furniture being all the time in the mortgagor, the jury found the defendant had no intent to convert the property to his own use, or to the use of the mortgagee, but simply intended to transport it from one house to another, there to be used as before by the mortgagor. The court says (page 87): "The case discloses on the part of the defendant no assumption of ownership, or of a right to dispose of another's goods, by wrongfully taking, illegally using, or wrongfully detaining them." In the present case, an assumption of ownership and an illegal disposal of the goods, so that the plaintiff lost them, were found by the jury under the instructions given to them by the presiding judge.

Ever since Holt's time, it has been the law, "that assuming to one's self the property and right of disposing of another's goods is a conversion."

The first instruction requested was as to the right acquired by an administrator to sell and dispose of the property. As the plaintiff only claimed to hold defendant accountable for his own conduct in depriving him of his property, this instruction was wholly irrelevant.

The second request was, "that if defendant did not receive any of the proceeds of the sale of the butter, he was not to be held accountable." If by the acts of defendant, the plaintiff has been deprived of his goods, it is wholly immaterial whether the defendant did or did not profit thereby.

The third was, "if the defendant merely aided the administrator in making the sale of the goods, and indorsed the check given for the proceeds of the sale, without retaining any portion of such proceeds, that would not be, as a matter of law, a conversion of the goods by the defendant, and the plaintiff would not be entitled to recover in this action." This instruction was not given; but the jury were instructed that, if they credited the testimony of the defendant, he was entitled to their verdict. The requested instruction as drawn should not have been given, as where one party aids another in depriving a third party of his goods, under ordinary circumstances, all concerned in the proceeding are jointly accountable for the value of the property. The instructions given by the court were more full, precise and direct, and of them, it is very certain the defendant has no cause of complaint. Whether they could have been sustained if plaintiff had excepted, it is not necessary for us now to determine.

In Bray v. Hartshorn [Case No. 1,820], Mr. Justice Clifford says: "When evidence is given on both sides, and the verdict of the jury is satisfactory to the court, the parties must not expect an extended argument in disposing of a motion for a new trial." This is all we deem necessary to remark on that portion of the motion which alleges the verdict was against the evidence.

It is suggested in argument, that since the verdict, the defendant has been summoned as trustee of the plaintiff. This we do not deem a valid cause for delaying judgment in the present suit, as the action of the court in disposing of the motion must be considered had as of the day when the motion was filed. The intervening delay, being for the accommodation of counsel and of the court, should not in any degree affect the right of the plaintiff to the fruits of his verdict. Motion overruled. Judgment on the verdict.

Case No. 8,488.

LONGSTRETH v. PENNOCK et al.

[30 Leg. Int. 29;[1] 7 N. B. R. 449; 9 Phila. 394; 20 Pittsb. Leg. J. 107.]

Circuit Court, E. D. Pennsylvania. Oct. 9, 1872.[2]

BANKRUPTCY—RENT DUE—PAYMENT BY ASSIGNEE.

Rent for store occupied by bankrupt, and subsequently by his assignee, and where there were sufficient goods to satisfy rent on distress, should be paid in full by assignee up to the time of the surrender of the property.

[Cited in Bailey v. Loeb, Case No. 739.]

On the 19th of December, 1867, the bankrupts [Osbourn Watson and Joseph B. De Young, trading as Watson & De Young] rented from Abraham L. Pennock and others, for the term of one year from January 1, 1868, the front store and other portions of premises No. 533 Market street, at an annual rental of five thousand dollars, payable quarterly, and entered upon possession under the lease. Subsequently, another portion of the basement was let to Watson & De Young, by a verbal agreement and the rent for the whole, for the year commencing January 1, 1870, was reduced to four thousand five hundred dollars per annum, the tenants continuing their occupancy of the premises without any new or other written agreement. The accruing rent was paid in full to July 1, 1870. On the 25th of January, 1871, Watson & De Young, who still continued their

[1] [Reprinted from 30 Leg. Int. 29, by permission.]

[2] [Affirmed in 20 Wall. (87 U. S.) 575.]

occupancy of said premises as tenants, were adjudicated bankrupts by the United States district court of this district, on creditors' petition, filed January 20, 1871, and an assignment of all their estate under the bankrupt law, was duly made on the 28th day of March, 1871. The goods of the bankrupts (which were at all times sufficient, if distrained on, to have satisfied the rent in arrear,) remained on the premises, and the same were occupied by the assignee until he had sold all the goods, which brought an amount largely exceeding the rent claimed to be in arrear, and until May 24, 1871, when the premises were surrendered to the defendants [George Pennock and David Sellers] in this action. They claimed from the assignee, rent of said premises, at the rate of four thousand five hundred dollars per annum, from July 1, 1870, to May 24, 1871. Allowing certain credits, this amount was paid to the defendants by the assignee, he taking a receipt from them in which they agreed, that in case this payment should be disallowed in whole or in part, to refund so much as would be necessary to indemnify the assignee. On the 26th of October, 1871, the assignee wrote the defendants the following letter: "Gentlemen: Under a recent decision of the circuit court of the United States for the Western district of this circuit,—In re Butler [Case No. 2,236],—to which my attention has been called by James Parsons, Esq., register in bankruptcy, it becomes my duty, as assignee in bankruptcy of Watson & De Young, to demand from you the return under your refunding receipt of June 13, 1871, of all the rent received by you on that date from Charles Vezin, former assignee of Watson & De Young, bankrupts, that accrued up to the time of his appointment as assignee. Will you favor me by a prompt response to this demand, and oblige, yours truly, J. Cooke Longstreth, Assignee." The defendants having refused to comply with this demand, this action was brought.

Mr. Longstreth, for plaintiff, cited the above case of In re Butler.

Before STRONG, Circuit Justice, and McKENNAN, Circuit Judge.

McKENNAN, Circuit Judge. I am reported as having concurred in that decision. I did so; but I said that I did not adopt the reasons for it stated in the report.

Mr. Townsend, for defendant, cited In re Appold [Case No. 499].

October 9th, 1872, it is ordered by the court that judgment be entered for defendants against the plaintiff on the case stated.

[NOTE. This case was affirmed by the supreme court in error. Mr. Justice Swayne, who delivered the opinion of the court, said, in speaking of the Pennsylvania statute (June 16, 1836), which gives, in case of property seized under execution, one year's rent to the landlord: "This case is within the equity of that statute. The question presented is one belonging to the local law of Pennsylvania. We think it was correctly decided by the circuit court." 20 Wall. (87 U. S.) 575.]

LONGWORTH (RAYMOND v.). See Case No. 11,595.

LONGWORTH (BANK OF THE UNITED STATES v.). See Case No. 923.

Case No. 8,489.

LONGWORTH v. CLOSE.

[1 McLean, 282.] [1]

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

DEED — UNRECORDED FOR TWENTY-SIX YEARS — CERTIFIED COPY — SUSPICION OF FRAUD — DEED TO SON — NO ACTS OF OWNERSHIP — ADVERSE POSSESSION.

1. A deed which purports to have been executed in 1809, but not recorded until 1835, is not recorded within the act of Indiana, which makes a duly certified copy evidence.

2. A deed thus executed and recorded by the order of a father to his infant son, must excite suspicion, and needs explanation. The explanations which are attempted in this case rather go to strengthen than remove the suspicions which arise from the facts.

3. The father remaining in possession of the premises for more than twenty-five years, and having surrendered the deed to his son and procured a deed to himself, is not guilty of fraud, so as to set aside the deed thus procured.

4. The deed from Kemper to the son was not recorded until after the decease of the father, and it is probable the son had no knowledge of the existence of the deed until after that event. The son, though living with the father, appears at no time to have exercised any acts of ownership over the farm. The possession of the father must be considered adverse to the son, and the son is bound by the statute of limitations.

5. The son acquired no title under the deed to him from Kemper.

6. But if the deed from Kemper to the son were good, still the deed from the son to the lessor of the plaintiff is inoperative, as it is proved there was an adverse possession of the premises, at the time it was executed.

Mr. Caswell, for plaintiff.

Mr. Dunn, for defendants.

HOLMAN, District Judge. The plaintiff in support of his claim to the lands in controversy, offered in evidence the copy of the record of a deed from Elnathan Kemper, to David B. Close, dated March 27th, 1809, and acknowledged the same day before a justice of the peace of the state of Ohio, but whose official character is not certified until May 5th, 1835. The deed was recorded the 11th of May, 1835. The defendants [Elizabeth Close and others] objected to the admission of the copy in evidence, unless the absence of the original was accounted for. The court, however, permitted the copy to be read, reserving the question, until the whole of the evidence was given. The plaintiff also offered in evidence a deed from David

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

B. Close, to Nicholas Longworth, plaintiff's lessor, dated March 20, 1833, which had not been recorded. He proved by Daniel J. Caswell, that the grantor and the subscribing witnesses were not residents of this state, and claimed the right of proving their hand-writing as proof of the execution of the deed, to which the defendants objected, but the objection was overruled by the court. The hand-writing of the grantor and of the subscribing witnesses was proved and the deed was read in evidence. The defendants gave in evidence a deed from the said Elnathan Kemper, to David Close, the father of David B. Close, for the same land, dated Sept. 29th, 1821, and recorded the 3d of October following. The substance of the parol evidence as testified by Samuel Jelly and John Craft, is, that David Close, the father, was residing on the land, and had made some improvement, when the witness Jelly first came to the country in 1812. That he stated to the witnesses at different times, that he had purchased the land of Kemper, with his own money, and for his own use in 1809, but took a deed in the name of his son, David B. Close, who at that time was an infant residing in the state of Connecticut, that the reason he gave why he took the deed in his son's name was because that after the death of his first wife, he had married a woman in Pennsylvania, who had children by a former husband, that he had left this wife, and had come to this state, that he paid for the land with money or property he had obtained by this wife, and fearing his wife or her heirs might claim the land, he took the deed in his son's name. That he kept possession of the deed and never had it recorded. That after the death of this wife he delivered up the deed to Kemper in 1821, and took the deed from Kemper in his own name, giving Kemper a writing on the back of the deed thus given up, to indemnify him against the claim of D. B. Close. That David Close married a third wife, by whom he had children. That David B. Close lived with his father on the premises in 1818, that his father became displeased with him and sent him away. That David Close continued to reside on the premises and use them as his own until his death, which took place in 1832. That his wife and family still continued in possession. That he made a will devising the premises, which by mistake was not produced. That David B. Close, in conversation with the witness Craft, after the death of his father, relative to this and other lands purchased by his father in his name, stated that it was not his money but his father's that paid for the land.

In deciding on this case I find it necessary to review the questions that were presented during the trial. On the subject of proving the execution of the deed from D. B. Close to Longworth, by other than subscribing witnesses, when those witnesses are not residents of the state, my opinion remains unaltered. Although the decisions on this subject are not uniform. But such has been the decision of the supreme court of this state, and I think that decision correct. But the propriety of admitting a copy of the deed from Kemper to D. B. Close, presents a different and a very complicated question. I have become satisfied that when the original deed is presumed to be in the possession of the party who offers the copy in evidence, the copy is inadmissible, unless the absence of the original is accounted for. On this point however the decisions are contradictory. In New York, Virginia, Kentucky and Tennessee, it has been decided, that when the law requires the deed to be recorded, and the record shews a compliance with all the legal pre-requisites, a copy of the deed recorded, regularly certified, is admissible evidence without any inquiry as to the original, and in some cases it has been decided that it is received equally with the original. Jackson v. Hopkins, 18 Johns. 487; Baker v. Preston, Gilmer, 285; Tebbs v. White, 4 Bibb. 42; Strode v. Churchill, 2 Litt. [Ky.] 76; Lannum v. Brooks, Hayw. [Tenn.] 121; Smith v. Martin, 2 Overt. 208. In Pennsylvania, North Carolina, Connecticut, and in the supreme court of the United States, a copy of a recorded deed is not to be received as evidence without accounting for the non-production of the original. Scott v. Leather, 3 Yeates, 184; Yarborough v. Beard, 1 Tayl. 25; Nicholson v. Hilliard, 1 Car. L. Repos. 253; Cunningham v. Tracy, 1 Conn. 252; Riggs v. Taylor, 9 Wheat. [22 U. S.] 483; Brooks v. Marbury, 11 Wheat. [24 U. S.] 78. In South Carolina there are statutory provisions respecting the admission of such copies in evidence, and independently of these provisions, the decisions support the principle contained in the last named cases. See Purvis v. Robinson, 1 Bay, 493; Dingle v. Bowman, 1 McCord, 177. In Maryland the case of Carroll v. Llewellin, 1 Har. & McH. 162, seems to be in accordance with the first class of decisions. But in that case some stress seems to have been laid on the fact, that possession of the land had been given with the deed. And Chief Justice Marshall in Brooks v. Marbury [supra], doubts the uniformity of the decisions in Maryland in favor of receiving the copy when no account is given of the original. And in Gittings' Lessee v. Hall, 1 Har. & J. 14, it was decided that the deed itself must be produced unless it was lost. Dorsey v. Gassaway, 2 Har. & J. 407, supports the same principle.

Taking all these cases together and the principles on which they were decided, and I am clearly of opinion that both reason and authority are in favor of rejecting the copy when the party producing it is presumed to be in possession of the original and does not account for the non-production of it. But if the party is not presumed to be in possession

of the original, a regularly certified copy of a recorded deed is admissible in evidence, without accounting for the absence of the original. It has been decided in Tennessee, that when a deed contains a general warranty, the title papers are presumed to be in the hands of the warrantor and the warrantee is not bound to produce them in evidence. Cook's Lessee v. Hunter, 2 Overt. 113. But here the deed, from D. B. Close to Longworth, not being with general warranty, does not come within the terms of this case. I see no reason that excuses the plaintiff from producing the original deed or accounting for its non-production. But even if the copy of a regularly recorded deed were admissible in evidence, without accounting for the non-production of the original, the circumstances of this deed as they appear from the copy offered in evidence, independently of the parol evidence, are such as to excite suspicions strong enough to render the copy inadmissible. In the language of Talbert v. Stinson, 1 Pet. [26 U. S.] 188, the acknowledgment of a deed is merely for the purpose of having it recorded, and it is not conclusive on the opposite party. It is ex parte and consequently only prima facie evidence where every thing appears to be regular and legal, and the party to be affected by it may question its validity. See, also, Jackson v. Schoonmaker, 4 Johns. 164; Pidge v. Tyler, 4 Mass. 541. And a copy of a recorded deed cannot be admitted as evidence unless all the formalities and legal requisites have been complied with. Horton v. Hagler's Ex'r, 1 Ruff. [Hawks] 48; Miller's Lessee v. Holt, 1 Overt. 111; Vickroy v. M'Knight, 4 Bin. 209. And a deed acknowledged but not recorded cannot be received in evidence without proof of its execution. Jackson v. Shepard, 2 Johns. 77.

In the case before the court, the deed was executed the 27th of March, 1809, and acknowledged on the same day, but it was not recorded until the 5th of May, 1835. Nor until this time was it proffered for being recorded, the official character of the justice of the peace of the state of Ohio, who took the acknowledgment, nor being certified, presenting a lapse of more than twenty-six years after the execution of the deed before it was recorded. So great a length of time between the execution of the deed and the recording of it, without any explanatory circumstances, exhibits such a gross irregularity, such a departure from one of the requisites of the statute of this state, as to show conclusively that this was not a regularly recorded deed. In the case of Harvey v. Alexander, 1 Rand. [Va.] 219, it was decided that a deed not lodged to be recorded until eight months after its date, and not proved by the witnesses on whose testimony it was recorded, to have been sealed and delivered within eight months before it was recorded, is not good as a recorded deed.

Without subscribing to the doctrine of this case in its whole extent as exactly applicable to the case before the court, I feel warranted in the conclusion, that if a deed is not recorded until so great a length of time after it purports to have been executed, as precludes the party to be affected by it, from every reasonable opportunity of detecting any fraud, imposition or forgery, that may have been practised in the case, that the deed cannot be considered as a regularly recorded deed so as to authorize the reading of a copy of it in evidence. So much suspicion would attach itself to the deed, that nothing but the instrument itself should be received. But the copy of this deed is before the court with explanatory circumstances. I presume this is the deed that was taken by David Close of Nathaniel Kemper, in the name of David B. Close, and which David Close afterwards delivered up to Kemper with a writing on the back of it to indemnify Kemper against the claim of D. B. Close. That D. B. Close was then an infant in the state of Connecticut and knew nothing of the transaction. If D. B. Close was in existence when the deed was executed, he had been of age more than five years before the deed was recorded; but the testimony will warrant the supposition that he was two or three years of age, at least, when the deed was executed—and that seven, eight, or more years had passed after he was of age before the deed was recorded. These circumstances, taken in connection with the fact that the deed was not recorded until several years after the decease of David Close, and altogether they give this deed a more suspicious aspect than if the copy was before us without any explanatory circumstances. I am therefore of opinion that the copy of this deed cannot be considered as any part of the evidence in this case.

Leaving this deed out of the case, there is no evidence that David B. Close was entitled to the premises in controversy — consequently the title of the plaintiff must fail, unless, as was suggested in argument, that David B. Close inherited an interest in the premises as one of the heirs of his father, and that the plaintiff was entitled to recover to the extent of that interest. This position was incidentally assumed by the plaintiff's counsel. It appeared to be the thought of the moment, arising out of the absence of the will of David Close. It was not a feature of the case to which the attention of the court or of the witnesses was directed. It is true the witnesses spoke of the children of David Close, yet I do not consider that there is any testimony before the court as to the number of heirs that are entitled to inherit his estate; or that David B. Close, as one of the heirs, has shown his claim to any specific portion of the lands of his ancestor. But if I have mistaken the law in rejecting the copy of this deed, I have done the plaintiff no injury. For if this deed is considered a part of the testimony in this case, there is not then such a case presented as entitles the plaintiff to recover.

These questions would arise out of the facts

in the case:—First. Did David B. Close acquire a legal title to the premises by virtue of the deed made by Kemper, in 1809? Secondly. If he did, had he or his assignee, at the time this suit was instituted, an existing right of entry, so as to maintain an action of ejectment? Thirdly. Was his conveyance to Longworth operative at law, so as to constitute a legal transfer of his title? If either of these questions are answered in the negative, it defeats the plaintiff's right of action; and although they are involved in some intricacy, it is my opinion that each of them must be answered in the negative.

In the first place, David B. Close acquired no title by virtue of the deed from Kemper. Laying out of view the question of fraud, that I will presently look into, this position seems to be incontrovertible. When a man purchases lands with his own money, and takes the deed in the name of another, the general rule in equity is, that the grantee takes the title in trust for the purchaser. Gascoigne v. Thwing, 1 Vern. 366; Lloyd v. Spillet, 2 Atk. 148; Smith v. Baker, 1 Atk. 385; Walley v. Walley, 1 Vern. 484; 2 Fonbl. Eq. 117. But if a father purchases and takes a deed in the name of his son, unadvanced, it is presumed to be an advancement for the son, and not a trust, except the father acts as proprietor, or does any thing that implies him to be the owner of the land, this shall overrule the presumption of the law. 2 Fonbl. Eq. 121, 122; Loyd v. Read, 1 P. Wms. 608; Finch v. Finch, 15 Ves. 43. In this case the conduct of the father shows conclusively that he did not intend this land as an advancement for his son. He took possession of it, improved it, and used it as his own, and never recognized his son as having any interest in it. Holding up the deed, and not having it recorded, and afterwards delivering it up to the grantor and taking a deed in his own name.

But it is contended that the son received the legal title to the land by virtue of the first deed from Kemper, of which he could not be divested by the act of the father. It is true, on general principles of law, that a title is not divested by the destruction of the deed that conveyed the title, and that a voluntary deed once perfected cannot be revoked at the pleasure of the maker; but these principles in their application are subject to various modifications, and are not conclusively applicable, to any case, except the title is in all respects complete. In this case the title of the son was not complete. No man can make another a grantee, without his consent; and a deed though recorded is null and void if it is not afterwards accepted by the grantee. Harrison v. Trustees of Phillips Academy, 12 Mass. 456. Here, then, is no evidence that D. B. Close knew of the existence of the deed until after the death of his father, twelve years after the deed had been given up, and another taken for the same land in his father's name. In the case of Maynard v. Maynard, 10 Mass. 456, the father made a deed to his son, which was acknowledged, and recorded, and delivered to a third person to be kept until called for. The father afterwards called for it, and cancelled it: no estate passed to the son, although he had concurrent possession of the land with his father. In Stinson's Lessee v. Russell, 2 Overt. 40, a deed was executed, but before it was registered, the grantee destroyed it, and at his request the grantor conveyed the land to a third person, it was held that the first grantee had no title to the land after the second deed was executed.

These cases, and many others of a similar import, induce me to believe that D. B. Close had no title to the premises, even as trustee, after the execution of the deed to his father. For no court, either of law or equity, will enlarge the rules of construction, so as to favor a trustee who has no beneficial interest, in setting up a title to the prejudice of his cestui que trust.

But it is suggested in the argument, that David Close took the deed from Kemper in the name of his son, with intent to defraud his second wife or her heirs; and that he cannot now allege his own fraud in order to destroy his son's title. I do not think there is anything in this that affects the father's title. The nature of the claim that this wife or her children had against David Close does not appear, and I am not prepared to say that an act that is done to defeat an imaginary claim, will be so affected with fraud as to change its legal or equitable character. A deed made to defraud creditors, cannot be set aside if there are no debts founded on a legal, subsisting consideration. Alexander v. Gould, 1 Mass. 165; Taylor v. Eubanks, 3 A. K. Marsh. 243. But it is not the father that is here alleging his own fraud, in order to set up his own deed, and destroy his son's title. How the case would have stood between the father and the son, if the son had received the deed from Kemper, before it was given up, and no other deed had been given, and the father had now come into a court of equity as cestui que trust to enforce his claim against his son, as trustee, need not now be inquired into. In that case it might have been said with more propriety, that the question of fraud was applicable. But the father having kept the first deed in his own power, in such a way, and for so long a time, that if his design was fraudulent, was well calculated to defeat that design, and then having taken a deed in his own name, it is not now with the son, after such a lapse of time, to urge this indefinite fraud of his father, in order to revive his own dormant title, and defeat the deed of his father, which had been on record thirteen or fourteen years before he set up his claim, and to disturb a possession which has been uninterrupted for more than five and twenty years.

Secondly. If David B. Close acquired a title to the land by virtue of the first deed from Kemper, I am inclined to think that neither he

nor his assignee had a right to enter on the premises at the time this suit was instituted, in November, 1833, because David Close and those claiming under him had been in adverse possession of the premises more than twenty years. There can be but little doubt about the length of time of the father's possession. It is in proof that he was in possession, and had improved the premises in 1812. The presumption is, he took actual possession as soon as he made the purchase, in 1809. His possession continued until his death, since which time his widow and family had retained the possession, being nearly twenty five years before this action was commenced. But was the father's possession adverse to the title of the son? The question as to what constitutes an adverse possession, is perplexed by many conflicting decisions, which it is difficult to reconcile. In this case, it is evident that the father purchased the land for himself, and held possession of it in his own right, and never recognized his son as having any right to disturb his possession. And from the principles established by the supreme court of the United States, in the case of Boon v. Chiles, 10 Pet. [35 U. S.] 177, I am inclined to believe that the father held the possession adverse to the title of the son, from the beginning, and that the plaintiff's right of entry was barred by the act of limitations, before this suit was instituted. But the act of limitations which bars an ejectment after twenty years adverse possession, has a saving in favor of infants, until five years after their disabilities are removed. And D. B. Close was an infant when his title accrued. The age of D. B. Close is not given, and from the testimony it is barely possible that he was within the saving of the act of assembly. If he was one year and a half old when the deed in his name was executed, more than five years elapsed after he came of age before this suit was commenced; but from the facts in the case, the presumption is, he was more than two years of age when the deed was executed, and consequently, his case is not within the saving of the act of assembly. It lay on the plaintiff to rebut this presumption, and to show that D. B. Close, and those claiming under him, were within the saving of the act of limitation. This has not been done, and the saving of the statute will not avail the plaintiff.

It is further urged that statutes of limitation do not operate as between trustee and cestui que trust. All the cases I have seen where this principle has been applied, are where the trustee has attempted to set up the statute in bar of the equity of the cestui que trust, and even then the statute runs after the trust is disclaimed. See the above case of Boon v. Chiles. But a contrary principle prevails in favor of a cestui que trust against his trustee. A long, uninterrupted possession in the cestui que trust weakens even the legal title of the trustee, and a conveyance to the cestui que trust is presumed.

Another position was taken by the plaintiff's counsel in the argument, of this part of the case. That David B. Close was in possession of the land, while he lived with his father in 1818, and that it was not until after that time that the act of limitations began to run. But certainly this ground is not tenable. There was nothing in the fact of the son's living with the father at that time, that in any way interrupted the father's possession. No intimation whatever is given that the son pretended any claim to the premises, or exercised any ownership over them. Thus, whatever view is taken of this part of the case, it seems clear, that the plaintiff's right of action is barred by the statute of limitations.

The third question remains to be considered. If David B. Close acquired a legal title to the premises by virtue of the first deed from Kemper, and his claim was not barred by the statute of limitations, was his conveyance to Longworth operative in law so as to constitute a legal transfer of his title? This deed bears date the 20th of March, 1833; at that time the widow and younger children of David Close, were in possession of the premises, by virtue of the seizure of David Close at the time of his death; and if the possession of David Close at the time of his death, was adverse to the title of David B. Close; that adverse possession continued when this deed was executed, and the deed was therefore void. Whatever doubts may have existed as to the character of the possession of David Close, prior to the time he received the deed from Kemper in his own name, there can be no doubt, but that after he received that deed, and had it recorded, he held the possession, as in his own right, adversely to all the world. And it has been decided in this state, and in many others, that a conveyance of land to a stranger to the possession when there is an adverse possession, is in law a nullity and conveys no title. See Fite v. Doe, 1 Black. [66 U. S.] 127; Hopkins v. Ward, 6 Munf. 38; See v. Greenlee, Id. 303; Swett v. Poor, 11 Mass. 549; Jackson v. Elston, 12 Johns. 452; Gibson v. Shearer, 1 Murph. 114.

Thus in every point of view in which the case can be considered, the plaintiff has shown no right to recover, even if the copy of the deed from Kemper to David B. Close had not been rejected. Judgment for the defendants.

Case No. 8,490.

LONGWORTH v. TAYLOR.

[1 McLean, 395.] [1]

Circuit Court, D. Ohio. Dec. Term, 1838.

CONTRACTS—TIME—SAME JUSTICE CAN BE DONE—PARTY SEEKING EQUITY—NEGLIGENCE—MORTGAGOR AND MORTGAGEE—ASSIGNEES OF EQUITY.

1. Time may be made of the essence of the contract by the parties. And it is never to be wholly disregarded.

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

[Cited in Rummington v. Kelley, 7 Ohio, 437.]

2. But in a case where the same justice can be done between the parties, and neither has sustained inconvenience by the delay, and the property has not changed in value, the court will not consider time as essential.

[Cited in Mason v. Wallace, Case No. 9,255.]

3. The party who asks equity, must do equity. He must show, at least, a reasonable diligence in performing or offering to perform his part of the contract.

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

4. Where both parties have been grossly negligent, equity will leave them to their legal remedy.

[Cited in Cooper v. Brown, Case No. 3,191.]

5. A party who wishes to put an end to a contract, for negligence, must, himself, not be in default.

6. A vendor, having received a part of the purchase money, must return the money, and also the outstanding securities, especially if they are negotiable, for the purchase money.

7. A party has no right to annul a contract, when he is himself the cause of the failure by the other party.

8. The vendor agreed to make a deed in three months, one-third of the consideration being paid, and the other two-thirds to be paid annually —the vendee agreeing to execute a mortgage to secure that sum. But the vendor failed to make a deed, and brought an ejectment and recovered the possession of the lot. *Held* that the relation of mortgagor and mortgagee existed between the parties in equity.

[Cited in Smith v. Babcock, Case No. 13,009; Wright v. Shumway, Id. 18,093.]

[Cited in Love v. Watkins, 40 Cal. 571; Peake v. Young (S. C.) 18 S. E. 239.]

9. The assignees of an equity are necessary parties. They may assert their right, through their assignees, therefore they are interested, and may have grounds of equity which cannot be asserted by the assignor.

10. That the vendor may be harassed with another suit, is a sufficient ground to object, that the assignees are not parties.

[This was a bill in equity by Nicholas Longworth against James Taylor for a specific performance of a contract made for the sale of a lot of ground in the city of Cincinnati.]

Chase & Wilcox, for complainant.

Mr. Fox, for defendant.

OPINION OF THE COURT. This court delivered an opinion in this case at December term, 1829; but on account of a change in one of the members of the court, and a wish expressed by the counsel of the defendant, for a re-argument of the case, the court directed it to be re-argued. The controversy arises on a contract made the 5th of April, 1814, in which the plaintiff purchased from the defendant part of lot 81, in Cincinnati, at one hundred and twenty-five dollars per foot; one-third of the purchase money to be paid down, one-third in six, and the other in twelve months. The defendant to execute a deed of conveyance in three months, and the plaintiff agreed to give a mortgage on the premises to secure the balance of the purchase money. The purchase money amounted to about the sum of $7,406 25; one-third of which was paid at the execution of the contract, and possession was taken by the plaintiff. The deed was not executed by the defendant, and when the instalment became due, he agreed with the complainant to suspend the payments on his paying the rate of interest paid on Miami Bank stock, which was nine or ten per cent. This interest was paid up to about the close of the year 1819. The complainant caused to be built four houses for stores on the lot, which cost $4,464 83. In the year 1819 or the beginning of the year 1820, the plaintiff was informed that Chambers and wife had a claim on lot 81, which would be prosecuted, and that the counsel who had investigated it, were of the opinion that the claim was valid. The complainant was advised by counsel to withhold the payment of the balance of the purchase money until this claim should be settled. No interest being paid from the year 1819; the defendant, in September, 1822, commenced an action of ejectment and recovered possession of the premises in August 1824. After notice of the claim of Chambers and wife, the plaintiff states that he made various propositions for payment, varying the original conditions, none of which were finally accepted by the defendant; though, it seems the plaintiff supposed, that he had some grounds to expect, that a payment into the Branch Bank of the United States at Cincinnati, in discharge of a debt due to it by the defendant would be received; and he sold a part of the lot for payments, which would meet the requisitions of the bank. But the purchaser on account of the interfering claim, refused to complete his purchase and the contract was rescinded.

In the year 1825, the plaintiff filed his bill praying a specific execution of the contract. Some time in the following year, Lewis, the agent of the plaintiff called on the defendant, and requested a statement of the amount, which he informed the defendant, the plaintiff was ready to pay; but the defendant refused to converse on the subject, observing that he had possession of the lot, and did not wish to part with it. Some time in July, 1827, the same agent again called on the defendant with upwards of $7,000, principally in notes of the Bank of the United States, and tendered the amount to the defendant, and requested him to exhibit a statement of the amount due, he having kept the amount

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

of payments; but he refused to give the statement or receive the money, and said that he relied on his legal rights. No objection was made to the kind of money tendered. Subsequent to this tender, a supplemental bill was filed setting forth the facts. The buildings on the lot rent for a considerable sum annually, which defendant contends indemnified the plaintiff, while he was in receipt of the same for the improvements made, and also for the sum paid on account of the purchase. Recently the plaintiff has filed another supplemental bill, in which he states that in the year 1815 he sold a part of the lot to one Joseph Canby, and bound himself to convey it to him in fee simple, on the performance of certain conditions. That afterwards, this agreement was assigned by Canby to one Thomas D. Carneal, a citizen of Ohio, which assignment was afterwards ratified by the plaintiff. That this right is still in Carneal, to whom he is bound to make a warranty deed, so soon as he shall obtain a title from Taylor. Two other sales of parts of lot 81, to other persons, which covered the residue of the lot, are also stated in this supplemental bill, but these contracts were afterwards rescinded.

The question which arises out of these facts is, whether the plaintiff is entitled to a specific execution of the contract. On the part of the defendant's counsel it is insisted that the plaintiff has been so negligent in the performance of his part of the contract, as to forfeit all his right to a specific execution of it. And a great number of authorities are referred to as sustaining this position.

The leading case of Scott v. Fields, 7 Ohio, 90 (2d part), is relied on. In this case, a bill was brought for the specific execution of a contract for a tract of land which was to be paid for by instalments, and it was agreed that if the vendee should fail to make payment in all respects as specified, the payment then made should be forfeited, and that the agreement should be considered null and void. The instalments were not paid at the time stipulated, and the court held that time was of the essence of the contract, and dismissed the complainant's bill. In this opinion the court refer to a great number of reported cases, and controvert the rule as laid down by Lord Thurlow that "time is immaterial in contracts."

And the case of Rummington v. Israel, reported in the same volume (page 97), is also relied on. In this case, the plaintiff purchased of the defendant a lot of ground, and gave four several promissory notes, one of which was payable annually. The note first payable was not paid at maturity, and some days after the failure, the defendants stated to the plaintiff that they considered the contract forfeited or void, and tendered to him his notes, which he refused to receive, and they were deposited in the hands of a third person. In May, 1833, the plaintiff tendered to the defendants, the amount supposed to be due on the first payment, and in June, 1835, he tendered the balance of the money due on the contract. The plaintiff, without the consent or knowledge of the defendants, entered upon the lot, and made some improvements on it. On this state of facts, the court dismissed the bill of the complainant, and held that he had been too negligent in the performance of his part of the contract, to call upon the defendants for a specific execution of it.

In the case of Benedict v. Lynch, 1 Johns. Ch. 370, the chancellor considers very much at large the influence that time should have on a contract. That case arose out of a contract for the purchase of land, payment for which was to be made by annual instalments. On full payment a deed was to be executed. And it was agreed if the plaintiff failed in the payments, or any of them, the contract should be void. The plaintiff took immediate possession of the land and made improvements on it. He failed to make the payments, and between three and four years after the first default, the contract seemed to have been abandoned by the plaintiff, and he agreed to do a certain amount of work on the premises, as tenant, within the year. The defendant then sold the land to another person, who consulted with the complainant before he made his purchase. The court dismissed the bill filed by the complainant for a specific performance. There can be no doubt that the parties may make time of the essence of the contract; and in no case is it to be considered as an immaterial circumstance.

Lord Thurlow in the case of Gregson v. Riddle, cited 7 Ves. 268, intimated, it would seem, that the parties could not make time of the essence of the contract; but there was no decision of this point in the case, and the remarks of his lordship may not have been accurately reported. It is the province of chancery to relieve against penalties and forfeitures, but it would be strange if this relief were extended against the positive stipulation and understanding of the parties to the contract. This would be, not to give effect to the contract, but to make a new one between the parties, contrary to the terms which they themselves had adopted. At law, time is always an essential part of a contract; but in chancery the court consider it in connection with the circumstances of the case. The rule at law is so inflexible as not to admit of any excuse, however strong, for a failure to perform the contract at the time fixed. But, it is otherwise in chancery. Not that chancery disregards time as immaterial, but, if the party can show that he has been prevented, by inevitable accident, or by any justifiable excuse from performing his part of the contract, at the time stipulated; and the other party has suffered no material injury by the delay, the court will not withhold its aid.

In the case of Lloyd v. Collett [4 Brown,

Ch. 469], Lord Loughborough well remarks, that it is a singular head of equity which arises out of one's own neglect. And he calls for a case to show where nothing has been done, by either party, that chancery has not held time as an essential part of the contract. In most cases the contract has been in part performed, and some hindrances or excuses are alleged, for the non-performance of it in full, and out of these circumstances the equity arises. It may be laid down as a rule established by adjudged cases, and stated in the elementary treatises on the subject; that where a party has failed to execute his part of the contract, without a sufficient excuse; and there has been no acquiescence in the delay by the other party, the court will never decree a specific execution of the contract. The party who asks a court to aid him must show reasonable diligence, in doing or attempting to do what he agreed to perform. In 1 Ves. Sr. 450, Lord Hardwicke says, it is the business of this court to relieve against lapse of time, in the performance of an agreement; and especially where the non-performance has not arisen by default of the party seeking to have a specific performance.

Nearly a century and a half ago, in the case of Hayes v. Coryll [2 Eq. Cas. Abr. 16], 5 Vin. Abr. 538, pl. 18, it was held that a person was not entitled to a specific performance, who had trifled or shown a backwardness in performing his part of the agreement. The facts and circumstances of cases are infinitely diversified. No two cases, perhaps, can be found exactly alike in every particular. Consequently, no general rule can apply with equal force to all cases. And here is a wide scope for the exercise of the judgment of the chancellor. Not that in the exercise of his discretion, he may substitute a new rule, but in applying the facts of the case to establish principles.

In the case of Hepburn v. Auld, 5 Cranch [9 U. S.] 262, the supreme court say, a vendor may compel a specific execution of a contract for the sale of lands, if he is able to give a good title at the time of the decree; although he had not a good title when, by the contract, he ought to have conveyed. And in the case of Pratt v. Law, 9 Cranch [13 U. S.] 456, they say, that time is material as to the specific performance of a contract, wherever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible.

In the case of Brashier v. Gratz, 6 Wheat. [19 U. S. 528], the court say, the general rule is that time is not of the essence of a contract of sale; and a failure on the part of the purchaser or vendor to perform his contract on the stipulated day, does not, of itself, deprive him of his right to a specific performance when he is able to comply with his part of the agreement. But circumstances may be so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time; in such case a court of equity will leave the parties to their remedy at law. And in the same case the court remark, if a bill for a specific performance be brought by one who is himself in default, the court will consider all the circumstances of the case, and decree according to those circumstances. These views would seem somewhat to relax the rule laid down by Lord Loughborough in the case of Lloyd v. Collett. And it will, perhaps, be found that in the decisions of the supreme court they have not regarded time, in the specific execution of contracts, when it stands unconnected with controlling circumstances, with the same degree of strictness as has been done in some modern decisions. And there may be some danger in avoiding the loose expressions of Lord Thurlow, on this subject, of going to the other extreme. We may look more at the letter of the contract than its substance. We may regard a morality so strict in this respect as to be governed by legal technicalities, and substantially cut off this great branch of equitable jurisdiction. In almost all the modern cases, in which time has been strictly regarded, it was made of the essence of the contract, by the express agreement of the parties; and the language of the decisions combats the idea that this cannot be done. To hold that the failure of the vendee to pay the purchase money for an hour or a day, should of itself authorize the vendor to rescind the contract, would disregard the distinction which has heretofore been made between the action of a court at law and chancery. Not that the latter has a dispensing power over contracts; but regarding the substance of the contract, as well as its letter, if the chancellor finds that the delay of payment has not operated injuriously to the vendor; that the condition of the parties is the same as when the payment should have been made; that the value of the property has not materially changed; and that the same justice can be done under the circumstances, as if the payment had been made at the time stipulated, chancery will not refuse its aid. And more especially will its aid be given, if the party can assign a reasonable excuse for his default.

In looking to the facts of the case under consideration, it appears that time was not made of the essence of the contract. The times at which the payments were to be made, and the period within which the deed was to be executed, were fixed in the contract; but there was no expression that a failure in any of these should avoid the agreement. And by the subsequent agreement of the parties the payments were suspended on the plaintiff's paying ten per cent. interest, or the amount which was paid on stock by the Miami Exporting Company Bank,

which appears to have been ten per cent. This amount was paid up to about the beginning of the year 1820. And in the forepart of this year, the first default of the complainant occurred. He had entered into the possession of the lot, paid one-third of the purchase money; and expended more than four thousand dollars in improvements. All this was done with the knowledge and presumed approbation of the defendant. If the ten per cent. interest for forbearance be added to the first instalment, and the amount paid for improvement, the sum advanced by the complainant would exceed nine thousand dollars. This was the position of the plaintiff in the beginning of the year 1820, he having made no default. There was due to the defendant, at this time, a sum less than five thousand dollars of the purchase money. About this time the plaintiff was informed of the claim of Chambers and wife, and on enquiry of the counsel in whose hands this claim was placed for prosecution, he was told it would, probably, be sustained. And he was advised by counsel to withhold further payments until the claim was settled. Some time after a bill was filed by Chambers and wife, which was pending in 1827, when the agent of the plaintiff offered to pay to the defendant, the full amount due.

Objection is made to receiving the bill of Chambers and wife in evidence, though duly certified; as it is not accompanied by the answer, and the proceedings of the court, making the complete record. The bill is offered, not to prove its contents, but merely to establish the fact that a bill was filed in the case; and for this purpose, it is competent. The dispute as to the title of the lot, connected with other circumstances, is the excuse offered by the plaintiff for withholding further payments. The circumstances of the defendant, as to his ample means to indemnify the complainant on a failure of the title, can have little or no influence on the rights or remedies of the parties growing out of this failure.

Having stated the acts of the complainant up to this stage of the case, we will turn our attention to the acts of the defendant. Within three months from the time the contract bears date, he was bound to make a deed for the lot. But this he failed to do, nor is there any evidence that he offered to execute it. The first default was committed by the defendant. And how does this affect his rights. Being thus in default was he in a condition to exact a strict performance of his obligations from the complainant? Until he executed the deed, or offered to execute it, could he have called upon a court of equity to decree a specific execution of the contract. The execution of this deed was not a mere matter of form. On receiving the deed the plaintiff was to execute a mortgage to secure the payment of the balance of the purchase money. This would have changed the relations of the parties. The plaintiff would have stood in the relation of a mortgagor, and been entitled to all the rights which pertain to that relation. The defendant as mortgagee might have enforced his legal rights, but he could not have extinguished the rights of the plaintiff except by a bill to foreclose the equity of redemption. And in such a proceeding a court of equity would have given time for the payment of the money. The only excuse set up for not executing this deed is, that the plaintiff did not prepare the deed and tender it to the defendant. This is the rule in England, but it has not been considered the rule in this country. It is not the understanding of the parties. The vendor binds himself to make a deed, and it is his duty to make it. Besides the exact quantity of ground seems not to have been ascertained, by the contract; and the price was fixed at one hundred and twenty-five dollars per foot. It was the duty of the defendant before he made the deed to ascertain the number of feet by actual measurement. The defendant has no excuse for this default. Can a vendor disaffirm his contract, when he is himself in default? Can he enforce a strict compliance with the contract, against the vendee, whilst he himself disregards the terms of it? The rule that he who asks equity must do equity, applies with equal force to both parties. Where a vendor acting in good faith sells land to which he believes he holds a good title, and on which the vendee enters and makes valuable improvements: and it afterwards turns out that the title of the vendor is so defective that he cannot make a good title; the vendee, after a reasonable lapse of time, will be compelled to make his election either to receive the deed or surrender the possession of the premises. But in such case the vendor must show a willingness to make the deed or return the purchase money paid. In this case the defendant brought his action of ejectment in 1822, without tendering the deed or offering to refund the purchase money and pay for the improvements. He attempts to disaffirm the contract, on the default of the plaintiff, some sixteen or eighteen months, disregarding the dispute as to the title, while he himself had been in default for nearly eight years. But he attempts to do more than this. He endeavors to take advantage of his own negligence, by placing the plaintiff in a worse condition than he would have stood, if the deed and mortgage had been executed. This would be a new head of equity arising out of a party's own default.

It is admitted that negligence on the part of the defendant, will not excuse gross negligence on the part of the complainant. But it goes to lessen any hardship complained of by the defendant, and it weakens or destroys his right to a specific execution of the contract. And if it shall appear that the failure of the defendant tended to produce the default of the complainant, it will go far to ex-

cuse him. There are cases in which both parties have been so negligent, as to prevent either from receiving a favorable consideration in a court of equity. And however a party may have disregarded his terms of the contract, the other party to entitle himself to a specific execution of it, must show reasonable diligence. He must do or offer to do that which he is bound to perform, unless prevented by some justifiable excuse, or by the act of the other party. Do the circumstances of this case, which are relied on by the complainant, excuse his default. Chancery will not compel a party to receive a doubtful title, nor in a case where he has expended large sums of money in making improvements on the property, and paid a part of the consideration, will it compel him to make an election to take the title or relinquish the possession of the land, except after a reasonable lapse of time. Where there is no prospect that the vendor, by time, could perfect his title, the election might be directed in a short time; but where, with diligence, the title may be cleared in the course of some months, or even years, under peculiar circumstances, equity will give relief, by adapting its proceedings to the circumstances of the case. Time is often given to the vendor to perfect his title, when he has acted fairly; and until he can make a clear title, there is no case where a court of chancery has compelled the payment of the consideration money; unless the terms of the contract specially require it.

In the case under consideration, the defendant, strictly, had no right to demand a payment of either the second or third instalment, until he had executed a deed for the property. And if he had brought a suit for the money, chancery might have interposed its powers, under special circumstances, by enjoining the proceedings until he had executed the conveyance, not as a matter of form, but such a conveyance as vested a clear title in the plaintiff. If the complainant can be considered in the light of a mortgagor, under the circumstances of the case, his right would be undoubted. The lot would be considered merely a security for the debt, and equity would give the mortgagee his debt and interest, and nothing more. An express provision may be inserted in the mortgage that if the money were not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem in the same manner, as if no such stipulation had been entered into. The mortgagee shall not take advantage of the necessities of the mortgagor and obtain the estate itself, when the payment of the money was the object to be secured. The maxim is, once a mortgage always a mortgage, and in this view it is considered by a court of equity. And why shall not the parties be treated as bearing this relation to each other. If this be not technically their position, it is the fault of the defendant, and shall his own default give him an advantage in equity. Chancery considers what ought to be done by the parties as done. And this rule, it would seem, can in no case apply with greater justice than to the case under consideration.

If, then, in equity, we consider the plaintiff as mortgagor, and the defendant as mortgagee, the lapse of time has not extinguished the plaintiff's equity of redemption. And if this view shall seem to impose some hardship on the defendant, it is chargeable to himself. The court look at this contract, and determine his rights by the rule which he has himself prescribed. They only say that his neglect to execute a deed, has prevented the execution of the mortgage by the complainant; and that equity cannot consider him as placed in a better condition by this neglect, nor the plaintiff in a worse one. But, independently of this view, if the default of the defendant, be connected with the shade that rested upon the title, which was first made known to the complainant about the time his default occurred; and we look at the proceedings at law by the defendant, through which he entered into the possession of the property and still retains possession of it, we think such an excuse arises for the failure of the plaintiff, as to authorize him to ask the favorable interposition of the court. And this view is greatly strengthened by the fact, that the defendant endeavored to put an end to the contract by bringing the ejectment, without making an offer to return the whole or any part of the money paid on the purchase or laid out in improvements. Nor has such an offer been since made. He seems to think that the nine thousand dollars expended on the property, and paid to him by the plaintiff, were either forfeited by his default or reimbursed by the rents he received.

And here the question arises, whether the vendor can disaffirm the contract, where he has himself refused to perform it; at least, without returning or offering to return the money which has been expended on the property; and also the outstanding obligation for the residue of the purchase money. By the doubt in which the title of the lot was involved, and the change of possession, the complainant was compelled to rescind contracts which he had made for the sale of the greater part of it. At no time does he show a disposition to abandon his purchase, if the defendant can make him a good title. But little more than eighteen months had transpired from the failure to pay the ten per cent. interest, under the new agreement, before the ejectment was commenced. And this delay, we think, was excusable, from the doubts resting upon the title, and the other circumstances of the case. And we also think the doubts which still remained on the title, and the embarrassments which resulted to the plaintiff from the acts of the defendant, subsequently to the bringing of the eject-

ment, up to the time the tender was made, may go to excuse the default. The accounts of payments were kept by the defendant, and he refused to exhibit a statement of them, though called on for the purpose. And it appears from the evidence that the property was about as valuable when the tender was made in 1827, as it was when the complainant failed to pay the ten per cent. interest.

From the supplementary bill lately filed, it appears, a part of the lot in controversy was sold by the complainant to Canby, and that he assigned his interest to Carneal. And this equity being still in Carneal, it is objected, that he is not made a party to the suit. Is Carneal interested in this controversy? It is admitted that he might file his bill against Taylor, and set up his equity through his assignees. And if he may do this, is he not interested in the subject matter of the bill. Is not the court called upon to act on an equitable title, which includes the title of Carneal. And if he be not a party to the suit, will his rights be concluded by the decree. It is true, he may look to the complainant for a deed; but is he not the assignee of the plaintiff to the extent of the equity he claims. The supreme court has decided that an assignee in equity must make his assignees a party, when he asks a specific execution of the contract. And this is required to be done, that the court may see that the rights of the assignor are duly protected. But, how much stronger is the reason to make the assignee of the equity a party, on a bill filed by the assignor. The interests of the assignee are directly involved, and how can these be protected unless he be made a party to the suit? Carneal may have some special ground of equity against Taylor, which the plaintiff has not, and a decree in the case, as it now stands, would not prevent him from setting up this equity hereafter. And if the defendant may be again harassed with the assertion of a right, which is necessarily involved in this suit, he may well object to the further progress of the suit until Carneal shall be made a party, if under the limited jurisdiction of this court it can be done. He has a right to insist that the whole controversy shall be decided in the present suit.

It is a well settled principle that the assignee of an equity is a necessary party, when such equity is set up in a court of chancery. Carneal can be made a party as a co-plaintiff, so that no objection arises to this, from the limited jurisdiction of this court. That some inconvenience may arise in making assignees parties, where they are very numerous, may be admitted. But the same inconvenience arises in many other cases, and for which the law has, as yet, provided no remedy, except in cases where a few persons may sue in behalf of themselves and others.

The question raised as to the ten per cent. on the purchase money due, under the new agreement, up to the time of the tender, is reserved until the next term; at which time, Carneal having been made a party, the court will be prepared to enter a final decree.

[NOTE. The bill was amended by making Carneal a coplaintiff. The defendant objected to proceeding in the cause as no subpoena was issued upon the amended bill, and that the defendant was not a resident of the district. Both objections were overruled, and a final decree entered in favor of the complainants. Case No. 8,491. From this decree an appeal was taken by the defendant to the supreme court, which affirmed the decree. 14 Pet. (39 U. S.) 172. See note at end of Case No. 8,491.]

Case No. 8,491.

LONGWORTH v. TAYLOR.

[1 McLean, 514.] [1]

Circuit Court, D. Ohio. July Term, 1839.[2]

PRACTICE IN EQUITY—AMENDMENT TO BILL—NECESSITY FOR PROCESS—ILLEGAL INTEREST—DECREE—INTEREST PAID.

1. Where a bill is amended, process need not be issued against the defendants, who are in court. Being in court they have notice of the amendment, and are subject to the orders of the court.

[Cited in French v. Stewart, 22 Wall. (89 U. S.) 247.]

2. An agreement to pay illegal interest will not be decreed. But, when such interest has been paid, the court will not decree its repayment.

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

[Suit in equity by Nicholas Longworth against James Taylor for specific performance of a contract for the purchase of land. For a former hearing of the case, see Case No. 8,490.]

OPINION OF THE COURT. This case was continued from the last term, with leave to the plaintiffs, to make Carneal the assignee of a part of the equity set up in the complainant's bill, a party. The merits of the controversy were fully considered and decided at that term; except a question reserved, whether ten per cent. interest under the agreement should be decreed as the balance due of the purchase money. The bill having been amended by making Carneal a co-complainant, the defendant's counsel object to proceeding in the cause, as no subpoena has been issued since the amendment, or notice served on the defendant. And that the defendant being a resident of the state of Kentucky, no process can be served on him, so as to give jurisdiction to the court, of the new matter inserted by the amendment. The bill in this case was designed to be an injunction bill. An injunction was prayed for and allowed, and was not issued because the writ of possession, which was intended to be injoined, was executed before

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

[2] [Affirmed in 14 Pet. (39 U. S.) 172.]

the injunction could be obtained. And it is well settled that where the object of a bill is to stay proceedings at law, between the same parties, a service of the notice on the attorney of the party is sufficient. It is true that where process is served, in an original suit, beyond the district, the party may take the exception, and he is not bound to answer; but this, it is said is a personal privilege which he may waive. But in this case no subpoena was issued, and the question arises, whether the complainant was bound to issue one. And this must be determined from the nature and extent of the amendment. Carneal makes no new defendant, and asks no decree against the defendant in court. Being the assignee in part of the equity asserted in the bill, his right is stated, that it may be protected by the court. He does not pray for a decree of conveyance, but is content that the decree shall be for the complainant, subject to the right of the assignee. No new fact is asserted in the amendment, and no answer of the defendant is required; and consequently, it is insisted, no process was required to be issued or served on the defendant. If the service of process were essential, to give effect to the amendment, and the defendant resides beyond the jurisdiction of the court, the court for this reason, as in numerous other cases, would sustain jurisdiction of the cause, without requiring the amendment. The excuse would be sufficient to dispense with Carneal as a party. But was it necessary, by the rule of proceeding in the high court of chancery in England, which constitutes the rule of practice in this case, to issue process. In the case of Angerstein v. Clarke, 1 Ves. Jr. 250, the question was whether upon an amended bill, it is necessary to serve new subpoenas upon the original defendants. The lord chancellor asked the register whether in the common case of an amended bill, upon exceptions, new subpoenas are served? The register answered in the negative, and such was the decision. 4 Ves. 65. After answer, the bill was amended. The defendant being abroad, a motion had been made on the part of the plaintiffs, as of course, that the service of the subpoena on the defendant's clerk should be deemed good service. The register declined drawing up the order. Mr. Thomas, for the motion, distinguished this from cases in which exceptions to the answer being allowed and the bill amended; the usual order is, that the amendments and exceptions shall be answered together. In that case a new subpoena is not necessary, a complete answer not being put in. In this instance the answer was sufficient. The lord chancellor said he understood from the register that there is no occasion for a subpoena upon an amended bill. In Blake. Ch. Prac. 195, it is said, an amended bill is considered as an original bill, but new subpoenas are not necessary unless where there is a new engrossment of the bill. 2 Madd. Ch. Prac. 287. In 1 Har. Ch. Prac. the rule is stated to be, that after answer the plaintiff may have leave to add parties or amend his bill with respect to them without costs; and so he may in other matters, if he requires no further answer of those that have already answered, and that the defendant be at liberty to answer if he think fit. And in 1 Har. Ch. Prac. 93, it is said a plaintiff may be struck out of the bill any time before hearing, a special order of the court being had for that purpose.

It is clear from the above authorities, and from the reason of the case, that no process was necessary to bring the defendant into court, to answer the amended bill. He was in court and subject to the orders of the court. And as, from the nature of the amendment no answer was required from the defendant, it was, perhaps, unnecessary to enter a rule for answer. But such a rule was entered and no answer has been filed. The court think that as the amendment introduces no new fact, and does not, in any respect, affect the merits of the case, the plaintiff may proceed without answer; and that a subpoena was unnecessary. And as it regards the question of interest reserved, the court think that the agreement to pay ten per cent. interest, being against law, cannot be enforced. But the court will not disturb the payments of this interest which have been voluntarily made. A court of equity cannot decree a specific execution of a contract made in violation of law, or against the policy of the law.

The case [Pratt v. Carroll] 8 Cranch [12 U. S.] 477, relied on by the defendant's counsel, is where the party contracted to pay one hundred pounds damages for every lot not built upon, and the court decreed this sum. Now that was not where an illegal rate of interest was agreed to be paid on a certain contingency, but a fixed sum as damages for a failure to build. If this sum had been named as a penalty, its payment would not have been enforced in equity. But it was stipulated damages, fixed by the parties, as a sum to be paid on a breach of the contract. A contract thus made is binding on the parties, as well in a court of equity as at law.

The court direct that the legal rate of interest shall be calculated on the balance of the purchase money; and that the annual rents, from the time the defendant entered into the possession of the premises, be deducted therefrom. That the sum which the annual rents shall amount to, after discharging the purchase money and interest, shall be paid by the defendant to the complainant; and that the defendant shall convey to the complainant by a deed of general warranty the premises in question. The costs to be divided between the parties, on the ground that the complainant has, on various occasions, been permitted to amend his bill, &c.

[NOTE. The supreme court affirmed this decree upon appeal by defendant. Mr. Justice

Story delivered the opinion of the court, in which he held that time is of the essence of the contract, when made so either by express stipulation, or arising from implication, and even when not expressly or impliedly of the essence of the contract, yet gross negligence in performing the contract on his part, or laches, may defeat the right of recovery of one seeking specific performance. "But except under circumstances of this sort, or of analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases the court expects the party to make out a case free from all doubt, and to show that the relief which he asks is, under all circumstances, equitable, and to account in a reasonable manner for his delay, and apparent omission of his duty. * * * In applying the doctrine above stated to the facts and circumstances of the present case, the first remark that occurs is that the first default was on the part of Taylor. By his contract he undertook to make a deed of general warranty of the premises in the course of three months after the date of the contract; the second installment not being payable until a long time afterwards." The learned justice considered that the delay on the part of Longworth was, under the circumstances of the case, excusable. The adverse claim of Chambers and wife, openly asserted, he considered of great weight, for, said the learned justice, "While it was known and pending, there is as little pretense to say that Longworth could be compelled to complete the contract on his side, or that he had not a right to lie by, and await the decision of the title, which thus hung, as a cloud, upon that of Taylor." 14 Pet. (39 U. S.) 172.]

Case No. 8,492.

LONSDALE v. BROWN.

[3 Wash. C. C. 404.] [1]

Circuit Court, E. D. Pennsylvania. April Term, 1818.

BILL OF EXCHANGE—ENDORSEMENT WITHOUT CONSIDERATION—COMMISSION TO TAKE DEPOSITIONS—STATUTE OF LIMITATIONS—SUBSEQUENT PROMISE—TERMS VARIED.

1. Action on a bill of exchange, by the payee, against the drawer, which he had endorsed to O., and which was by O. endorsed to C. The court admitted O. to prove that he endorsed the bill to C., merely to recover the money, for the account of the plaintiff, and without consideration. The possession of the bill, by the drawee, is prima facie evidence, that he has paid all those who could claim against him, on the bill; and the endorser, O., has no interest in the event of the suit.

[Cited in Conant v. Wills, Case No. 3,087.]

[Cited in Brinkley v. Going, 1 Ill. 367; Parks v. Brown, 16 Ill. 456; Brown v. Ferguson, 4 Leigh, 51; Austin v. Birchard, 31 Vt. 591. Cited in brief in Craig v. Craig, 3 Rawle, 478; Weakly v. Bell, 9 Watts, 278.]

2. A commission directed to A and B, or either of them, to take depositions, authorizes the deposition of A, to be taken by B.

3. Where a subsequent promise, or acknowledgment of a debt is made, it may be given in evidence, to remove the bar of the statute of limitations; although the action be brought upon the original cause of action. But if the new promise, vary the terms of the original contract, on which the action is brought; as if the former be conditional, and the latter absolute; the former cannot be given in evidence.

[Cited in Davis v. Van Zandt, Case No. 3,656; Lonsdale v. Brown, Id. 8,494.]

[Cited in brief in Downing v. Lindsay, 2 Pa. St. 383. Cited in Howe v. Saunders, 38 Me. 352; Mattocks v. Chadwick, 71 Me. 315.]

Action on a protested bill of exchange, dated 19th of May, 1807, drawn by the defendant, at New-Orleans, in favour of the plaintiff, at sixty days after sight, on James Brown & Co. of Philadelphia, for 600 dollars—pleas, 1st, non assumpsit; and, 2d, non assumpsit, within six years; and issue joined, with leave to the plaintiff, by the agreement of the parties, to give any legal evidence to prove a new promise, or the inapplicability of the act of limitations. The bill was presented for acceptance, on the 11th of July, 1807, and was protested; on which protest for non-acceptance, this action was brought. It did not appear, that payment was ever demanded, or that a protest for non-payment was made; neither did it appear, that notice of the non-acceptance had been given to the defendant. The bill was endorsed in full, by the plaintiff, to O'Neil, and by O'Neil to Chancellor. The plaintiff offered the deposition of O'Neil, to prove that no consideration passed from Chancellor; but that the bill was endorsed to him, as agent merely, to receive the amount, for account of the endorser. This evidence was objected to, on the ground that it was calculated to discredit a negotiable paper, on which the witness had placed his name.

BY THE COURT. There is no weight in this objection; the bill having got into the hands of the payee, it is prima facie evidence, that he has paid the amount of it, to those who had a right to call upon him; although it is not endorsed to him by O'Neil, or Chancellor, according to the late decision of the supreme court, in the case of Clark v. U. S., 2 Wheat. [15 U. S.] 27. In this suit, therefore, by the payee against the drawer, O'Neil has no interest; nor can it be said, that his evidence has a tendency to discredit the bill.

A commission to take depositions directed to A and B, or either of them, under which sundry depositions were taken by A, one of the commissioners; and then the deposition of A, taken by B, was offered in evidence, and objected to. But the objection was overruled.

The plaintiff offered parol evidence, to prove what was the legal rate of interest, and the damages on protested bills of exchange at New-Orleans, at the time this bill was drawn.

BY THE COURT. The presumption is, that those subjects are established by some written law; and if so, the law itself must be produced. Parol evidence, to prove foreign laws, is never admitted, but in cases where it appears that those laws are unwrit-

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

ten. The plaintiff proved, that in November, 1809, the defendant, in a conversation with the plaintiff, expressed his regret that this bill had not been paid; and promised that if he should ever be able, though it should be ten years, he would pay it. This evidence was given to prove a new promise, so as to take the case out of the act of limitations.

J. R. Ingersoll and Mr. Chauncey, for defendant, objected to the plaintiff's right of recovery, on the following grounds: (1) That the bill was not presented for payment, and that no notice of non-acceptance was given to the drawer; and that the promise in November, 1809, was not binding on the defendant, unless it appeared, that he was fully informed of the above facts, and of his legal rights founded thereon. 7 Mass. 449; Kyd, Bills, 129. (2) The promise in 1809, cannot avail the plaintiff, as this suit was not brought till 1816, more than six years after it was made.

Mr. Shoemaker, for plaintiff, contended: (1) That if a bill be protested for non-acceptance, presentation for payment is unnecessary, but suit may be immediately instituted. Promise to pay a bill by the drawer, or endorser, is evidence of notice. 4 Johns. 144; 5 Johns. 248; 2 Camp. 188. (2) The act of limitations did not begin to run from the time of the new promise in 1809—1. Because it was conditional, to pay when the defendant was able, till which event, the plaintiff could not commence his action. 2 H. Bl. 116;—and 2. Because the defendant had ten years to pay it in; which, of course, suspended the operation of the act during all that period. He cited 5 Burrows, 2630; Peake, Ev. 310; 6 Mod. 26.

WASHINGTON, Circuit Justice (charging jury). This is a plain case, upon the plea of the act of limitations. It is admitted, that an absolute promise to pay, made in 1809, would not take this case out of the operation of the act, unless the suit had been brought within six years after the promise was made, which this was not. But it is contended that the promise was conditional, in two respects, —first, to pay when the defendant should be able; and secondly, at any time within ten years; and consequently, that the limitation did not begin to run till he was able, nor till the expiration of the ten years. As to the first, whether a promise to pay when the defendant shall be able, be absolute or conditional, need not be decided in this case; because, if it be conditional, still this action, which is upon the original promise, cannot be supported. Where a subsequent promise, or acknowledgment of a debt, is made, it may be given in evidence, to remove the bar of the act of limitations, though the action be brought upon the original cause of action. But, if the new promise vary the terms of the original contract on which the action is brought; as if the former be conditional, and the latter absolute; the former cannot be given in evidence, because the proof would not correspond with the allegation. The defendant could not be prepared to meet evidence, of which the declaration gave him no notice; and if the plaintiff were to state the conditional promise, in a replication, it would be a departure from the declaration. It was for these reasons, that the court refused to permit the plaintiff to give evidence of the ability of the defendant to pay this debt. As to the promise to pay, if it were ten years, it is subject to the same objection; and also to another. If the defendant was bound, by this promise, to pay at any time within the ten years, as the plaintiff contends he was, then the act of limitations began to run from the time the new promise was made, and of course this action was brought too late. If he was not bound to pay before the expiration of the ten years, then it is brought too soon. So that, take it either way, the plaintiff cannot recover. If the true construction of the promise be, to pay, if the defendant should be able at any time within ten years; still it would be liable to the objection before stated, that of its being conditional.

Verdict for defendant.

[NOTE. Action was brought by the plaintiff against the defendant upon a similar bill, drawn in 1806, for the same sum. A new promise of defendant in 1809 to pay when able was pleaded. There was a verdict for plaintiff. Case No. 8,493. Subsequently, upon a motion for a new trial, the court required the plaintiff to elect either to release damages to a certain sum or go to a new trial. Case No. 8,494.]

Case No. 8,493.

LONSDALE v. BROWN.

[4 Wash. C. C. 86.] [1]

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

BILLS AND NOTES — NEW PROMISE — PAY WHEN ABLE—PROTEST—INLAND BILL—DRAWN IN ANOTHER STATE—ABILITY TO PAY—DEBT BARRED—CONSIDERATION FOR NEW PROMISE.

1. Action on a bill of exchange drawn by plaintiff in favour of defendant. Second count, on a promise of defendant in 1804 to plaintiff, that if the plaintiff would indulge him, he would pay the bill if he should be able so to do; and on averment that he was able. The protest of a bill of exchange was offered in evidence, and objected to on the ground that it was an inland and not a foreign bill, and the evidence was admitted.

[Cited in Musson v. Lake, 4 How. (45 U. S.) 285.]

[Cited in Williams v. Putnam, 14 N. H. 541; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 525.]

2. In an action of assumpsit, or on the case, the defendant is not bound to plead a former recovery, and may give it in evidence.

3. As to the defendant's ability to pay, it is not necessary for the plaintiff to prove that fact

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by positive evidence; it may be inferred from the apparent circumstances of the defendant.

4. The verdict and judgment in the former suit upon this bill, is no evidence of a want of consideration for the new promise, because that cause was decided, not upon the validity of the bill, but upon the act of limitations. A debt barred by operation of law, or by the statute of limitations, is a good consideration for a new promise.

This was an action on the case. The declaration contains a great number of counts; but the only two which it is necessary to notice are founded, 1. Upon a bill of exchange drawn by the defendant at New Orleans for $600, upon James Brown & Co. of Philadelphia, in favour of the plaintiff, in the year 1806, and 2. On a promise made by the defendant to the plaintiff in the year 1809; that if the plaintiff would indulge him he would pay the bill, if he should ever be able to do so, with an averment that he did indulge the defendant, and that he was able to pay. Plea, non assumpsit.

After proving the hand writing of the defendant, the plaintiff offered in evidence the protest made by a notary public in this city, stating, that he had presented the bill for acceptance, which was refused. This was objected to by the defendant's counsel, on the ground that this was an inland bill, which did not require to be protested; and consequently it could not be read to prove that acceptance had been demanded and refused; the protest not being an official act. Those facts, then, should be proved on oath in the ordinary way.

WASHINGTON, Circuit Justice, stated that the question, whether a bill drawn in one state upon a person in some other of the United States, is an inland, or a foreign bill, is a question of difficulty and unsettled. That he would admit the evidence, and the defendant, in case the verdict should be against him on the bill, could move for a new trial; which would put it in the power of the counsel and of the court to examine the point more deliberately.

John Dowden's deposition was read; and the witness stated that in the year 1809 he was in company with the plaintiff and defendant, when the subject of this bill was mentioned; and the defendant promised the plaintiff that if he would indulge him he would pay the bill, if he ever should be able to do so.

Mr. Davidson, another witness for the plaintiff, stated, that from the year 1816 to the period when his deposition was taken in 1819, the defendant had an open store in Philadelphia; that he bought and sold goods; and, from the extent of his business, he believed that during that period the defendant was able to pay this debt.

In answer to the plaintiff's demand on the bill of exchange, the defendant's counsel gave in evidence the record of a verdict and judgment in favour of the defendant, in an action on a bill of exchange, in all respects precisely like the present, as appeared by the declaration. [Case No. 8,492.]

Upon the other count, they relied upon the above suit brought upon the bill in 1816, to prove that the defendant's offer to pay when he was able, was not accepted; but was on the contrary rejected.

Mr. Shoemaker, for plaintiff, contended, that though there was no protest in this case for non-payment, it cannot affect the plaintiff's right, as it was protested for non-acceptance. Kyd, Bills, 120; Chit. Bills, 121, 124; 4 Johns. 144; 5 Johns. 144; Miller v. Hackley, Id. 282. As to the want of proof of notice of the protest, that was waived by the subsequent acknowledgment in 1809. Chit. Bills, 248, 249, 410; Peake, N. P. 202. As to the record of the former recovery, he contended, that it ought to have been specially pleaded; and at all events the defendant should have produced other evidence than the record to prove that that suit and the present were brought on the same bill. As to the new promise, he insisted that the promise being made to the plaintiff, and that followed up by proof of indulgence granted, and evidence being given of the ostensible circumstances of the defendant, sufficient to show his ability to pay this bill; the plaintiff had made out his case.

Mr. Chauncey, and J. R. Ingersoll, for defendant, took no exception to the want of protest for non-payment, or to the want of proof of notice. But they relied that they could give the former recovery in evidence without pleading it; and that the identity of the bill sufficiently appeared from the description given of it in the declaration in that suit, and its entire agreement with that now given in evidence. Upon the new promise, they contended that no evidence was given of its having been accepted by the plaintiff, but, on the contrary, that the suit on the bill in 1816 proved that it was rejected. That the verdict in the former suit showed that nothing was due on the bill, and consequently the new promise was totally destitute of a consideration to support it.

WASHINGTON, Circuit Justice (charging jury). Although the declaration contains a great number of counts, they all may be resolved into two grounds of action. 1. On the bill of exchange; and 2. The new promise made in 1809.

1. The only objection made by the defendant's counsel to a recovery on the bill, being a former verdict and judgment on the same bill, I shall notice no other. As to this defence, it is objected by the plaintiff's counsel, that this matter ought to have been pleaded in bar; and that at all events the defendant is bound to prove otherwise, than by the record, that the bill of exchange, on which that action was founded, was the same as the one now in controversy. There is nothing in the first objection; it being clearly settled that in actions of assumpsit, and on the case, a for-

mer recovery may be given in evidence. Burrows v. Jemino, 2 Strange, 733; 1 Saund. 92, note 2; Jones v. Scriven, 8 Johns. 453; Bird v. Randall, 3 Burrows, 1353; 1 Wils. 44, 175; 2 Saund. 155, note 4; 1 Show. 146. The plaintiff, nevertheless, must show that the matter in dispute in that action and this, is the same. To prove this, he has given in evidence the declaration in that case, which describes this bill precisely. This is sufficient to throw the burthen on the plaintiff to prove that another bill of the same tenor and date, for another sum of $600, was drawn by the defendant. If you are satisfied that the bill in the former case is the same with that on which this action is brought, your verdict ought to be for the defendant, on the counts on the bill of exchange. On the other counts, it is incumbent on the plaintiff to prove, to your satisfaction, the promise as laid; the acceptance of it by the defendant; performance of the condition on his part, by having granted the indulgence; and the ability of the defendant to pay this debt, at the time this suit was commenced.

As to the first of these particulars, I do not understand the defendant's counsel as controverting it. Dowden proves it fully, and there is no opposing evidence. It is objected, however, that neither Dowden, nor any other witness, has proved that the offer by the defendant, to pay when he should be able, was accepted; on the contrary, that he showed his dissent by bringing an action on the bill, in the year 1816; and the case of Craig against the same defendant, decided in this court at the October term in 1819, is strongly relied upon. But it is obvious from the slightest attention to that case, that it is totally dissimilar from the present. There, the promise was made, not to Craig himself, nor to any person authorised to represent him, and by acceptance to bind him; but to a stranger. Neither did it appear that Craig, at any time, intimated his acceptance of the offer, or that the promise was even communicated to him; on the contrary, the first step he took was to show his dissent, by bringing a suit on the bill. Upon this state of the case, the court charged the jury that the objection that the plaintiff was no party to the promise, was fatal to his recovery on the promise. The court further observed, "that if the promise was valid to bind the defendant to pay whenever he should be able, it must have been equally obligatory on the plaintiff to wait, until that event should take place. But this, clearly, was not the case. The declaration was not made to the plaintiff, nor yet to any person authorised by him to assent to it, or in any respect to bind him. It was never afterwards ratified by the plaintiff, in word or in deed. So far from it, he afforded record proof of his dissent, by instituting a suit, at least two years before it is pretended that the defendant was able to pay, and grounded it, not on the promise, but upon the original cause of action." In this case, the promise was made to the plaintiff in person, and although the witness does not say that he accepted it in terms, yet his silence, followed up by a conduct corresponding with an assent tacitly given, was equivalent to an express assent. He did indulge the defendant for seven years, and until his remedy on the bill was completely barred by the statute of limitations. And although in the year 1816, he brought a suit on the bill of exchange, yet that, nor any other act of his, could dissolve a valid contract once made; and which existed in full force at the time that suit was brought. The two circumstances then, of acceptance and forbearance, seem to be sufficiently proved.

The last particular mentioned is, was the defendant able to pay at the time this suit was brought? Mr. Davidson states that he kept an open store in Philadelphia, bought and sold goods, and that from the extent of his business, he was, in the opinion of the witness, able to pay this debt from the year 1816 to the time when the deposition was taken. The objection of the defendant's counsel that the witness states nothing but his belief, is not quite correct. That he was in business, and kept an open store, are facts; and it is for you to judge from those facts of the defendant's ability to pay this debt. It is not necessary to prove, by positive evidence, that he was able; this could seldom be done, particularly in respect to a person in trade. If you are satisfied from the apparent circumstances of the defendant, unopposed by contradictory evidence on his part, that he was able to pay, this will be sufficient.

It is again objected, that the verdict and judgment in the former suit on this bill, proves that there was no consideration for the new promise. The court cannot consent to this conclusion. In that case, the defendant pleaded the act of limitations, and the court in the charge to the jury, stated, expressly, that the plea was a complete bar to the action. The ground then of the verdict and judgment was not on account of a defect of right, but of the want of a remedy. But a debt barred by the act of limitations, or by operation of law, not affecting the right; as for example, by a certificate of bankruptcy; is nevertheless a sufficient consideration for a new promise to pay it. Indeed, it is not quite clear, that if the case had been decided on the general issue, that would show, without something more, that the bill was not justly due, since the plaintiff might have failed in his action merely for the want of proof of some matter unconnected with the reality and the honesty of the debt. No opinion, however, is intended to be given on this point. It is a sufficient answer to the objection, that that cause was decided on the ground that the action was barred by length of time. If then you are satisfied that the promise was made, was accepted, and the condition of forbearance performed by the plaintiff; and also that the defendant was able to pay this debt when this

suit was brought; then you ought to find for the plaintiff, on the counts grounded on that promise.

Verdict for the plaintiff for $1162.37.

[NOTE. The case was subsequently heard by the court upon motion in arrest of judgment and upon motion for new trial. Under the last motion the court held that the jury had erred in giving damages in their verdict, and that the plaintiff was entitled to only the amount of his bill and interest. Under this ruling the plaintiff was required to go to new trial or to release damages beyond $600 and interest. Case No. 8,494.]

Case No. 8,494.

LONSDALE v. BROWN.

[4 Wash. C. C. 148.] [1]

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

BILL OF EXCHANGE—ASSUMPSIT—NEW PROMISE—CONDITIONAL—FORBEARANCE—JUDGMENT ENTERED ON GOOD COUNT—NEW TRIAL.

1. In what cases a past consideration is good to support an assumpsit.

[Cited in Carman v. Noble, 9 Pa. St. 371.]

2. In assumpsit on a promise to pay a debt due by the promiser, if plaintiff would give time, whenever the promiser should be able; the declaration need not state that the promise was accepted by the plaintiff. It is sufficient to aver that time was given, and that the defendant is able.

3. On a new promise by the debtor to pay a continuing debt, the creditor may sue on the old debt, and give the new promise in evidence to avoid the act of limitations, &c. or may sue upon the new promise. But if the new promise be conditional, it cannot be given in evidence in a suit for the old debt.

[Cited in Taylor v. Slater, 16 R. I. 92, 12 Atl. 729.]

4. A promise to pay in consideration of forbearance for a short time, is not good to uphold assumpsit. Aliter, if the forbearance be for a convenient or reasonable time, in general or specific terms, or indefinitely.

5. A promise to pay in consideration of forbearance, when defendant should be able, is good, and is to be construed until he is able.

[Cited in Glasscock v. Glasscock, 66 Mo. 630.]

6. If the evidence apply to one count which is good, and the verdict be general, the court will direct the judgment to be entered on the good count. But on a writ of error this cannot be done; and the court must order a venire facias de novo.

7. Quaere, if a bill of exchange drawn in one state on another, is a foreign bill; and whether the protest of such a bill is good evidence?

[Cited in Musson v. Lake, 4 How. (45 U. S.) 285.]

[Cited in Williams v. Putnam, 14 N. H. 541.]

8. If there be two issues, or issues on two counts, and the verdict be not contrary to evidence applicable to one of them, the court will not grant a new trial, though the verdict be contrary to evidence as to the other.

[Cited in State v. Templin, 122 Ind. 238, 23 N. E. 698.]

9. If the jury take out with them a deposition, part of which was deemed inadmissible by the court, but that part totally inapplicable to the count on which the judgment is given, this is no ground for a new trial. Aliter, if it was delivered to the jury by the counsel of the party in whose favour the verdict was given.

[Approved in Rawson v. Curtiss, 19 Ill. 481.]

10. A promise was made by the defendant, the drawer of a protested bill of exchange, that if plaintiff would give time, he would pay the bill when he should be able. In an action on the new promise, the plaintiff is entitled only to the sum stated in the bill, and to interest from the time when defendant was able, and not to any damages. If the jury give more, the court will set aside the verdict, unless the plaintiff enter a remittitur for the overplus.

[This was an action upon a bill of exchange. In a former suit before the court, Case No. 8,493, there was a verdict for the plaintiff. The case is now heard upon motion of defendant for arrest of judgment and for new trial.]

WASHINGTON, Circuit Justice. This case comes before the court upon two rules to show cause, 1. Why the judgment should not be arrested. And 2. Why a new trial should not be granted.

1. In support of the first rule, certain exceptions were taken to the second, third, fourth and fifth additional counts in the declaration. We shall direct our attention principally to the fourth count, because this was the one which the counsel seemed to consider the most faulty. It states, "that the defendant being on the 1st of November, 1809, at Philadelphia, indebted to the plaintiff on a certain bill of exchange, of which the defendant was the drawer, in the sum of $600, he then and there averred to the plaintiff that he was then not able to pay the said bill, but promised the plaintiff that if he would grant to the defendant indulgence, in time he the defendant would pay to the plaintiff the amount of said bill, whenever he the defendant should be able to pay the same; and the plaintiff avers that he did grant a reasonable indulgence in time to the defendant; and further, that at the time this action was brought, the defendant was able, and had the means to pay the said bill, but that he had nevertheless refused to pay the same," &c. The objections made to this count are, 1. That the consideration being past, it affords no ground to support an assumpsit to pay an existing debt. 2. That the contract as set forth was all on one side; the count not stating that the conditional promise of the defendant was accepted by the plaintiff. 3. That although the promise might have been given in evidence to establish the original debt, if the action had been to recover the same, it is not of itself a ground of action; because, if it be, then there would be two independent subsisting contracts, upon either of which the plaintiff might bring his action. 4. That forbearance is not a sufficient consideration to raise an assumpsit, unless it be specific and reasonable in point of time, which this is alleged not to be.

In support of the first objection, the counsel

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

cited no authorities, and we take the rule to be, that a promise to pay a sum of money on a consideration executed, if it was induced by the request of the defendant, or by some previous duty, or if the debt be continuing at the time or is barred by a rule of law, or provision of some statute, as the act of limitations, bankruptcy, and the like, is good to maintain an assumpsit. This is laid down by Powell in his Essay on Contracts, 350, 351, who cites Hodge v. Vavisor, 1 Rolle, 413; Johnson v. Astell, 1 Lev. 198; T. Raym. 260. See, also, 3 Salk. 96. But it is unnecessary to examine this position further, because in this case the promise was "to pay, if the plaintiff would give time to the defendant;" which was a new consideration, and clearly sufficient to uphold the promise, being a benefit to the defendant, and an injury to the plaintiff. The cases upon this subject are both numerous and uniform, a few of which only it will be necessary to refer to. Bidwell v. Catton, Hob. 216; Cro. Eliz. 74, 75, 849, 881, 665; Mapes v. Sidney, Cro. Jac. 683; 1 Rolle, Abr. 25, 27, pl. 34, 49.

The second objection is opposed by all the cases and precedents which refer to this subject. In all the cases referred to in answer to the first objection, where a new promise in consideration of forbearance was the ground of the action, the declarations state the promise, the consideration, and the forbearance without any averment that the plaintiff had agreed on his part to forbear. Such too are the precedents. See 2 Chit. Pl. 82-84. The case of Mapes v. Sidney, Cro. Jac. 683, was assumpsit on a promise to pay in consideration of forbearance, with an averment that the plaintiff did forbear for such a time, and this was decided to be sufficient, and that, if the defendant had paid this debt, and the plaintiff had afterwards sued on the original cause of action, the defendant might have maintained an action on the case against him.

As to the third objection, it may be conceded, that an action may be maintained on the original cause, and the new promise given in evidence to avoid the operation of the act of limitations, or to obviate an objection grounded on the omission to give due notice of the dishonour of a bill of exchange. This was the case of Thompson v. Osborne, 2 Starkie, 98, and there are many cases of the same kind which might be quoted. But it is not less true, from the cases referred to under the first head of objections, that the action may be supported upon the new promise; and Selw. N. P. p. 52, who states that the plaintiff is not obliged to declare on the new promise, but may do so on the old, and give the new in evidence, adds, "that some pleaders of eminence declare on both promises." Whether, upon a declaration on the old promise, the plaintiff can give in evidence a new conditional promise, varying from the old one, may admit of some doubt. In the case of Davies v. Smith, 4 Esp. 36, and Besford v. Saunders, 2 H. Bl. 116, this was permitted. In a former action between these parties upon this bill of exchange [Case No. 8,492], this court was of opinion that a conditional promise could not be given in evidence, in answer to the act of limitations, because it did not correspond with the promise laid in the declaration, and if put into the form of a plea, it would have been a departure from the declaration. This opinion is strongly supported by the case of Hickman's Ex'rs v. Walker, Willes, 27, which was an action by an executor on a promise to the testator; and upon a plea of the act of limitations, it was decided to be a departure to reply a new promise to the executor. See, also, Dean v. Crane, 1 Salk. 28; 2 Ld. Raym. 1101; 3 East, 409; 2 Hen. & M. 401. In some of the above cases, it is said that the plaintiff should have declared on the new promise to himself; and in Executors of the Duke of Marlborough v. Widmore, 2 Strange, 890, the plaintiff had leave to amend his declaration for that purpose. Until otherwise instructed by the supreme court, we shall adhere to the opinion given in the former case.

4. The last objection was principally relied upon by the defendant's counsel. It was strongly insisted, that no specific time of forbearance was stipulated in this case, and that the plaintiff might have brought his suit in an hour after the promise was made. If the promise in this case was such as the counsel have contended it was, we admit the conclusion, in point of law, to be correct. If, for example, the promise of forbearance be for a short time, such a forbearance would not be a good consideration, and that for the reason assigned by the counsel. Lutwich v. Hussey, Cro. Eliz. 19. But we take the rule to be, that, if the promise be to forbear for a convenient or reasonable time, either in general or specific terms, or indefinitely, it is sufficient to maintain assumpsit; for in the latter case the court will intend the forbearance to be total and absolute, and after forbearing for a reasonable time, the plaintiff may bring his action upon the new promise, and is not obliged to wait all his life. Mapes v. Sidney, Cro. Jac. 683. Lingen v. Broughton, 3 Bulst. 206; Rolle, 379; Moore, 1167; Mature v. West, Cro. Eliz. 665. Comyn, Dig. tit. "Actions on the Case upon Assumpsit," B 1, states the rule that forbearance generally is a good consideration. He cites Hob. 216, and Cro. Eliz. 387, and adds as the reason, that it shall be intended a total forbearance, for which he refers to Mapes v. Sidney, before mentioned, and Therne v. Fuller [Cro. Jac. 396]. In Philips v. Sackford, Cro. Eliz. 455, it was laid down, that a promise to forbear indefinitely was not a good consideration; but this decision was clearly overruled by the other cases above referred to. In this case, however, there is no necessity to rely upon these authorities, because here was a reasonable and convenient time of forbearance fixed; and although it was uncertain at the time

as to its duration, yet it was referable to a certain standard, viz. the ability of the defendant to pay. For we understand the promise to be "that the plaintiff would forbear until the defendant should be able;" on the happening of which, the defendant promised to pay. This is precisely the same in principle as the case of May v. Alvares, Cro. Eliz. 387, before notice for another purpose. There the promise was to deliver goods in six months, in consideration of forbearance generally. The plaintiff did not promise expressly to wait six months, but the court said that this was to be implied, and the consideration was deemed sufficient to uphold the promise.

Upon the whole we are of opinion that none of the objections to this count are supported. We have selected the fourth count, because that is the one to which the evidence applied, and we have endeavoured to show from the cases, that the objections to this count are untenable. It is unnecessary, and would be a waste of time, to notice the other counts, because, if any one count be good, and the evidence given at the trial applied only to that count, and a general verdict be given, the court may direct the judgment to be entered on the good count, and we find, from the English cases, that the court has even gone so far as to direct the postea to be amended by the notes of the judge, and the verdict to be entered upon the count to which the evidence given at the trial applied, and for the defendant on the others. Eddowes v. Hopkins, 1 Doug. 376. But this cannot be done on a writ of error, and in that case the court can do no more than award a venire de novo. Grant v. Astle, 2 Doug. 730; Williams v. Breedon, 1 Bos. & P. 329. Now, in this case, the evidence applied to the fourth count, and in some respects to the fifth, which is equally unexceptionable. A part of the evidence applied to the original counts, to which no objection is made, and which, on the motion in arrest of judgment, are not before the court.

The reasons assigned for a new trial are the following:

1. That a protest for non-acceptance of an inland bill of exchange was admitted in evidence. The inquiry then is, whether a bill drawn in New Orleans, upon a person living in Pennsylvania, is an inland or a foreign bill? To this inquiry my attention has been directed, because to this alone the arguments of the counsel were applied. The question is in a great measure new, as well as difficult, and involves general principles, in relation to the federal union of these states, which I consider as being highly important. "Foreign" and "inland," when applied to bills of exchange, are terms purely technical, which we have borrowed from the English law. to which it is proper we should refer for their true meaning. The English elementary writers, in distinguishing the one kind of bill from the other, make use of different expressions, all of which, however, seem intended to mean the same thing. Kyd, in his Treatise (page 8), describes foreign bills to be those which pass from one country to another, and inland bills, such as pass between persons residing in the same country. Evans (page 2) states a foreign bill to be "one which is drawn by a creditor in one kingdom, upon his debtor in another, and an inland bill, as one where the drawer and the drawee reside in this kingdom." Blackstone, in his Commentaries (volume 2, p. 467), uses the word "abroad," when speaking of a foreign bill, and "kingdom," in reference to an inland bill. If the phrase "kingdom" is to be taken in its strict sense, to mean the territories belonging to the king, it would follow, that bills drawn in the West Indies upon England, would be considered as inland, which they most unquestionably are not. No direct authority was produced by the counsel on either side, nor have I been able to meet with any, as to the particular character of bills drawn out of England, but within the king's dominions, on England. It was said by Treby, J., in the case of Bromwich v. Lloyd, 2 Lutw. 1582, "that bills of exchange at first extended only to merchant strangers trading with English merchants, and afterwards to inland bills between merchants, trading, the one with the other, here in England, and afterwards to all traders, and of late, to all persons trafficking or not;" from which expressions it would seem, that inland bills were confined to persons residing in England.

In the argument of this cause, it was said by counsel, that bills drawn in Scotland upon England, since the union, were treated as inland; and if any direct decision to that effect had been produced, I should have deemed it worthy of serious consideration. I have spared no pains, during the vacation, in searching for such a decision, but without success. Marius (page 2) uses some loose expressions to that effect, but it would be very unsafe to rely upon them as authority. In Swift's Treatise on Bills (page 291), the learned author lays it down, that bills drawn in Ireland before the union, and in their colonies, on England, were treated as foreign bills. He adds, "I know not whether the question has arisen, how a bill shall be considered drawn in any other state in the union; but the practice has been, to admit protests for non-acceptance and non-payment of bills, under the official seal of notaries public, to be conclusive evidence of the fact, in like manner as in the case of foreign bills; of course, they may be considered to be foreign bills." I refer to what is here stated, not as the kind of authority which I was in search of, but as the statement of a learned judge, in a highly commercial state, in relation to the practice of lawyers and merchants upon this subject. In the case of King v. Walker, 1 Black. [66 U. S.] 286, it

was said by counsel, and not contradicted by the bench, or bar, "that it had been questioned whether Scotch bills of exchange were inland or foreign bills, and been determined by Chief Justice Ryder, at Guildhall, that they were foreign bills." That inland bills, prior to the statute of the 8 & 9 Wm. III. c. 17, were considered as confined to England, is strongly to be inferred from the provisions of that statute, which speaks of bills drawn at any place in the kingdom of England, dominion of Wales, or town of Berwick upon Tweed; although Wales and Berwick had been, previous to that statute, as firmly united to England, as Scotland was after the union. It is possible that naming Scotland, and the town of Berwick, was unnecessary, and that they might have been considered as included under the general terms, "kingdom of England." However this might have been, it would seem that the legislature which enacted that statute thought otherwise, or it is not likely that they would have been included by express words. If bills drawn in England on Scotland be inland bills, they are of a peculiar character, as it is perfectly clear that they are not within the provisions of the above statute, and consequently cannot be protested, nor are they entitled to any of the other privileges bestowed by that statute upon inland bills; and if in fact they are so treated, it is inconceivable that that portion of the British dominions, and even England, should for so long a period have been subjected to the inconvenience of having a species of commercial paper, which is neither a foreign bill, nor a statutory inland bill. Unless they are considered and treated as of the former description, it is highly probable that the statute 8 & 9 Wm. III. would have been extended to Scotland, as it was to Wales and the town of Berwick. If in point of fact, those bills are treated as foreign (a conclusion to which my mind strongly inclines,) it cannot but have a strong bearing upon this case. The union between England and Scotland is, politically speaking, as intimate as between England and Wales, or between the different counties of either. They form one kingdom; are subject to the same government, and are represented in the same legislative body; and although the laws and customs of Scotland, in force at the time of the union, were suffered to continue, yet they are alterable by the parliament of Great Britain, even as they relate to private rights, if the alteration should be deemed for the evident utility of the people of Scotland. How different is the union of these states? They are, in their separate political capacities, sovereign and independent of each other, except so far as they have united for their common defence, and for national purposes. They have each a constitution and form of government, with all the attributes of sovereignty. As to matters of national concern, they form one government, are subject to the same laws, and may be emphatically denominated one people. In all other respects, they are as distinct as different forms of government, and different laws can render them. It is true, that the citizens of each state are entitled to all the privileges and immunities of citizens in every other state; that the sovereignty of the states, in relation to fugitives from justice and from service, is limited; and that each state is bound to give full faith and credit to the public acts, records, and judicial proceedings of her sister states. But these privileges and disabilities are mere creatures of the constitution; and it is quite fair to argue, that the framers of that instrument deemed it necessary to secure them by express provisions.

In the case of Warder v. Arell, 2 Wash. (Va.) 282, the question in part was, whether the tender laws of Pennsylvania, where the contract was made, ought to be regarded by the courts of Virginia, where the suit was brought? And throughout the opinions delivered by the judges, Pennsylvania was treated as a foreign country. The president of the court is express upon this point. He observes "that in cases of contracts, the laws of a foreign country, where the contract is made, must govern. The same principle applies, though with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal laws, are to each other foreign." If the union between the states be so complete, that a bill drawn in one state upon another is to be treated as an inland bill, one would suppose, that a discharge under the insolvent laws of one state, though the creditor resided in another state, would be regarded as a discharge in every other state. And yet the law is otherwise laid down in Massachusetts and New York, and perhaps in other of the states. Van Raugh v. Van Arsdaln, 3 Caines, 154; Smith v. Smith, 2 Johns. 236. These decisions are in strict conformity with the rule in England, that a discharge under a foreign bankrupt law is no bar of a debt contracted in England, due to a creditor residing there. 1 East, 6. In Pennsylvania the rule of reciprocity is observed, and the courts here will discharge on common bail a person who has been discharged by the insolvent laws of another state; if the courts of that state use the same courtesy towards the citizens of Pennsylvania. 2 Bin. 20. Even the judgments of other states are considered in the courts of Vermont, Massachusetts and New York as being so far foreign, that the grounds of them may be inquired into, when impeached by the defendant. Bartlet v. Knight, 1 Mass. 401; Hitchcock v. Aicken, 1 Caines, 460. In Hubbell v. Coudrey, 5 Johns. 132, the court considered a judgment rendered in the state of Connecticut as a simple contract debt; and so a judgment rendered in a French tribunal would be considered in the

English and American courts. It seems very clear that all the above cases proceed upon the principle laid down by President Pendleton before noticed, "that with respect to their municipal laws, the states are foreign to each other." And if this be so, I am at a loss to conceive how a bill of exchange drawn in one state, upon a person residing in another, can be considered as an inland bill. The inconveniences which would result from so considering them, would lead me to hesitate long before I could be induced to do it, unless indeed I were pressed by decisions of the courts of the United States, or a current of state decisions. It may be sufficient to point out one of the inconveniences alluded to, viz. the necessity of proving by witnesses or depositions, in every suit upon such a bill, presentation and a demand; since the protest could not be given in evidence to prove these facts. It is greatly to be feared that such a necessity would, in no small degree, cramp the circulation of this species of paper. The only case I have met with in which these bills have been considered as inland, is that of Miller v. Hackley, 5 Johns. 375, which I acknowledge to be the decision of a court greatly to be respected. It is however a single authority, and this particular question does not appear to have been very minutely examined by the bench or bar. Indeed, as the cause was decided upon the ground of want of notice of the protest, it was immaterial whether the bill was foreign or inland, since the objection was equally fatal in both cases; and it was therefore the less necessary to examine with attention the other point. It may be worthy of remark, that the counsel for the plaintiff in that case placed great reliance upon a note in 2 Tuck. Bl. Comm. p. 467; in which the learned editor, speaking of inland bills of exchange, in reference to Virginia, describes them as bills drawn in that state or any other of the states. But the counsel could not have been apprized of the circumstance, that by a law of that state, passed on the 28th of December 1798, it was declared, that bills of exchange drawn by any person residing in Virginia, on any person in the United States, should be considered as an inland bill, and the act proceeds to give damages and interest in case the same should be protested. I remark further, that it is not easy to reconcile the decision in Miller v. Hackley, as to this point, with those before mentioned, which treat the states, in respect to their municipal laws, as foreign to each other.

I believe that the general opinion of commercial and legal men in the United States has not corresponded with the doctrine laid down in the above case. This may fairly be concluded from the circumstance, that these bills have uniformly been protested, and so far as I am informed, this is the second case only in which the validity of those protests, or their admissibility in evidence has been questioned. In Swift's Essay on Bills, before referred to (page 336), the author observes, that "it is generally understood by merchants in this state, that on bills drawn here on a foreign country, and returned protested, twenty per cent. damages is allowed; and that on bills drawn on any other state in the Union, (which are to be considered as foreign bills) two and a half per cent. shall be allowed in lieu of all costs, charges, and damages." Upon the whole, I am of opinion, that upon principle, as well as for the sake of commercial convenience, the bill in question is to be considered as a foreign bill, and therefore that the protest was properly admitted in evidence.

2. The second reason assigned, why a new trial should be granted is, that the verdict is against evidence; and to make this out, it was insisted by the counsel, that the jury, not having said on which count their verdict was found, they may have found it on the counts on the bill of exchange, contrary to the evidence; which proved, that the former suit, in which a verdict was given for the defendant, was founded upon this very bill. We do not think that this is a ground for a new trial; because if there be two issues, or issues on two counts, and the verdict be not contrary to evidence as to one of them, the court will not grant a new trial, though it be contrary to evidence as to the other, for since the verdict is right in part, the court will not set it aside. 5 Bac. Abr. tit. "Trial," L (Wils. Ed.) § 4, p. 662; 1 Barnes, Eq. Prac. 9, 317, 333. Now, we think, there can be no question but that the verdict on the fourth count, before noticed, is in strict conformity with the evidence.

3. The next reason alleged is, that the jury took out with them a deposition, part of which was objected to at the trial by the defendant's counsel, and the objection allowed by the court. The fact, as stated, is fully made out in proof, and the question in point of law is, whether this be a sufficient ground for setting aside the verdict? If the parts of the deposition, which were not read, were material to the plaintiff's case, we should think that the verdict ought not to stand. 5 Mass. 405. So if the deposition had been delivered to the jury by the plaintiff's counsel, without the consent of the other side, although it fully appeared that the rejected parts had not been read by the jury. Cited Pratt's Case, 21 Vin. Abr. 451. But if the evidence be altogether irrelevant, and immaterial to the issue, and the deposition is taken out by the jury by mistake, we think it would be going too far to set aside the verdict, when the court can not but perceive that it could not have influenced the finding of the jury. The rejected testimony related to an instrument which the witness had once seen, by which O'Neal, the indorser of the bill of exchange mentioned in the original counts, acknowledged that he had no claim upon the plaintiff, in consequence of the transfer of the bill to him, and released the plaintiff from all liability. It has not

the slightest relation to the counts upon the new promise, which are founded on a distinct cause of action, and if the verdict correspond with the evidence on those counts, or either of them, the court ought not to set aside the verdict, because evidence was improperly taken out by the jury, not applicable in any respect to those counts, but to others founded on a distant cause of action.

4. The last reason assigned for a new trial is, that the verdict gives damages and interest on the bill of exchange. In this we think the jury did wrong, as no evidence was given to support the claim of damages, even if we could construe the defendant's promise as extending to them. We think the plaintiff was entitled to recover only the amount of the bill of exchange with interest, if the jury thought proper to give it in the name of damages, and that he may cure this defect in the verdict, by releasing all beyond what he is justly entitled to. There are three periods from which the interest may be calculated: The protest of the bill; the time of the promise; and the ability to pay. We reject the first, because this action is to be considered as founded on the new promise, which has no further connection with the bill of exchange than to ascertain the amount due, and to show a subsisting and continuing consideration. The promise proved is, "that the defendant would pay the bill of exchange if he ever got able;" that is, "that he would pay $600 when he should be able." If the promise had been to pay the bill generally, in consideration of forbearance, the defendant could not have been properly chargeable with interest, but from the time when the promise was made. But it was to pay when he should be able. Time then was given until he should be able, and interest could not properly be chargeable, until the contingency should happen, when payment was to be made, any more than if it had been to pay ten years afterwards, if he should then be able. The promise was of a debitum in presenti, solvendum in futuro; and in such a case, it is clear, that interest is not demandable until the debt is payable, unless an express stipulation to the contrary is made. We are, therefore, of opinion, that the plaintiff is not entitled to retain this verdict, unless he will agree to release all the damages beyond the $600, with legal interest from the time when it is proved the defendant was able.

Bills of exchange drawn in one state of the Union on persons living in another state, partake of the character of foreign bills; and ought to be so treated in the courts of the United States. Buckner v. Finley, 2 Pet. [27 U. S.] 586.

Case No. 8,495.

LONSDALE v. BROWN.

[See Case No. 8,494.]

Case No. 8,496.

LONSDALE CO. v. MOIES.

[1 Brunner, Col. Cas. 655;[1] 21 Law Rep. 658.]

Circuit Court, D. Rhode Island. June, 1857.

DEED — PROOF OF EXECUTION BY SUBSCRIBING WITNESS — EQUITY — EFFECT OF REGISTERED DEED WITH NOTICE OF PRIOR UNREGISTERED CONVEYANCE—INJUNCTION — NOTICE—OPEN AND NOTORIOUS POSSESSION— EASEMENT — RIGHT TO TAKE WATER — CANAL — PUBLIC USE — WATER RIGHTS.

1. A deed which is more than thirty years old at the time of the hearing, the grantor and one of the subscribing witnesses being dead, and the other testifying to her own signature as a witness, is sufficiently proved, though the witness can neither swear to the genuineness of the grantor's signature, nor the execution of the deed by him.

2. A court of equity has jurisdiction to postpone a registered deed taken with notice of a prior unregistered deed, and to enjoin an action at law based on the former deed against the grantee under the latter deed.

3. Visible possession and occupation by the grantee under an unregistered deed, known to the grantee under a registered deed, is sufficient, if not controlled by other circumstances, to warrant a court or jury in finding notice of the unregistered deed.

4. An incorporeal right to water may be granted in gross.

[Cited in Goodrich v. Burbank, 12 Allen, 462; Amidon v. Harris, 113 Mass. 64.]

5. A canal corporation may permit water to be drawn through its canal for mill purposes, if neither the public use nor any private right is thereby injured.

[Cited in Lonsdale Co. v. Moies, Case No. 8,497.]

[Bill by the Lonsdale Company against Miles G. Moies for a title to certain water rights.]

CURTIS, Circuit Justice. This is a suit in equity, wherein the complainants assert their title to certain water rights, and pray that their title may be quieted as against the respondent, and especially as against a suit at law instituted by him, and now pending in this court. Both parties claim title under one Simon Whipple; the complainants through certain conveyances alleged to have been made by him, and the respondent through a conveyance made by Simmons and wife, in her right as the daughter and heir of Simon Whipple, after his decease, to Charles Moies, and by him to the respondent. Among the deeds alleged to have been made by Simon Whipple, and under which the complainant claims, is one in the following words and figures:

"To All People to Whom These Presents shall Come. I, Simon Whipple, of Smithfield, in the county of Providence, state of Rhode Island, send greeting. Know ye that I, the said Simon, for and in consideration of one dollar, in hand before the ensealing hereof, well and truly paid by Wilbur Kelly, of North Providence, state and county aforesaid, the receipt whereof I hereby acknowl-

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

edge, and am therewith fully satisfied and paid, and thereof do acquit and discharge him, the said Kelly, his heirs and assigns forever, by these presents. Have given, granted, sold, conveyed, confirmed, and by these presents do give, grant, convey, and confirm unto him, the said Kelly, his heirs and assigns forever, all my right, title, and interest in and to the waters of the Blackstone River, with the further right and privilege to him, the said Kelly, his heirs and assigns forever, to take, divert, convey, and use the said waters on, over, through, or by my land, through the Blackstone Canal, wherein situated, for any purpose whatever. To have and to hold the said granted and bargained premises, with all the privilege thereunto belonging, or appertaining to him, the said Kelly, his heirs and assigns forever; and I, the said Simon, do covenant with the said Kelly, that I am lawfully seized and possessed of the same, and have full right and power to convey the same; and that the said Kelly, his heirs and assigns, shall and may, from time to time, and all times hereafter, by virtue of these presents, lawfully hold the said water and the use thereof. Provided, however, the said Simon reserves to himself, his heirs and assigns forever, the right of taking and drawing water, either from the mill pond by a trench, or through the Blackstone Canal banks, conformable to their agreement made with me the 16th day of March, 1826, whenever the water is running to waste over said dam or flashboards thereof, for the purpose of watering my intervale land south of said Kelly's factory, on the west side of the Blackstone river. In testimony whereof, I have set my hand and seal, this 31st day of March, A. D. 1826. Simon Whipple. (Seal.) In presence of (Memod. through the Blackstone Canal, first interlined.) (Signed.) Salah S. Whipple. (Signed.) Martha Hull.

"Providence, sc.—At Smithfield, August 30, 1826, at 8 o'clock p. m., the within deed was then received, and is recorded in the registry of deeds for said town, in Book No. 16, and page 337.

"Town Clerk's Office, Smithfield, December 2, 1845. I hereby certify that the aforegoing deed is recorded in Smithfield registry of deeds, in Book No. 15, page 337. Witness, (Signed.) Orin Wright, Town Clerk."

If this deed was executed by Simon Whipple, and is valid and operative as against the respondent, to convey all Whipple's rights to water which are now in controversy, and the complainants have acquired those rights from Wilber Kelly, they have the better title, and are entitled to such relief as a court of equity deems appropriate to the case. The execution of the deed by Simon Whipple is denied. One of the subscribing witnesses is shown to be deceased. The other, the daughter of the grantor, and the person under whom the respondent claims, testifies to the genuineness of her own signature, and that she placed it there as a witness; but what is somewhat strange, says she does not know her father's handwriting, and cannot say whether or not he executed the deed. But when this exhibit was produced at the hearing, and when for the first time it became necessary for the complainants to prove it (Gres. Eq. Ev. 188), the deed was more than thirty years old, and coming from the proper custody, and especially when accompanied by proof of enjoyment in conformity with it, was admissible in evidence without proof of its execution. A fortiori it is admissible after the memory of one of the subscribing witnesses has been exhausted, and the other is shown to be dead, and the relation of the living witness to the grantor, and the genuineness of her own signature, and the fact of her attestation, strongly tend to repel any idea of fraud or mistake, and to prove the execution of the deed by the grantor, and there is no evidence tending to create a doubt or suspicion concerning its genuineness. It is denied that the deed is operative as against the respondent, because, though recorded, it was not acknowledged. The statute of Rhode Island provides that "all bargains, sales, and other conveyances whatsoever, of any lands, etc., shall be void, unless they shall be acknowledged and recorded as above said; provided always, that the same between parties and their heirs shall nevertheless be valid and binding." It is a settled rule, both in England and America, that a court of equity will not suffer a subsequent grantee, by a registered deed, to hold an estate conveyed by a prior unregistered deed, of which he had notice at the time of his purchase. An attempt thus to acquire a title known to have been conveyed to another is an attempt to commit a fraud; and upon the ground of fraud equity interposes, and restrains the second grantee from availing himself of his covinous contrivance. And this without regard to the particular terms of the registry acts, whose purpose is fully answered when purchasers are protected from secret liens and conveyances. 4 Kent, Comm. 171; 1 Story, Eq. § 397. In Landes v. Brant, 10 How. [51 U. S.] 348, it was decided that open and notorious occupation by the first purchaser, when the second deed was taken, is in itself sufficient to warrant a jury or court in finding that the second purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under; and that the subsequent purchaser was bound by that title, aside from all other evidence than such possession and holding. Whatever diversities may exist in the decisions made elsewhere, this is binding on me, sitting in this court. I do not understand that the supreme court of Rhode Island, in Harris v. Arnold, 1 R. I. 125, have decided otherwise. It is there held that

possession is not, under all circumstances, conclusive evidence of notice. So I understand the law to be. See Jones v. Smith, 1 Hare, 43, 1 Phil. Ch. 244. Knowledge of possession by a third person may be accompanied by such circumstances, as, taken all together, do not evince what Mr. Vice Chancellor Wigram terms a fraudulent turning away from a knowledge of the facts which the res gestae would suggest to a prudent mind. Each case must be examined by the light of all the surrounding circumstances, which have a tendency either to prompt or check those inquiries to which it is the natural effect of notorious adverse possession to give rise.

These surrounding circumstances in this are, that Simon Whipple, having made the deed in question in March, 1826, those under whom the complainants claim built three large cotton mills in the years 1831, 1832, and 1833, and at the close of the latter year began to operate them by means of the water diverted from the river, under the titles which they assert in this suit, including that granted by Simon Whipple to Wilbur Kelly. This diversion and use were by means of permanent works, visible to the eye, and visibly necessary to the operation of this large and costly establishment. Under the reservation made in the deed in question, of certain waste water to be drawn through the described culverts for purposes of irrigation, Simon Whipple, during his lifetime, and his heirs after his decease, continued to make that restricted use of the water. This state of things continued until Mrs. Simmons, one of the heirs of Simon Whipple, conveyed to Charles Moies, by deed, dated March 12, 1849, certain lands inherited from Simon Whipple, together with the water rights now in controversy; and on the 26th day of September following, Charles Moies conveyed the same to his brother, the present respondent. Both Charles Moies and the respondent were well acquainted with the actual state of the premises, and knew at the time their respective deeds were made that the complainants were, and for some years had been, actually diverting the water, and using it at the Lonsdale Mills; and the respondent had actual knowledge that the water rights described in his deed were the subject of disput between Simmons and the complainant, and that counsel had been retained in expectation of a controversy concerning them. The lands conveyed by Simmons and wife have never been in the actual possession of either of the grantees, but of Simmons. Charles Moies does not appear to have paid anything for his deed. He gave back a mortgage for the amount of the consideration mentioned in the deed to him. The respondent answers that he paid his brother the one thousand dollars mentioned as the consideration of the deed to him about three years after the deed was executed, without interest. Whether Simmons has ever paid any rent for the lands, or to whom, does not appear. He has acted as agent and counsel in managing this suit. These special circumstances are not of a character to rebut the presumption of notice which arises from an adverse possession. On the contrary, when we consider that the deed from Whipple to Kelly, though not acknowledged, was actually spread on the public records, the facts, in my judgment, show that if the transaction between Simmons and Charles Moies, and that between the latter and the respondent, was an actual and not a colorable sale, the purchaser knew enough to send him to those records; and if he did not go there, he purposely turned away from a knowledge of the existence of that deed, and voluntarily kept himself ignorant of it, that he might enter with a better prospect of success upon the litigation which he knew he had purchased. I hold both Charles Moies and the respondent chargeable with notice of the deed from Whipple to Wilbur, and consequently, that it is valid and effectual, in equity, as against the respondent. It remains to consider the legal effect of the deed.

It is argued, that when viewed by the light of the surrounding circumstances, in and upon which the deed was to operate, its true construction is, and the intention of the parties was, to grant the water only for canal, and not for mill purposes. But it is difficult to perceive how any ambiguity, calling for a construction, can be raised on the words of this deed, which expressly conveys the right to use the water, when diverted, "for any purpose whatever." To draw from extraneous facts a restriction of the use to canal purposes, would be, not to construe but to contradict the deed.

It is further insisted, that whatever may have been the intention of the parties, the deed cannot operate, in point of law, to grant to Kelly a right to use the water for any but canal purposes. 1. Because Kelly was acting as agent or trustee of the canal corporation, which was not authorized to acquire water for mill purposes. 2. Because the canal corporation could not lawfully permit this section of its canal to be used for a conduit to conduct water to mills. 3. Because Kelly did not then own any land, to which this water right could be or was annexed, as an appurtenance, by the grant. I do not think either of these positions sufficient to restrict the legal operation of this deed to the use of the water for canal purposes. Kelly appears to have acted, not only as the trustee of the canal corporation, but also in behalf of himself and certain associates who desired to acquire mill sites. It was competent for him to purchase property and rights which were in part available for canal and in part for mill purposes; and it rested between himself and the canal corporation to distribute what was thus acquired, between them,

according to their respective wants. Third persons had no power to interpose between them. I cannot agree that it was unlawful for the canal corporation to allow Kelly to draw water for mill purposes through the canal. So long as such use was no interruption to the public use of the canal, and infringed on no private right, it was competent for the corporation to permit this incidental use. See Rundell v. Delaware & R. Canal Co., 14 How. [55 U. S.] 93. By their agreement with Kelly of the 16th September, 1826, this right was granted in consideration of covenants on his part, which amounted to a valuable consideration, directly subserving the public use. I perceive no legal objection to the arrangement. It is true Kelly had not acquired this right when the grant from Whipple was made; nor did he then own any land upon which he could use the water to be drawn through the canal. But I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring I may sell the right to take water from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be acquired afterwards. Incorporeal rights may be inseparably annexed to a particular messuage, or tract of land, by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards for purposes of enjoyment be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land, without the right, or a conveyance of the right without the land. Com. Dig. tit. "Appendant and Appurtenant," D; 2 Bl. Comm. (Chitty's Ed.) 19, 22, 34, 39; Ashley v. Pease, 18 Pick. 274; Cocheco Manuf'g Co. v. Whittier, 10 N. H. 305. And even if the common law were otherwise, as a grant is but a contract executed, if the grant could not take effect as such, still if it were acted on by the grantee, and expensive works erected, which were dependent on the enjoyment of what was bargained for, a court of equity would protect the grantee from an assertion of his legal title by the grantor.

It is further objected that the complainants have not acquired Kelly's title, first, because the deed from him to Brown and others bears date before the deed from Whipple to Kelly; and secondly, because Kelly conveys only the water rights he acquired "by virtue of agreement with Simon Whipple, the Blackstone Canal Company, and others"; and there is no agreement with Simon Whipple in evidence. But it is conceded that the deed from Kelly to Brown and others was antedated, and a deed speaks from the time of its delivery. U. S. v. Le Baron, 19 How. [60 U. S.] 73. And though his deed speaks of acquiring the rights from Whipple by agreement, yet, as Chief Justice Marshal says, in Fletcher v. Peck, 6 Cranch [10 U. S.] 87, a grant made in pursuance of a contract is an executed contract. Strictly speaking, therefore, there was no impropriety in referring to this grant as an agreement, for it was an agreement executed. Considering that it was the only agreement to which it could have been intended to refer, and that Brown and others, the grantees of Kelly, and their successors in the title, had acted under it for nearly twenty years when the respondent brought his action at law, and neither Kelly, nor any one representing him has ever questioned the complainant's title, I cannot say that the words "agreement with Simon Whipple," fail sufficiently to refer to and identify the rights he conveyed to Kelly.

It is also argued that if the deed from Whipple to Kelly was operative, it conveyed a legal title, and the complainants may have the benefit thereof in defending the action at law, and so there is no ground for the action of a court of equity. But there is no doubt of the jurisdiction of a court of equity to restrain the grantee by a registered deed from setting it up against a prior grantee by an unregistered deed, and to proceed to adjust the rights of the parties upon the footing of what equity deems the true title. Some courts of law in this country, though not in England, have exercised a similar jurisdiction. Robinson v. Allsop, 5 Barn. & Ald. 142; 1 Story, Eq. Jur. § 397. But this does not divest a court of equity of its powers to give relief.

The very elaborate and able arguments of the counsel in this case have discussed many questions and traversed much ground upon which I have not found it needful to pass. The result at which I have arrived is, that upon the deeds of conveyance, including that from Simon Whipple to Wilbur Kelly, the complainants have made good their title as against the respondent, to divert the water of the Blackstone river, saving only what was reserved for purposes of irrigation in the last mentioned deed; and consequently are entitled to an injunction to stop the prosecution of the suit at law, and protect their incorporeal right from disturbance. Let a decree be drawn up to this effect, and for the costs.

Incorporeal Rights in Water—Transfer of Water Rights. See Goodrich v. Burbank, 12 Allen, 462; Amidon v. Harris, 113 Mass. 64,—citing above case.

[NOTE. The case was subsequently heard upon exceptions to master's report, upon which hearing the court explained and construed the decree above. The exceptions were partially sustained. Case No. 8,497.]

Case No. 8,497.

LONSDALE CO. v. MOIES.

[2 Cliff. 538.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1865.

MASTER'S REPORT IN CHANCERY—VARIANCE FROM DECREE—EASEMENT—RIGHT TO TAKE WATER—NEEDFUL STRUCTURES—AMOUNT TO BE TAKEN.

The decree of the court was, that the complainants were confirmed in their right and title to divert and use the water of a certain stream, through a canal, for mill or other uses, subject to the right of the respondent to use the water of said river for irrigation only, in accordance with a reservation in the deed under which the complainants claimed, and also by virtue of a certain agreement between the canal company and the grantor in the said deed, and that the cause be referred to a master to ascertain and report the amount of damage, if any, sustained by the complainants in consequence of the insertion by the respondent of a flume or culvert in the bank of the canal, as admitted in his answer; also what structures were proper and needful to enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, in accordance with the reservation contained in the deed and the agreement. *Held*, that the decision of the master to the effect that the complainants were not entitled to any damages was inconsistent with the decree, which assumed that a wrongful act was charged in the bill and confessed in the answer, and therefore that the complainants were at least entitled to nominal damages. *Held*, also, that proper and needful structures, within the meaning of the decree, were not only such as would enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, but such as would enable him to do so, as far as practicable, consistent with the right of the complainants to insist that only so much water should be taken as might be reasonably necessary for that purpose; that the master erred in holding that it was not within his province to provide a safe preventative against any possible abuse of his right by the defendant; and that the cause must be again sent to the master under the present construction of the decree.

This was a bill in equity [against Miles G. Moies], and the case came before the court upon exceptions to the master's report. Decree having been entered for the complainants in 1857 [Case No. 8,496], the cause was referred to a master, with certain directions hereinafter mentioned. The decree was in substance that the complainants were confirmed in their right and title to divert and use the water of the Blackstone river, in the county of Providence in this district, through a canal formerly known as the Blackstone Canal, for mill or other uses, at Lonsdale, in accordance with the conveyance by Simon Whipple to Wilbur Kelly, dated March 21, 1826, subject to the right of the respondent to use the water of said river for irrigation only, in accordance with a reservation contained in the said deed, and in accordance also with an agreement dated March 16, 1826, between the commissioners of the Blackstone Canal Company and the said Simon Whipple. The instrument called the agreement purported to grant to the said Whipple, his heirs and assigns, the privilege of taking water from said canal, when the water was running to waste or flowing over the dam or flash-boards thereof, sufficient for watering said interval land, to be drawn from said canal by three tunnels placed under the towing-path of said canal, the under side of said tunnels to be on a level with the top of the dam aforesaid, and not to exceed fifteen inches wide and six inches high, with slide-gates in the same to stop the run of water when not wanted for watering said land. The reservation in the deed was, "to said Whipple, his heirs and assigns forever, of the right of taking and drawing water either from the mill-pond by a trench, or through the Blackstone Canal banks, conformable to their agreement with me, whenever the water is running to waste over said dam, or flash-boards thereof, for the purpose of watering my interval land south of said Kelly's factory on the west side of the Blackstone river." The decision of the court was, that the complainants had made good their title, as against the respondent, to divert the water of the Blackstone river, saving only what was reserved for the purposes of irrigation in the last-mentioned deed. In the present opinion the court said: "It will be observed that the deed referred to expressly recognizes the privilege granted to the grantor of the deed in the prior agreement, as the alternative right of taking and drawing water secured in the reservation. The language of the decree therefore corresponds with the decision of the court; and in both the right of the respondent to use the water of the river is declared to be for irrigation only, and only in accordance with the agreement, and the reservation of the same as contained in the deed." The duties of the master, to whose report exceptions were taken were described in the decree as follows: First, to ascertain and report the amount of damage, if any, sustained by the complainants in consequence of the insertion by the respondent of a flume or culvert in the bank of the canal, as admitted in his answer. Second, to report what structures were proper and needful to enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, in accordance with the reservation contained in the deed, and the agreement referred to in the decree.

The following is the substance of those portions of the master's report necessary to be reproduced in this statement: Three tunnels had existed in the bank or tow-path of the Blackstone Canal since 1827, for irrigation upon the Whipple meadow. In 1852, the defendant substituted a flume or gateway with a sliding gate, for the central tunnel, the same being at the same height at the bottom as the former tunnel; assuming that, as the Blackstone Canal Corporation had been dissolved, and the tow-path had reverted to him, the agreement had become obsolete, but that his right to the water under

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

the reservation remained unimpaired. Upon this the litigation between the parties commenced. The grounds of the claim for damages, within the scope of the master's commission, was the following: That the said flume was so unskilfully and insecurely constructed by the defendant that the complainants' interests at Lonsdale were greatly imperilled, and that they were obliged to expend labor and materials in improving the structure. That the defendant, in March, 1852, inserted in the bank or tow-path of the canal a flume of much larger dimensions and greater capacity than the tunnel, and that through the said flume a quantity of water passed more than what could flow through the tunnel, to the damage of the complainants of from $1000 to $1500 per annum. Upon this the master reported that the ground for an estimate of the damages was too vague and insufficient; that the injury, if any, was damnum absque injuria; and that the complainants were not entitled even to nominal damages. As to the structures proper and needful to enable the defendant to enjoy and use the right to divert the water for irrigation purposes, the following recommendations were made: First, that the defendant henceforth draw his supply of water for irrigation through only two orifices: one at the flume, the other at some point between that flume and the lower or southernmost tunnel; economy and convenience, as well as the topography of the premises, dictating this arrangement. Second, that these orifices be securely constructed and inserted in or under the bank, the bottoms of which respectively shall be at such a height relatively to the Ashton dam, as that the water will flow into them whenever it is running over the Ashton dam proper (i. e. its cap-log), let the current in the canal be as rapid as it can be made by any conceivable management or use of water or water power at Lonsdale, or any improvements in the canal itself, at its mouth, or at the dam. Third, that said tunnels respectively each be of dimensions not exceeding twenty-two and a half inches in width and six inches in height, "with slide-gates to stop the run of water when not wanted for watering said" meadow. The master further reported it not to be within the scope of his duties to provide against any possible future abuse of his rights by the defendant.

Exceptions to the report were filed by the complainants, in which objection was taken to the fact that the master had assumed that the decree referred to him the construction of both the "reservation" and the "agreement;" whereas the court had already decided the rights of the parties under both. They also excepted to his ruling that no damages were recoverable by complainants, to his construction of the reservation and agreement, and to his decision as to what structures were necessary to enable the defendant to enjoy his right of irrigation. These exceptions, twelve in number, were overruled by the court, excepting the fifth, ninth, and tenth, which were as follows: "Fifth Exception. For that said master in and by his said report finds and awards no damages for the complainants, and rules that the injuries sustained by them are among the class known in the law as damna absque injuria, or among those to which the maxim de minimis, &c. applies; to which finding and ruling complainants except, as contrary to law and unsound in principle, and because said master should have ruled that complainants have sustained damage recognized by law, and should have estimated and awarded to the complainants the amount of such damage." "Ninth Exception. For that said master, in and by his said report, has ruled and reported as structures needful to enable the defendant to enjoy his rights, two tunnels, as specified in his said report, and has neglected therein to provide any means by which the improper flow of water through the same can be checked by the complainants, or on their behalf; whereas said master should have reported some means whereby such improper, unwarranted, and injurious withdrawing of the water could be prevented by them, or in their behalf. Tenth Exception. For that said master, in and by his said report, has decided and ruled, that under said decree, 'it is not his province to provide a safe preventative against a possible abuse of his right by the defendant,' in exercising his right of irrigation through the two structures, as provided and recommended by said master in his said report, and has also neglected to provide any safeguard against such abuse; to which ruling and omission so to provide safeguards, the complainants except as erroneous in point of law, and of fact as highly injurious and dangerous to the rights and interests of the complainants, and as contrary to the scope of the decree under which said master alone can act." The deraignment of title, so far as the same is necessary to be recited, appears in the opinion of the court.

B. R. Curtis, W. H. Potter, S. Ames, and W. Binney, for complainants.

T. A. Jenckes, for respondent.

CLIFFORD, Circuit Justice. Nothing can be more certain than the fact that the decree recognizes and declares the right of the respondent to divert water from the mill-pond or through the Blackstone Canal banks for the purposes of irrigation. The limitation to the exercise of the right for that purpose, as stated in the decree of the court, is, that it must be in accordance with the reservation contained in the deed, and in accordance with the described agreement.

The authority of the master was conferred by the decree in the cause, and in the per-

formance of his duties he was bound by its terms. The citation of authorities to support that proposition is unnecessary, as it is one universally acknowledged. Some reference to the instruments of title under which the respective parties claim will be necessary, in order to understand the nature of the present controversy, although both parties claim to derive their title from the same source. Prior to the 11th of December, 1809, Simon Whipple owned the whole estate in controversy; but the record shows that on that day he conveyed twenty thirty-second ($^{20}/_{32}$) parts of two tracts of land to his associates in the Smithfield Cotton and Woolen Manufacturing Company, without any reservation whatever. One of those tracts was situated in Cumberland and the other in Smithfield, in this state, as appears by the recitals of the deed. The record also shows that his associates on the same day conveyed to him twenty thirty-second parts ($^{20}/_{32}$) "of half the water to water the land of the said Simon Whipple, on the Smithfield side of the river, and for no other purpose," which may be raised by a dam to be erected by the company over Pawtucket river, leaving at the same time so much of the water raised as aforesaid as will be at all times sufficient to carry all the water-wheels necessary to work all the machinery in all the factories, mills, and other water-works which may at any time hereafter be by said company erected on any parts of the two lots of land described in the before-mentioned deed of the same, together with the right and privilege of drawing from said dam half said water for the purposes aforesaid, and conveying the same through any part of the Smithfield lot, provided the manner of taking out the water and conveying the same and the direction thereof shall be the most beneficial to the grantee and the least injurious to the grantors. The court said: "Reference is made to that deed, not only as showing the origin of the right to divert and use the water for irrigation, but as showing conclusively that the right at that period of time rested in grant, and not merely in reservation." The owner of the two tracts conveyed, by the deed referred to, only twenty thirty-second parts of the two tracts, as is obvious from the terms of the deed. The effect of the arrangement was, that the grantee retained the title to twelve thirty-second ($^{12}/_{32}$) parts of the tracts in himself, while he conveyed eight such parts to George Olney, two to George Smith, one to Thomas Arnold, five to Joseph Wilkinson, two to William Whipple, and two to Joseph Whipple, 2d, making thirty-two in all. The parties to the deed, including the grantor and grantees, entered into an agreement on the same day, reciting that they had formed themselves into a company for the purpose of manufacturing cotton and woolen goods, and agreed that each should hold as many shares of the capital stock of the company as he held parts or shares of the two tracts of land as specified in the deed. Passing through various mesne conveyances, the entire title to the premises, on the 1st of February, 1825, became vested in Wilbur Kelly, subject to the right and privilege of the original owner of the same, to water his land on the Smithfield side of the river as set forth in the deed from his associates to him, to which reference has been made. Before the last of these conveyances was made, however, the record shows that the Blackstone Canal Company had been duly incorporated, both by the legislature of this state and by the legislature of the commonwealth of Massachusetts. The original owner of the premises, with others, granted to that company in September, 1823, the right and privilege of constructing their canal over his land and estate in Smithfield, adjoining and south of the manufactory of Wilbur Kelly, on the west side of the Blackstone river, provided it was built not more than seventy feet wide. Consequent upon that license, which was irrevocable, the canal company granted to the said Whipple, on the 16th of March, 1826, his heirs and assigns, the privilege of taking water from said canal, when the water is running to waste or flowing over the dam or flash-boards thereof, sufficient for watering said interval land, to be drawn from said canal by three tunnels placed under the towing path of said canal, the under side of said tunnels to be on a level with the top of the dam aforesaid, and not to exceed fifteen inches in width and six inches in height, with slide-gates in the same to stop the flow of water when not wanted for watering said land. The said agreement recites that "said Whipple had the right of drawing and using the water from the mill-pond of said manufactory, to be taken by a trench to the interval land of said Whipple south of said manufactory on the west side of said river, and that by the construction of the said canal the said trench for watering said land would be interrupted and destroyed." The antecedent right of said Whipple is also expressly recognized and admitted in one of the recitals of the consideration for the grant, in which it is stated that he had the right to use the waste water from said mill-dam and pond for watering his said land. The language of the reservation contained in the deed referred to in the decree is equally explicit and comprehensive. The grantor reserves to himself, his heirs, and assigns forever, the right of taking and drawing water either from the mill-pond by a trench, or through the Blackstone Canal banks, conformably to the agreement of the 16th of March, 1826, whenever the water is running to waste over the said dam or flash-boards thereof, for the purpose of watering the described interval land south of said Kelly's factory, on the west side of the Blackstone river.

Recurring to the decree of this court, it is obvious that the first duty of the master was

to ascertain and report the amount of damage, if any, sustained by the complainants, in consequence of the insertion of the flume or culvert in the banks of the said canal by the respondent, as confessed in his answer. The conclusion of the master under this direction was, that the complainants are not entitled to any damages for the reasons stated in his report; but after careful examination of the subject, I am not able to concur in that conclusion. The conclusion, I think, is inconsistent with the decree of the court, which assumes that a wrongful act was charged in the bill of complaint, and that the allegation was confessed in the answer. Assuming the fact to be so, then the complainants were at least entitled to nominal damages. The second duty of the master was to report what structures are proper and needful to enable the respondent to enjoy and use the right to divert water for the purpose of irrigation, as specified in the decree. The master is correct, in the judgment of this court, in holding that reference must be had both to the reservation and the agreement, in order to ascertain the rights of the parties in this controversy. Lonsdale Co. v. Moies [Case No. 8,496].

The interlocutory decree entered under the order of this court is to that effect, and such undoubtedly is the true construction of the instruments. The reservation contained in the deed expressly adopts the agreement as defining the alternative right of the respondent, and the case would be no stronger in favor of that construction if the words of the agreement were recited in the reservation. Adopting that rule, the court is clear that the respondent holds the right of taking and drawing water either from the mill-pond by a trench, or through the banks of the canal, as provided in the agreement, whenever the water is running to waste over said dam or the flash-boards thereof, for the purpose of watering the interval land described in the respective instruments. The words of the reservation are, "whenever the water is running to waste, over said dam or flash-boards thereof," but the language of the agreement is, "when the water is running to waste or flowing over the dam or flash-boards," showing that the water is running to waste, within the meaning of the instruments, whenever it is running over the dam or flash-boards. The respondent has the right to take and draw the water as waste water whenever it runs over the cap-log of the dam, for the purpose described; and although he undeniably has the right also to take and draw the water when running over the flash-boards, still the complainants, when the head is sufficient to run over the cap-log, cannot, by the use of flash-boards to increase the height of the dam, restrict his right to take and draw the water. The meaning of the instruments is, that the right of the respondent to take and draw water attaches, when the head of the water is such, that if unobstructed by flash-boards it would run over the cap-log of the dam, and it is equally certain that the right does not cease to attach because the head is sufficient, not only to run over the cap-log, but over the flash-boards, which usually add more than a foot to the height of the dam. On the other hand, while it is true that the respondent can take and draw the water for the described purpose whenever it runs over the cap-log of the dam, still he can only use it for that purpose, and only so much as may reasonably be necessary for that purpose. The agreement provides for three tunnels placed under the tow-path of the canal, and that the under side of the tunnels shall be on a level with the top of the dam.

The opinion of the court is, that the under side of the orifices, whatever they may be, should be on a level with the top of the cap-log of the dam, and that they should not exceed in all the maximum dimensions prescribed in the agreement. But a continuous flow of the water is not contemplated, because the agreement provides that the tunnels therein mentioned shall be constructed "with slide-gates in the same to stop the run of the water when not wanted for watering said land."

Proper and needful structures, within the meaning of the decree, are not only such as will enable the respondent to enjoy and use the right to divert the water for the purpose of irrigation, but such as will enable him to do so, as far as reasonably practicable, in consistency with the right of the complainants that only so much water shall be so taken and drawn as may be reasonably necessary for that purpose. Looking at the subject in that light, it is quite clear that it is the duty of the master to inquire into the subject, and, if reasonably practicable, to report such structures as will conform to the rights of both parties The fifth, ninth, and tenth exceptions are sustained, and all the rest are overruled. Under the circumstances the cause must be again sent to the master, with instructions to hear the parties under the former decree, as explained and construed in the present opinion of the court.

Case No. 8,498.

LOOMIS v. WILBUR.

[5 Mason, 13.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1827.

WASTE—TIMBER FOR REPAIRS—IDENTITY OF TIMBER USED.

It is not waste, in a tenant for life, to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, for such repairs, provided this be proved to be the most economical mode of making the repairs.

[Disapproved in Dennett v. Dennett, 43 N. H. 500. Cited in Miller v. Shields, 55 Ind. 77.]

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

This was an action of waste under the statute of Rhode Island (see Dig. 1822, p. 199), for the recovery of the freehold wasted. Plea, the general issue. Daniel Wilbur, deceased, by his will, made on the 20th December, 1802, and proved on 1st of June, 1807, devised all his lands undisposed of, including the premises, to his son Daniel Wilbur, the defendant, for his life, remainder to his wife for her life, if she survived him, remainder to Daniel Wilbur, his grandson, and son of his son Daniel, in fee; but if his said grandson died before 21 years of age, &c. then to his son Daniel in fee. The grandson attained the age of 21 years and is still living. The grandson sold his interest in the estate to one James Aldrich, through whom, and by intermediate conveyances, and a levy on execution, the premises came to the plaintiff [Luther Loomis] on the 23d of December, 1825. The only waste proved was, the cutting of a few timber trees sparsely on the land, not exceeding ten or fifteen in number. It was proved, that the defendant was very poor and unable to repair the fences and buildings from other means; that the principal part of the trees were cut down for repairs of the buildings. They were sold by an agent, and boards, already sawed, &c. were purchased with the proceeds and applied to the repairs. This was the most economical way of attaining the object, and most for the benefit of the estate, and was done on consultation with the agent, before the trees were cut down. It was also proved, that a timber tree or two were cut down and sold; but whether the proceeds were applied to repairs did not appear. But it did appear, that the defendant owned a contiguous wood lot, and sometimes used the timber from that lot for fire bote and house bote.

The plaintiff contended, that the case of waste was clearly made out, and that the sale of the timber was waste, by the authorities; that the tenant might have cut down trees for the necessary repairs and fire bote, but had no right to sell them; and he cited Bac. Abr. "Waste," F. The defendant contended, that there was no waste; that no injury was done to the estate; that repairs were necessary; and there was no difference between applying the proceeds of the sale and the identical timber.

Mr. Richmond, for plaintiff.
Mr. Tillinghast, for defendant.

STORY, Circuit Justice (charging jury). The supposed waste in this case is so very small in point of value, that if a forfeiture is incurred, it must operate with peculiar severity. The jury therefore ought clearly to see, that the plaintiff makes out his case upon reasonable evidence. The question in cases of this nature is, whether the tenant has done any injury to the inheritance; for the averment in the declaration is, that the timber has been cut down to his disherison. If, under all the circumstances, what has been done, has been for the benefit of the estate, for necessary repairs, and for the interest of the remainder-man, then there has been no waste. Now it is admitted, that the tenant is very poor and had no other means to repair; and that the repairs were indispensable, and any longer omission would have been very injurious to the estate. The quantity of timber applied to the repairs is not pretended to be extravagant or unnecessary. But it is said, that the same timber, which was cut down, ought to have been applied, and not sold, and that the sale was per se waste. For this position reliance is placed on a citation from Bac. Abr. "Waste," F, where it is said, that if a lessee cuts trees and sells them for money, though with the money he repairs the house, it is waste. The authority relied on in Bac. Abr. is 1 Co. Litt. 53b. The doctrine there stated may be good law, if it be properly understood and limited. If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so, it would not be purged or its character changed, by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were bona fide applied for that purpose, in pursuance of the original intention, it does not appear to me to be possible, that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense, that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate.

As to the other part of the case, the sale of one or two trees, the application of which to repairs is not established, it is, if at all, waste in its most minute form. But the jury will judge of the facts, and consider in the first place, whether the proceeds might not have been applied to the repairs. In the next place, if they were not, but if an equal quantity of timber from the other woodlot of the defendant was so applied, and these trees were only taken by way of compensation and remuneration therefor, then there was no waste. It has been said, that the terms of the will make the tenant for life dispunishable of waste, and that the intention was to give him a full and entire control of the inheritance during his life. The words are certainly very broad and comprehensive, giving ample powers to a tenant for life for general purposes; but my opinion is, that they do not authorize any act to be done, which injures the inheritance, much less do they authorize positive waste.

Verdict for the tenant.

Case No. 8,499.

The LOON.

[7 Blatchf. 244.] [1]

Circuit Court, S. D. New York. May 9, 1870.

SHIPPING—MASTER—BILL OF LADING—GOODS NOT ON BOARD—AUTHORITY FROM CONTRACTING PURCHASER OF VESSEL — MONEY ADVANCED ON BILL.

1. The master of a vessel has no power, by signing a bill of lading for goods which are not on board, to charge the vessel or her owner.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

2. Nor has he such power, where the vessel is, by the consent of her general owner, in the hands of a party who has contracted to purchase her, and the latter distinctly authorizes the signing of the bill of lading and induces the master to sign it.

3. Where the party who had contracted to purchase the vessel, having possession and control of her, procured, by misrepresentation, the preparation of a false bill of lading, covering goods not on board, and the master of the vessel, in reliance on the representation, signed it: *Held*, that the vessel was not liable for the value of the goods named in the bill of lading, but not on board, to a person who, in reliance on the bill of lading, advanced money thereon.

[Cited in The Asphodel, 53 Fed. 836.]

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

In admiralty.

Erastus C. Benedict, for libellants.

Welcome R. Beebe and Charles Donohue, for claimant.

WOODRUFF, Circuit Judge. John M. Green, the claimant, owner of the schooner Loon, entered into a contract with Charles W. Gilley for the sale of the schooner, then in the port of Baltimore, on condition that he should pay therefor the sum of five hundred dollars before she should leave Baltimore, and the balance, thirty-five hundred dollars, on or within five days after her arrival in New York, in default of which latter payment the first-named five hundred dollars should be forfeited to Green, as damages for the failure of Gilley to perform, and Gilley was given the privilege of loading the vessel for his own account, he paying all expenses from the time of loading till her discharge in New York. The proof shows that Gilley took charge of the loading of the vessel with lumber, and employed a stevedore, and that all the lumber which he desired to have placed on board was put on board, to his satisfaction. At or about the time the cargo was on board, Gilley told Green, the owner, that he desired the master of the schooner to call at the office of the ship's broker and sign bills of lading. Green, having no knowledge of the quantity of the cargo, and having no reason to suppose that any fraud was contemplated, meeting the master, delivered the message. Gilley went to the office of the broker and requested him to fill up two bills of lading, and gave him verbally the quantities and kinds of lumber to be inserted therein as the cargo of the vessel, and such bills of lading were drawn. Thereafter, the master of the schooner called at the broker's office himself, wholly ignorant of the quantity of cargo on board, and, relying solely on the correctness of the bills of lading prepared by Gilley's direction, signed the bills of lading, by which the lumber, of various quantities and kinds, was stated to have been shipped, consigned to the libellants. With those bills of lading, Gilley came to New York, and, in faith thereof, the libellants advanced to him several thousand dollars. When the vessel arrived she delivered all the lumber that was shipped, but it proved to be only about half the quantity mentioned in the bills of lading. Thereupon the libellants filed their libel to charge the schooner with the deficiency. It further appeared that Gilley paid to Green, the owner, in pursuance of his contract, or on account thereof, in Baltimore, one thousand dollars, and that nothing more had been paid on account of the purchase.

It is now insisted, that the libellants had no lien upon the schooner for the lumber that was never shipped; that the master of the schooner had no authority from the owner of the vessel, either express or implied, to sign bills of lading for cargo not shipped; that Gilley could not bind the schooner or the owner, except to the extent of the cargo shipped; and that the act of Gilley, in inducing the master of the vessel, by a practical misrepresentation, to sign bills of lading which were false, did not create any lien which can be enforced against the schooner.

The question how far a bill of lading imports absolute verity, in favor of a third person who receives it, and, in good faith, in reliance thereon, purchases the goods mentioned therein to have been shipped, or makes advances thereon, is of very great interest and importance to the commercial world; and it is not until within a recent period that the question can be said to be definitely answered, if indeed it can now be deemed settled in all its bearings. From the time of the decision in Lickbarrow v. Mason, 2 Term R. 63, when there was imputed to bills of lading a negotiable quality for certain purposes, there seemed some ground for saying that a third person, dealing with a bill of lading, should be protected in his reliance thereon, according to its exact tenor, against masters, charterers and owners; and that the act of the master should be deemed fully within his authority and conclusive. See Abb. Shipp. (6th Am. Ed.) 323-326, and notes. Such however, does not appear to be the rule as established by modern decisions in England, or the rule in this country. In Grant v. Norway, 10 C. B. 665, and in Hubbersty v. Ward (in the court of exchequer) 18 Eng. Law & Eq. 551, it is held, that the

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

master of a vessel has no power, by signing bills of lading for goods that are not on board, to charge the owner. The like want of authority of an agent, in other cases, is declared in Coleman v. Riches, 29 Eng. Law & Eq. 323, and illustrations are found in numerous cases cited and commented upon in the three cases above-named. The result would follow, that, if the owner was not charged, neither was the ship, and, therefore, that no lien existed to be enforced in admiralty. It is not necessary, and would not, I think, be profitable, to discuss the question in all its possible relations. The general doctrine of the English cases named has been affirmed in this country, so far as relates to the personal liability of the owner in such a case. See Pars. Merc. Law, 347, and cases there referred to.

The decision of the supreme court of the United States in The Freeman v. Buckingham, 18 How. [59 U. S.] 182, seems to me conclusive of the case now under consideration; and it meets the suggestion that here the schooner was, by the consent of the general owner, in the hands of a party who had contracted to purchase her, and that the latter distinctly authorized the signing of the bills of lading, and induced the master to sign them. Indeed, I am wholly unable to distinguish the present case from that one, and I might, with propriety, have so stated, without enlarging upon the subject. There, the claimant, owner of the Freeman, had made an agreement with one Holmes, for the sale of the schooner to him for a price payable by instalments, and the bill of sale to be delivered when the payments were made, and Holmes meantime to have the entire control and management of the vessel, which was to be in his own employment, victualled and manned by him, and commanded by a master of his own selection. This gave to the purchaser a more unqualified possession and control than Gilley had in the present case. Holmes had, also, paid to the owner five hundred dollars, that being one instalment of the purchase money. The son of Holmes, (to whom the control and management of the vessel were entrusted by the father,) induced the master, by false representations, to sign bills of lading, certifying that certain quantities of flour had been shipped by his, the son's firm, to be carried and delivered to the libellants' agent at Buffalo, to be forwarded to the libellants, as consignees, for account of the shippers. Upon those bills of lading the alleged shippers procured from the libellants advances, which were made in good faith, in reliance upon the bills of lading. Thirteen hundred and sixty barrels of the flour mentioned in these bills of lading were not delivered at Buffalo, and it appeared that they were never in fact shipped. It would be difficult to state a case more exactly like the one before the court in every principle involved, and in every circumstance affecting the liability of the schooner. The opinion of the court, delivered by Mr. Justice Curtis, discusses the subject with great fulness, and reviews the cases in England and in this country which he deems material to the decision, and the court, without dissent, held, that the maritime law gave no lien upon the vessel for the flour mentioned in the bills of lading but not shipped. The opinion declares, that the master of a vessel has not unlimited authority to sign bills of lading, nor even an apparent authority to do more than sign bills for cargo actually shipped; that the act of the special owner or purchaser gave no additional sanction, as against the general owner; that such a signing by the master, induced by the misrepresentations of the purchaser, was a fraud upon the general owner; and that the fact that the libellants had advanced money on the faith of the bills of lading did not create in their favor an estoppel which prevented such owner from showing that the goods were never shipped. See, also, Vandewater v. Mills, 19 How. [60 U. S.] 82. All this is equally applicable to the present case. Gilley was the purchaser. He, by misrepresentation, procured the preparation of false bills of lading, and the master of the vessel, in reliance thereon, signed them. If he had known they were false, the fraud on the owner would have been no less.

It is true that declarations of Gilley, made in New York after the deficiency was discovered, tended to show that it was through mistake and not through fraud that the lumber shipped did not correspond with the bills of lading. If it were material, I should hold that testimony inadmissible. Gilley could not, by statements in regard to a past transaction, affect the rights of the owner. But the other proof satisfies me that his statement was false, and that all the lumber which he desired to have put on board the schooner was in fact put on board. The decree must be reversed, and the libel be dismissed, with costs.

LOPER, The (PICKELL v.). See Case No. 11,119.

Case No. 8,500.

LORAINE v. CARTWRIGHT.

[3 Wash. C. C. 151.] [1]

Circuit Court, D. Pennsylvania. April Term, 1812.

AGENT—ORDERS — ACCEPTANCE OF CONSIGNMENT —SHIPPER'S TERMS—RATIFICATION OF UNAUTHORIZED ACTS.

1. This court has always deemed it proper to hold agents to a strict account, in relation to the orders they receive, provided they are expressed in plain terms, and free from ambiguity; and in this respect the same measure of justice has been

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

dealt out to agents within the United States, acting for persons abroad, as to the foreign agents of citizens of the United States.

[Cited in Very v. Levy, 13 How. (54 U. S.) 359.]

2. Where an agent abroad, is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter, stating the prices of the articles, and the amount of the charges on the shipments, the price stated in the invoice is the maximum by which the agent is to be governed. He has nothing to do with the actual cost of the articles.

3. If a consignee accepts a consignment, he does it on the terms prescribed by the shipper; he might have rejected it, but he cannot, after accepting it, refuse a compliance with the orders which accompanied it.

4. Quere, what will amount to a ratification of the unauthorized acts of an agent?

[Cited in Perkins v. Currier, Case No. 10,985; Clark v. Manufacturers' Ins. Co., 8 How. (49 U. S.) 246; Le Roy v. Beard, Id. 468.]

[Cited in brief in Yeatman v. Corder, 38 Mo. 339.]

In May, 1809, the plaintiff was encouraged by Mr. Sheepshanks of Philadelphia, the agent of Bainbridge and Cartwright of Liverpool, to ship them a large parcel of cotton, on consignment; and at the same time, drew on them, by way of advance, a bill for £1000 sterling, (which was much less than the usual advance,) which bill was endorsed by Sheepshanks, and was duly accepted, the day before the house in England knew of the intended shipment of the plaintiff. The day after acceptance, the vessel with the cotton arrived at Liverpool, bringing a letter from the plaintiff, in which he expressed the sanguine expectations he had formed of obtaining a high price for this parcel of cotton, and his confidence in the judgment of the consignees, Bainbridge and Cartwright. The letter enclosed the invoice of the cotton, priced at 20 cents per pound, besides the charges; and the plaintiff, after stating that he always wishes to give his agents the greatest possible latitude in his power, as they must be the best judges of the present and future probable prices, adds, that "they are to sell on arrival, provided the price should be such as to cover first cost and charges." Sheepshanks, at the same time, wrote to Bainbridge and Cartwright, informing them of the shipment, of the plaintiff's bill on them, and that the policy of insurance on the cargo, to the amount of more than 10,000 dollars, was lodged with him for security. On the day that the cargo arrived at Liverpool, Bainbridge and Cartwright wrote to the plaintiff, that they had accepted his bill before they knew of the shipment, and that they should run off a small part of the cotton the same day. In fact, they disposed of the whole cargo in a day or two after its arrival, at the highest market price at that time, though much below the invoice enclosed to them; and though there were at the time strong appearances that this article would decline in price, the unexpected disavowal of Erskine's treaty, and the renewal of the non-intercourse, by the United States, produced a sudden change, and cotton rose to a high price soon after the sale of this cargo. Bainbridge and Cartwright informed the plaintiff of this sale soon after it was made, and forwarded the account of sales to him, stating a balance in favour of the plaintiff. In answer to these letters, the plaintiff, on the 6th of October, 1809, wrote to Bainbridge and Cartwright, that being then in a hurry, he could only acknowledge the receipt of their letter, but that he would in his next, write to them more fully. That he had drawn on them for £430, and in his next would give directions as to the application of the balance in their hands. On the 6th of November following, the defendant, Cartwright, being in Philadelphia, the plaintiff wrote to him, that he should bring suit to recover compensation for the breach of his orders. The defendant proved, that though the invoice enclosed by the plaintiff to Bainbridge and Cartwright, rated the cotton at 20, yet in fact, it cost him only 18 cents, and that that was the market price at Philadelphia when this shipment was made.

It was contended, by Mr. Ingersoll, for defendant—1. That the words first cost, meant the market price, and not the invoice price. 2. That let the plaintiff's orders be construed how they might, still, Bainbridge and Cartwright had a right to sell, at least to the amount of the bill drawn upon them; although the price should be less than they were ordered to take. 3. That the plaintiff's letter of the 6th of October, and the bill which that letter announces he had drawn, is a complete affirmance of the conduct of Bainbridge and Cartwright, and a waiver of any demand against them for breach of orders.

WASHINGTON, Circuit Justice (charging jury). This court has always thought it right to hold agents to a strict account, in relation to the orders they receive, provided they are expressed in terms, plain and free from ambiguity; and in this respect, the same measure of justice has been dealt out to agents within the United States, acting for persons abroad, as to the foreign agents of citizens of the United States.

The first inquiry is, what is the meaning of the terms used in the letter of the plaintiff, in relation to the sale of this cargo? Prime or first cost, is in itself somewhat equivocal, as it may mean the price at which it was purchased, or the market price at the time it was shipped, or the invoice price, which is generally understood to correspond with the market price, although frequently this is not the case. But, when an agent abroad, is directed not to sell for less than the first cost and charges, and an invoice accompanies the letter, pricing the articles and stating the amount of the charges on the shipment, nothing can be

more clear, than that the sum stated in the invoice, is the minimum by which the agent is to be governed. As to the actual cost of the articles, it is almost impossible that the agent should know any thing about it, and very improbable that he should know even the real market price, at the place of shipment; and it is not to be supposed, that the principal could intend to refer his agent to an uncertain standard, when the order carries with it one which is certain. The goods may have cost the shipper much more than they are really worth at the time of shipping, or much less; and of course, the invoice price, more especially when it is referred to, as in this case it was, as fixing the sum for which the insurance was effected, fixes the only rational standard, by which the agent can and ought to be governed.

2. The plaintiff's bill did not authorize a breach of his orders, either in whole, or so far as to cover that bill. It was accepted before the defendant had notice of the shipment, upon the credit of the drawer and endorser; and even if it had been accepted afterwards, yet in either case, Bainbridge and Cartwright, if they accepted the consignment at all, it could only be upon the terms prescribed by the shipper. They might have refused to accept in the first instance, for want of advice or of funds; and might have done so even after the cargo was received, upon the ground, that they were restricted by the orders from selling, so as certainly to furnish funds for taking up the bill when it should become due. But it is entirely inadmissible for the defendant, to make their voluntary acceptance of the plaintiff's bill, an excuse for a breach of his orders.

3. There is no doubt, but that a principal may ratify the act of one who has acted in his behalf, as his agent, though without authority, or who has transcended his powers; and in this way give validity to the act, as if it had been strictly authorized in the first instance. This ratification may take place, not only directly, but by collateral acts; as if the principal, knowing all circumstances, sue for, accept, or even demand the payment of the purchase money, in this way indicating his willingness to affirm the sale. But in this case, the plaintiff did not demand the amount of sales, or even intimate that he would be satisfied to receive them. He drew for £430, which he had certainly a right to do, and informed Bainbridge and Cartwright, that he shall, in a subsequent letter, write more fully to them, and will then give directions as to the application of the balance in their hands; so that he reserves the right of deciding as to his future conduct, until the time when he should write again. It is possible, that the plaintiff wished to obtain further information as to the circumstances under which the sale of his cotton had taken place, and at the moment, might even have inclined to submit to what had been done. But his letter of the 6th of October, certainly did not commit him so far, as to prevent his subsequent refusal to sanction the sale which had been made. Accordingly, in his next letter, dated the 6th of November, he informs the defendant that he shall bring suit, to recover a compensation for the damages he had sustained by the breach of his orders. What those damages should be, you, gentlemen, must decide.

Verdict for upwards of 3000 dollars.

Case No. 8,501.

In re LORD.

[5 Law Rep. 258.]

Circuit Court, D. Ohio. July 20, 1842.

BANKRUPTCY—DEBTS OF FIDUCIARY CHARACTER—AUCTIONEER—DEBT CONTRACTED BEFORE PASSAGE OF ACT.

This case having been certified up from the district court upon the following question, to wit: It appearing to the court that the debt specified in the schedule of the petitioner as owing, by the petitioner, to William A. Platt, is due from the petitioner in the character of auctioneer; and the court doubting whether said debt shall be considered as fiduciary in its character; and also doubting whether, in case it shall be so considered, it is a bar to a decree in bankruptcy, in behalf of the said [Horace] Lord,—the above points having been submitted to the circuit court, without argument, and having been considered by THE COURT, it was held, that the debt of an auctioneer is of a fiduciary character, and that, under the act, no relief can be given against such debt; and (2) that this debt having been contracted before the passage of the bankrupt act [of 1841 (5 Stat. 440)] that the application is not thereby deprived of the benefit of the act, as to other debts.

Case No. 8,502.

In re LORD.

[3 N. B. R. 243 (Quarto, 58).] [1]

District Court, D. Maine. Dec. 7, 1868.

BANKRUPTCY—EXAMINATION OF BANKRUPT—RIGHT TO CONSULT COUNSEL BEFORE ANSWERING.

Whether the bankrupt should be allowed to consult counsel upon his examination, must be determined by the register, according to the circumstances of each particular case.

By the Register:

I, Charles Hamlin, one of the registers of said court in bankruptcy, do hereby certify, that in the course of the proceedings in said matter, before me, the following question arose pertinent to said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit: Mr.

[1] [Reprinted by permission.]

McCrillis, who appeared for the bankrupt, and Mr. Crosby, who appeared for Wood & Bishop, creditors of said bankrupt. The bankrupt on his examination, conducted by Mr. Crosby, attorney for creditors, was asked by me to answer the following written question proposed by Mr. Crosby, viz.: Have you ever made more than one deed to Hinkley & Egery, and if yea, what property and when? The bankrupt answered, that he desired to consult with his counsel, Messrs. Varney & McCrillis, who were present, before answering the question. Being of opinion that it was within my duty by law to determine whether, from the nature of the question and the facts sought to be discovered, the aid of counsel was necessary, and to aid me in deciding whether to refuse or admit the bankrupt to consult his counsel, I asked the following question of the bankrupt, viz.: Have you any recollection or knowledge of the subject-matter inquired into? and decided he should answer this last question without consulting his counsel; and the bankrupt answered, that he desired to consult with his counsel upon this question. I thereupon decided, the bankrupt should answer both of above questions without consulting with his counsel. And the said parties requested that the same should be certified to the judge for his opinion.

FOX, District Judge. Whether the bankrupt should be allowed to consult upon his examination, must be determined by the register according to the circumstances of each particular case. Counsel should not frame the answers; and as a general rule, I do not approve of the bankrupt's consulting with his counsel on his examination. In the present case the register was right in his decision.

Case No. 8,503.

In re LORD.

[5 N. B. R. 318.] [1]

District Court, D. New Jersey. July 25, 1871.

BANKRUPTCY—FRAUDULENT PREFERENCES—POWER OF ATTORNEY TO CONFESS JUDGMENTS.

Where a debtor gave to his creditors several bonds with warrants of attorney to confess judgments, for money lent in good faith, when neither the borrower or lender had reasonable cause to believe that the debtor was insolvent or intended any fraud upon the provisions of the bankrupt act [of 1867 (14 Stat. 517)], *held*, that judgments subsequently entered thereon, within four months of the date of filing petition in bankruptcy, and where both the debtor and the creditors had cause to believe the debtor to be insolvent, and intended a fraud upon the provisions of the act, were fraudulent preferences. The case of In re Wright [Case No. 18,071] considered and overruled.

[In the matter of F. C. Lord, a bankrupt.]

[1] [Reprinted by permission.]

P. L. Voorhees and E. T. Green, for assignee and general creditors.

F. Voorhees and J. Wilson, for judgment creditors.

NIXON, District Judge. This matter comes before the court upon a rule taken by the assignee of the bankrupt, upon certain judgment creditors to show cause why the judgments held by them against the property of the bankrupt should not be set aside as fraudulent preferences, and that the money arising from the sale of said property, by the sheriff, should be paid to such general creditors as had proved their claims according to the provisions of the bankrupt act. From the testimony taken in the case these facts seem to exist. A petition for adjudication in bankruptcy was filed against the bankrupt on the eleventh day of January, eighteen hundred and seventy, and such proceedings were had thereon that he was adjudged a bankrupt on the sixteenth day of February following. At the time of filing the petition there were eight judgments outstanding against the alleged bankrupt, entered in the circuit court of the county of Burlington, upon which executions had been issued, and levies made upon the property of the defendant, more particularly stated hereafter. Upon petitions and proofs filed, the court directed an injunction to issue, restraining the plaintiff and the sheriff of Burlington from all proceedings upon the said executions, and ordered the property levied upon to be sold clear of encumbrance, leaving the judgment creditors the right to show before the court, why the proceeds should be applied to the payment of their judgments in the order in which their liens attached.

We learn from the testimony taken in the case, that the bankrupt commenced business as a country merchant in the village of Marlton in the county of Burlington, about the first of March, eighteen hundred and sixty-four; that his capital did not exceed six hundred dollars; that on the fifth of February preceding, and before he purchased his stock of goods or opened his store, he borrowed of his brother, Wm. R. Lord, two thousand dollars, and gave to him, as evidence of his indebtedness, a bond for the payment of said sum in one year after the date, with interest payable half yearly, and at the same time executed to him a warrant of attorney, authorizing him to confess judgment thereon for the debt due upon his failure to pay the same; that on the fourth of March, eighteen hundred and sixty-four, he borrowed of Thomas Evans, Jr., six hundred dollars, and on the twenty-second of the same month, five hundred dollars more; and on the first of October following, one thousand dollars more; for which sums he executed to the said Evans, like bonds with warrants of attorney to confess judgments; that on the first of March, eighteen hundred

and sixty-five, he borrowed of his brother, Wm. R. Lord, eight hundred dollars, securing the same by bond with warrant of attorney to confess judgment; that in the summer of eighteen hundred and sixty-eight, finding himself unable to pay his bills in Philadelphia as they became due, he borrowed of his brother the further sum of one thousand dollars, giving to him his note due in six months for the amount; that when the note became due he was unable to pay the same, and executed to his brother, on the twenty-fifth of January, eighteen hundred and sixty-nine, another bond with warrant of attorney to secure said debt, but, by mistake, dated the same January twenty-fifth, eighteen hundred and sixty-eight; that on the twentieth of December following, when his brother was entering his judgments upon these bonds, the error in the date of this bond was discovered, and in order to correct it, and to have some allowances for payment made, a new bond was executed for the sum due upon this defective bond, and judgment entered upon the new bond after the surrender of the old one; that the three judgments held by the said Wm. R. Lord, against the said bankrupt, were entered upon the twentieth of December, eighteen hundred and sixty-nine, upon the said three several bonds executed to him at the time and upon the consideration aforesaid; that the three judgments held by the said Thomas Evans, Jr., against the said bankrupt, were entered upon the twenty-first day of December, eighteen hundred and sixty-nine, upon the three several bonds executed to him at the time and upon the considerations aforesaid; and that no question has been raised against the good faith of these transactions, and no doubt suggested, but that the said several sums of money had been loaned according to the allegation of the judgment creditors, and the admission of the bankrupt. The two remaining judgments in favor of Higgins, Vanaman & Bell and P. H. Medara & Co., against the bankrupt, were entered on the eighteenth day of December—two or three days respectively before the judgments of Lord and Evans, and inasmuch that the results of the questions involved in this case very much depend upon the facts and circumstances attending the giving and entry of those judgments, it is necessary to give to these facts and circumstances a most careful consideration.

The evidence shows that previous to the month of December, eighteen hundred and sixty-nine, the bankrupt had difficulty in meeting his bills, notes and checks as they matured; that during the last year especially his paper was allowed to go to protest, but as this is not unusual amongst country traders and dealers of small means, with whom the chief significancy of a protest is the fee of the notary, and who are compelled to trust out their goods to their neighbors upon long credit; no particular apprehension seems to have been excited amongst his creditors on account of these failures to pay. His brother William talked of taking an interest in the business with him, but was not willing to do so as long as these unpaid bills were outstanding. He states in his testimony that the bankrupt was at his house about December fifteen, eighteen hundred and sixty-nine, and that he (William) told him that he should see his creditors, and see what arrangements he could make, and try to get an extension for a year; and that Franklin advised him by letter, on the eighteenth, that he had written to all his creditors for such extension. Thomas Evans, Jr., also admits that the bankrupt talked with him about the partnership with his brother, and of the necessity which existed to have a year's extension for the payment of his debts. Franklin, himself, testifies that on the Wednesday before the seventeenth of December, he addressed a letter to each of his creditors, informing them of his proposed partnership with his brother and asking them to allow to him an extension of one year for the payment of the debts which he then owed to them. Two of these letters have been made exhibits in the case, and are as follows:

"Marlton, Dec. 16, 1869. Dear Sir: I am compelled to ask a favor from all my creditors, and that is, will you sign off with all the rest? If you will, all right; if not, I shall be compelled to stop business. I have a brother that will come in partnership with me, if you will all sign off for that length of time. He has money, and all the goods we buy will pay cash for them. Please let me hear from you soon and I will come and see you. Yours truly, F. C. Lord."

The effect upon the creditors of such a letter might have been anticipated. It was an acknowledgment of legal insolvency. It was a confession, of what most of them knew before, that he was not able to pay his debts in the usual course of business as they became due. A race of diligence commenced and they crowded in upon the debtor in hot haste, to get security for their claims. Let us hear the bankrupt's graphic account of what took place. He says, "I wrote to all my creditors that my brother and myself expected to go into partnership on the first day of January, eighteen hundred and seventy. That was on the Wednesday before the seventeenth of December. I asked them for an extension of one year, until I could get time to collect my bills up and settle with them. Charles Jones, one of the firm of P. H. Medara & Co., was the first man who came to see me; he came just before night, on December seventeenth; he asked me the state of my affairs, and if my brother was endorsing for me, or would endorse for me; I told him I did not know; had not asked him. He said he was willing to give me the year if I would give him a judgment bond; I refused; told him I did not want to give any bonds; would see my brother and see

what he thought of it. Jones told me it would do no hurt, no one would know how we settled, and I should tell no one how we settled, and that he would hold them for one year and longer if I wanted. When I consented, I gave him the judgment bond or signed it; I told him if he would give me a receipt not to use it for one year unless other creditors pushed me, I would make it. If others pushed me, I was to notify him, and he was to have the privilege to go on with his bond; and he gave me such a receipt; said he had received my letter asking for an extension written on the Wednesday before, and that had brought him there; he said he did not want me to stop business, and hoped I would get through all right. About fifteen minutes after he left, Vanaman & Bell, of the firm of Higgins, Vanaman & Bell, came to me and talked over the matter; I told them I gave Jones, of Medara & Co., a statement and what it amounted to. They told me they would be willing to settle with me the same as the others had done; I told them if they would give me a receipt of the same time, I would. They drew up the bond and I signed it, and they gave me the receipt; they stayed and took supper and went home. Vanaman and Bell also said that they had received my letter to them, and that that had brought them there. Q. When did you first hear that these persons had entered judgment against you? A. On the following Monday morning, December twentieth. Q. After you had given these bonds as before stated, did you see any of your other creditors, and what occurred? A. I did see them. The first man came next day and was John Iszard, of the firm of Smith & Iszard. Iszard asked me what I had done; if any of my creditors had been to see me. I told him they had. He asked me what they had done. I told him the way I had settled with the two parties who came before. He said he would be willing to settle in that way for their book account, but the balance on the check I owed them, he thought I ought to pay in cash. I told him I could not do that; I had not the money. The balance on the check was for one hundred and the book account for thirty-eight or thirty-nine dollars. After we talked awhile, he said he would take the judgment bond for the whole amount. He or I drew it up, and he gave me the same kind of receipt as the others gave. Then after I gave him the bond, I promised him, that if nothing happened, I would pay him the balance on the check on the next Wednesday week, and that he should endorse the balance on the bond. He said he would hold the bond and do nothing with it unless other parties did; I saw the salesman of Chandler & Hart, by the name of Paul; came while Iszard was there. After Iszard got through we went back to the desk. I gave him the same statement I gave Jones, as near as I can recollect. He said their firm was willing to do what the others did, and I gave them a bond and took the same kind of receipt as I gave the others. Several other creditors came there but I did not see them." The bonds thus executed by the bankrupt to his creditors were due at once; were given partly for open book account, and partly for outstanding promissory notes which were not yet due, and the warrant of attorney accompanying them, authorized an immediate entry of judgment upon them. The receipts which the bankrupt demanded and received when he executed the bonds have been made exhibits, and are in the words following: "Received, Marlton, December seventeenth, eighteen hundred and sixty-nine of Mr. F. C. Lord, his judgment bond, * * * being in full for bills to date * * * and guarantee, not to force the bond under one year unless other parties should push F. C. Lord before that time," which receipts, when interpreted by the testimony and the acts of the parties, simply mean that by virtue of these bonds and warrants of attorney, they had obtained a preference over other creditors, which they meant to maintain and hold at all hazards, but that they would give to the debtor one year in which to pay the debt, without forcing a sale of his property, unless, indeed, their priority should be in somewise endangered by some of the less fortunate creditors pushing for the collection of their claims, in which event they should not be expected by further delay, to lose their preferences.

It appears by the testimony of Evans, that on the evening of the seventeenth of December, after the execution of the bonds to Medara & Co., and Higgins, Vanaman & Bell, he went to the bankrupt's store and there received the information that the bonds had been given. He did not approve of the transactions, and told Lord that he had no business to have done it, and he feared that it would lead to trouble and difficulty. Before this, he says he had had no suspicion or anxiety about the business affairs of the bankrupt, but that now he began to feel unsafe in regard to his bonds and the position in which they stood, and resolved at once to send or take them to the clerk's office at Mount Holly, and have them recorded, thinking they were like mortgages and proper instruments to be recorded; that Lord came to his house on the Sunday evening following; that they had another talk over their affairs, and ascertaining that he was going to Mount Holly on the next day, he asked him to take his bonds to the clerk's office and have them put upon record; that Lord agreed to do so and took them home with him for that purpose; that he saw him again on Monday evening, when he returned to his house and said that the clerk had refused to record his bonds; that he had left them with F. Voorhees, Esq., who had sent a message to him that he would have to come to Mount Holly the next day and qualify to them; that being unwell he was not willing to go unless the bankrupt would agree to take him; that Lord made the agreement and did take him on the next

day; went with him to the lawyer's office and even paid the costs for the entry of the judgments against himself, which money, however, he states was afterwards refunded. He admits that before these judgments were entered, he had full knowledge that the two Philadelphia creditors and also Wm. R. Lord had entered judgment upon their bonds. It also appears by the examination of Wm. R. Lord, that he was informed of the giving of these bonds to the Philadelphia creditors by letter, on the eighteenth of December, and by a personal interview with his brother on Sunday morning, December nineteenth; that he remonstrated with Franklin and was angry about it; predicted that he had done something which would break him up and at once resolved that he would have his own bond recorded; that he went to Mount Holly on Monday morning for that purpose, and there learned, at the clerk's office, that judgment had been entered upon two of the bonds which his brother had given to his mercantile creditors; that upon the recommendation of the clerk, his bonds were taken to the office of F. Voorhees, Esq., to be put into judgments; that whilst engaged in that business, Franklin C. Lord came there and ascertained what was going on; that at the suggestion of Mr. Voorhees, he executed to his brother a new bond for the one thousand dollar bond, bearing date January twenty-fifth, eighteen hundred and sixty-eight, and entered the judgment upon the substituted bond, and that these judgments were taken by Wm. R. Lord, as he informs us, because he understood that his brother was giving other bonds to other creditors.

This state of facts presents to the court the question whether, under the provisions of the bankrupt act, these judgments are valid liens upon the property of the bankrupt, or whether they should be set aside as fraudulent preferences and the proceeds of the sale of the estate levied upon be paid to the general creditors? In considering it, we should first look at the intention of the law. It was designed to prevent preferences, by one insolvent or in contemplation of insolvency. In this respect it differs from the act of eighteen hundred and forty-one, which only avoided preferences given in contemplation of bankruptcy. Its object is as far as possible to insure the equal distribution of the property of persons in failing circumstances among all their creditors. But although preferences are odious in the eye of the law, it is not its policy to work injustice, in order to secure equality. All preferences are not illegal. Liens, honestly acquired, are upheld. Judgments, not tainted with fraud, and not confessed by those who are unable to pay their debts in the usual course of their business, to those who have reasonable grounds for believing that the debtor is insolvent, are protected. Let us apply these tests to the two judgments given by the bankrupt, and one to P. H. Medara & Co., and the other to Higgins, Vanaman & Bell, on the seventeenth of December, eighteen hundred and sixty-nine.

First. Was Franklin C. Lord at that time insolvent? This question must be determined by the evidence in the case, and considering that carefully, is there any real doubt of the fact that insolvency, legal and actual, then existed? The bankrupt was not only unable to pay his debts in the ordinary course of business, as persons carrying on trade usually do, but there was an absolute inability to pay upon a settlement and winding up of his affairs. He exhibited a statement to his creditors on the seventeenth of January, eighteen hundred and seventy, one month after giving these judgments, and then his liabilities were over sixteen thousand dollars, whilst his assets were only about ten thousand dollars, and he testifies that there was no material change in his pecuniary condition between these dates.

Second. If the debtor was then insolvent, the legal result of giving the judgment was to give a preference, the law presuming that every man intends what is the necessary and unavoidable consequence of his acts. But we are not left to presumption here. He writes to all his creditors on the day before he gave the judgments, in which he describes a condition of affairs which defines legal insolvency. No other interpretation can be given to his statements. His indebtedness is large; his debts have already been extended, are again due and pressing; he asks his creditors to allow him a further extension for one year, alleging that he must stop business unless they will agree to it. The letter awakens their apprehensions and they act promptly. Instead of going into the bankrupt court, where all would share equally, they struggle for bonds with warrants of attorney to confess judgments, that each may secure a preference over the other. These bonds, authorizing an immediate entry of judgment, are given, to some, not to others, the bankrupt in each case requiring the creditor to sign a stipulation that he would not force their collection for a year, unless others should attempt to get their honest dues, which agreement or understanding admits of no other construction than this; that the debtor should give security by judgment to some of his creditors for their debts, in consideration of which the creditor would not compel the payment thereof for one year, unless by his delay he should lose his priority.

Third. Had these judgment creditors, when they took their judgments, reasonable cause to believe that the debtor was insolvent and that a fraud upon the provisions of the bankrupt act was intended? His letter advised them of his insolvency, and was sufficient to put them upon inquiry. Their diligence in obtaining the judgments forcibly suggests the doubts and reveals the fears which they entertained respecting the safety of their claims. But aside from this, their own testimony

seems to me to be conclusive upon this point. One of them (Jones) says that the judgment bond which he took was given in lieu of a note that was just falling due and which the bankrupt had notified them he would be unable to pay, and that he had in fact paid them no money on his indebtedness during the past year; that his notes had been renewed several times, and that the debtor assured him that he expected to be able to pay all his debts, if his creditors would give him a year's extension. Had he not a reasonable cause for believing, nay, for knowing that his debtor was insolvent and that he was obtaining a preference in fraud of the bankrupt law, by demanding and taking a judgment bond due at once, and upon which, without delay, he acquired a lien upon the debtor's property? The other (Bell) states in his examination, that he visited the bankrupt, Lord, at Marlton, on the same day on which the firm received his letter, asking for the year's extension for payment of his indebtedness; that he was informed by him that he had already given a judgment bond to P. H. Medara & Co. to secure their claims; that he was satisfied after an inspection of a statement of his affairs rendered by the bankrupt that he was solvent unless he was forced to sacrifice his property, and that although a part of their debt was not due until the month of February following, he demanded security at once, and took a bond with a warrant of attorney to confess judgment thereon for the express purpose of acquiring a lien upon the bankrupt's estate. The inference from this state of facts is irresistible; that he too had reasonable cause to believe that his debtor was insolvent, and that the inspiration of his conduct was an endeavor to get a preference over other creditors in the payment of his debts.

In considering the remaining judgments, three in favor of William R. Lord and three in favor of Thomas Evans, Jr., I shall look at them together as the principles by which their validity is to be tested apply to all of them alike. Without adverting to the legal consequences of substituting a new bond for one previously given on the day of the entry of the judgments in favor of William R. Lord, and stating the matter most strongly for the judgment creditors, I am now to consider the case of six judgments entered by creditors upon bonds with warrants of attorney to confess judgments, given by the debtor when his solvency had not been questioned, and held by the obligees until the debtor became insolvent and then entered up; executions issued thereon and levies made upon the debtor's property after they had reasonable cause to believe that he was insolvent, and that a fraud upon the law was intended. Are such judgments fraudulent preferences?

In considering this branch of the case, I have been embarrassed by the apparently conflicting provisions of the thirty-fifth and thirty-ninth sections of the bankrupt law, and by the still more conflicting opinions of the different district and circuit court judges in their construction of them. It was held by my predecessor, the late Judge Field, in Re Wright [Case No. 18,071], that where the bankrupt, not being insolvent, borrowed money and gave a bond to the creditors with warrant of attorney to confess judgment, and they afterwards took a judgment thereon and made a levy with a knowledge of the debtor's insolvency, such judgment was good and should be paid out of the assets in court, being the proceeds of the sale of the bankrupt's personal estate. In other words, he seemed to interpret the transaction solely in the light of the provisions of the thirty-fifth section, and viewed it in reference to the condition and knowledge of the parties when the bond was executed and the warrant of attorney given, and not when the lien upon the bankrupt's property was acquired by the entry of the judgment and the levy of the execution. But does not this view overlook the provisions of the thirty-ninth section in reference to the recovery of property conveyed or transferred contrary to the act? These sections in this regard are in pari materia, and must be construed together. Admitting that the primary object of the thirty-ninth section is to define acts of bankruptcy in involuntary cases, yet does not it also expressly provide that if the person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, assigned or transferred contrary to said act, subject only to the condition that the person receiving the same had reasonable cause to believe that a fraud on the act was intended and that the debtor was insolvent? If any effect is to be given to this clause of the thirty-ninth section, must we not hold that where a debtor stands by and suffers his property to be taken on legal process with intent to give a preference, the creditor having reasonable cause to believe that a fraud upon the act was intended and that the debtor is insolvent, the fruits of such judgment must be surrendered by the creditors either upon a suit brought by the assignee or upon summary proceedings, when, as in the present case, the parties have submitted themselves to the judgment of the court, and that the knowledge on the part of the creditor refers rather to the time when the lien was acquired than to the time when the bond, which is a mere evidence of the debt, and the warrant of attorney, were signed? It ought to be observed that, in the above case, Judge Field rested his opinion mainly upon the decision of the supreme court, as rendered in Buckingham v. McLean, 13 How. [54 U. S.] 151, where the question arose under the bankrupt act of eighteen hundred and forty-one, the provisions of which, in this respect, materially differ from the act of eighteen hundred and sixty-seven; and further, that he expressly stated there was

no evidence to show that the creditor, in entering his judgment, had any reasonable cause to believe that a fraud upon the provisions of the bankrupt law was intended.

I am glad to find that the view of the law which I am constrained to take, is sustained by the reasoning of his honor, Judge McKennon, in the conclusion of the opinion delivered by him in the case of Vogle v. Lathrop [Case No. 16,985]. He says: "Another question remains, which, although it is not raised by any direct allegation in the bill, may, perhaps, be regarded as presented with sufficient distinctness in the bill and answer to call upon the court to consider it. It involves the right of the respondent to hold a lien upon the personal property seized under the executions issued on the judgments. By the thirty-ninth section of the bankrupt act, where any person being bankrupt or insolvent, procures or suffers his property to be taken on legal process with intent to give a preference to his creditors, or with intent to defeat or delay the operation of the act, and shall be adjudged a bankrupt, his assignee may recover back the property so taken, if the person receiving it had reasonable cause to believe that a fraud on the act was intended and that the debtor was insolvent. Passive acquiescence in the seizure of his property in execution by an insolvent debtor when he could prevent it by going into voluntary bankruptcy, has been held to be suffering it to be taken with intent to give a preference within the meaning of the section. In re Black [Id. 1,457]; In re Craft [Id. 3,316]; In re Sutherland [Id. 13,638]. But the facts here import more than inactive submission, if they do not amount to positive procurement on the part of the debtors. They confided to the respondent the secret of their embarrassment and insolvency, and thereupon gave him a judgment for the amount of other judgment indebtedness to him for the very purpose of protecting their surety and better securing the collection of the debts by a prompt seizure of their property in execution; while the plan was abandoned by the respondent upon his conceiving doubts of its efficiency, he immediately issued executions upon some of his other judgments and caused them to be levied upon the personal property of the defendants. Is there any room for doubt, then, that the debtors were moved by an intent to prefer the respondent's debt, and that the respondent was prompted by the debtor's information to seek a preference by an exclusive appropriation of their personal property to his judgments? Such is the clear significance of all the circumstances. But as the assignee might recover back the property seized, if it had been sold, the respondent cannot maintain the advantage thus apparently given and the property or its equivalent must go to the assignee."

Apply this reasoning to the facts in the case before us. Here are two creditors, who have, it is admitted, honest claims against their debtor for sums of money advanced to him at various times, to enable him to carry on his business. As evidence of their debt, they hold bonds with warrants of attorney to confess judgment which give them no lien upon the debtor's property but are valuable, as enabling them at any hour to acquire one by judgment and execution. They hold them for years satisfied with their security, and having no suspicion that the debtor is not able to pay his debts. But the time comes when he is not able, and they know it. They know that he fails to pay his debts as they become due, in the ordinary course of business; that he sends notice to all his creditors; that he must have one year's extension or must stop; that he gives bonds with warrants of attorney to confess judgments to several of his other creditors, and that two of these had entered judgments against him, and that he suffers his property to be taken on legal process on executions in favor of these preferred creditors. With a knowledge of these facts imparted to them by the bankrupt, they first seek to record their bonds with the avowed purpose of putting them in a position where they will be paid in full. And when they learn that such is not the legal result of recording them, they procure judgments to be entered, executions to issue and levies to be made upon the whole estate of the debtor. Can we doubt that the creditor had knowledge of the insolvent condition of the debtor, and that their intent was to get a preference in fraud of the provisions of the law? And how can the conduct of the debtor be explained, except upon the hypothesis that he intended a preference when he suffered his property to be taken under the execution issued upon judgments, to the entry of which he was privy—nay, the entry of which, I think it fair to say, he procured.

Under the bankrupt act of 1841, the supreme court in the case of Shawhan v. Wherritt, 7 How. [48 U. S.] 644, held that after an act of bankruptcy had been committed by the debtor, of which the creditor had knowledge, he could not by proceeding in a state court obtain a valid lien and seize the property of the bankrupt to the exclusion of his other creditors. Such a proceeding was considered a fraud upon the law, and void. It was further held, that acts of bankruptcy committed by the debtor were tests of insolvency, showing the inability or the debtor to pay his debts or carry on his trade; that the policy and aim of bankrupt laws were to compel an equal distribution of the assets of the bankrupt among his creditors; and that hence when a merchant or trader, by any of these tests of insolvency, had shown his inability to meet his engagements, one creditor could not, by collusion with him or by a race of diligence obtain a preference to the injury of others. Such conduct was treated as a fraud upon the act, whose aim

was to divide the assets equally and therefore equitably. Adopting these principles as applicable in all respects to the act of 1867, and recognizing the decisions of Judge Blatchford, in Re Black [supra]; of Judge Hall, in Beattie v. Gardner [Case No. 1,195], and of Judge Woodruff, in Smith v. Buchanan [Id. 13,016], as the best expositions of the scope and spirit of its provisions, and considering all the facts of the case before me, I have no doubt that I ought to hold, and I do hold, that all of these judgments must be set aside as fraudulent preferences, and that the proceeds of the sale of the bankrupt's personal estate must go to and be held by the assignee for the payment of the general creditors.

Case No. 8,504.

The LORD.

[Chase, 527.] [1]

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

CARRIERS — ATTACHMENT BY SHERIFF — STIPULATION TO HOLD FOR SHERIFF—DEMAND AND SUIT BY CONSIGNEE.

1. The master of a vessel may lawfully refuse to deliver goods to the consignee which, having been attached on his vessel, are carried to the port of consignment under an agreement with the sheriff that they should be returned.

2. Goods are being shipped from N. to W., some of which are on the wharf, some on the steamer. At this time the sheriff levies an attachment on them, but those on the steamer being covered up by other goods, and difficult to remove, he allows the captain to proceed with them under an agreement that he will bring them back. When the steamer arrives at W., the consignee tenders the freight, and demands the goods. The captain might lawfully refuse to deliver them up.

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

Moore shipped certain cases of mechandise at New York by the steamer Lord, consigned to himself at Wilmington, North Carolina, and received bills of lading for them. After part of the goods were stored in the hold of the vessel, and the remainder were on the dock about to be so stored, the sheriff of New York appeared with an attachment against the goods of Moore, and took possession of the cases on the dock, and was about to have the vessel discharged so as to get possession of those in the hold. To save time, trouble, and expense, the New York agent of the ship gave the sheriff a receipt for the goods on board, agreeing to bring them back from Wilmington, whither she was then bound, and deliver them to him on his return. On her arrival at Wilmington, Moore's agent went on board the ship, offered the freight money due by the bills of lading, and demanded the goods. The master decliped to deliver them to the said agent, but took them back to New York and delivered them to the sheriff, the latter paying charges and giving his receipt therefor. Soon after that Moore produced to the sheriff an order from the plaintiff in the attachment countermanding it, and that officer then delivered the goods to Moore, he paying sheriff's fees, costs, and charges. Moore then filed his libel in the district court of the United States for the district of Cape Fear in the district of North Carolina, against the steamer in the port of Wilmington, claiming to recover the full value of all the goods shipped and taken by the sheriff's attachment, which value was eight hundred and twenty-five dollars and eighty-eight cents. The district court decreed that Moore was not entitled to recover for the value of the goods seized by the sheriff on the dock, but that he should be paid such sum as it cost him to get back from the sheriff the goods which had been brought to Wilmington by the ship, and which the master there refused to deliver to Moore's agent, but carried back to New York, and delivered to the sheriff. This amount was fixed by agreement of counsel at five hundred dollars, and the court pronounced a decree for that amount against Ward, the master and claimant of the steamer, from which decree is this appeal.

Person & French, for libellant.
A. M. Waddell, for reclaimant.

CHASE, Circuit Justice. This is a case of affreightment. The libellant purchased certain goods in New York, which were shipped by his agent on the steamer Charles W. Lord for Wilmington. Bills of lading were given, in the usual form, by the master of the steamer.

Before the lading of the goods had been completed, a writ of attachment was issued from one of the courts of New York, in favor of a creditor of the libellant. Under this attachment, the sheriff seized the goods not actually on board, and levied the writ upon the remainder of the goods already in the hold of the vessel. As it would occasion great inconvenience to discharge the cargo for the purpose of taking actual possession of the goods in the hold, the sheriff consented to receive a stipulation from the master of the vessel, and from the agent of the libellant, for the safe return of the goods from Wilmington to New York, and their delivery upon arrival at the latter port to him.

Under the circumstances, the steamer proceeded to Wilmington, where the freight money was tendered by the libellant, and delivery of the goods demanded. The master of the steamer refused compliance with this demand, and carried the goods to New York, and delivered them to the sheriff in fulfilment of his stipulation. Subsequently, the libellant effected a compromise with the

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

attaching creditor, and the goods were delivered into his possession in New York. Under these circumstances, damages are claimed by the libel for non-delivery of the goods at Wilmington according to the bills of lading.

The only question presented for consideration by the court is whether the master of the steamer was excused from compliance with his contract with the libellant by action of the sheriff, under the writ of attachment, and the stipulation made with him. Undoubtedly it was the right and duty of the sheriff under the writ of attachment to seize the goods described in the writ. He had the right to remove all the goods on board, so far as such removal was necessary to reach and take possession of those goods. The authorities cited to us sufficiently establish the law of New York to be, that the sheriff, instead of pursuing this course, had a right to take from the master a stipulation for the safe return of the goods. The custody of the master, during the time he had possession under this stipulation, was the custody of the sheriff. He had no more right to deliver the goods to the libellant at Wilmington than the sheriff would have had to convey the goods to that port and make the delivery. The right of the creditor in attachment displaced, for the time being, the right of the purchaser and assignee of the goods.

It follows that the master was under no obligation to deliver the goods when demanded by the libellant. The decree of the district court must be reversed, and the libel dismissed; and it is ordered.

Case No. 8,505.

LORD et al. v. DOYLE et al.

[1 Cliff. 453.] [1]

Circuit Court, D. Rhode Island. June Term, 1860.

VENDOR AND PURCHASER—UNRECORDED MORTGAGE—KNOWLEDGE OF EXISTENCE.

1. Actual knowledge of the existence of a prior unrecorded mortgage has the same effect as if the mortgage had been duly recorded.

2. Where a person purchasing real estate gave back to his grantor a mortgage, to secure a part of the consideration money, and subsequently sold a portion of the property to certain third parties, with the agreement that they should assume a certain proportion of the liabilities to which it was subject up to the time of such sale, and among such liabilities was the mortgage to his original grantor: *Held*, that the subsequent purchasers had sufficient knowledge of the prior unrecorded mortgage.

This was a bill in equity, wherein the complainants [Lord, Warren, Evans & Co.] prayed that certain unrecorded mortgage deeds held by them might be decreed, as against the respondents, to be valid and subsisting liens upon certain real estate therein described, in the same manner and to the same effect as if the deeds had been duly recorded at the time of their execution and delivery. The respondents named in the bill of complaint were Louis J. Doyle, William W. Bishop, Walter W. Updike, Nathaniel Bishop, Charles Jackson, and two corporations, to wit, the Rhode Island Bleach and Cambric Works, and the Coddington Manufacturing Company. Complainants' case was in substance thus stated in the bill of complaint: Louis J. Doyle, on April 15, 1856, purchased certain real estate in Newport, and on the same day with the purchase gave back to his grantor, the Coddington Manufacturing Company, a mortgage to secure a part of the consideration, viz. the sum of $30,903, which mortgage was duly executed and recorded. Doyle then commenced and prosecuted, on the said purchased estate, the business of manufacturing cotton goods, under the name and style of the Rhode Island Manufacturing Company. During the progress of his business he became indebted to the complainants for certain advances, evidenced by certain promissory notes, bills of exchange, drafts, and a balance of account stated, and executed to them two mortgages upon the above-mentioned estate, one dated August 21, 1856, and another upon the day following, to secure these claims. About the 6th of September, 1856, Doyle proposed to Walter Updike and William W. Bishop, two of the other respondents, to form a copartnership for the purpose of carrying on the same business as that in which he was engaged, and they acceded to the proposal, agreeing that they were each to assume one-third of the debts and liabilities he had incurred in the business on and after a given day in that year, which agreement embraced the sums complainants had advanced to Doyle. The articles of copartnership were drawn up between the parties on September the 27th of that year; and Doyle executed to Updike and Bishop deeds of one third each of the before-mentioned estate, and then the company continued to carry on the same business at the same place and under the same partnership name. Both deeds were executed September 27, 1856, and were delivered by the grantees to Doyle to be recorded. The deed to Bishop was properly acknowledged, and was recorded two days after the date, but the one to Updike was not acknowledged till the 2d of October following, and was not then recorded. It was alleged by complainants that, although their mortgages were not recorded, Bishop and Updike, grantees in the deeds above referred to, had actual knowledge of their existence, and that they recognized and acknowledged the same as subsisting liens on the estate. Three other deeds were made by Doyle; on the 21st of October, 1856, he mortgaged the remaining third of the said estate to William W. Bishop to secure $16,207.21; on October 27th, same

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

year, during the absence of Updike from the state, he deeded the same one third part to the Rhode Island Bleach and Cambric Works; and on the 6th of November following he quitclaimed to William W. Bishop all his interest in the whole of the estate. These were all recorded shortly after the date of their execution. Complainants' mortgages were not recorded until December 10, 1856; but it was alleged that the grantees of the two last-mentioned deeds, viz. the corporation respondents and William W. Bishop, had actual knowledge of the complainants' mortgages at the time the three last-mentioned deeds were executed and delivered. The grantees in these deeds were the only real parties who were contesting the priority of complainants' mortgages.

Thomas A. Jenckes, for complainants.
William H. Potter and Charles Hart, for respondents.

CLIFFORD, Circuit Justice. Relief is sought against the respondent corporation and William W. Bishop solely upon the ground that they had actual knowledge of the complainants' mortgages; and that is the principal question in the case. Separate answers are filed by the contesting respondents, and it is very clear that the questions presented in the case of the respondent corporation are altogether different from those presented in the case of the other contesting party. Knowledge, whether actual, implied, or constructive, is explicitly and unqualifiedly denied by both in language as direct and unequivocal as could well be chosen, and in that respect the questions arising under the respective answers are the same; but it should be remembered that the third part claimed by the respondent corporation is the same third part as that embraced in the deed to Walter W. Updike, which was not recorded. Before this suit was brought, the said Walter W. Updike had commenced a suit in equity against Louis J. Doyle, William W. Bishop, Charles Jackson, and the same corporation respondents in the supreme court of the state. The prayer of the bill of complainant in that suit, among other things, was, that the aforesaid deed to the said respondent corporation might be declared void, and that the priority of his title to that third part of the said estate might be established. Respondents were duly served with process, and appeared, answered, and took proofs; and upon final hearing it was ordered, adjudged, and decreed that the corporation respondents and William W. Bishop had actual notice of the before-mentioned deed to Walter W. Updike, and that the deed to the corporation now under consideration was void, and of no effect as to the complainant in that suit. A supplemental bill of complaint was thereupon filed in this court setting up that decree. Parties made respondents therein appeared, and answers and replications were duly filed, and proofs taken, and final hearing had; and I am of the opinion that the decree is final and conclusive between the parties, and that the immediate and direct effect of the decree is to establish the title to that third part of the estate in the said Walter W. Updike, both as against William W. Bishop and the respondent corporation. The contesting respondents in this case, therefore, have no title whatever to that third part of the said estate. Stopping there, however, it may be questionable whether any decree could be made in favor of the complainants; but they go further, and introduce the deposition of Walter W. Updike, duly taken in this case, and he testifies that he saw the two mortgages of the complainants prior to the 1st of September, 1856, and that he had actual knowledge of the considerations therein expressed. Taken together, the decree of the supreme court of this state, and the uncontradicted testimony of Walter W. Updike, establish the right of the complainants to a decree in their favor in this case, so far as that third part of the estate is concerned. The controversy between William W. Bishop and the complainants as to the other two-thirds parts of the said estate remains to be considered. Answer of this respondent admits that the proposal and acceptance in writing, as exhibited in the record, were made and executed, and that one third of the said estate was, pursuant thereto, on the 27th of September, 1856, conveyed to him by deed of that date, as alleged in the bill of complaint. He also admits that there was a proposition for a copartnership, and that the articles of copartnership were duly executed as alleged; but he absolutely denies that, by any one or all of these instruments, he ever in any manner became liable to the complainants or to any other person for the debts due from his grantor to the complainants, or that he had, at the time he took said deed, any notice or knowledge whatever of the before-mentioned mortgages of the complainants. Admission is also made by him that the same grantor, on the 21st of October, 1856, mortgaged to him another third part of the estate to secure a loan amounting, with interest, to the sum of sixteen thousand two hundred dollars, but he avers that the same was made in good faith and for a valuable consideration, and without any knowledge or notice in any way of the pretended claim of the complainants, or of the alleged mortgages held by them on the said estate. Regarding the aforesaid deed and mortgage as standing substantially upon the same ground, so far as respects the evidence of notice, they will be considered together. Said mortgage deeds to the complainants were executed to secure certain acceptances and advances made by them at the request and for the benefit of the mortgagor; and it appears that the mortgagees agreed with the mortgagor, at the time of the execution of

the mortgages, that they should not be recorded. They made that agreement at the request of the mortgagor, and in consideration thereof the mortgagor procured Walter W. Updike to give the complainants a written guaranty "to hold them harmless of all loss, cost, and expenses which may in any way accrue to them, their heirs, and assigns, by reason of their not recording said deeds of mortgage." Reference is made to the guaranty, as showing that the omission to record the mortgages in this case was not an oversight, or the result of accident, forgetfulness, or inadvertence, but that the respective transactions were intended to be kept secret, as is evident from the very terms of the written guaranty. Respondents contend that such an agreement is a fraud upon the registry law, and that the complainants, having accepted a written guaranty against loss for keeping the mortgages secret, are bound to look to their guarantor for redress, and that they cannot invoke the aid of a court of equity in their behalf in any matter pertaining to that agreement. Courts of equity might well refuse to enforce such an agreement, or to afford a party thereto any relief, who alleged that it had been broken; but it can hardly be admitted that proof that a complainant has entered into such an agreement in respect to an unrecorded deed, is a good defence on the part of the respondent, who has taken a subsequent deed of the same premises, with actual knowledge that the premises had been previously conveyed to another in good faith. Parties making such an agreement, it may well be held, are entitled to no favor as against a subsequent purchaser for a valuable consideration; but it would be an encouragement to fraud to hold that the wrongful act of one party to a suit is a justification for another wrongful act on the part of the other party, of equal magnitude and immorality. Frauds are forbidden in equity, and when committed they cannot be set off one against another, but each separate transaction must stand or fall by itself. Actual notice is alleged in this case, and the party alleging it must prove it to the reasonable satisfaction of the court. Such a notice of a prior unrecorded deed, in order to be available to the party setting it up, must be so clearly proved as to make it fraudulent in the second purchaser to take and register a conveyance in prejudice to the known title of another; and in weighing the evidence upon that subject, the circumstance that an agreement to keep the mortgages secret was made must necessarily be taken into the account, as diminishing the probability of the theory that the transaction became public. McMechan v. Griffing, 3 Pick. 149; Jackson v. Sharp, 9 Johns. 163; Rogers v. Jones, 8 N. H. 264; Harris v. Arnold, 1 R. I. 125; Landes v. Brant, 10 How. [51 U. S.] 348; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 314; Foot v. Emerson, 10 Vt. 344; Pendleton v. Fay, 2 Paige, 202; Gray v. Hook, 4 Comst. [4 N. Y.] 449; Porter v. Cole, 4 Me. 20; Jackson v. Van Valkenburgh, 8 Cow. 260.

The evidence chiefly relied upon by the complainants to prove notice consists of the testimony of Louis J. Doyle, one of the respondents in the suit, and the grantor in all these deeds, and of the testimony of Henry C. Whitaker, the agent of the complainants, who procured the guaranty in their favor against loss for not recording the mortgages, and witnessed the signature of the guarantor. They also contend that a memorandum or short description of the advances and mortgages in question was entered by Louis J. Doyle in a "blotter" kept by him at the mill of the company at Newport, and that the respondents William W. Bishop and Charles Jackson saw the book and read the entry the last of September, 1856, during a visit they made there about that time. Referring to the witness Louis J. Doyle, it will be recollected that he is the grantor in the mortgages in question, and that he is the party for whose benefit the agreement was made to keep the transaction secret, and who furnished the guaranty to save the grantees harmless for not recording their deeds. He it is, also, who sold and conveyed one third part of the said estate to William W. Bishop for its value, and afterwards mortgaged another third part to the same person for a loan amounting to sixteen thousand two hundred dollars, and he it is, also, who conveyed the other third part twice, and now, when examined as a witness, undertakes to testify that all these parties had actual knowledge of the prior unrecorded mortgages to the complainants, although the latter, at his request and for his benefit, had agreed not to put them on record, and he had furnished them with a satisfactory guaranty to save them harmless against loss or expense in consequence of complying with his request. Besides, he made no such communication on the 6th of September, 1856, in the proposal for sale, and nothing of the kind was acknowledged or recognized in the written acceptance executed at the same time. His testimony upon the subject is quite cautious, and far from being satisfactory. Inquiry was made of him whether he had any conversation with William W. Bishop before he made the before-mentioned conveyance to the respondent corporation, and his answer is, that, as near as he could recollect, he did have a conversation with him on the 20th of October, 1856, concerning the contract between himself and the complainants, and the advances made by them and the mortgages given by him to them. To what mortgage or mortgages he refers he does not state, nor is it possible to ascertain from his testimony how near to the actual fact "as near as he can recollect" is; but it does appear that the time when the conversation took place, if at all, is a matter of very great importance, as on the 21st of October, 1856, the witness

mortgaged the only remaining third part of the said estate he then owned to William W. Bishop, to secure a bona fide loan amounting to sixteen thousand two hundred dollars. The deed of mortgage to Bishop was executed on that day, and was duly recorded on the 29th of the same month. Notice should also be taken of the fact in this connection, that, on the 27th of the same October, he conveyed another third part of the said estate to the before-mentioned corporation, well knowing that the same belonged to Walter W. Updike, to whom he himself had previously conveyed it. The witness admits that William W. Bishop inquired of him on that day who, if any one, had claims on the estate, and that he told him that there were no claims, except that of Walter W. Updike, arising out of his unrecorded deed, and the outstanding recorded mortgage of his own grantor, but he reiterates that he had previously, on the 20th of October, 1856, told him particularly of the mortgages of the complainants. Whitaker is also examined, and he testifies that he was present on the last-mentioned occasion, and that he heard the other witness tell William W. Bishop all the particulars in relation to the mortgages and other securities, and the disposal of the goods to be manufactured at the mill. Advances had been made by the complainants to the witness Louis J. Doyle, of about sixteen thousand dollars, and something more than ten thousand dollars remained unpaid when they took the two unrecorded mortgages. The arrangement between them and the witness was, that he, the witness, should make them his consignees of his manufactured goods, and that he was to give them the two mortgages in question, which were not to be recorded, and another of a different estate situate in North Providence, which was to be recorded. They therefore held under the same grantor a recorded mortgage, as well as the two which were unrecorded, and all three had respect to the same subject-matter. The recorded mortgage was specified in the proposal of sale, and it is there stated that the grantor therein obtained an advance of ten thousand dollars, for the security of which he gave a mortgage on his estate situate in North Providence, and that he put the capital into the concern; but he made no mention of the unrecorded mortgages, or of any other lien on the said estate, except the outstanding mortgage of his own grantor. Statement of the first witness is, that, just after his first conveyance to William W. Bishop, he, the grantee and Charles Jackson came to the mill and counting-room and examined the mills and books, and that the latter took the daybook, that is, the "blotter," in his hands and commenced at the beginning and read the entries aloud to the other party, and made comments on them in his usual style. Theory of complainants is, that this meeting was on the 27th of October, 1856, which is the date of the deed to the before-mentioned corporation respondent. Assuming that to be true, it would then appear that the respondent then ascertained, unless he knew before, that the two-third parts of the estate conveyed to him, one-third part by an absolute conveyance and for its full value, and the other by a mortgage deed to secure a loan of sixteen thousand two hundred dollars, were subject to two unrecorded mortgages to the complainants; and that, instead of complaining of the attempt to defraud him, he proceeded to purchase, in the name of the company he represented, another third part of the same estate, well knowing that the title would be subject to those mortgages unless he and the other two persons present should all refuse to speak the truth. Such a theory is improbable, if not incredible, and must be fully proved before it can be adopted. Respondents examined Oliver P. Davis, who was the clerk of the before-mentioned respondent corporation, and he testified that Charles Jackson, on the 27th of October, 1856, asked Louis J. Doyle if there were any claims or encumbrances on the property he was about to sell, and that his reply was, that there were none whatever known to him, except the outstanding mortgage of his grantor. Twice he was interrogated upon that subject, and twice he answered in the same way, and without any qualification. They also examined Pardon Olney, who was the superintendent of the mill at Newport, and he testified that Louis J. Doyle came there on the 19th of November, 1856, and asked him, the witness, to let him have the keys of the safe where the books were kept, and the witness let him have the key, and he, the said Louis J. Doyle, took the book out of the safe and did some writing in it, but the witness does not know what it was. Argument for respondents is, that the memorandum now appearing in that book respecting the unrecorded mortgage or mortgages of the complainants was made at that time, and they exhibit the book and insist that its appearance establishes the theory that it was not made at the same time as the writing which stands in the same connection. The deposition of William W. Bishop is also introduced by respondents, that the first he heard of such mortgages was after the 1st and before the 6th of November, 1856, and he admits that he and Charles Jackson went to Newport in October, 1856, as alleged, and that they visited the mill and saw the blotter. Entries were then on the book, as he states, describing the four acceptances of twenty-five hundred dollars each, and also describing the four notes given in exchange for the same; but he states that he is positive there was then no entry on that book such as now appears respecting the unrecorded mortgages of the complainants. Asseverations equally explicit and unqualified are also made by Charles Jackson, whose deposition also was taken

by the respondents. He says he is positive that Louis J. Doyle represented that there was no encumbrance on the property, except the mortgage to his own grantor, and he is fully confident that the disputed entry on the blotter was not there when he and the witness examined it. Pressed by the weight of this testimony, the complainants re-examine Louis J. Doyle, and he testifies that he does not recollect that he got the key of the safe as stated, but says he always had the keys. His account of the matter is, that some one handed him a note that he was discharged, and that he went to the room where the safe was, and made the last two entries on pages thirty-seven and thirty-eight of that same book, and he avers that he thinks William W. Bishop examined the books at the mill more than once. Suffice it to say, that I am of the opinion that the weight of the evidence clearly shows that the entry respecting the unrecorded mortgages was not on the blotter at the time the two witnesses of the respondents examined the book, and I am also of the opinion that the complainants fail to overcome the allegations in the answer of William W. Bishop, wherein he denies that he had knowledge or notice in any way of their unrecorded mortgages, either when his first deed or when his mortgage of the 21st of October, 1856, was made and recorded. On the other hand, I am of the opinion that he had actual knowledge of those unrecorded mortgages before the quitclaim deed to him of the 6th of November, 1856, was executed and delivered. Decree for complainants in conformity to the opinion of the court, and unless the parties agree they will be heard as to the form of the decree.

LORD (FISHER v.). See Case No. 4,821.

LORD (FRANKLIN FIRE INS. CO. v.). See Case No. 5,057.

Case No. 8,506.

LORD v. GOODALL, ETC., STEAMSHIP CO.

[4 Sawy. 292; 5 Cent. Law J. 325; 1 San Fran. Law J. 52; 12 Am. Law Rev. 391.] [1]

Circuit Court, D. California. Aug. 28, 1877.[2]

INTERSTATE COMMERCE — DOMESTIC COMMERCE — PRIVITY OR KNOWLEDGE OF OWNER — CORPORATIONS AS OWNERS — CARE OF OWNER IN FITTING OUT SHIP — SEAWORTHINESS — CAUSES ARISING AFTER LEAVING PORT — DEVIATING COMPASSES.

1. Where a vessel running upon the ocean between ports of the same state carries merchandise between such ports, destined to points in other or foreign states, on through bills of lading, or carries passengers between such ports, destined to points in other states, or foreign countries, upon through tickets, she is engaged in interstate and foreign commerce, and, as an instrument of such commerce, is subject to the regulating power of congress, and the provisions of section 4283 of the Revised Statutes, limiting the liability of owners, are applicable to such vessel.

[Cited in Armstrong v. Beadle, Case No. 541; In re Long Island, etc., Transportation Co., 5 Fed. 620.]

2. Where such a vessel also carries merchandise from one port to another port of destination in the same state, the provisions of section 4283 of the Revised Statutes, limiting the liability of owners of vessels for losses occurring without their privity or knowledge, are applicable to such merchandise, as well as to merchandise destined to other states or foreign countries.

[Cited in The Giles Loring, 48 Fed. 471.]

3. A party using, for the transportation of his goods, an instrument of commerce, which is subject to the regulating power of congress, must use it subject to all the limitations imposed upon its use by congress.

4. The word "privity" of the owner, used in section 4283 of the Revised Statutes, means some fault or neglect in which the owner of the vessel personally participates; and "knowledge," as used, means some personal cognizance, or means of knowledge, of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to a loss, without adopting appropriate means to prevent it.

5. Where the owner is a corporation, the privity or knowledge of the managing officers of the corporation is privity or knowledge on the part of the corporation itself.

6. The owner is bound to exercise the utmost care in the selection of a competent master and crew, and in providing a vessel in all respects seaworthy; and if, by reason of any neglect or fault in these particulars, a loss occurs, the owner is in privity within the meaning of the statute.

7. If the owner exercises due care in the selection of the master and crew, and in providing a seaworthy vessel, and a loss afterward occurs, without his privity or knowledge, through the negligence of the master or crew, or from some secret defect in the ship or its equipments, which could not have been discovered or avoided by the exercise of proper care on his part, the owner's liability is within the limitation of the statute.

8. In order to be seaworthy, a ship must be furnished with suitable compasses.

9. Where a vessel is properly officered and manned, and in all respects seaworthy, when she leaves port, and a loss occurs from the subsequent negligence of the master or crew, or from other causes arising during the voyage, without the privity or knowledge of the owner, the owner's liability is within the limitations prescribed by the statute.

10. Where the ship is provided with several correct compasses, and one compass, from any cause, deviates, if the master, by the exercise of ordinary care and skill, can discover the deviation, and correct the deviating compass by the others, and thus be able to steer the proper courses, the ship is, in this respect, seaworthy.

Action [by I. W. Lord] against the owner of the vessel to recover the value of goods lost by the wreck of the steamship Ventura. The jury was instructed in accordance with the views expressed in the following opinion, and a verdict was returned for the defendants. The testimony disclosed the following state of facts: The steamship Ventura, of about 800 tons burden, from January 22, 1875, to April 20, 1876, was owned by defendant, a corporation formed under the laws of the state of California, and was running reg-

[1] [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 12 Am. Law Rev. 391, contains only a partial report.]

[2] [Affirmed in 102 U. S. 541.]

ularly upon the Pacific Ocean, as a passenger and freight ship, between the ports of San Francisco and San Diego, touching at the intermediate ports, the ports between which she was plying being some five hundred miles apart, and together with all the intermediate ports situated within the state of California. Goods, upon through bills of lading from cities in the Eastern States, were sent across the continent by rail to San Francisco, and, at the latter port, transferred to the steamer Ventura, and thence carried on said steamer to San Diego, Los Angeles, and other intermediate ports, and vice versa. So, also, passengers for Texas, Arizona and New Mexico purchased through tickets of the company from San Francisco, going by the steamer Ventura, to San Diego; thence by stage over a line deflecting into Mexico, and returning into California through the southern part of the latter state, to and through Arizona and New Mexico to Texas. Merchandise was also shipped on board said steamer, from southern ports of California, for ports in Oregon and British Columbia. On the night of April 20, 1876, while on a voyage from San Francisco to San Diego, the said steamer ran ashore at Point Sur, in a dense fog, and was wrecked, there being a total loss of ship and cargo. This action is brought against the owner to recover the aggregate value of goods amounting to some $60,000, shipped by various parties on said steamer at San Francisco, for San Diego and various intermediate ports, the respective owners having assigned their several rights of action to the plaintiff. The ship, at the time of her loss, was furnished with five compasses—one spirit and four mariner's compasses, of the usual construction. The spirit compass and one other were in the pilot-house. One compass was on the deck, in the after part of the ship, and farthest removed from the machinery, boilers, etc., and this, the testimony indicates, was regarded as the standard compass. One was in the mate's room, and the other easily accessible to the master. The testimony showed that the ship was usually steered by the spirit compass, as it was less disturbed by a rough sea. The officers of the corporation defendant testified that they procured the best compasses to be had, and that they had no knowledge of, or any reason to suspect, any defect in any of the compasses. A witness who went on the steamer as mate, seven months before, testified that at that time the spirit compass deviated from half to three-fourths of a point, and that the deviation was constant. Captain Harloe, who afterward made two voyages in the steamer as master, and the voyages immediately preceding the one in which she was lost, testified that the compasses were correct, and that he so informed Captain Fake, who commanded at the time of the loss. Captain Fake took charge of the vessel four days before her departure. He testified that he examined the compasses to see if they were correct, and found them so; that he tested them as he went out of the Heads, and they appeared correct then, and were correct on the several courses—some three or four—run before he got into the fog. But that, after the vessel struck, he looked at the spirit compass, and found that it deviated about half a point. This was the first deviation he had noticed. The mate, on the voyage, also corroborates the master as to his examination and testing of the compasses; and testified that they carried the vessel on the correct course through the several courses run before they got into the fog, and he did not notice any deviation afterward. There was nothing to show that any of the compasses, other than the spirit compass, were incorrect; but, on the contrary, the testimony was that they were correct. Since the time when the spirit compass was said to have deviated, seven months before, there had been some change in the location of the boiler and iron works, removing them considerably further from the location of the compass. The testimony, also was, that all compasses are more or less inaccurate, and are liable to deviate in some degree; that one object in having several compasses is to enable the master to discover and correct any deviation that may occur; and that where there are several good compasses on board, a competent master, by the exercise of ordinary care and skill, can correct any deviation that may chance to occur. There was testimony as to variable strong currents in the region, and before arriving at the location of the wreck. The defense was, that the accident occurred without the "privity or knowledge" of the owner of the steamer, and, there being a total loss, that the defendant is exonerated from further liability, under section 4283 of the Revised Statutes, which reads as follows: "The liability of the owner of any vessel for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight, then pending." On the part of the plaintiff it was insisted: (1) That as to the goods in question, the steamer was strictly engaged in domestic commerce within the state of California, which is wholly under the control of the state, and not subject to regulation by congress, under the clause of the national constitution, conferring power to regulate commerce with foreign nations, between the states and with the Indian tribes; and, therefore, that the statute invoked can have no application. (2) If wrong in this, that the defendant, as an implied term of its

contract, undertook, at all events, to furnish a seaworthy vessel, or, in other words, warranted the seaworthiness of the vessel, and that if from any defect, whether unknown or not, a loss occurred, the owner is responsible for the entire loss, even though he be without fault. It was further claimed that the steamer, in this instance, was not supplied with compasses suited to the navigation in which she was engaged; that in this particular she was unseaworthy, and that this defect caused or contributed to the loss.

S. F. Leib and Thos. H. Laine, for plaintiff.

Hall McAllister and Milton Andros, for defendant.

SAWYER, Circuit Judge (after stating the facts). Upon the facts as stated there can be no doubt, since the decision in the Daniel Ball, 10 Wall. [77 U. S.] 565, that the steamer Ventura was engaged in both inter-state and foreign commerce; and, as an instrument of such commerce, was subject to the regulating power of congress, notwithstanding the fact that the particular goods in question were passing only from port to port within the state of California, and constituted a portion of its domestic commerce. In the case cited the supreme court, in relation to the vessel then in question, says:

"So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan, and destined to places within that state, she was engaged in commerce between the states; and however limited that commerce may have been, she was, so far as it went, subject to the legislation of congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move, as an article of trade, from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity—some acting entirely in one state, and some acting through two or more states—does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of congress."

The vessel, then, was an instrument of inter-state and foreign commerce, and as such was within the regulating power of congress. But does this power extend to a limitation of the liability of the owner as to those goods shipped upon her from one port to another, in the same state, and constituting a part of the domestic commerce of such state? This seems to be a new question, as I find no case in which it has been decided, or even discussed.

In order to provide better security for the lives of passengers, and the safety of merchandise shipped, congress in 1838 [5 Stat. 304], passed an act requiring all vessels propelled, in whole or in part, by steam, to be inspected, and forbidding their employment in commerce without first being licensed upon such inspection, and without complying with many prescribed conditions as to the manning and equipment of the vessel. It provided that a sufficient number of skillful engineers should be employed; also, for safety-valves, the number and character of boats to be carried, iron tiller-rods, hose, signal-lights, etc. In 1852 [10 Stat. 61], an amendatory act was passed, adding many other conditions, such as providing for pumps, safety-plugs, life-preservers, means of access to decks; limiting the amount of steam to be used, and the number of passengers to be carried; excluding carriage of dangerous goods; requiring license of engineers, masters, pilots; prescribing kind and quality of boiler-iron to be used, etc. These and many other onerous conditions are imposed upon owners—some as conditions precedent to the use of the vessel at all, and the observance of the others enforced by forfeitures, fines, liabilities and severe penalties, civil and criminal. All these precautions are taken for the safety and better security of life and property embarked in commerce. As a counterpoise, in some degree, to these severe and onerous conditions, and as an encouragement to citizens to build ships and engage in commerce, some limitations, also, were subsequently placed on the common-law liabilities of ship-owners, by the provisions of the statute in question, first adopted in 1851, and which, with the other provisions cited, have been carried into the present Revised Statutes. One means of security is to a certain extent substituted for the other, and it cannot reasonably be doubted, I think, that, upon the whole, the security afforded by the provisions of the statute, if properly enforced, notwithstanding the limitation of the personal liability of owners provided for, is far greater than it would be under the full common-law liability of owners without the security provided by congress. However this may be, a vessel engaged in inter-state or foreign commerce, as an instrument of such commerce, is brought within the regulating power of congress; and congress has seen fit to make these provisions, together with the changes in the responsibilities and liabilities of the owners of such vessels. Congress deals with the vessel as an instrument of commerce, and the rights and obligations of the owners as related to such instrument. The vessel, being engaged in inter-state or foreign commerce, must conform to the regulations prescribed; and any party using it for the purposes of domestic commerce, enjoys all the benefits afforded by these regulations, for they inhere in the vessel and cannot be separated from it. If a party avails himself of these benefits by the use of the vessel, he must also suffer the inconveniences inci-

dent to such use. He must take the vessel as he finds it, with all the inconveniences imposed, as well as the additional security afforded. It would be impracticable for two sovereignties to regulate the same instrument, used at the same time in different branches of commerce. If the state should attempt to regulate the vessel as to state commerce, and the national government as to inter-state or foreign commerce, it is easy to see that their regulations might be wholly inconsistent. The regulation as to all must necessarily fall to that sovereignty which is supreme or paramount as to any part, and having control of the instrument employed; and all parties availing themselves of the use of the instrument must take it as they find it, with all the responsibilities and exemptions provided by the controlling power. The power to prescribe the conditions upon which the vessel shall be employed as an instrument of inter-state or foreign commerce, necessarily carries with it the power to modify the rights of those who use it—as well those who, at the same time, make use of it for the purposes of domestic commerce as those who employ it in inter-state or foreign commerce. The steamer Ventura, being engaged in inter-state and foreign, as well as domestic commerce, the provisions of section 4283 of the Revised Statutes, limiting the liabilities of owners of vessels, are applicable to her; and the limitations apply to the goods in question as well as to goods destined to ports or places beyond the state of California.

The next question is, what is meant by a loss "occasioned or incurred without the privity or knowledge of such owner?" These words, as related to this subject, seem to have been first used in the statute of Geo. II., in 1734, where there was a restriction provided as to the liability of the owner in certain specified cases happening without the "knowledge or privity" of such owner. Eng. Adm. St. 167. The restriction was extended to other cases by statute 26 Geo. III., 1786 (Eng. Adm. St. 448). The restriction was again extended to other cases by the statute of 53 Geo. III., 1813. And in the statutes of 18 & 19 Vict., the words "privity or knowledge" were changed to "actual fault or privity." Macl. Shipp. 704. These statutes seem to form the basis of our own; and an examination of these statutes, with their preambles, will afford no little aid in arriving at a proper construction. The policy of the act is well stated in Norwich Co. v. Wright, 13 Wall. [80 U. S.] 121, and Moore v. American Transp. Co., 24 How. [65 U. S.] 39. It is quite apparent that it was intended to exonerate owners from liability beyond the value of the ship and freight pending, for losses resulting from many causes for which they were before liable; and, among them, from mere negligence or carelessness of the master or crew of the vessel—from mere general negligence of employees. So much is already determined by the supreme court in Walker v. Western Transp. Co., 3 Wall. [70 U. S.] 153, wherein the court says: "We are, therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally." Privies, as defined by Bouvier, are "persons who are partakers, or have an interest in any action or thing, or any relation to another." One of Webster's definitions of privity is: "Private knowledge; joint knowledge with another of a private concern; cognizance implying consent or concurrence." And one definition of privy, as an adjective, is: "Admitted to the participation of knowledge with another of a secret transaction; secretly cognizant; privately knowing." As a noun, "A partaker," etc. As used in the statute, the meaning of the words "privity or knowledge," evidently, is a personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself of a contemplated loss, or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it. There must be some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates, to constitute such privity, within the meaning of the act, as will exclude him from the benefit of its provisions. 113 Mass. 499. It is the duty of the owner, however, to provide the vessel with a competent master and a competent crew; and to see that the ship, when she sails, is in all respects seaworthy. He is bound to exercise the utmost care in these particulars—such care as the most prudent and careful men exercise in their own matters under similar circumstances; and if, by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity within the meaning of the act. But the owner, under this act, is not an insurer. If he exercises due care in the selection of the master and crew, and a loss afterward occurs from their negligence, without any knowledge or other act or concurrence on his part, he is exonerated by the statute from any liability, beyond the value of his interest in the ship and the freight pending. So, also, if the owner has exercised all proper care in making his ship seaworthy, and yet some secret defect exists, which could not be discovered by the exercise of such due care, and the loss occurs in consequence thereof, without any further knowledge or participation on his part, he is in like manner exonerated, for it cannot be with his "privity or knowledge," within the meaning of the act, or in any just sense, and the provision is that "The liability of the owner * * * for any

act, matter, or thing, loss, etc., * * * occasioned without the privity or knowledge of such owner or owners, shall, in no case, exceed the amount or value of the interest of such owner in such vessel and her freight then pending." This language is broad, and takes away the quality of warranty implied by the common law against all losses except by the act of God and the public enemy.

When the owner is a corporation, the privity or knowledge of the managing officers of the corporation must be regarded as the privity and knowledge of the corporation itself. 113 Mass. 500; [Phila. Wilmington & Balt. R. Co. v. Quigley] 21 How. [62 U. S.] 202. Where a vessel is properly officered, manned and equipped, so as to render her seaworthy when she leaves port, any loss resulting from causes arising during the voyage after she leaves port, without the privity or knowledge of the owner, will be within the protection of the statute. To render a vessel seaworthy, she must be furnished with compasses suitable for the voyage. Where there are several correct compasses, and one compass from any cause deviates, if a competent master, by the exercise of ordinary care and skill, can discover the deviation and correct the deviating compass by comparison with the others, and be thus enabled to steer the proper course, the ship, in this respect, is seaworthy. All compasses appear to be liable to deviate more or less, and it is in part to enable masters to make this correction that prudent owners provide the vessels with several.

[Verdict rendered for the defendant.] [2]

Case No. 8,507.

LORD v. MILWAUKEE & M. R. CO.

[17 Wis. 588 (570) note.]

Circuit Court, D. Wisconsin. 1863.

TAX DEEDS—EFFECT AS EVIDENCE—CONSTITUTIONAL LAW—EJECTMENT.

[1. The Wisconsin statute of April 19, 1852 (Laws 1852, p. 783), making a recorded tax deed conclusive in regard to any errors of officers in levying taxes and selling lands to enforce payment, was within the constitutional powers of the legislature.]

[2. A tax deed made in pursuance of a sale under the Wisconsin act of April 19, 1852, being conclusive evidence of the regularity of the proceedings, the prescribed notice of redemption is to be regarded as merely directory, and the court is not to inquire whether such notice was regular or not. But as to tax deed made pursuant to sales had prior to the passage of that act, they are only prima facie evidence of regularity, and thence may be declared void for want of a lawful notice of redemption.]

[3. To enable a plaintiff in ejectment to recover on a tax deed lands originally held by the United States, it must be shown that the land was sold by the United States before it was taxed, but it is not necessary that a patent should have issued.]

MILLER, District Judge (after citing the provisions of the acts of April 19, 1852, March 31, 1853, and March 31, 1854): By the act of 1852, under which the sale of this lot was made, the deed is conclusive in all courts that the proceedings have been regular, from the valuation of the land up to the execution of the deed; and also of the existence of all conditions precedent in any way affecting its validity. And there is only left to the owner of the land the right to contest its liability to taxation; to prove the payment of the taxes for which the land has been sold; and to prove the redemption of the land, after the sale, and before the recording of the deed. All defense against a deed is cut off, excepting in these three particulars, in regard to which the purchaser, by the deed, acquires but a contingent title, liable to be defeated by proof of any one of them. If the land described in the deed was the property of the United States at the time of the assessment, the whole proceeding and deed would be void. The power of taxation resides in the government, as a part of itself. It is granted by all, for the mutual benefit of all; and it operates on all the persons and property in the state. The predominant policy of the legislature, in passing the act of April 19, 1852, is to secure the collection of revenue for public uses. The precise directions given in the law, as to the mode of assessing, advertising and selling, and all other things prescribed to be done by the public officers, should be followed strictly and substantially, although they are but directory. As the system was carried on by various officers, changed frequently by public election, and not always conversant with the necessary modes of carrying on complicated plans of taxation and sale, or sufficiently cautious to do it accurately, it was seen that these directions were not strictly pursued, and that loose, irregular and defective methods had been fallen upon in practice. It was determined therefore by the legislature to consider the provisions of the law as directory merely, and to protect the purchaser against the neglect, imperfections and malfeasance of public officers. The act therefore prescribes in strong terms that the deed shall be conclusive in the hands of the grantee as to all things in their character directory. While the door was open for the legal owner to contest the proceedings, they were considered essential; and the courts, in their decisions, were reduced to the necessity of overruling the tax title merely on account of some slight irregularity or deviation from the terms of the law. From this they are relieved by the overruling and sweeping provisions of the act of April, 1852. Many hard cases, no doubt, will occur under this law; but it is considered, by the representatives of the people, expedient that individual loss should be submitted to in order to carry out a measure of public policy. If the owner will not exercise the ordinary vigilance required by law in paying his taxes,

[2] [From 5 Cent. Law J. 325.]

or in redeeming his land within the time allowed, he neglects a duty at the peril of having it applied for the purpose of defraying the expenses of government. Every person, whether resident or non-resident, who owns land located in this state, knows that it is subject to taxation, and to sale for the payment of taxes annually assessed. He is presumed to know the times prescribed by law for the sale of his land and for its redemption, and also the conditions of the sale and the effects of non-redemption. Ignorance of the law should not in this matter excuse a man. The legislature has, after much imperfect legislation, adopted the wise policy of requiring the owners of lands to pay the taxes annually assessed thereon, and thereby contribute punctually to the support of the government. Land is wisely made the debtor of the taxes, and subject to a statute lien, to be extinguished by a summary proceeding in rem, whereby the title of the owner is divested upon neglect to redeem, after the long time allowed by law for that purpose. A due regard to the interests of the tax-paying citizen, and to the improvement of the state, required the enactment of the law; and the courts should enforce it, as to sales made subsequent to its publication.

The law of Pennsylvania provides that "no alleged irregularity in the assessments, or in the process, or otherwise, shall affect the title of the purchaser; but the same shall be declared to be good and legal." In that state taxes are a lien only on unseated or vacant lands and lots, and such only can be sold by the treasurer. The courts of that state have enforced that statute provision with such uniformity of construction that a treasurer's deed of lands not redeemed is considered an undoubted muniment of title. In Stewart v. Shoenfelt, 13 Serg. & R. 360, it is decided that the assessor of one township has no right to assess lands lying in another township; but if he does so, and the land is sold for payment of the taxes, the sale is not void, and the purchaser is protected. In Thompson v. Brackenridge, 14 Serg. & R. 346, it is decided that the omission of the notice of sale required by the law does not vitiate the deed. The court says: "Returning periods of sale are fixed by the law, and owners are therefore apprised by the law itself that their lands will be sold at the regular period if the taxes are not paid." In Hubley v. Keyser, 2 Pen. & W. 496, the court says: "The object of the law was to make the sale for taxes and treasurer's deed confer a title, without proof of any one prerequisite, except that the land was vacant, and that a tax was charged, regularly or irregularly; that the tax was unpaid; and that the land was sold, and not redeemed." In Strauch v. Shoemaker, 1 Watts & S. 166, it is decided that when vacant land is sold for the payment of taxes the title of the real owner, whatever it may be, passes to the purchaser, whether it be assessed and sold in his name or that of a stranger; and whether the person in whose name it is taxed has or has not any title. And in Fager v. Campbell, 5 Watts, 288, the court says: "The land itself, and not the owner of it, is the debtor for the public charge; and it is therefore immaterial, at the moment of sale, what may be the state of the ownership, or how many derivative interests may have been carved out of it. With these the public have no concern. They are sold with the land, just as a remainder would be sold with a particular estate." And in Frick v. Sterrett, 4 Watts & S. 269, the court ruled that the act on the subject of the sale of vacant lands for the payment of taxes was designed to give effect to the title, without regard to irregularities in the mode of assessment or sale.

On the subject of redemption under the law, the court, in Orr v. Cunningham, Id. 294, ruled that the right to redeem is exclusively in the owner; but, if the land be actually redeemed by another, it will enure to the benefit of the owner; and vest no title in him who redeemed it, although he may have been a claimant of the land at the time. In Laird v. Heister, 12 Harris (24 Pa. St.) 452, the court says: "When the owner of land goes to the treasurer and offers to pay him all the taxes upon it, and does pay him the amount demanded, and the treasurer credits the payment to another tract and sells this, it is a good payment and the sale is void. The unseated land laws are intended to enforce the payment of taxes, and their purpose is fulfilled when the duty is performed. If a man has actually and in good faith performed his duty to the satisfaction of the proper officers, his land is safe. If it is sold after that, it is through the error of some officer, which cannot be visited on the owner; for the state does not mean that the owners shall warrant the fidelity or competency of its officers. The sale involves an assertion by the treasurer that the taxes are unpaid, and the purchaser relies on this or on his own investigations, and his title depends upon its truth." And in the case of limitation, the same court, in Burd v. Patterson, 10 Harris (22 Pa. St.) 219, decided that the owner was barred, though his agent had been informed by the treasurer, before the sale, that the taxes on his lands had been paid. There was no offer to pay the taxes; and, where either the owner or purchaser must suffer, the loss should fall on the former, who neglected to pay his taxes. The supreme court of the United States, in Dubois v. Hepburn, 10 Pet. [35 U. S.] 1, which was a case involving the right to redeem under the Pennsylvania statute, says: "A law authorizing a redemption of land so sold ought to receive a benign construction in favor of those whose estates will be otherwise divested."

I have referred to these few cases, selected

from many on the same subject, to show how a law similar to the act of April, 1852, has been enforced, and the principles on which it is administered. The law of Pennsylvania has been in force forty-two years, and I am not aware of a case wherein its constitutionality is doubted by the courts. In my opinion, the legislature of Wisconsin had the same constitutional power to pass the act of April, 1852, making a recorded tax deed conclusive in regard to errors of officers in levying taxes and selling lands for their payment, as to declare by law that no pursuit or proceeding for the recovery of lands sold for taxes shall be commenced after three years from the time of recording the deed.

In all cases it is the duty of the court to enforce the constitutional laws of the state; particularly those that regulate and control the titles to property. In conformity with this principle, I have decided, in this case, that under the law in pursuance of which the sale for taxes assessed in the year 1848 was made, the deed, being but prima facie evidence of the regularity of the proceedings, is void for want of a lawful notice of redemption. And as, by the law of April 19, 1852, "deeds shall be conclusive in all courts that the proceedings have been regular, from the valuation of the land up to the execution of the deed, and of the existence of all conditions precedent in any way affecting the validity of the deed," with the exceptions mentioned, I now decide that the prescribed notice of redemption is merely directory, and that a deed made in pursuance of a sale under this law is conclusive; and the court is not to inquire whether the notice of redemption was regular or not. The design of the act of April, 1852, is to place tax deeds, in regard to their conclusiveness, on an equality, as near as may be, with deeds of lands sold under execution by sheriffs. The legislature has power to create liens upon lands by mortgage and judgment, and also a paramount lien by taxation. And it can constitutionally provide for the extinguishment of those liens by sale of the incumbered premises, and transfer of the title to the purchaser. In either case there is a proceeding according to law, sufficient to divest the owner of his title, and to protect the purchaser against irregularities or errors of officers.

The court seeing the law of April, 1852, upon the statute book, and recognizing it to be a law in relation to titles to property, will enforce it. And this deed, being made in confirmation of a sale under that law, and recorded, is to be received in evidence as a muniment of the plaintiff's title; provided the execution is correct, and the title to the land be shown out of the United States. To enable a plaintiff in ejectment to recover on a tax deed, it must be shown that the land was sold by the United States before it was taxed; but it is not necessary that a patent should have issued. Carroll v. Safford, 3 How. [44 U. S.] 441; Crum v. Burke, 1 Casey (25 Pa. St.) 377.

[In 17 Wis. 588 (570), this case is published as a note to Smith v. Cleveland.]

LORD (MISTON v.). See Case No. 9,655.

Case No. 8,508.

The LORD WELLINGTON.

[2 Gall. 103.] [1]

Circuit Court, D. Rhode Island. June Term, 1814.

PRIZE—CARGO FROM ENEMY'S SHIP—PRETENCE—SEIZURE ON RETURN VOYAGE.

If an American vessel take on board a cargo from an enemy's ship, under the pretence that it is ransomed, it is an illegal traffic, for which, by the law of war, she is liable to condemnation as prize of war, and may be seized on the return voyage.

[Cited in Caldwell v. Southern Exp. Co., Case No. 2,303.]

See The Joseph [Case No. 7,533]; The Rapid, 8 Cranch [12 U. S.] 155; The Diana [Case No. 3,876].

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

This was an information filed in behalf of the United States by the district attorney, claiming the sloop Lord Wellington, as forfeited to the United States for an alleged trading with the enemy. From the facts admitted by the claim, or proved by the evidence, it appeared that the sloop, on the 11th of December, 1813, cleared out from Newport for New York, and a manifest was then produced at the custom-house, and sworn to by the master, stating the cargo on board to be 700 tons of iron, and six tons of burr stone. In fact there was no cargo on board. The sloop sailed from Newport, went alongside of the British squadron in Long Island Sound, and there received the iron on board, which was thereupon transported to New York, and upon her return to Newport, about the 4th day of January, 1814, the sloop was seized by the commander of the revenue cutter, as prize to the United States. The special claim filed by the claimants [Sandford and others] admitted, that the cargo had been taken on board, as above stated; and averred, that it had been some time previously captured from another American vessel, the Amelia, bound from New York to Newport, and was ransomed by the American owners from the British captors under a special agreement, and the sloop Lord Wellington was engaged by the owners to pay the ransom and take the iron back to New York.

Mr. Robbins, for the United States.

Mr. Burrill, for claimants.

STORY, Circuit Justice. This is a very clear case of trading with the enemy. Wheth-

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

er the facts stated in the special claim are true or not, is not now material to be considered. It is not competent for American citizens to engage in this sort of traffic with the public enemy. Even admitting the ransoming of captured property to be legal, it cannot be admitted to be made at any distance of time, and by any new voyages undertaken for this especial purpose. There would be no end to such intercourse; or to the dangers, which would thereby arise to the country. No intercourse of this kind can be carried on, except by the express permission of the government. I will not stop to consider, whether the claim can be supported in point of fact. It comes with no very good grace, after an inception of the voyage by a most gross and palpable perjury in swearing to a cargo, which was not on board. This was a fraud, which deserved no countenance, and can be sustained by no apology. I condemn the sloop to the United States.

Case No. 8,509.

LORIE v. CONNECTICUT MUT. LIFE INS. CO.

[4 Ins. Law J. 632; 5 Bigelow, Ins. Cas. 233.]

Circuit Court, W. D. Missouri. April Term, 1875.

INSURANCE—LIFE—PROHIBITED LOCALITIES—WAIVER—RECEIPT OF PREMIUMS.

[1. In order to show a waiver of the condition of a life insurance policy prohibiting residence within certain latitudinal limits, it is necessary that the evidence of such waiver shall be clear and precise. The waiver cannot be inferred from mere incidental conversation had on the streets with the company's agent.]

[2. A life insurance policy contained a prohibition of residence within certain latitudinal limits. A mere receipt of premiums by the company while the insured resided within the prohibited limits cannot be taken as constructive notice to the company, and a waiver of the prohibition. It is necessary, in addition, to show actual knowledge of such residence by the company when receiving the premiums.]

This is an action on a life policy issued by the defendant on the fifth day of May, 1870, at Kansas City, Missouri, to Abraham Lorie, for one thousand dollars, containing, among others, the following conditions: "That the said insured is, under this policy, freely permitted to reside in any civilized abode in the Western hemisphere lying north 32d parallel of north latitude, in the United States, lying south of said 32d parallel (except from the first day of July to the first day of November,) * * * * without the consent of this company previously given in writing." The defense is, that the insured at the time of his death, which occurred on the 24th of September, 1871, was residing south of the prohibited line. To this defense the reply is, that the defendant, through its agent, for a valuable consideration, agreed to give deceased its written consent to remain and reside at Videlia, Louisiana; and again, that defendant, after knowing that deceased resided within the prohibited lines, received a premium, and thereby waived the conditions of the policy as to residence.

The testimony in the case is, that the premiums were paid to one E. W. Pierce, the resident agent of defendant at Kansas City, Missouri, which was also the place of residence of the insured; that between the tenth day of October and the nineteenth day of November, 1870, the insured, without notice to the company or its agent, left Kansas City to go by way of St. Louis to Videlia, Louisiana; that a day or two after he left, the plaintiff, who is a brother of the deceased, and who also resided in Kansas City, met Pierce on the street and told him that his brother had gone to Videlia; whereupon Pierce asked whether he was going to live there, and, being answered in the affirmative, said he ought to have a permit, intimating that he would charge nothing for it. Plaintiff told Pierce that he would attend to it for his brother if it did not cost too much. There is a conflict of testimony as to the time deceased left Kansas City; the plaintiff, soon after the death of his brother, in the making of proof of death furnished the company, states that it was on the 19th day of November, 1870, and when he testifies on the trial, makes it between the 15th and 29th of October, while another witness, whose deposition was taken, makes it between the 10th and 15th of October, 1870. The insured died at Videlia, Louisiana, on the 24th of September, 1871, of yellow fever, after an illness of four or five days. There were two letters, dated respectively May 5th and 22d, 1871, written by Pierce to deceased, the first addressed to him at Natchez, Miss., and the second at Videlia, La. The first, dated May 5th, as follows: "Enclosed please find renewal receipt for your life insurance policy. Your brother, Joseph Lorie, paid for it." The letter of May 22d is as follows: "Mr. J. Lorie handed me this day your letter dated May 16th. I mailed your receipt in a registered letter, May 6th, to you, to Natchez, Miss., as Joseph Lorie directed me. In regard to the premium, I told you after the second payment it would be less. You need not have any fears about it not being a good investment. It is the best investment you can make with the money it costs. After the second payment your dividend will decrease your payment annually. Wishing you health and prosperity, I remain yours very respectfully [both signed] E. W. Pierce."

This is all the testimony directly bearing on the issues.

Johnson & Botsford, for plaintiff.
Lee & Adams, for defendant.

[Before DILLON, Circuit Judge, and KREKEL, District Judge.]

KREKEL, District Judge. The questions to be determined are, was there an agreement, as set up in the reply, to waive the

condition of the policy as to residence, and if not, was the receiving of the premium on May 5th, 1871, a waiver of the condition of residence? The testimony as to an agreement for a valuable consideration to waive in writing the condition of the policy as to residence is, that plaintiff met defendant's agent on the streets of Kansas City two or three days after the insured had left, and stated to him that his brother had gone to Videlia, Louisiana, to live, and when the agent spoke of the necessity of having a permit, he replied that he would see to it if it did not cost too much. Such incidental talk on the streets, when viewed with reference to the allegations in the reply, and specially the policy, providing as it does that previous written consent must be obtained of the company, and by a printed note on the face of the policy, giving notice that no agent had a right to waive any of the conditions of the policy, cannot be construed into an agreement to waive the conditions of the policy as to residence.

As to the second point, was the receiving of the premium on the 5th of May, 1871, a waiver of the condition of the policy as to residence? In support of the affirmative view, May on Insurance (page 404, § 339) is relied on, and is as follows: "But the right to insist upon a compliance with such restrictions may be waived, and a receipt of the premium by the insurers after a known violation of the conditions against residence abroad, or of the terms of the permit granted, is a waiver of their right to claim a forfeiture by reason of such violation. And this is true whether the knowledge be actual or constructive, as whether the violation is known to the agent of the insurers who receives the premiums." It will be observed, in the first place, that a knowledge of the violation of the conditions of the policy must be brought home to the company, either direct or to the agent. The language that the knowledge may he actual or constructive, has reference to the knowledge of the agent being the knowledge of the insurers, and does not mean to convey the idea that constructive knowledge of the agent is sufficient to bind the insurers. If the view was to prevail that constructive knowledge of the agent bound the insurers, then the date of the deceased leaving Kansas City becomes important.

An examination in the most favorable view to the plaintiff of the testimony in the case seems not to furnish constructive notice to the agent even. Assuming that the insured left Kansas City between the 10th and 19th days of October, by way of St. Louis, to go to Louisiana, and that, two or three days afterwards, plaintiff, meeting defendant's agent on the street, informed him that he had gone there to reside, in the absence of all testimony that he arrived within the prohibited lines before the 1st of November, would not give constructive notice. The possibility that he might have arrived certainly imparts no notice such as the plaintiff, who sets up and must maintain the waiver, is bound to show. It is true that the witness testifying to deceased leaving between the 10th and 19th of October also states that he soon thereafter received a letter from him; but this fact is not brought home to the knowledge of the agent. With the knowledge which deceased had of the condition of his policy, and his failing to apply for a permit when leaving, it is not likely that he would enter within the prohibited limits for the sake of, at best, a few days earlier arrival. The letters of the agent, Pierce, of May 5th and 22d, 1871, quoted in full and relied on by plaintiff, both as showing an agreement to waive and a waiver in the view of the court, bear rather against than for him. If a written waiver has been agreed on, or a waiver was intended, what would be more likely than a reference to either or both? But instead of that, after his brother had paid the premium for him, he props up his faith in life insurance as though he was apprehensive of an abandonment,—an idea in keeping with his feeling, previous to removal to obtain a permit. His failure to obtain a permit would be explained, however, if he did not intend to enter within the prohibited lines before the 1st of November, or left Kansas City late in October, or on the 19th of November, as first testified by plaintiff. The most careful examination of the testimony fails to satisfy the court that the agent had constructive notice even of the coming of insured within the prohibited limits prior to the 1st day of November, 1870, much less knowledge of his so doing. That it is actual instead of constructive knowledge the cases in maintenance of the text cited abundantly shows. Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244, is a case in which the company had received three premiums one year after full knowledge of the claimed violation. In Wing v. Havey, 27 Eng. Law & Eq. 140, the violation was known to both agent and company for fourteen years, and the premium received each year. The other cases are of similar import. In all of them the premiums were received after a known violation. In the case before the court the premium of the 5th May, 1871, was received before a violation, and while insured resided at Videlia, Louisiana, as under the policy he had a right to do up to the 1st July. The statement of the plaintiff to Pierce (who is dead) in the accidental conversation on the street, that insured intended to reside at Videlia, and that he would attend to getting a permit if it did not cost too much, must be understood as saying that if deceased continued to reside there it would be in conformity of the conditions of the policy, and under a permit, which, failing to obtain, the policy is avoided.

Case No. 8,510.

LORILLARD et al. v. McDOWELL et al.

[2 Ban. & A. 531;[1] 23 Int. Rev. Rec. 90; 11 O. G. 640; 13 Phila. 461; 34 Leg. Int. 78; 24 Pittsb. Leg. J. 119.]

Circuit Court, E. D. Pennsylvania. Feb. 24, 1877.

PATENTS—CLAIMS OF PATENT — MODE OF PRACTISING EXTENSIVE USE—EXPANDED CLAIM —REISSUE.

1. The words "as specified," in the claims of a patent, do not necessarily limit such claims to the particular mode of practising the invention described in the patent.

2. Where a patentee has described one mode of practising his invention, as the law requires him to do, he must be understood as merely describing the best mode, and not as excluding a method different from it only in a single detail which produces the same result, and is distinctly within its object.

3. Where an invention involves reflection and experiment to bring it to practical maturity, its evident utility, indicated by its prompt displacement of other devices and extensive use, strongly attest its patentable merit.

4. A reissue may be granted with an expanded claim, to secure to a patentee the benefit of the invention described but not claimed in the original, when caused by the inadvertence of the inventor.

[Approved in Lorillard v. Carroll, 9 Fed. 510.]

In equity.

George Harding, for complainants.

Leonard Meyers, for defendants.

McKENNAN, Circuit Judge. This is a motion for an interlocutory injunction, to restrain infringement of the patent set up in the complainants' bill. An original patent No. 158,604 was granted to Charles Seidler, on the 12th of January, 1875, which was surrendered and reissued to him October 24th, 1876, No. 7,362. The invention is thus described: "I have discovered and successfully developed in practice a means of marking and distinguishing tobacco in plugs. I prepare labels, or distinguishing pieces of separate material, and impress them into the body of the plugs, one label into each plug, preferably putting the label under the outside wrapper, and giving it a character by raised letters or analogous devices, which is recognizable through the flexible covering. The material of which these labels are composed is preferably sheet iron tinned, cut into a circular form, and having points or prongs bent backward from their edges, and with raised or sunken letters or marks upon their upper face, to indicate the quality, origin, or trade-mark. Before the plug of tobacco is subjected to its final pressure, one of these labels is placed upon it in proper position, and, by powerful pressure, the prongs of the label are sunk into the tobacco, so that its face is about flush with the outer surface of the plug, and adheres firmly to it. An outer leaf of properly dampened tobacco is then wrapped around the plug, which is subjected to a powerful pressure, and the label is seen beneath this wrapper, and is rendered thereby difficult of removal."

The invention is claimed under five heads, the first and third of which are: "(1) A plug of tobacco having a hard label pressed into one of its faces, as specified." "(3) A plug of tobacco having letters or other decorative and distinguishing marks produced on a hard metallic surface, and pressed, as specified."

These claims the respondents are alleged to have infringed, and construing them, as I think they must be construed, to indicate the impressment of a hard or metallic label upon either the inner or outer face of a plug of tobacco, the fact of infringement is clearly made out, both by the affidavits read in support of the motion, and by an inspection of the tobacco manufactured and sold by the respondents.

This construction of the patent has been very earnestly contested, upon the ground that the specification describes only the mode of applying the label to the plug underneath the outer covering, and that the words "as specified," limit the scope of the claims to that particular mode, but the patentee must be understood as merely describing what he regards as the best mode of practising his invention, as the law requires him to do, and not as excluding a method different from it only in a single detail, which produces the same result, and is distinctly within its object. He claims to have discovered a new method of identifying tobacco, which consists in the attachment of a hard label to each plug by pressing into it the points or prongs which project from the under surface of the label, and thus the fundamental object of his invention is fully effectuated. When this is done the outside wrapper is applied; but the label is thus placed underneath the wrapper, not as auxiliary in any way to the specific office of the label, but avowedly only to render it more difficult of removal.

It is obvious, then, that to dispense with this additional safeguard, and to apply the label outside of the wrapper, does not differentiate the devices, nor does it vary the method of attaching them to the plug in any essential degree.

Of the objections to the validity of the patent, but little need be said at this stage of the case. The first of these is to the novelty of the invention, or rather that it is a double use of an old device. But it is not shown to have been used for any purpose analogous to that contemplated by the patentee, or even remotely suggestive of such use. It was the result of considerable thought, and of careful and repeated experiments, and supplied a perfect means of distinguishing the quality and origin of plug tobacco, which had not before been furnished to either the manufacturer or consumer.

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

Nor does the denial of its patentability seem to me to have any firmer foothold. Simple as it is, it nevertheless involved reflection and experiment to bring it to practical maturity, and its evident utility, indicated by its prompt displacement of other identifying devices, and its very extensive use, even by the respondents, strongly attest its patentable merit.

The remaining objection, that the reissue is void, as not being for the same invention described in the original patent, is clearly untenable. The drawings in both are the same, and the specifications of both are substantially the same. They both describe, as the invention, a hard or metallic label applied to a plug of tobacco before it is subjected to its final pressure, with characters impressed upon it indicating its quality, origin, or trade-mark; while, in the original patent, the claim is limited to tobacco, to which the label is applied underneath the wrapper. To remedy this restriction, inadvertently imposed, as the commissioner of patents has conclusively found, the reissue was properly granted with an expanded claim, to secure to the patentee the full benefit of the invention described, but not claimed in the original.

The motion for a preliminary injunction must, therefore, be allowed.

[For other cases involving this patent, see note to Lorillard v. Dohan, 9 Fed. 509.]

Case No. 8,511.

LORILLARD et al. v. RIDGWAY.

SAME v. SELLERS.

[4 Ban. & A. 564; [1] 16 O. G. 1231; Merw. Pat. Inv. 254; 14 Phila. 410; 36 Leg. Int. 444; 25 Int. Rev. Rec. 377.]

Circuit Court, E. D. Pennsylvania. Oct. 31, 1879.

PATENTS—METALLIC TAGS IMPRESSED ON TOBACCO—PATENTABLE INVENTION.

The first and third claims of reissued patent No. 7,362, granted to Charles Seidler, October 24th, 1876, for improvement in plug tobacco, *held* invalid for want of patentable invention. The case of Lorillard v. McDowell [Case No. 8,510], upon the additional proof offered in this case, not followed.

[Cited, but not followed, in Lorillard v. Carroll, 9 Fed. 510.]

[These were suits in equity by Peter Lorillard and others against Eli Ridgway and against Sellers, alleging infringement of certain patents.]

George Harding and John R. Bennett, for complainants.

C. A. Seward, S. S. Boyd, and A. J. Todd, for defendants.

McKENNAN, Circuit Judge. When Seidler's patent (reissue No. 7,362, dated October 24th, 1876) was before me, on a motion for a preliminary injunction, in the case of Lorillard v. McDowell [supra], it was held that the patent was not void by reason of any essential difference between it and the reissue; that the invention described in it was not a double use of an old device, because it did not appear "to have been used for any purpose analogous to that contemplated by the patentee, or even remotely suggestive of such use," and that, under the proofs exhibited of the state of the art, there was sufficient inventiveness involved in its production to sustain its patentability. But the proofs presented here very much circumscribe the field left unoccupied by devices of the class to which the alleged invention belongs.

Impressions were made upon tobacco, in the process of manufacture, by the application of metallic and other hard substances, under heavy pressure, the imprint of which was left upon the tobacco after they were withdrawn. This was done for the purpose of distinguishing or identifying the tobacco. These impressing substances were left only temporarily in the tobacco, but it is apparent, that they might have remained permanently in it, if it had been so desired. The only objection to this would be the superficial and insecure method of their attachment to the tobacco. Seidler, however, obviated this defect by providing projections or prongs on the under side of his tag, which, by sinking deeper into the tobacco, gave it a secure attachment. But he did not invent this device, and, if he did, it is difficult to see how the mere attachment of prongs to a flat disk, which had been used before, would involve a patentable exercise of inventiveness.

Another feature of his alleged invention consists, as stated in the third claim, in "having letters or other decorative and distinguishing marks produced on a hard metallic surface, and pressed, as specified." It is abundantly shown, by the proofs, that letters and distinguishing marks had been produced upon the surface of tobacco, and that machines had been patented to make such impressions, before the date of Seidler's patent. The objects of these marks were in both cases the same. The only difference is, that in the one case they were impressed upon the surface of the tobacco, and in the other upon a metallic disk attached to the tobacco. To put these marks upon a metallic tag, if greater permanence was desired, instead of upon the tobacco to which it was attached, would obviously very readily suggest itself to the common mind, and the conception does not rise to the dignity of invention.

The only claims of the patent which are involved in this suit are the first and third, and the proofs as to the state of the art, leave so little for them to rest upon, that they cannot be sustained, and the bill must, therefore, be dismissed with costs.

[For other cases involving this patent, see note to Lorillard v. Carroll, 9 Fed. 509.]

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

LORILLARD v. SELLERS. See Case No. 8,511.

Case No. 8,512.

In re LORING.

[Holmes, 483.] [1]

Circuit Court, D. Massachusetts. March, 1875.

BANKRUPTCY — CREDITOR'S PETITION TO HAVE CLAIM EXPUNGED—REFERENCE TO REGISTER.

The district court is authorized in bankruptcy to refer to the register a petition of a creditor praying that the proof of claim of another creditor be expunged on account of matters occurring since the claim was proved.

Petition for review of a decree of the district court of Massachusetts, in bankruptcy. Jordan, Marsh & Co., creditors of J. C. Loring, a bankrupt, presented a petition to the district court, representing that Edward S. Jaffray & Co., of New York, after proving a large claim against the bankrupt's estate, brought an action of contract in New York against him upon the debt, and on execution obtained in that suit caused him to be arrested and committed to jail, and subsequently discharged him from the arrest. The petition prayed that the proof of Jaffray & Co.'s claim against the bankrupt's estate be expunged, and that the assignees be enjoined from paying them a dividend already declared, or any dividend. Upon this petition the district court directed an order to show cause before the register, and granted an interlocutory injunction as prayed. At the time fixed for hearing by the register, Jaffray & Co. objected to any proceeding under the petition before the register, upon the ground that such a proceeding was not authorized by the thirty-fourth general order in bankruptcy. The question thus raised was certified by the register to the district court, and, upon hearing, the petitioners' objections were overruled and the hearing before the register ordered to proceed; whereupon Jaffray & Co. brought this petition for review.

T. F. Nutter and Isaac Dayton, for petitioners.

Stephen B. Ives, Jr., and Henry M. Rogers, for Jordan, Marsh & Co.

SHEPLEY, Circuit Judge. This petition for the exercise of the revisory power of the circuit court over an order and decree of the district court in bankruptcy presents this question: Has the district court sitting in bankruptcy, authority, after a debt has been proved in the usual mode, to re-examine the claim and expunge or diminish it, or to refer it to a register for re-examination with a view to its being expunged or diminished, for causes, such as payment or other causes, alleged to have arisen after the proof was made? It is denied by the petitioner that this power exists except under a proceeding by bill in equity. The twenty-second section of the bankrupt act [of 1867 (14 Stat. 527)] authorizes the court to "reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake."

The thirty-fourth of the general orders in bankruptcy provides as follows: "When the assignee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the register to whom the cause is referred for an order for such re-examination; and thereupon the register shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed, the register shall take the examination of the creditor, and of any witnesses that may be called by either party; and if it shall appear from such examination that the claim ought to be expunged or diminished, the register, if no objection be made, may order accordingly. If objection be made, the register shall require the parties then, or within a time to be fixed for that purpose, to form an issue to be certified into court for determination." This general order was promulgated by the supreme court of the United States under the authority conferred upon the court by the tenth section of the bankrupt act to frame general orders "for regulating the practice and procedure of the district courts in bankruptcy, and generally for carrying the provisions of this act into effect." Whether the order be considered as indicating the construction which the court put upon the twenty-second section of the act, or as intended to regulate the practice and procedure in cases not covered by the twenty-second section, the order clearly applies to the practice and procedure of the court in a case like this, and is one clearly within the power of the court to frame, not being repugnant to any of the provisions of the act, and within the purposes enumerated in the tenth section. Petition for review dismissed.

[1] [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Case No. 8,513.

LORING v. DOWNER.

[1 McAll. 360.] [1]

Circuit Court, N. D. California. July Term, 1858.

EQUITY—PLEADINGS IN COMMON-LAW FORM—DISTINCTION IN FEDERAL COURTS—EQUITY AND LAW—EQUITABLE RIGHT.

1. An equitable right cannot be enforced in a common-law form, and as a legal right, on the equity side of this court.

2. The distinction between the enforcement of legal rights and the pursuit of equitable remedies in the circuit court, United States, is well defined by law, and must be maintained.

[Cited in Hall v. Yahoola River Min. Co., Case No. 5,955.]

3. The right sought in this case is equitable; the removal of a cloud from title; and should

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

therefore have been enforced on the equity side of this court.

[Cited in Lamb v. Farrell, 21 Fed. 12.]

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

The case was originaly brought in the district court of the United States for the Northern district of the state of California, when that court was in the exercise of the powers of a circuit court of the United States. On a demurrer filed in that court to the complaint, the objection to the jurisdiction of the court raised by the demurrer was overruled. Subsequently, under a recent act of congress organizing this tribunal, the case has been transferred to this court; who having ordered a re-argument, the case now comes before it on bill and demurrer. The following in totidem verbis is a copy of the complaint filed in the district court of the United States for the Northern district of the state of California, with exception of the description of the property:—"Samuel C. Loring v. George Downer. At Common Law. Samuel C. Loring, who is a citizen of the state of Massachusetts, complains of the defendant, who is a minor over fourteen years of age, and citizen of the state of California residing in said district. For that the plaintiff is seized and possessed of (certain real estate described in the complaint), and that the defendant claims an estate or interest in said real estate adverse to the plaintiff which is invalid, but which is wrongfully used by the defendant to annoy and harass the plaintiff's enjoyment of said real property and to obstruct and prevent the free use and disposition of the same. Wherefore, the plaintiff prays that the defendant may be summoned to answer, that a guardian may be appointed by the court, that the defendant may be required to disclaim, or produce such claim, estate, or interest; that the same may be duly determined by the judgment of this court according to the statutes of this state."

Sloan, Brosnan & Groat, for plaintiff.

Joseph B. Wells, for defendant.

McALLISTER, Circuit Judge. The complaint professes in its caption to be a common-law pleading. The defendant so treats it, and both parties so consider it. In the brief of plaintiff's counsel it is stated: "This action is a proceeding at law, the right to be tried is a legal right, as much so as if the defendant had of his own independent motion commenced an action of ejectment against the adverse party, to recover the possession of the premises. After the defendant pleads (which pleading, on his part is in the nature of a declaration), the whole proceeding is but an inverted action of ejectment. The court also considers it a common-law proceeding. It partakes of none of the features which characterize a bill in chancery, and, ex concessis of the parties, is to be tried at common law by a jury, according to the principles of an ejectment suit. If this proceeding be purely a proceeding at common law, the question which arises in limine is, what is the nature of the remedy sought through its instrumentality? If it be an equitable one purely, then is its fate determined by the 56th rule of this court, which after prescribing that the practice and forms in this court shall, so far as is not provided for by the rules of this court, or by the acts of congress of the United States, conform to those prescribed by certain acts of the legislature of this state therein referred to, closes with the proviso, that nothing in either of said acts shall be so construed as to authorize the enforcement of a merely equitable right by any action or proceeding on the common-law side of this court."

This rule but reiterates a doctrine arising out of the organization of this court, under the laws and constitution of the United States. In Robinson v. Campbell, 3 Wheat. [16 U. S.] 222, it is said: "The acts of congress have distinguished between remedies at common law, and in equity. * * * The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." That case enunciates the principle that if state laws have given a legal remedy founded on an equitable title, the equity jurisdiction of the circuit court is not affected thereby. In Boyle v. Zacharie, 6 Pet. [31 U. S.] 658, we find that the chancery jurisdiction given by the constitution and laws of the United States, is the same in every state of the Union, and the rule of decision is the same in all. "And the settled doctrine of this court, is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contra-distinguished from that of courts of law." In U. S. v. Howland, 4 Wheat. [17 U. S.] 115, it is said: "And as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." The court, therefore, decided in that case, that the chancery jurisdiction was not affected by a law of that state which provided a peculiar process for a party. In Livingston v. Story, 9 Pet. [34 U. S.] 632, it was decided, that a federal court in Louisiana, ought to proceed in equity according to the same principles, rules, and usages as the other circuit courts administered it; and it made no difference whether there were, or were not,

courts in the state administering equity law. In Bennett v. Butterworth, 11 How. [52 U. S.] 674, carried to the supreme court from the district court, U. S., for the district of Texas, Taney, C. J., says: "Whatever may be the laws of Texas, they do not govern the proceedings and practice in the courts of the United States; and although the forms of proceedings and practice in the state courts have been adopted in the district court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title, must proceed at law, and may undoubtedly proceed according to the forms and practice in such cases in the state courts. But if the claim is an equitable one, he must proceed according to the rules this court has prescribed, under the authority of the act of congress, 23d August, 1842 [5 Stat. 516], regulating proceedings in equity." In McFaul v. Ramsey, 20 How. [61 U. S.] 526, the court cite approvingly the immediately preceding case, and say: "In those states where the courts of the Unitel States administer the common law, they cannot adopt these novel inventions which propose to amalgamate law and equity, by enacting a hybrid system of pleadings, unsuited to the administration of either."

The foregoing authorities enunciate the following propositions: (1) That the constitution and laws of the United States create a distinction between legal and equitable rights, and they must be administered on the common-law and equity sides of this court respectively. (2) That the distinction between the two must be preserved in every state, even where no court of chancery exists. (3) That if a legal remedy is given by a state law for an equitable right, such fact does not affect the equity jurisdiction of the federal courts.

The inference from the last proposition is, that if a legal remedy has been given by a state law for an equitable right, the equity jurisdiction of the federal courts, being unaffected by it, must be maintained. I know of no exception to the rule, unless it is to be found in some cases in which an equitable title has been declared by state statutes to be legal, and in which it has been decided that upon such titles actions of ejectment may be sustained. Such exceptions are doubtless owing to the construction placed upon the 34th section of the judiciary act [1 Stat. 92], adopting the laws of the several states as rules of decision in the courts of the United States in common-law cases.

We come now to the character and nature of the remedy sought to be enforced in this case. The right given by the legislature, on which the present proceeding rests, is the right to any one in possession of real estate to institute an action to determine any adverse claim of another to said real estate. As to the policy or propriety of that legislation, this court has nothing to say. In the courts of this state, by the practice act, one form of action is prescribed in all cases, whether common law, in equity, or in the admiralty. The courts, however, have been forced, by the very reason of the thing, to create practically those differences which the nature of things create, and which legislative theory cannot annul. In McFaul v. Ramsey, 20 How. [61 U. S.] 525, the court say: "But this attempt to abolish species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ." There will be found, on examination of the decisions of our state courts, a practical illustration of the justness of the foregoing remarks of the supreme court of the United States. If a party goes into a state court, he has to enter it with one form of action, whatever be the nature of his right, or the character of the remedy he seeks. But he finds practically that the remedy he seeks is administered according to the rules of equity or common law, just in proportion as it is legal or equitable. This must necessarily be in the nature of things. In Minturn v. Hays, 2 Cal. 593, our supreme court says: "Although in this state there is no separate forum for the adjudication of chancery cases, yet in our courts having chancery jurisdiction, the rules and principles of equity practice remain unaltered." In Guy v. Hammond (January term, 1858), they decide that in chancery cases parties are not entitled to juries. They have entertained jurisdiction over bills quia timet, bills for the cancellation of deeds, bills to remove clouds upon titles, to enjoin sales, and for many other purposes. In the case of Merced Min. Co. v. Fremont, 7 Cal. 320, the section of the practice act of this state upon which the present proceeding has taken place, came under consideration. In whatever form the proceeding was presented to the court, it is evident it was considered and decided by the principles of equity jurisprudence. Speaking of their power to issue an injunction, they ask, "Is not an injunction pendente lite a remedial favorite in equity?" When, then, the state courts possessing under the same forms of pleading a mingled jurisdiction of common law and equity, are constrained by the necessity of the case to distinguish between the principles of the two systems in the administration of justice, how can this tribunal, bound by the constitution and laws of the country, confound them? It is not a formal, but a substantial difference which exists between a common-law proceeding and a proceeding in equity in this court, and they are followed by different results. If this proceeding is taken cognizance of by this tri-

bunal, it could not, bound as it is to recognize the distinction between common law and equity, permit any equitable title of defendant to be given in evidence; whereas, in the state courts, who recognize no such distinction, the equities of defendant might prevail over a legal title, as it might also, if the plaintiff had invoked the equity powers of this court.

But it is contended that the present proceeding is nothing more than an "inverted ejectment," a common-law remedy asserting a common-law right. In Surgett v. Lapice, 8 How. [49 U. S.] 65, the court, commenting upon another case, say in relation to it, "But that was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party, who not only holds the legal title, but is also actually in possession of the land in dispute," &c. Now, the complaint in this case alleges the plaintiff to be seized and in possession of real estate, to which defendant claims an adverse title, which it charges to be adverse and wrongfully used by defendant to annoy and harass the plaintiff's enjoyment of said real estate, and to obstruct and prevent the free use and disposition of the same; and prays, among other things, that the defendant may be required to disclaim or produce his adverse claim, that the same may be determined. If this is not a proceeding in the nature of a bill quia timet to quiet possession, and remove a cloud from title, it is difficult to classify it.

It is also urged, that the legislature of this state has converted the right prosecuted into a cause of legal action, and therefore this court is bound so to consider it. The legislature does not touch the title or alter its character. It simply authorizes the party to litigate it. How is this to be done? By a resort to the appropriate tribunals. If his right be a legal one, by going into a common-law court; if equitable, by invoking the powers of a court of equity, if he makes an appeal to the federal court. We have seen, that this proceeding is substantially instituted for the vindication of equitable rights; that it seeks to quiet possession—to remove a cloud from title; and asks such action from this court as will dispose of defendant's title, and prevent him from using it to harass and annoy the complainant. That such proceeding is one which is for a court of equity, is manifest by the decisions of the supreme court. In Clark v. Smith, 13 Pet. [38 U. S.] 195, that tribunal administered a statute of Kentucky, very similar to that under which complainant is proceeding, in the exercise of its equitable jurisdiction. This they could not have done, had they supposed the proceeding a common-law one, brought to enforce a mere legal title. In Wickliffe v. Owings, 17 How. [58 U. S.] 47, a similar action took place; and the court rested the right of the plaintiff to recover, upon the general principles of equity, as well as on the statute of Kentucky.

The last ground taken against the demurrer, and to prove this proceeding as perfectly proper in a court of common law, is that there existed at common law writs issued to prevent possible mischief, and known as "Brevia participantia," which are enumerated by Lord Coke; and it is contended, that this fact shows that the administration of precautionary justice was never limited to courts of equity. There is no doubt that before the limits between law and equity, and, indeed, before the modern system of equity had existed, such writs did issue. Story, in his treatise, alludes to the fact. One of these writs was that of "Ne injuste vexes;" to which, it is suggested, the procedure in this case may be assimilated. No instance is given of their present vitality; and it is matter of serious doubt, whether the old common-law writs of mesne, warrantia charta, monstraverunt, curia claudelia, and ne injuste vexes, or any other of the six writs enumerated by Judge Story, existed as part of the common law, when adopted by this state in 1850. It is clear, the authorities heretofore cited, did not recognize them as part of that law, previous to that period. Willard, in his treatise on Equity (page 328), enumerates these relics of the olden time, and says, "These remedies have been so long antiquated, that but few traces of their former existence remain. In modern times, courts of equity have administered relief in the foregoing and many other instances, and arrested the commission of anticipated injuries, by the bill quia timet." 25 Wend, 132; 5 Paige, 493. Whenever the equitable powers of this court shall be invoked in a case like the present, an inquiry into its merits will be appropriate.

The demurrer in this case must be sustained, and an order to that effect entered upon the minutes of the court.

Case No. 8,514.

LORING et al. v. MARSH et al.

[2 Cliff. 311.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1864.

EFFECT OF STATE LAW — CONSTRUCTION BY STATE COURT — PRIOR SUIT PENDING IN STATE COURT — RULE IN FEDERAL COURTS — PROCEEDINGS DIFFERENT.

1. The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as the rules of decision in trials at common law in the courts of the United States, in cases where they apply.

2. In cases depending upon the statute of a state, especially in those respecting the titles to

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

land, the federal courts will adopt the construction of the state courts, when that construction is settled or can be ascertained.

3. The same rule prevails in suits in equity as at law.

4. The natural import of the words in the judiciary act includes the laws in relation to evidence as well as the laws in relation to property.

[Cited in Merrill v. Portland, Case No. 9,470.]

5. The construction given to a state statute of the description mentioned, by the state court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the state court adopts new views as to the construction of such a statute, the federal courts will follow the latest settled adjudication.

[Cited in Bowditch v. Boston, Case No. 1,719.]

6. The decisions of the state courts, however, cannot be allowed to retroact upon the judgments of the federal courts. The supreme court will not reverse its own judgment in a case depending upon the local law, if correctly given at the time in accordance with the settled construction given to the law by the state court, even should it appear that the state court subsequently changed its views, and adopted a different construction. The same is true of the decisions of the circuit courts.

7. In the absence of any construction of a state statute by the state court, the federal courts derive their rules from the common law. Therefore, in an equity suit in this court, in which a motion for continuance was filed, upon the ground that a prior suit was pending in the supreme court of the state, depending upon the local law, between the same parties, and involving the same subject-matter, and until such cause might there be heard and determined, *held*, there was no occasion for continuance, because this court, in such case, must follow the construction given to the provision of the local law by the state court, if it can be ascertained; but if it cannot, then the duty of determining the true construction of the provision in question devolves first on this court, and finally on the supreme court.

8. Comments upon Board of Foreign Missions of the Presbyterian Church v. McMaster [Case No. 1,586].

9. The circuit court has no discretionary power to stay a suit in equity brought therein, or to refuse jurisdiction, on the ground that a prior suit involving the same subject-matter, and between the same parties, is pending in the state court of the district where the circuit court is held.

10. There are cases in which it has been held that the pendency of another suit between the same parties, for the same matter, in another jurisdiction, may be pleaded in bar or in abatement to a second suit.

[See Ex parte Balch, Case No. 790; United States v. Dewey, Id. 14,956.]

11. The rule in this circuit has always been, that the pendency of another action for the same cause in a state court is not a good plea in abatement.

[Cited in The Custer, 10 Wall. (77 U. S.) 218; The Prince Albert, Case No. 11,426; McKay v. Garcia, Id. 8,844; Stanton v. Embrey, 93 U. S. 554. Criticised in Brooks v. Mills Co., Case No. 1,955. Cited in U. S. v. Dewey, Id. 14,956; Brooks v. Vermont Cent. R. Co., Id. 1,964; Hughes v. Elsher, 5 Fed. 264; Latham v. Chafee, 7 Fed. 523; The Tubal Cain, 9 Fed. 837; Radford v. Folsom, 14 Fed. 99.]

[Cited in Vail v. Central R. Co. (N. J. Ch.) 4 Atl. 664. Cited in brief in Wilson v. St. Louis & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 289.]

12. A priori a motion for a continuance, upon the ground of the pendency of another suit in the state court, cannot be granted here, when it appears to the court that the nature of the proceedings are different, the parties not the same, and there are questions presented for decision not involved in the suit in the state court.

13. Where, from an inspection of the pleadings which had been regularly filed under the rules, in an equity suit, the court can see that different questions are raised from those presented in a suit in the state court, and pending at the same time, a motion to refer the case to a master, with directions to inquire whether the subject-matter and parties were not the same in the two actions, must be denied.

Bill in equity. The case at this time came before the court upon a motion of the respondents, that the case might be continued until a prior suit in equity, pending in the supreme judicial court of the state, should be heard and determined. Should that motion be denied, then the respondents moved that the court should order the cause to be referred to a master, with directions to report whether the cases were upon the same matter and between the same parties. As a foundation of the motion for continuance, it was alleged that the bill of complaint in the state court was first filed; that the parties to the respective suits were the same, and that in substance and effect the subject-matter was also the same. The motion set forth that the subject-matter of both suits was the construction of the will and devise described in the bills of complaint, and that the same questions of law and fact were presented in the state court as were involved in the pleadings and proofs in this record. The suggestion was that the questions presented depended upon the local law; and the argument in support of the motion was in brief, that inasmuch as the federal courts, in construing a state statute constituting a rule of property, uniformly adopt as a part of the statute the settled construction given to it by the state court, it became the duty of the court here, in the exercise of its discretion, to decline to hear the parties in this cause, until the questions presented in the record arising under the local law had been fully settled by the state court. The will referred to in the motion and described in the bill of complaint was that of Abigail Loring, widow of Elijah N. Loring, formerly of the city of Boston, in this district. The record showed that she made her will on the 19th of October, 1858, and a codicil on the 14th of July of the following year. In view of the case as at this time presented, it is only necessary to notice the following provisions of the will: "All the rest, residue, and remainder of all my estate and property, real and personal, I give, devise, and bequeath unto Levi H. Marsh and Samuel E. Guild, both of said Boston, to have and to hold the same, to them and the survivor of them and their and his heirs and assigns forever, to their own use, but in trust to, under, and for the following purposes,

trusts, and limitations, namely, to hold, manage, invest, and reinvest the same according to their best discretion, and to pay over" to each of her three children, Abby M. Loring, Cornelia W. Thompson, and Josiah Q. Loring, one third of the net income therefrom during their several lives. There was also a provision that, "upon the decease of my said children severally, the shares of said income which they would continue to take if living shall be retained and invested by the trustees until the decease of my last surviving child, and shall then, with the principal or trust fund, be disposed of for the benefit of the poor in the manner hereinafter provided." The remaining provision material to be noticed was that "when, upon the decease of all my children, the trust fund is to be disposed of as aforesaid, the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how by the payment to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect." The first-named trustee was also appointed executor, and the request of the testatrix as expressed in the will was, that he should be exempted from giving sureties on his official bond. The testatrix died on the 8th of November, 1862, seised and possessed of a large amount of real and personal estate. The pleadings showed that the daughter, Cornelia W. Thompson, died on the 10th of June, 1859, without issue, and that her son Josiah Q. Loring died on the 6th of April, 1862, leaving three children, who were the complainants mentioned in the bill of complaint. The case also showed that Abby M. Loring, the other daughter mentioned in the will, died on the 2d of June, 1863, unmarried, and that Peter Renton was duly appointed administrator of her estate. Further, the complainants alleged that Samuel E. Guild, one of the trustees, died on the 16th of July, 1862, and the fact was not controverted. Abby R. Loring, Marion W. Loring, and Elijah James Loring, infants, who brought this suit by Christian W. Loring, their mother and prochein ami, were the parties complainant. They were children of Josiah Q. Loring, deceased, and both they and their mother were alleged to be citizens of the state of New York. The respondents were Levi H. Marsh, the surviving trustee, and Peter Renton, administrator of the estate of Abby M. Loring, both of Boston, in this district, and citizens of the commonwealth of Massachusetts, together with certain corporations and associations subsequently made parties respondent under an amendment allowed by the court. The suit in the state court was a bill of interpleader, brought by the said Levi H. Marsh as executor and trustee under the will of the said Abigail Loring. The bill of complaint as exhibited in this record alleged that Peter Renton, administrator as aforesaid, was also the duly appointed guardian of the said minors, and contained the proper allegations to make the said Peter Renton and the said minors and the several corporations and associations before mentioned parties respondent. The transcript of the record from the state court also showed that Peter Renton appeared in the suit and filed his answer, in which he alleged that the complainants in this suit, Abby G. Loring, Marion W. Loring, and Elijah James Loring, were residents and citizens of the state of New York, and that they had no place of residence in this commonwealth. Service was not made upon them; but it appeared that the state court, on the 24th of October, 1864, passed an order that they should appear and answer the bill of complaint within one month from the date of the order, and that the complainants serve them with notice thereof by the usual publication as therein directed. Among other things, the complainants in the case alleged that all the valid and legal trusts created and declared by said will had ceased and determined, and that they and Abby M. Loring, whose administrator Peter Renton then was, were the sole heirs at law of Abigail Loring; that the property in the hands of Levi H. Marsh, as trustee under the will, rightfully belonged to them and to said Renton, as administrator as aforesaid, and that it was the duty of said Marsh to convey, transfer, and deliver the same in pursuance of that rightful claim. The prayer of the bill of complaint was that Marsh might be decreed to account with the complainants and pay over to them their shares of the property and money so held by him in trust, and as such trustee under the will.

In the suit pending in the state court, the complainant alleged that he accepted the trust, and was duly appointed executor; that he paid the bequests mentioned in the will which precede the clause disposing of all the rest, residue, and remainder of all her estate and property; that the other trustee and the parties entitled to the life estate, having deceased, he proceeded to execute the trust in accordance with the other provisions of the will, to which reference has already been made; that he accordingly selected and appointed three persons as therein directed, to determine the payments to be made; that they accepted the appointment, were duly informed of the facts by the complainant, and advised, made, and declared in writing to the trustee the distribution of the trust fund as therein set forth and described. It should be remarked that the distributees of the funds as therein declared, were the several corporations and associations made respondents in the respective bills of complaint. The before-named complainant also alleged that Peter Renton as administrator and guardian, and the minor children, had demanded of him

the transfer, conveyance, and payment to them of the moneys and estates in his hands as trustee under the said will, claiming to be entitled to the full possession and enjoyment of the same, and alleging that the said devise for the benefit of the poor was null and void. Following these averments was the formal allegation that he was ready to convey, transfer, and pay over said trust estate to whomsoever was entitled thereto, but that he was advised that he could not safely convey or pay over the same to any of the said parties. Wherefore he prayed that the respondents might be decreed to interplead together, and that it might be ascertained in such manner as the court should direct, to which of them the said trust estate ought to be conveyed and assigned.

B. R. Curtis, C. Cushing, and Hutchings & Wheeler, for complainants.

Sidney Bartlett, F. C. Loring, and C. W. Loring, for respondents.

CLIFFORD, Circuit Justice. Assuming all to be true that is alleged in the motion, still the argument in support of it is based upon the assumption, that the questions arising under the local law are undertermined; and of course it concedes that, if the fact be otherwise, that if no such questions are involved, or, if involved, that they have already been determined, the court here may properly proceed to hear and determine the cause. The theory of the motion is that the construction of the will and devise referred to in the motion depend upon the local law, and that the cause should be continued until the state court shall determine what is the true intent and meaning of the local law upon that subject, and not that there is any conflict of jurisdiction, arising out of the fact that the bill of interpleader was filed in the state court two days before the bill of complaint was filed in this court. Careful attention to the precise theory of the written motion will very much facilitate the proper application of decided cases to the question presented for decision.

"When a testator omits to provide in his will for any of his children, or for the issue of a deceased child," the Massachusetts statute of wills provides that "they shall take the same shares of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake. Gen. St. § 25, p. 478; Rev. St. c. 62, § 21. The theory of the complainants here is that the devise for the benefit of the poor, under the circumstances disclosed in the pleadings, cannot be executed, and that in fact it is null and void. They also insist that under the provision referred to in the Massachusetts statute of wills, they take the same share of the estate, both real and personal, that they would have been entitled to, if the testatrix had died intestate. The respondents deny both propositions, and insist that the devise in question has been duly executed and that it is neither void nor voidable; and they also deny that the statute of wills gives the complainants any portion of the property, real or personal, of the deceased. Where a child has no share given him or her in the will, the supreme court of the state hold that he shall have a share, unless it is manifest from the other parts of the will or other evidence that the omission was intentional, and not occasioned by accident or mistake. Wilson v. Fosket, 6 Metc. [Mass.] 400. The supreme court of the state have also held that the provision in the statute of wills already recited applies to a child or children born after the making of the will, and before the death of the father, and gives him or them the same rights as those have who were born before the will was made. Able counsel maintained the contrary, but the court was of the opinion that, in adopting that provision, it was not the intention of the legislature to alter the law in that respect, but only to give effect to the old statute, and give the authority of positive law to the construction which had previously been put upon it by the courts of the state. The proposition attempted to be maintained in the argument was, that by the term "omits to provide in his will," was meant a child then living, but the court held otherwise, and the chief justice, who delivered the opinion, remarked that a man's will is ambulatory until his decease, as it may be revoked, republished, altered, or modified by any codicil or number of codicils, quite up to the time of his death. The conclusion of the court was, that the time to which the question of omission applies is the time of the testator's decease, and the construction upon that subject may be regarded as settled beyond dispute. Bancroft v. Ives, 3 Gray, 367. Children, therefore, born after the will of their father was made, if before his death, unless provided for in some subsequent codicil, are as much entitled to the benefit of that provision as those who were born before the will was made. Granting that to be so, still the respondents insist that the construction given does not authorize the conclusion that the complainants, who are grandchildren of the testatrix, must come within the same rule, although the case shows that they were severally born, and that their father deceased in the lifetime of the testatrix. Looking at the whole case, it is clear that there are questions presented in this record which are not involved in the record in the state court, and which cannot be decided there under the pleadings exhibited in this case. On the other hand, it is equally clear that there is a question common to both cases, and that that question is

one which has not been directly decided by the state court, and that it depends upon the construction of the local law. Taking the case as stated, the question is, what is the proper course to be pursued? The counsel of the respondents insist that the cause should be continued; but the counsel of the complainants resist that proposition, and contend that, if granted, it is a denial of justice. The circuit courts have, under the judiciary act, original cognizance, with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds the sum or value of $500, and the suit is between the citizens of the state where the suit is brought and citizens of another state. 1 Stat. 78. The record shows that the complainants are citizens of the state of New York, and that the respondents are citizens of this commonwealth. Evidently, therefore, the case is one within the jurisdiction of the court, unless some new condition be interpolated into the provision in the act of congress, by which jurisdiction is conferred. The continuance, if granted, must be to the next term, and from term to term indefinitely, until the expected adjudication is made. The principal respondent in this suit is the complainant in the suit in the state court. The service there has not been completed, and it may never be made, or the complainant may dismiss his bill of complaint or fail to prosecute it with effect. Pending controversies, whether at law or in equity, are subject to many contingencies by which they may be retarded or prevented from being prosecuted to judgment, and yet the argument is that the cause must be continued indefinitely, until the question depending upon the local law is determined by the state court. The industry of counsel, however, has not furnished the court with any decided case which supports any such proposition, and the researches of the court in that behalf have not been attended with any better success. Undoubtedly the rule is that the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Stat. 92. Consequently it was very early held, and has been so determined on many occasions, that in cases depending upon the statute of a state, especially in those respecting the titles to land, the federal courts will adopt the construction of the state courts, where that construction is settled or can be ascertained. Polk v. Wendall, 9 Cranch [13 U. S.] 87. The same rule prevails in suits in equity as at law, and in both it is the settled practice of the supreme court in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. Elmendorf v. Taylor, 10 Wheat. [23 U. S.] 157. Justice to the citizens of the several states required this to be done, and the natural import of the words in the act of congress includes the laws in relation to evidence as well as the laws in relation to property. Vance v. Campbell, 1 Black. [66 U. S.] 430; Wright v. Bales, 2 Black. [67 U. S.] 535. The construction given to a state statute of the description mentioned, by the state court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the state court adopts new views as to the construction of such a statute, the federal courts will follow the latest settled adjudication. Leffingwell v. Warren, Id. 599; U. S. v. Morrison, 4 Pet. [29 U. S.] 124; Green v. Neal, 6 Pet. [31 U. S.] 291. Decisions of the state courts, however, cannot be allowed to retroact upon the judgments of the federal courts, and consequently the supreme court will not reverse its own judgment, even in a case depending upon the local law, if correctly rendered at the time, in accordance with the settled construction given to the law by the state court, although it may appear that the state court subsequently changed its views, and has adopted a different construction. The established rule also is that the judgment of the circuit court will not be reversed under like circumstances. Morgan v. Curtenius, 20 How. [61 U. S.] 3. Guides for the construction of the laws of congress are furnished in the rules of the common law, and the same rules apply in the construction of a state statute, except in cases where the courts of the state have already furnished the construction. Rice v. Railroad Co., 1 Black. [66 U. S.] 374. The supreme court held, in Charles River Bridge v. Warren Bridge, 11 Pet. [36 U. S.] 545, that the rules of the federal courts for the construction of statutes were borrowed from the common law, and that rule is undoubtedly correct in all cases except where the courts of the state have previously determined the construction of a local law. See, also, 1 Story, Comm. (3d Ed.) § 158.

Applying those rules to the present case, there is no occasion for a continuance of the cause, because this court must follow the construction given to the provision by the state court, if it can be ascertained, and if not, then the duty of determining in this case what is the true construction is devolved in the first place upon this court, and finally upon the supreme court. Such has been the uniform practice of the court, and it is not perceived that there is any necessity for any change. Attempts have been made to maintain the proposition that, where there is a concurrent jurisdiction in the state court and in the circuit court, the latter has a discretionary power either to stay the suit or to refuse jurisdiction, but such attempts in this circuit have never been attended with any success. An example of such an attempt is to be found in the case of Wadleigh

v. Veazie [Case No. 17,031], which was a writ of entry for the recovery of certain land situated in the state of Maine. The defendant pleaded in abatement the pendency of a prior suit in the state court between the same parties for the same tract of land. Judge Story held that a plea in abatement to a suit in the circuit court for the recovery of land, that another action in which the present defendant was plaintiff and the present plaintiff was defendant, was pending in the state court, was not a good plea, and, in disposing of the cause, he adverted to the suggestion made in the argument that it was competent for the court to order a stay of the suit, or to refuse jurisdiction. He remarked that he knew of no such authority; and if none such existed in that case where the only difference between the two suits consisted in the fact that the parties in the circuit court were reversed, it may well be assumed that none such can arise in any case within the jurisdiction of the court. "If the parties are rightfully before the court," said that learned judge, "in a case within its jurisdiction, however unpleasant it may be to entertain a suit here in regard to which there may possibly be a diversity both of verdict and judgment from those given in the state court, I know not how that is to be avoided." Attention has very properly been called, since the argument, to the case of Board of Foreign Missions of the Presbyterian Church v. McMaster [Case No. 1,586], as asserting a contrary doctrine. The bill of complaint in that case was filed in the circuit court of the United States by the complainants against Samuel S. McMaster, the administrator de bonis non with the will annexed. The facts are not very clearly stated, but the purpose of the suit was to enforce the payment of a bequest contained in the will. The defendant, it seems, had paid the debts of the deceased, and the other legacies mentioned in the will, and had on hand a certain sum to be applied to the bequest in question, if the same was valid. The answer alleged that the said amount was claimed by other persons, on the ground that the bequest was void, and that the respondent had filed a bill of interpleader in the county court, against all the parties, and that the same was still pending.

Under that state of the case the district judge, sitting in the circuit court, held that the rule of comity in such a case required that paramount authority should be yielded to the court before which the proceedings were first instituted; but he afterwards proceeded to examine the merits of the case, and having come to the conclusion that the bequest was void, entered a final decree, dismissing the bill of complaint with costs. "Courtesy requires," says the learned judge, "that paramount authority should be yielded to the court before which the proceedings were first instituted."

Doubts are entertained as to what is meant by the district judge in that part of the opinion; but if it must be understood as affirming that there is any discretionary authority vested in the circuit court to stay the suit under such circumstances or to refuse jurisdiction, it will be sufficient to say that it is not possible for this court to yield its assent to the proposition, and none of the authorities cited support it. Cases may unquestionably be found where it is held that the mere pendency of another suit for the same matter between the same parties in another jurisdiction, may be pleaded in abatement or in bar to a second suit. The decision in Hart v. Granger, 1 Conn. 154, was of that class, but the case has recently been distinctly overruled by the court in which it was made. Hatch v. Spofford, 22 Conn. 495. The English cases go no further than to hold that the plea of another suit depending will be good, if the first suit was instituted in the same jurisdiction. Such a plea is not a good one in the courts of that country, if the first suit is pending in another country, nor in the colonies of the parent country. Maule v. Murray, 7 Term R. 470; Imlay v. Ellefsen, 2 East. 453; Dillon v. Alvares, 4 Ves. 357; Foster v. Vassal, 3 Atk. 587; Bayley v. Edwards, 3 Swanst. 703; Howell v. Waldron, 2 Ch. Cas. 85; 2 Daniell, Ch. Prac. 721; Story, Eq. Pl. § 741. The weight of American authority also is decidedly to the same effect. The undeviating rule in this circuit has been that the pendency of another action for the same cause in a state court is not a good plea in abatement. White v. Whitman [Case No. 17,561]; Lyman v. Brown [Id. 8,627]; Wadleigh v. Veazie [supra]. The same rule is established in most of the states. Bowne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 99; McJilton v. Love, 13 Ill. 486; Mitchell v. Bunch, 2 Paige, 606. Much consideration was given to the whole subject in the case of Salmon v. Wootton, 9 Dana, 422, to which reference is specially made, for a clear and full exposition of the reasons on which the rule is founded. Expressions are to be found in some of the cases decided in the supreme court, which until carefully examined may seem to favor the opposite rule. Take, for example, the case of Smith v. McIver, 9 Wheat. [22 U. S.] 532, where the opinion was delivered by the chief justice. He says that in all cases of concurrent jurisdiction, the court which first has the possession of the subject-matter must decide it; but that remark was made in a case where all the questions had been decided in a court of law, and the proposition was to have them reviewed on the chancery side of the court.

Another rule is, where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they in general shall be considered as effectually bound by the au-

thority which first actually attaches upon them and takes them into custody. Numerous cases have arisen where that principle is involved; and in enforcing it there will be found expressions which, if separated from the facts to which they were applied, would seem to conflict with the present rule. Hagan v. Lucas, 10 Pet. [35 U. S.] 400, is of this class; and so also are Wallace v. McConnell, 13 Pet. [38 U. S.] 151, and Taylor v. Carryl, 20 How. [61 U. S.] 583. The strongest case of the description mentioned is that of Shelby v. Bacon, 10 How. [51 U. S.] 68, in which the opinion was given by Mr. Justice McLean. But the remarks of the learned judge were not necessary to the decision of the case, and clearly cannot be regarded as a judicial determination. The case of Suydam v. Broadnax, 14 Pet. [39 U. S.] 67, also contains an expression which may or may not be construed in the same way. None of these cases, however, decide the question under consideration, and I am of the opinion that the pendency of a suit in the state court cannot be pleaded in bar or abatement to a suit between the same parties in this court. Suppose it were otherwise, however, still the rule would not apply in this cause, because the nature of the proceedings is different, the parties are not the same, and there are questions presented for decision here which are not involved in the suit in the state court. The motion for a continuance is, therefore, denied.

The second branch of the motion is, that the cause may be referred to a master, with directions that he shall look into the two cases and report whether or not they are both upon the same matter and between the same parties. Where the defendant pleads the pendency of another suit, it is said in the practice of the parent country, that the plaintiff ought not to reply to such a plea, even if he disputes the fact, but that he should obtain a reference to a master. 2 Daniell, Ch. Prac. 726, 797. Strong doubts are entertained whether that rule ever had any application where the alleged prior suit was not pending in the same jurisdiction, because the learned author speaks of the plea as being clearly a good plea, whereas he had previously stated, in the same section of the same chapter, that the plea of another suit depending is not a good plea in the court of another country, or in Ireland, or in the colonies. Id. 658, 726. But it is unnecessary to decide that question, as there is no plea of any kind in this case. The docket entries show that the cause was set down for hearing upon bill, answer, replication, and proofs. The practice of the circuit courts is chiefly regulated by the printed rules prescribed by the supreme court. A reference to the course of proceeding where pleas are filed is not necessary, because, as before stated, there is no plea in the case of any kind. The process of subpoena cannot issue from the clerk's office in any suit in equity until the bill of complaint is filed at the office. Whenever the bill is filed, the clerk is required to issue the process of subpoena, as of course, upon the application of the complainant, which shall be returnable into the clerk's office the next rule-day or the next rule-day but one, at the option of the complainant. The appearance-day of the respondent is the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day. The answer, plea, or demurrer must be filed by the respondent, unless the time for it is enlarged on the rule-day succeeding that of entering his appearance. The former rule, that, if a respondent submits to answer, he shall answer fully to all the matters of the bill, is repealed in cases where he might by plea protect himself from such answer and discovery. But he is entitled in all cases by answer to insist upon all matters of defence, except such as are dilatory, in bar, or to the merits of the bill of complaint, of which he could avail himself by a plea in bar. After an answer is filed on any rule-day, the complainant is allowed until the next succeeding rule-day to file exceptions thereto for insufficiency, and no longer; but if no exception shall be filed thereto within that period, the rule is that the answer shall be deemed and taken to be sufficient. Whenever the answer shall not be excepted to, or shall be adjudged sufficient, the complainant shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes at issue, without any rejoinder or other pleading on either side. The dismissal of the suit follows if the complainant omits or refuses to file such replication within the prescribed period. The proceedings in this case have been in conformity to those rules, and they are correct. No exceptions were taken to the answer of the respondents, and consequently, when the prescribed period had elapsed, it became the duty of the complainants to file the general replication. The motion is denied.

[NOTE. The case was subsequently heard on its merits upon bill and pleadings, and was dismissed, with costs. Case No. 8,515. From this decision the complainants took an appeal to the supreme court, which affirmed the decree below. 6 Wall. (73 U. S.) 337.]

Case No. 8,515.

LORING et al. v. MARSH et al.

[2 Cliff. 469;[1] 27 Law Rep. 377.]

Circuit Court, D. Massachusetts. Oct. Term, 1865.[2]

STATE STATUTE — CONSTRUCTION BY STATE COURT — WILLS — DEVISE TO TRUSTEES — CHILDREN OR ISSUE — NOT PROVIDED FOR — INTENTIONAL OMISSION — POWER COUPLED WITH INTEREST — SURVIVORSHIP.

1. In cases depending on the statute of a state, and more especially in those relating to titles to lands, the federal courts adopt the construction of the state courts, when such construction is settled or can be ascertained; but if the question has not been decided, then the duty of construction devolves upon the tribunal where the case is pending.

2. A testatrix, after certain minor bequests, devised all the rest, residue, and remainder of her property to two trustees, or the survivor of them, their heirs and assigns forever, to hold, manage, and invest the same according to their best discretion, and to pay over the net income to her three children in equal shares. Upon the decease of any one of the children, the share which such one would have taken, if alive, was to be divided between the surviving two; upon the decease of two of them, the survivor to have one half of the whole income during such survivor's life. Upon the decease of all the children, the trustees, or their successors, were to appoint three gentlemen to determine how, by payments to permanently established incorporated charitable institutions, the whole property might be disposed of for the benefit of the poor. After the decease of the three donees under the will,—two without issue,—the children of the other, which children were born before the will was made, as the sole heirs at law of the testatrix, brought a bill against the survivor of the trustees (when the provisions of the will relating to charitable institutions were about to be carried into effect by said trustee), praying for an account, and a decree that said trustee should transfer the property to the complainants, and alleging the trusts to be illegal and void; that they could not be executed; that they had ceased and determined; and that the intention of the testatrix to bestow the property upon charitable institutions was never perfected. *Held*, that the case showed no unintentional and accidental omission of the complainants in the will, which is requisite under the Massachusetts statute of wills, as construed by the courts of that state, to constitute the foundation of the relief prayed for, and that complainants were not entitled to a decree.

[Cited in Estate of Hinckley, 58 Cal. 495; White v. Ditson, 140 Mass. 351, 4 N. E. 606.]

[See note at end of case.]

3. The power conferred upon the trustees to appoint a committee who should designate the disposition to be made of the property, after the death of all the testatrix's children, was one coupled with an interest which could be exercised by the surviving trustee, and not a mere naked power to two, which could not be exercised by one of them.

4. It appeared that the intention of the testatrix to give the property for the benefit of the poor, had been legally carried into effect.

[See note at end of case.]

5. Review of the decisions of the supreme court of Massachusetts upon the 25th section of the state statute of wills. Children are omitted in the will, in the sense of this statute, when no legacy is given them, and they are in no manner mentioned; grandchildren, where it appears that their father died before the execution of the will, stand in the same position; and posthumous children fall within the same category, because they are within the express words of the colonial statute of May, 1718, as well as under the decision of the state courts, children born after the date of the will and before the death of the testator.

6. The courts of the United States cannot exercise any equity powers except such as are conferred by an act of congress, and those judicial powers which the high court of chancery in England, under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States.

7. Powers not judicial, exercised by the chancellor as the representative of the king's prerogative, are not possessed by the circuit courts.

8. The prerogative power belonging to the sovereign has not been delegated to the federal government, but remains in the several states, to be exercised according to the laws and usages there prevailing.

This was a bill in equity brought to set aside certain provisions in the will of Abigail Loring, formerly of Boston, deceased, and to enforce the rights of the complainants as heirs at law of her estate. [Heard upon motion to continue in Case No. 8,514.] The complainants were Abby R. Loring, Marion W. Loring, Elijah J. Loring, children of Josiah Q. Loring, deceased, who was the son of the testatrix. The will was dated October 19, 1858; and the pleadings showed that at that time the testatrix had three children, namely, Abby M. Loring, Cornelia W. Thompson and Josiah Q. Loring. After certain legacies not material to be noticed, the testatrix devised "all the rest, residue, and remainder of her estate and property, real and personal, unto Levi H. Marsh and Samuel E. Guild, to have and to hold the same to them, and the survivor of them, and their and his heirs and assigns forever to their own use, but in trust to, under and for the following uses, purposes, trusts, and limitations, namely, to hold, manage, invest, and reinvest the same according to their best discretion, and to pay over one third of the net income therefrom" to each of her before-mentioned three children, during their respective lives. Provision was also made in the will that "upon the decease of my said children, severally, the shares of said income, which they would continue to take if living, shall be retained and invested by the trustees, until the decease of my last surviving child, and shall then, with the principal or trust fund, be disposed of for the benefit of the poor in the manner" therein provided. All of the complainants were born before the date of the will, and it is to be observed that provision was made in the will for their father, then living.

The record showed that Cornelia W. Thompson, one of the daughters of the testatrix, died on the 10th of June, 1859, without issue, and that on the 14th of July following the testatrix made a codicil to her

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

[2] [Affirmed in 6 Wall. (73 U. S.) 337.]

will, giving the whole of the said income, under the conditions and provisions contained in the will, to her two surviving children, in equal shares, during their joint lives, and one half to the survivor of them during his or her life. Josiah Q. Loring died on the 6th of April, 1862, and Samuel E. Guild, one of the trustees, died on the 16th of July in the same year. The testatrix died on the 8th of November, 1862, leaving her will as originally executed, except as modified by the codicil above mentioned. Her remaining daughter, Abby M., died on the 22d of June, 1863, unmarried; and Peter Renton, one of the respondents, was appointed administrator of her estate. The claim of the complainants was, that they were entitled, as heirs at law of her estate, to one half of the property, real and personal, mentioned in the will of the testatrix. The claim was based upon the following grounds: First, that, being the issue of a deceased child of the testatrix, they should take the same share of the estate that they would be entitled to if the testatrix had died intestate, because the testatrix, on the facts exhibited in the record, omitted to provide for them in her will within the meaning of the twenty-fifth section of the Massachusetts statute of wills. Second, that the surviving trustee could not lawfully execute the power directed by the will as the sole means of designating the objects of the testatrix's bounty, because it was not a power to select or appoint the donees of the property, but a mere naked authority to nominate, appoint, and instruct persons who were to act for her in that behalf, in making such selections. Third, that the conclusion of law upon the whole case was, that the intention of the testatrix to give the property to charitable institutions was never perfected, and consequently that they were entitled to their distributive shares in the same as heirs at law.

The respondents contended that the case did not come within the provision of the state statute of wills; that the surviving trustee might execute the power to select and appoint the committee provided for in the will; and that the particular bequest in question was valid by the laws of the state of Massachusetts.

Caleb Cushing, B. R. Curtis, and Hutchins & Wheeler, for complainants.

Mrs. Loring's only son died April 6, 1862, leaving the complainants his sole heirs at law; and Mrs. Loring herself died November 8, 1862, without making any codicil to her will, after the decease of her son, and consequently, without naming the complainants, her grandchildren, in the will, or in any codicil; and as the provision made by the will and codicil for their father was limited to his life, and lapsed by his death in the lifetime of his mother, Mrs. Loring omitted to provide for the issue of her deceased son; and the first question is, whether they are not entitled to the same share of her estate as they would have been, had Mrs. Loring died intestate, by force of chapter 92, § 25, Gen. St. Mass. The time to which the question of omission applies is the time of Mrs. Loring's decease. Not having then made any provision by her will or any codicil for the issue of her deceased son, the case of the statute arises. She had made a will and left issue of a deceased child, without having made any provision for them. Bancroft v. Ives, 3 Gray, 367. This is the case of a son, born after the making of the will. It cannot be distinguished from the case of grandchildren, who became the issue of a deceased son, and so within the statute, by the death of their father after the making of the will. It does not appear that such omission was intentional, and was not occasioned by accident or mistake. The evidence of intention to disinherit an heir should be such as to leave no reasonable doubt of the existence of a formed and settled intention. The common law always favors the heir, and one of its rules is, that an heir cannot be disinherited, even by a will, unless there are express words or a necessary implication to that effect. 5 Cruise, Dig. 136. A fortiori where the disherison is to be effected by parol evidence of mere declarations of the testator. It is the office of such evidence to supply the omission of a clause in the will declaring the intention of the testator to disinherit the heir. Wilson v. Fosket, 6 Metc. [Mass.] 400. It is like the proof of the contents of a lost will by parol evidence and the courts have held that this requires "the clearest and most stringent evidence." Davis v. Sigourney, 8 Metc. [Mass.] 487. If what was actually written, in a duly executed will, cannot be proved to disinherit the heir but by "the clearest and most stringent evidence," a fortiori, the heir cannot be disinherited by an intention never written at all, unless such intention shall be made out by "the clearest and most stringent evidence."

The true inquiry is this: Does it appear, by the clearest and most stringent evidence, that the testatrix had a formed and settled intention to disinherit the children of her deceased son, and that by reason of such intention they were not named in her will or its codicil? The testatrix executed a will and a codicil before the decease of her son. These were ambulatory, and whether she intentionally omitted the complainants from them is not material, as no case under the statute then existed. And an intention to disinherit either children born after the making of a will, or the issue of a child dying after the making of a will, cannot be proved by parol. It can be manifested only by making another will or codicil from which the person is intentionally omitted.

The other branch of this case depends on other facts and principles. By her will, Mrs.

Loring devised the residue of her estate to Levi H. Marsh, one of the defendants, and Samuel E. Guild (who died in the lifetime of the testatrix), in trust to pay one third of the income of her property to each of her children during his or her life; and, upon the decease of the last surviving child, the trust fund was "to be disposed of for the benefit of the poor in the manner hereinafter provided." "It is my will that when, upon the decease of all my children, the trust fund is to be disposed of as aforesaid, the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payment to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect, and my gift may be made most productive of benefit to the poor; and that thereupon the said trust fund (including the said shares of income retained) shall be disposed of, and paid over in accordance with the determination of the said gentlemen, certified in writing to the trustees." Marsh alone could not execute this power to appoint the persons who were to designate the institutions which were to receive the property, and inform them of the facts needful to guide or influence their judgment in the selection. This was not a power to appoint or select the donees of the property, nor to appoint the uses of the property. It was not a power over property. It was a naked authority, to nominate and appoint persons, who were to act for the testatrix in choosing the objects of her bounty, and to make known to them such facts as the two trustees should judge to be proper to guide or influence their judgment in the selection. It was a power to appoint persons, and not a power to appoint property; and from the nature of the case must be a mere naked power, in contradistinction to a power coupled with an interest. A power coupled with an interest means coupled with an interest in the property which is the subject of the power (Hunt v. Rousmanier, 8 Wheat. [21 U. S.] 174); and where, as in this case, property is not the subject of the power, the power cannot be coupled with an interest. A naked power to two persons by name cannot be executed by one. Peter v. Beverly, 10 Pet. [35 U. S.] 564; 1 Sugd. Powers, 144; 2 Story, Eq. Jur. § 1062, and cases cited. The intention of the testatrix to give this property to charitable institutions was never perfected. She intended to speak only through persons selected and informed by both Marsh and Guild. There being no such persons, there is no expressed will of the testatrix in behalf of the institutions which are respondents. Fontain v. Ravenel, 17 How. [58 U. S.] 369.

The power exercised by the chancellor to make cy pres applications of charitable bequests is not a judicial power, and does not exist in any court of Massachusetts. Wheeler v. Smith, 9 How. [50 U. S.] 55; Const. Mass. pt. 1, art. 30; Fontain v. Ravenel, 17 How. [58 U. S.] 369. There being no mode consistent with the will of the testatrix, of ascertaining the objects of her bounty, there is a resulting trust in favor of the complainants, who are her heirs at law. Nor is there any trust created by the will in favor of any particular person who would have a right to call for the execution of the power. The creation of the trust was to follow the execution of the power. Nor could the attorney general file a bill, because no trust in favor of charity has been created or brought into existence. The English law is not in force in Massachusetts. The case of Moggridge v. Thackwell, 7 Ves. 36, was decided against Lord Eldon's own views, and merely on the strength of precedents not binding here. Mills v. Farmer, 1 Mer. 100; Boyle, Char. 18-23; Fontain v. Ravenel, 17 How. [58 U. S.] 369. Nor can the court appoint some person to join Marsh in executing the power. Though the court may appoint a trustee, it will not appoint a person to execute a naked discretionary power of appointment of persons, who are to execute a power over property. Even the English courts, in charity cases, have not gone so far as that. The court itself executes the power, because it cannot appoint persons to execute it. If such a person should be appointed, he would not be a successor to Guild, who never was a trustee.

S. Bartlett, F. C. Loring, and C. W. Loring, for respondents.

The present case does not come within the statute of Massachusetts, which provides that when a will makes no provision for a child or the issue of a deceased child, they shall be entitled to a share of the estate, unless it appears that the omission was intentional. The will and codicil do provide for all the children of the testatrix living at their respective dates; and there was then no issue of a deceased child. The law proceeds upon the presumption that when such omission is made it is unintentional; but this cannot be presumed when there was in fact no omission made at the time. In relation to children born after the will is made, the case is different, because that case falls expressly within the letter and spirit of the statute. It is otherwise with reference to those who become the issue of a deceased child after the will is made, but who were in being before it was made, and for whose parent provision was made by the will. With regard to them, the will when made was perfectly good; and if their father had survived the testatrix, they could have claimed no interest. The statute does not provide that in case of the decease of a child for whom provision was made, the testator shall be considered as having deceased intestate as to his issue. But supposing the pro-

vision for all the children living at the date of the will and codicil is not sufficient, then, in cases like this, where the child dies before the testatrix, leaving issue, the statutes (Gen. St. c. 92, § 28) expressly provide that the issue take the devise of real or personal estate made to the child. The issue being provided for in this manner, cannot also come under the provisions of section 25. This succeeding section controls the provisions of section 25, as the issue of a deceased child cannot both take the devise to its parent and a full proportion of the estate; it must be one or the other, as both could not be intended, and may be impossible. The latter section, which provides for all cases where, after a devise to him, a child dies leaving issue, shows that it was not considered that such a case had been provided for by the preceding section, or it takes it out of the class of cases therein provided for.

The mention of the father in the testatrix's will and codicil, the devise to him for life, the disposal of the principal afterwards to others, and the other provisions of the will, are evidence that the issue of the father mentioned were in the mind of the testatrix, and that the omission was intentional and not by accident or mistake. In the construction of the statutes in force before the Revised and General Statutes, the supreme court of Massachusetts held that the question was a matter of intent. They came to this conclusion, although the statute of 1783 (chapter 24), giving a child without a legacy a proportion of the estate of its parent, did not have the provision of the present statute as to the omission being intentional and not occurring by accident or mistake. And the court decreed in Church v. Crocker, 3 Mass. 17, that a devise to the children of a son proved that the parent was in the contemplation of the testatrix, and that therefore he could not claim a distributive share. So in Wild v. Brewer, 2 Mass. 570, devise to grandchildren of daughter Sarah, was sufficient to show Sarah was in mind. Also Terry v. Foster, 1 Mass. 146. And in Wilder v. Goss, 14 Mass. 357, the mention of a son-in-law and a legacy to one grandchild, was held as raising an inference that the other grandchildren were not forgotten. A fortiori, a devise to a father shows that his children are not forgotten. If the legacy had been one cent to the father, his issue would have taken it, by statute, and the omission to notice the grandchildren would be held to be intentional. It makes no difference, in fact, as far as the grandchildren are concerned, whether the legacy to their father is this nominal one or a devise for life. By a devise for life to the father it is shown that he and consequently his family were in the testatrix's mind. By limiting the devise to the life of the father, and then giving the estate on his death to other persons in trust for the poor, the testatrix as expressly says that she does not mean the grandchildren to be benefited by her estate, as if she in words had declared it.

The whole question is, whether from the will the inference is to be drawn that the omission was intentional, and not occasioned by accident or mistake. In Wilson v. Fosket, 6 Metc. [Mass.] 403, the court says the construction under the old law has been that whenever from the tenor of the will, or from any part of it, sufficient appeared to indicate that the testator had not forgotten his children or grandchildren (as the case might be) when he made his will, they would not be entitled to a distributive share of his estate, although no legacy was given them by the will. This principle, already adopted by the court, was also adopted as a statute provision by adding the words now contained in the General Statutes. In Converse v. Wales, 4 Allen, 512, evidence of wills previously made having the omission of the same grandchildren, was admitted to show intentional omission. If it does not appear by the will itself that the omission was intentional, it may be shown by parol evidence. Wilson v. Fosket, 6 Metc. [Mass.] 400. In administering the law in relation to charities, the United States courts are governed by the local law of the state, in the same manner as in relation to real estate. The prerogative power belonging to the sovereign has not been delegated to the federal government, but remains in the several states, and is exercised according to the usages or laws prevailing in each, and of course varying in every state; and whenever, by reason of citizenship or otherwise, a cause is brought before the United States courts touching the validity of a gift to charitable uses, the question to be considered is, whether it would be held valid or not by the courts of the state. Such has been the uniform doctrine of the United States courts from the beginning to the present day. Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1; Beatty v. Kurtz, 2 Pet. [27 U. S.] 566; Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. [28 U. S.] 99; Vidal v. Girard's Ex'rs, 2 How. [43 U. S.] 127; Wheeler v. Smith, 9 How. [50 U. S.] 55; Fontain v. Ravenel, 17 How. [58 U. S.] 369. "The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred." These prerogative powers, which belong to the sovereign as parens patriae, remain with the states. "In a suit by an heir, a representative of the testator, to recover property or money bequeathed to a charity, the court must of necessity examine whether the bequest was valid or not by the laws of the state."

There is no conflict of authorities on this point. The question is then presented whether or not this bequest is valid by the laws of the state of Massachusetts. If it would be maintained by the courts of that state, it must be here. The control of the legislature as parens patriae over the administration of

charities, has been constantly exercised from the earliest date to the present, and jurisdiction over them vested in its courts. In Ancient Charters (page 52) will be found an act passed in 1641, respecting benevolent or charitable donations, by which it was ordered that all gifts and legacies to the colleges, schools of learning, or other public use, shall be faithfully disposed of according to the intent of the donors, and the persons entrusted therewith are required to account to the county courts. See, also, St. 1785, c. 51; Rev. St. c. 40, § 39, etc.; St. 1847, c. 213; St. 1849, c. 186, § 8; St. 1855, c. 302. By the General Statutes (chapter 14, § 20) it is made the duty of the attorney general to "enforce the due application of funds given or appropriated to public charities." By chapter 113, §§ 1, 2, the supreme court is vested with the whole jurisdiction of the English court of chancery. Hadley v. Hopkins Academy, 14 Pick. 240 (see pages 253, 262); Going v. Emery, 16 Pick. 114; Burbank v. Whitney, 24 Pick. 146; Bartlett v. Nye, 4 Metc. [Mass.] 378; Washburn v. Sewall, 9 Metc. [Mass.] 280; Sohier v. St. Paul's Church, 12 Metc. [Mass.] 250; Brown v. Kelsey, 2 Cush. 243; Winslow v. Cummings, 3 Cush. 358; Bliss v. American Bible Soc., 2 Allen, 334; Sanderson v. White, 18 Pick. 328.

These cases establish the equitable jurisdiction of the supreme court over charities in its fullest extent; that the statute of Elizabeth is a part of the common law of this state, and that it is the settled law of this state that an appropriation of property to charitable uses will be upheld; that it is no objection that no person is named capable of taking the legal interest; that the court will supply the place of a trustee, and will sustain and protect such a gift whenever it is consistent with public policy and local laws, and the intention of the donor can be accomplished; and if it cannot be literally carried into effect, will accomplish it as near as possible.

The intent of the testatrix is explicit and legal, and can be accomplished, and has been carried into effect, in the mode designated by her. The object of the testatrix was to benefit the poor,—an intent not inconsistent with public policy or local laws. The mode in which that intent was to be effected was by distributing the trust fund among established, incorporated, charitable institutions. The trust has been performed, the committee have been selected; they have performed the duty, and designated various institutions, having the qualifications required by the testatrix, to receive various sums of money. The only objection can be that the will does not designate the objects of her bounty. To this it may be answered: First, that being a gift to charitable uses, the courts of Massachusetts will carry out the intent and effect of the will; second, that the law considers as certain and definite that which can be made so, and that the will expressly provides for ascertaining with precision the objects of the bounty; third, that the courts of Massachusetts have frequently sustained gifts to charitable uses where the objects of the bounty were as uncertain as here. Hadley v. Hopkins Academy, 14 Pick. 240; Going v. Emery, 16 Pick. 107; Brown v. Kelsey, 2 Cush. 244. Bequest of money, the income to be appropriated for the support of evangelical preaching by such ministers as shall be approved by a majority of the members of the Middlesex Union Association. Devise of residue for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing said association. Both held good as against the heirs at law. The statute of Elizabeth being a part of the common law of this state, and the laws regulating charitable uses being the same with those of England, the decisions of the English courts are authorities here. Attorney General v. Hickman, 2 Eq. Cas. Abr. 193; Attorney General v. Syderfen, 1 Vern. 224, 1 Eq. Cas. Abr. 96; Baker v. Sutton, 1 Keen, 224; Horde v. Earl of Suffolk, 2 Mylne & K. 59; Moggridge v. Thackwell, 7 Ves. 68.

The trust or authority vested in the named trustees, Marsh and Guild, to select and appoint a committee to determine what charitable institutions should receive the fund, was well executed by the survivor. The trust or authority was not personal, as it was to be exercised by those named or their successors; it could not be executed till the last of the children of the testatrix should decease,—an uncertain and probably remote period, before which it was possible if not probable, that the trustees named might decease. It was therefore provided that it should be exercised by their successors. It is well settled that a power given to trustees survives, and has been so for many years. Butler v. Bray, Dyer, 189; Attorney General v. Gleg, 1 Atk. 356. See Moggridge v. Thackwell, 7 Ves. 68; Lewin, Trusts, 299. In this case the trustees had an interest; the whole legal estate was vested in them, subject to the trust. As the question arises under a will made and established in this state, creating the trust now under consideration, the statutes of this state and decisions of its courts must furnish the law for this court, in relation to the appointment of trustees and the administration of the trust. See Greene v. Borland, 4 Metc. [Mass.] 330; Dixon v. Homer, 12 Cush. 43. If the devise was originally good, the property is wholly given away from the heirs. Sanderson v. White, 18 Pick. 328.

CLIFFORD, Circuit Justice. Obviously the first question involved is the construction of the statute of wills, and therefore is a question of local law. The universal rule is, in cases depending on the statute of a state, and more especially in those respecting the titles to lands, that the federal courts adopt the construction of the state tribunals when

that construction is settled or can be ascertained. Where the construction is settled by the state court, the rule is, that the federal courts will follow that construction; but when the question has not been decided by the state court, then the duty of ascertaining the true construction in the particular case is necessarily devolved upon the tribunal where the case is pending. The language of the provision under consideration is as follows: "When a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime, or unless it appears that such omission was intentional, and not occasioned by accident or mistake." Gen. St. Mass. 1860, c. 92, p. 478, § 25. The same provision, and substantially in the same words, is contained in the statutes of the state, called the "Revised Statutes," passed twenty-four years earlier. Indeed the substance of the provision as held by the courts, may be traced back to colonial times. The colonial statute of 12 Wm. III., passed in the year 1700, provided in its second section that any child or children, not having a legacy given them in the will of their father or mother, shall have a proportion of the estate of their parents given and set out unto them as the law directs for the distribution of the estates of intestates, provided such child or children have not had an equal proportion of his estate bestowed on them by the father in his lifetime. The preamble of the section refers specially to the fact also that many children are born after the making of the will, showing conclusively that after-born children, as well as those omitted in the will who were in being at its date, were intended to be included. Doubts, however, arose whether it included grandchildren, but the legislature, on the 18th of May, 1718, passed a resolve declaring the affirmative of the proposition, and such, ever after, was the received construction. Ancient Charters, c. 7, p. 351, § 2. The phraseology of the provision was somewhat changed in the act of the 6th of February, 1784, and the preamble was entirely left out. 1 Laws Mass. 1800, p. 111. By the eighth section of that act it is provided that any child or children, or their legal representatives, in case of their death, not having a legacy given him, her, or them in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate, provided such child, children, or grandchildren have not had an equal proportion of the deceased's estate bestowed on him, her, or them in the deceased's lifetime. The earliest decision of the courts of the state upon the subject is that of Wild v. Brewer, decided in 1797, and reported in the supplement of 2 Mass. 571. The testator in that case devised the income and improvement of his real estate to his wife, during her natural life, and then directed that, at her decease, the same should be divided among his grandchildren, describing them by their respective names, and as "children of my daughter Sarah," giving the estate to them "in equal parts or portions forever, for them to improve and dispose of as they may see fit," but he made no provision for his daughter, the mother of the devisees. She, with her husband, petitioned for partition of the estate, claiming a distributive share as heir at law, and the case was submitted to the court, upon an agreed statement of facts. Held, that she was not entitled to a portion of the estate as though the testator had died intestate. The next case is that of Terry v. Foster, 1 Mass. 146, decided in 1804, and is the first case upon the subject reported in the regular series of reports. The appellants in that case were the grandchildren of the testator; and the report of the case shows that their mother, the daughter of the testator, deceased before the date of the will. The material provision of the will was: "I give to my daughter Mary Russell, five dollars, and to my daughter Bushop, five dollars; to my grandchildren of my daughter Terry, deceased, to be paid to them when the youngest of them comes of age." Doubts were entertained by all the judges, whether any legacy was actually given to the appellants, but they all held that the act of the 6th of February, 1784, did not repeal the colonial statute, and that any child or grandchild being noticed or mentioned in a will showed that he was not forgotten; that the statutes taken together as in pari materia, extended only to cases of entire omission; that it was not necessary that the child or grandchild should have a legacy to exclude them, but that it was sufficient if it appeared by the will that the testator had not overlooked the claimant. Three years later the case of Church v. Crocker, 3 Mass. 17, was presented for decision. The report of the case shows that the testatrix in that case, gave one-fifth part of the residue of her estate to her six grandchildren, the children of her son Edward, but no legacy was given to Edward himself. The argument for the plaintiff was, that inasmuch as no legacy was given him in the will, he was undeniably entitled to a distributive share in the estate; but the court held otherwise, after the fullest consideration. Public policy, say the court, requires that the right of testamentary disposition in parents respecting their children, should be exercised at their discretion; and they held that the intention of the eighth section was, not to limit this discretion as distinctly conferred by the first section of the act, but to provide for a child or grandchild when this discretion from accident or some other cause had not been exercised. The conclusion was, that when a child is named in his parent's will, although he has no legacy given him,

he is not entitled to a distributive share of the estate, because that fact shows that the child was in the mind of the testator at the time the will was prepared, and consequently that it cannot be held that he was omitted by accident or mistake. The last case under that statute is that of Wilder v. Goss, 14 Mass. 357, which has an important bearing upon the question under consideration. It is shown by the statement of the case that the daughter of the testator died before the testator, and before he made his will, leaving seven children who survived their grandfather. The wife of the appellant claimed a distributive share in the estate, as heir at law, because she had no legacy given her in the will, and was not named in the same. The name of the mother of the claimant was Rebecca Thurston. Among other things, the testator stated in the will that having before that time conveyed to his son-in-law, John Thurston, the principal part of his real estate, he should make no further devise to him, but gave a legacy to Thomas Thurston, brother of the claimant, and then the residue of his estate to his other three daughters, who were living. The facts show that the claimant was an heir at law to the estate of the testator when the will was made, and that she neither had any legacy given her nor was she named in the will. But the court held that the mention of her father by the testator as his son-in-law, and the giving of a legacy to her brother, must have brought the recollection of his deceased daughter to his mind, and showed that the family was in his remembrance, and consequently that she was not entitled to a proportion of the estate. Whenever it appears, say the court, that the testator has, through forgetfulness or mistake, omitted to bestow anything upon his child or grandchild, the legislature wisely intended to effect that which it was highly reasonable to believe the testator, but for such forgetfulness or mistake, would himself have done. But the court insist that to go further than that, would be to defeat the principal intention of the legislature in the first section of the act, which authorizes every person seized of an estate in lands which may extend beyond his own life, to devise the same as he shall see fit. Consequently, whenever it may fairly be presumed from the tenor of the will, or of any clause in it, that the testator intentionally omits to give a legacy or to make a devise to his child or grandchild, whose parent is dead, the court will not interfere. Such were the views of the supreme court of the state, in the several cases which arose under the statute of the 6th of February, 1784; but the court went further in the case of Wilson v. Fosket, 6 Metc. [Mass.] 400, which is a case that arose under the Revised Statutes of 1836, and held that it was not necessary that it should appear by the will itself that such omission was intentional, but that it may be shown by parol proof; and such, it is believed, is the settled doctrine of the state court.

Referring to the prior decisions, the court say the construction has been, that whenever, from the tenor of the will or from any part of it, sufficient appeared to indicate that the testator had not forgotten his children or grandchildren (as the case might be) when he made his will, they would not be entitled to a distributive share of his estate, although no legacy was given them by the will. The emphatic language of the court is, that whatever may have been the grounds of the decision, it came to be well settled that the object of the prior statute was to furnish a remedy solely for those cases where, from accident or other causes, the child or grandchild might be supposed to have been really forgotten by the testator in making his will.

Reference is then made to the decided cases which affirm that doctrine, and it is undoubtedly true that they sustain the proposition. The construction given to the provision in the prior act was adopted in the Revised Statutes, which "introduced the broad principle of barring a child of a claim to a distributive share, upon its being made to appear that such omission to give a legacy was intentional and not occasioned by any mistake or accident." Wilson v. Fosket, 6 Metc. [Mass.] 404, decided in 1844. After-born children, it will be remembered, were included in the provision contained in the colonial statute, and the twenty-second section of the Revised Statutes expressly provided that when any child of a testator, born after the father's death, shall have no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate, both real and personal, that he would have been entitled to if his father had died intestate. Rev. St. 1836, p. 419. Explicit as this provision is, it still left the question as to what the rule should be in a case where a child was born after the making of the will and before the death of the father, quite undetermined. No such question was presented to the state court until 1855, when it came up in the case of the will of Thomas P. Bancroft. Bancroft v. Ives, 3 Gray, 367. The agreed statement in the case shows that the testator, having married the plaintiff in that case, had three children by her, and made his will, giving a legacy to each of the children and the residue to his wife. Said children all died in the lifetime of the testator, unmarried and without issue. But two other children were afterwards born to him, who were in full life at the date of the controversy. Plaintiff claimed the whole estate, but the court held that the provision under which any child for whom its father "shall omit to provide in his will is entitled to a share in his estate, unless such omission was intentional," applies also to children born after the making of the will and before the death of the father. Speaking of that provision as

contained in the Revised Statutes, the court say: "We think it manifest that it was not the intention of the commissioners and legislature to alter the law in this respect, but only to give effect to the old statute, and to affirm and give the authority of positive law to the construction which had been put upon it in several cases." Some of the remarks of the chief justice who gave the opinion, are supposed to be inconsistent with that view of the law, but the opinion itself affords conclusive refutation of that suggestion. Proof of that statement is found in the quotation already given from the opinion, and if more be needed, it will be found in the fact that the court cites with approbation every one of the prior cases which contributed to establish that construction. Omission to provide for children born after the will and before the death of the father, may well be regarded as occasioned by accident or mistake, in a case where the will, made before their birth, gave legacies to all the living children. Hence the court say in that case, "taking his will and the legacies therein given to the children then living, it appears that it was not his intent to omit any of his children, but to give each a legacy," as therein provided.

The true rule therefore is, that a child or the issue of a deceased child, when the testator omits to provide for him in his will, is entitled to a distributive share in the estate, unless it appears that such omission was intentional, and not occasioned by accident or mistake. "Whenever, from the tenor of the will, or from any part of it, or from parol proofs, or both combined, sufficient appears to show that the testator had not forgotten his children or grandchildren, as the case may be, when he made his will, no such child or grandchild is entitled to a distributive share in his estate, although no legacy was given him by the will." Direct decision is made to that effect in Wilson v. Fosket, 6 Metc. [Mass.] 403; and there is nothing in the remarks of the chief justice in Bancroft v. Ives, 3 Gray, 370, to overrule or qualify that doctrine. Undoubtedly a testator may revoke, republish, alter, or modify his will by any codicil or number of codicils quite up to the time of his death; and in that sense, it may be said that a man's will is ambulatory; but it by no means follows, if a man makes a will and dies without revoking, republishing, altering, or modifying it, that it must not be construed as of the date when it was made; and if it appears that a child or grandchild having no legacy was intentionally omitted, and not by accident or mistake, such child or grandchild is not entitled to a distributive share. It must be so, else it is not true, as is provided in the first section of the statute of wills, that every person of full age and of sound mind, may devise and dispose of his estate therein described, by his last will and testament in writing. Nothing need be said in explanation of the remark that all the testamentary papers, in force and capable of taking effect at the decease of the testator, constitute his will, as it is a remark which all must approve, and in that view, unquestionably the time to which the question of omission applies, is the time of the testator's decease; but it cannot be that the court in that case intended to hold that evidence of prior acts and declarations of the testator were not admissible, as tending to show whether the supposed omission was or was not, intentional at the time the will was made. Assuming such to be the effect of that remark, then it is directly contrary to the ruling in Wilson v. Fosket, 6 Metc. [Mass.] 403, and is expressly overruled by the case of Converse v. Wales, 4 Allen, 512, which is the latest case upon the subject. It was alleged in that case, that the omission was intentional, and that it was not occasioned by accident or mistake; and to prove those facts, the respondents were allowed to introduce evidence of the declarations of the testator, made before and after the will, during a period of twenty years, and they were also allowed to introduce several former wills, in which no provision was made for the petitioners. The instructions of the court to the jury were also to the same effect; and the petitioners excepted to the ruling of the court in admitting the evidence, and also to the instructions of the court.

The opinion was given by Chief Justice Bigelow. He held that in the absence of written evidence there was no mode of proving the intent of the deceased testator, in such a case, more direct and satisfactory than by his acts and declarations on the subject while living, and that the previous wills made by the testator are in the nature of declarations having a direct bearing on the issue. They tend, say the court, directly to show if the same omission exists in them as is found in the will offered for probate, that it was not occasioned by forgetfulness, mistake, or any accidental circumstances, but was the result of a well-settled and deliberately formed purpose. Doubt cannot be entertained, if prior wills are admissible to prove that the omission was intentional, that subsequent codicils are also admissible for the same purpose. Applying those principles to the present case, it is quite obvious that the question under consideration is one of fact, to be determined from the tenor of the will, the attending circumstances, and the parol proofs exhibited in the case. Take the facts as they appear on the face of the will and the codicil, and they are sufficient to show that the complainants were intentionally omitted, and not by mistake or accident. One third of the net income of the remainder of the estate was given in the will to the father of the complainants during his natural life, and he and the complainants were living at the date of the will. By the terms of the

will the legacy to the father was limited to his life, but the devise over for the benefit of the poor is plainly and clearly expressed. All the parties were then living; and there is not a doubt entertained by the court, as matter of fact, that it was the settled purpose of the testatrix to omit the complainants, and to dispose of the inheritance as specified in the will. Reasonably considered, nothing else can be inferred from the carefully arranged terms in which the legacy to the father and the devise over are expressed. Strong confirmation of this view is found in the terms of the codicil. The codicil was executed on the 14th of July, 1859, after the death of Cornelia W. Thompson, as before explained, and its language is: "I revoke so much of my said will as provides for the said division of the said income, and its payment in three parts." Mention is made of the death of her daughter Cornelia, and she orders and directs that the income of the estate shall be paid, under the conditions and provisions contained in the will, to her two surviving children by their respective names, during their joint lives, and one half thereof to the survivor of them, showing, in the language of Chief Justice Bigelow, that it was the result of a well-settled and deliberately formed purpose. Irrespective, therefore, of the parol testimony, I am of the opinion that it appears, from the tenor of the will when taken with the codicil, that the omission of the complainants, if such it may be called, was intentional, and was not occasioned by accident or mistake, within the meaning of the provision under consideration, in the Massachusetts statute of wills, as expounded by her courts. Ample provision was made for the father of the complainants, and it makes no difference that the legacy to him was limited to his life, because the fact of that limitation in the will, and its careful repetition in the codicil, especially when taken in connection with the devise over for the benefit of the poor, show conclusively that the entire disposition of the estate was in accordance with the settled purpose of the testatrix. But if there could be any doubt upon this subject, the parol testimony introduced by the principal respondent is conclusive that there is no legal merit in the claim of the complainants. Suffice it to say, without reproducing the evidence, that it is fully proved that the testatrix repeatedly said that her son should have his share of the income during his life, but that his children should not have any portion of her estate after his decease; and the witnesses say that her declaration was that the son should have the use of one third of the property during his life, and that after his decease it should go for charitable purposes. Such proofs coincide with the tenor of the will, and with all the presumptions to be drawn from the surrounding circumstances, and when considered in connection with those circumstances and the unmistakable inferences to be drawn from the tenor of the will, they afford a demonstration that the claim of the complainants has no legal foundation. Strong doubts are entertained whether grandchildren living at the date of the will of the grandfather, can ever be regarded as omitted because not named as legatees in his will, in any sense within the meaning of the statute, where it appears that their father was living at the same time, and was provided for in the will. Plainly they cannot be so regarded if the father is the donee of an inheritable estate, because it is expressly enacted, that where such a legacy is given to the father and he dies before the testator, his children shall take the legacy given to him in the will. Gen. St. c. 92, p. 479, § 28. The same conclusion must follow where the legacy to the father is of an estate for life, if the remainder is also devised, unless it be assumed that a devise by a father to his children for life and a remainder over to third persons is void, in case one of the children dies before the father, leaving issue. Grant that proposition, and then it is not true, as enacted in the first section of the statute, that every person may devise and dispose of his estate by will in writing. Carefully examined, the claim of the complainants is not founded upon any accident or mistake in the testatrix, but it is indubitably an attempt to restrict and qualify the right of parents to dispose of their estate by testamentary devise. Children are omitted when no legacy is given them, and they are in no manner named in the will, as exemplified in the decisions of the state court. Grandchildren stand upon the same footing where it appears that their parent died before the execution of the will, because, in that state of the case, they are the issue of a deceased child, and fall directly within the provision upon that subject. Posthumous children fall within the same category, because they are within the express words of the colonial statute; and under the decisions of the courts, it is also settled that children born after the date of the will and before the death of the testator shall have the same rights. In all these cases the foundation of the right, as expounded by the courts is, that the omission was unintentional and through accident or mistake, as appears by all the decisions of the state courts. But in the case at bar, there is no such foundation or just pretence for it, and therefore the rule cannot apply. The testatrix, when she made her will, gave legacies to all her children, and when one deceased without issue she made a codicil, and did the same thing for all who were living, including the father of the complainants. As before stated, they were born before the will was made, and neither child nor grandchild was born after the will was executed. All of the circumstances were in the mind of the testatrix both when she made the will, and when she afterwards deliberately modified it, and nothing occurred subsequently, to give the least coun-

tenance to the theory that there was any such mistake or accident as the law contemplates, to warrant the interference of the court.

The complainants scarcely deny that the power conferred upon the trustees in the will, to select and appoint the committee, could be executed by the surviving trustee, provided it be held that the power is one coupled with an interest, but they contend that it is a mere naked power to two persons which cannot be executed by one. The substance of that provision of the will is, that "when upon the decease of all my children, the trust fund is to be disposed of as aforesaid," that is, for the benefit of the poor, "the said Marsh and Guild, or their successors as trustees, shall select and appoint three or more gentlemen, who shall be informed of the facts by the trustees, and shall determine how, by the payments to permanently established and incorporated charitable institutions, my wish to benefit the poor will be best carried into effect," &c. Three persons were accordingly selected and appointed by the surviving trustee, and they have determined that the several corporations made parties respondents, shall be the recipients and beneficiaries of the testatrix's bounty. The record shows that the power has been executed, but it is insisted by the complainants that the proceedings are a nullity. The courts of the United States cannot exercise any equity powers, except such as are conferred by an act of congress, and those judicial powers which the high court of chancery in England under its judicial capacity, as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor as the representative of the sovereign and by virtue of the king's prerogative as parens patriae, are not possessed by the circuit courts. Fontain v. Ravenel, 17 How. [58 U. S.] 390. The supreme court hold that the prerogative power belonging to the sovereign, has not been delegated to the federal government, but remains in the several states, and is to be exercised according to the laws and usages prevailing in the several states. Consequently, whenever, by reason of citizenship or otherwise, a cause is brought before the federal tribunals involving the validity of a bequest or devise to charitable uses, the question to be considered always is, whether it would be held valid or not in the courts of the state. Numerous decisions of the supreme court assert this doctrine, and it has been the uniform course of the court. Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. [17 U. S.] 1; Beatty v. Kurtz, 2 Pet. [27 U. S.] 566; Inglis v. Sailor's Snug Harbor, 3 Pet. [28 U. S.] 99; Wheeler v. Smith, 9 How. [50 U. S.] 55. The state decisions cited for the principal respondent show beyond controversy, that the equitable jurisdiction of the supreme court of the state is established over charities in its broadest application; that the statute of Elizabeth is part of the common law of the state, and that it is the settled course of judicial decisions that a devise of property to charitable uses will be upheld. Argument in support of those propositions is unnecessary, as the authorities to support them are numerous, direct, and conclusive. Authority to select and appoint the committee was not a personal trust, because it is expressly provided in the will that it shall be exercised by the persons named, or their successors as trustees. The directions of the testatrix in that behalf were not to be carried out until the decease of all her children, and as they or some one of them might live for many years, it was provided, that if the persons named as trustees deceased before the time designated for the selection and appointment arrived, the duty might be performed by their successors.

The terms of the will show that the entire estate was vested in the trustees, and their successors as trustees, and they were authorized to sell and convey any and all real estate which might at any time be in their hands, according to their joint and sole discretion. Looking at the terms of the will, no doubt is entertained that the power in question is one coupled with an interest. Such a power survives, and may be exercised by a surviving trustee, or by successors. Butler v. Bray, 2 Dyer, 189; Attorney General v. Gleg, 1 Atk. 356; Lewin, Trusts, 299. Suppose, however, that any doubt could arise upon the subject under the general equity law, still, the decisions of the state courts fully support the proposition, and they must be regarded as conclusive. Greene v. Borland, 4 Metc. [Mass.] 330; Dixon v. Homer, 12 Cush. 43; Dexter v. Gardner, 7 Allen, 243.

Sufficient has already been remarked to show that the third proposition of the complainants cannot be sustained, because it is made to appear that the intention of the testatrix to give the property for the benefit of the poor, has been legally carried into effect. Other propositions were submitted by the complainants, but they are so fully answered by the state decisions, that it seems quite unnecessary to enter into argument upon the subject. Unless the state decisions are to be overruled, it is plain that the second and third propositions of the complainants cannot be sustained. In view of the whole case, I am of the opinion that the complainants are not entitled to relief.

Bill of complaint dismissed with costs.

[NOTE. This case was, upon appeal to the supreme court by the complainants, affirmed. Mr. Justice Nelson, who delivered the opinion of the court, considered at length the Massachusetts statute providing for omissions in wills of provision for children or their issue. In this case he considered that the omission was intentional. He said: "Our conclusion on this branch of the case is that, upon a perusal of the provisions of the will, regard being had to the course of deci-

sion under the statute in the courts of the state, it sufficiently appears, especially in connection with the oral proof, that the omission to provide for the issue of the deceased son in the will was intentional, and not by accident or mistake." The contention that the power conferred by the will upon Marsh and Guild was a mere naked power, and as such not competent to be executed by the survivor, or one of these, he considers in this case not tenable. He says: "Inasmuch as the trustees are invested with the legal estate, in order to enable them to discharge the trusts already declared, it is well settled that the power conferred is a power coupled with an interest, which survives, on the death of one of them, and may be executed by the survivor. It is not necessary that the trustees should have a personal interest in the trust; it is the possession of the legal estate, as a right virtute officii in the subject over which the power is to be exercised, that makes an interest, which, when coupled with the power, the latter survives. A trust, therefore, will survive when in no way beneficial to the trustee." 6 Wall. (73 U. S.) 337.]

LORING (PAIGE v.). See Case No. 10,672.

LORING (SEAMANS v.). See Case No. 12,583.

LORING (SOMBOY v.). See Case No. 13,168.

LORING (TATHAM v.). See Case No. 13,763.

LORIO (BRAGG v.). See Case No. 1,800.

Case No. 8,516.

LORMAN et al. v. CLARKE.

[2 McLean, 568.] [1]

Circuit Court, D. Michigan. Oct. Term, 1841.

COURTS — DERIVATION OF POWER IN FEDERAL COURTS—PROCEDURE—LEX LOCI—NEW RIGHT —BILL FOR DISCOVERY—STATE STATUTE.

1. The circuit courts of the United States derive their jurisdiction as well in chancery as at law, from the constitution and laws of the Union.

[Cited in Re Barry, 42 Fed. 121, 136 U. S. 608, note.]

2. The laws and usages of a state, which, at law, constitute a mode of procedure in the circuit courts, derive their force from their adoption by congress.

3. A state can not enlarge nor restrict the jurisdiction of the courts of the United States.

[Cited in Rich v. Bray, 37 Fed. 275.]

4. In those states where no courts having chancery powers ex the chancery powers of the circuit courts are the same as in the other states. But the contract, or right, is governed by the local law, where it originated, and was to be performed. This law, then, constitutes the law of the contract, and will be enforced by the courts of the United States.

[Cited in Ex parte McNiel, 13 Wall. (80 U. S.) 243.]

5. It does not give a capacity to these courts to exercise jurisdiction, but it fixes the rights of the litigant parties. The jurisdiction is derived from the laws of the Union.

6. There is no principle of the common law which pervades the Union, and exists independently of the laws of the states. This rule is found as adopted and modified by the laws and judicial decisions of the respective states.

[Cited in United States v. Garlinghouse, Case No. 15,189.]

7. If a local law, or usage, originate a new right, it may be enforced by the courts of the United States, sitting within the state, by the exercise of a common law or chancery power, as the case may require.

[Cited in Clark v. Sohier, Case No. 2,835; Buford v. Holley, 28 Fed. 684; Griswold v. Bragg, 48 Fed. 520.]

8. The law of this state, which authorizes a judgment creditor, after return of execution, no property found, to file his bill for a discovery, and subject the choses in action, and equitable credits of the defendant, to the payment of this judgment, may be enforced by an exercise of the chancery powers of the circuit court.

[Cited in Holmes v. O. & C. Ry. Co., 5 Fed. 84; Mann v. Appel, 31 Fed. 383.]

[Distinguished in Shaw v. Aveline, 5 Ind. 385.]

9. The law may be considered as creating a new right which can only be enforced in chancery.

10. There being no adequate remedy, under the statute, at law, this court will give relief in equity.

[Cited in Singer Manuf'g Co. v. Yarger, 12 Fed. 488.]

[See Baker v. Biddle, Case No. 764.]

11. This is no enlargement of the jurisdictional powers of this court. It is the application of its ordinary powers to the enforcement of a new right.

12. The remedy under the statute is clear.

In equity.

OPINION OF THE COURT. The complainants set out in their bill that they obtained a judgment at law, against the defendant, for —— dollars, and having issued an execution against his property, it was returned that he had no property real or personal. And the bill states that the defendant has equitable interests, choses in action, and other property, which the complainants are not able to discover and reach by execution at law. That he has money and personal property, either in possession, or held in trust, and has equitable interests in real estate, the particulars of which are unknown; and the complainants pray a discovery and relief in the premises. The defendant demurs to so much of said bill as seeks discovery and relief, touching the equitable rights and interests of the defendant, or any other part of the bill which seeks a satisfaction of the judgment, out of any other property than that which is subject to execution. This proceeding is attempted to be sustained by the complainants on two grounds: First: Under the statutes of this state. Second: On general chancery principles.

The 25th section of the act of Michigan, in relation to a court of chancery (Rev. St. 365), provides, "that whenever an execution, against the property of the defendant, shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole

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

or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of property, or things in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or things in action, or the payment, or delivery thereof, to the defendant, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant." And power is given to the court to compel such discovery, prevent such transfer, and to decree satisfaction of the sum remaining due on the judgment, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him. There are other statutes of the state which may have some bearing on the remedy thus provided, but it is not necessary, in deciding this case, to refer to them. That, under the above statute, the courts of the state, exercising chancery powers, may give the relief sought in this bill, on the facts stated, is admitted. But it is insisted that this court, deriving its jurisdiction under the constitution of the United States and the acts of congress, have no power to act in the case. That it is not in the power of a state legislature to restrict, or enlarge, or, in any manner, to modify the equitable jurisdiction of the federal court. And a great number of authorities are cited from the decisions of the supreme and circuit courts of the United States to establish this point. Without a particular reference to these authorities it may be admitted, in the broadest sense, that the equitable powers of this court are derived from the federal government. The second section of the third article of the constitution, declares, "that the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States," &c. And it is well observed by Mr. Justice Story, that "the uniform interpretation of the above clause in the constitution has been, that by cases in equity are meant cases which in the jurisprudence of England are so called, as contradistinguished from cases at common law. So that in the courts of the United States equity jurisprudence embraced the same matters of jurisdiction and modes of remedy as exist in England." 1 Story, Comm. 64, 65. The act of congress of 1792 [1 Stat. 275] declares, "that the modes of proceeding in suits of equity shall be according to the principles, rules, and usages, which belong to courts of equity, as contradistinguished from courts of law, except so far as may have been provided for by the act to establish the judicial courts of the United States." The 11th section of the act of 1789 [1 Stat. 78] gives to the circuit courts jurisdiction of all suits of a civil nature, at common law or equity, where the sum exceeds five hundred dollars. In some of the states there is no court of chancery, but this does not affect the exercise of a chancery jurisdiction by the federal court in such states. This jurisdiction extends alike to all the states. And it gives relief, where plain and adequate redress can not be had at law, agreeably to the well established rule in the English chancery. If a state were to authorize a chancery jurisdiction by her own courts, in all controversies concurrently with a court at law, this would not enlarge the jurisdiction of the federal court of chancery. It could only interpose its remedial powers where the remedy was inadequate at law. The rules of practice of the high court of chancery, in England, have been adopted by the supreme court, and are obligatory upon the circuit courts. They have power, however, to adopt other rules not inconsistent with the general rules.

It is argued that, in the exercise of the powers thus given and defined, we must look to the settled principles of an equitable jurisdiction in England; and that no relief can here be given which could not be given in that country. And that what a federal court of chancery may do in one state it may do in another. That its jurisdiction not being derived from the laws of a state, its powers are in no respect influenced by such laws. That if a different rule were to prevail the court would lose the national character which was intended to be given to it, by its organization under the laws of the Union. The judiciary of the United States constitutes a co-ordinate and independent branch of the government; and its powers are co-extensive with the laws. It was designed, undoubtedly, to secure a uniform construction and enforcement of the laws of the Union. And in this respect, in all the states, the rule of decision is unvaried. But the federal court has jurisdiction between citizens of different states, as well as in cases arising under the laws of the United States. And where controversies are brought before it, which do not arise under the laws of the Union, by what law are they to be determined. The law of the contract is the law of the place where it was made and was to be executed. There is no unwritten or common law of the Union. This rule of action is found in the different states, as it may have been adopted and modified by legislation, and a course of judicial decisions. The rule of decision, then, must be found in the local law written or unwritten. No foreign principle attaches to the federal court when exercising its powers within a state. It gives effect to the local law, under which the contract was made, or by virtue of which the right is asserted. And this independently of any act of congress adopting the modes of proceedings, at common law, of the state courts. And the principle applies as well to proceedings in chancery as at law.

The term "jurisdiction" is often used, not very appropriately, more in reference to the subject matter of the contract, or right set up, than to the capacity of the court. The

capacity of the federal court, for the exercise of chancery powers, is received from the laws of the Union. It is not dependent for this, in any degree, on the local law. But these powers are exercised in all cases where the contract or right comes appropriately under them. If a right exist within a state which can not be enforced at law, and which properly belongs to a chancery jurisdiction, there can be no doubt that relief may be given by the federal court. And it is immaterial whether a similar right has come under the action of a court of chancery in this country or in England. The right may be new. It may originate under a local statute or usage, and exist no where else. But this constitutes no objection to its enforcement. The inquiry is, is there no adequate relief at law, and does the right come within the powers of a court of chancery. Now, can it be said that, in a case like this, the jurisdiction of the court is derived from the local law. As in all other cases, which do not arise under the laws of the Union, the local law governs the contract or right, but the power to act on it is derived from the laws of the Union.

The circuit courts of the United States have a general common law jurisdiction in a state. Their powers of common law and chancery are alike derived from the laws of the Union. For the laws of a state, and the modes of proceeding of its courts, which form a rule for the federal court, at law, in the exercise of its jurisdiction, are in force, only, by reason of their adoption by act of congress. Now, to the exercise of this common law jurisdiction, can it be objected, that the right set up in the declaration is new, and has never before been asserted? Is not the proper inquiry, whether the right be a legal one; and, if it is, the action may be sustained? And if, in such a case, the plaintiff shall fail to establish his right by proof, is the failure attributable to a want of jurisdiction in the court? The jurisdiction to afford an ample remedy, at common law, is clear, but the case for the action of the court must be made out by the evidence. The subject matter, then, on which the court acts, is altogether distinct from its jurisdictional powers. The one is the contract, the other the powers by which it is enforced. The contract originates under, and is governed by, the local law; the jurisdiction is derived from the laws of the Union. And this view is applicable as well to the chancery as to the common law powers of the circuit court. A reference to the decisions of the supreme and circuit courts of the United States will show that this has been the settled course of action.

In the state of Kentucky land titles were generally acquired by the location of a warrant on a tract of land, giving a specific description of the beginning corner of the survey, and describing the boundaries. This was called an entry of the land, but it was indispensible to the validity of the entry that it should call for some object generally known in the nearest settlement. And if such object was not called for, the holder of a warrant could, subsequently, enter the same land, though he had full notice of the prior location. The well established doctrine of notice, in fact, was discarded, and the call in the entry, for an object generally known, was substituted for it. This was an innovation upon the principles of equity, but by the practice of the courts of Kentucky it was established as a rule of property. This system was sui generis. It was an artificial superstructure reared chiefly by judicial action. New principles and modes belonged to it. It had no foundation in the jurisprudence of England. And yet this system was regarded, by the courts of the United States, as the local law of property. And as the courts of Kentucky considered an entry as an equitable title, and gave relief to the claimant against an elder patent on a junior entry, for the same land, the courts of the Union adopted the exercise of their equitable powers to the attainment of the same end. In the case of Bodley v. Taylor, 5 Cranch [9 U. S.] 191, Mr. Chief Justice Marshall says it has been sufficiently shown that the practice of resorting to a court of chancery, in order to set up an equitable against the legal title, received, in its origin, the sanction of the court of appeals, while Kentucky remained a part of Virginia; and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle can not now be shaken. And, he remarks, the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself. And what can justify that assumption but the opinion, that cases of this description come within the sphere of its general action. In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. The court, therefore, he says, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery. In Tennessee land titles were acquired by entry as in Kentucky, but in the former state the elder entry is regarded, when connected with a junior patent, as constituting a part of the legal title. So that in one of these states relief is given in equity, and in the other at law, on substantially the same facts. And such is the action of the federal courts in those states. This forcibly illustrates the influence of the local law. In one state the right is held to be equitable, in the other legal, and it is acted on accordingly, by the respective jurisdictions. In the state of Kentucky a statute provides that, in certain cases, persons holding distinct titles may be united in the same action. And the supreme court have held, that under this statute parties may be united in a suit in chancery, who have no common interest. Lewis v. Marshall, 5 Pet. [30

U. S.] 470. In the case of Clark v. Smith, 13 Pet. [38 U. S.] 20, under the act of Kentucky of 1796, which provides, that any person having both legal title to, and possession of, land, may institute a suit against any other person setting up a claim thereto; and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto, &c. The court held it afforded ground for relief. They say the state legislatures have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and, at the same time, prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts. In Ohio a statute gives to a decree, for a conveyance of title, the same effect as a deed formally executed. But, in Kentucky, the conveyance, under a decree, is required to be executed by a commissioner, appointed by the court. These statutes have, uniformly, been considered as applicable to the federal courts, and many land titles rest upon them.

More authorities might be cited, if more were necessary, to show that the courts of the United States, in the exercise of their chancery powers, will enforce equitable rights, whether they originate by contract, by local usage, or by the statutes of a state. And the principle is the same, whether such rights relate to titles for land, or not. If full and adequate relief can not be given at law, relief may be sought in chancery. It is important, and the supreme court have often said so, that, in regard to land titles, there should be but one rule of decision in a state. But the same remark may be applied, with equal force, to any rule of property. Whether the contract or right be equitable or legal, the same effect should be given to it in the federal, as in the state courts. In the case under consideration, the statute declares, in substance, that all equitable rights, however held by the judgment debtor, may be reached by the plaintiff, to satisfy the judgment, by a bill in chancery. Now, these rights can not be reached by an execution at law; and if, as the defendant's counsel contend, they are not subject to the ordinary action of a court of chancery, still, under the statute, they are proper objects of chancery jurisdiction. It is, unquestionably, in the power of a legislature to subject the personal and real estate of the judgment debtor, to the payment of his debts, in such mode as they shall prescribe. And they have, in the above statute, subjected his choses in action, and other equities, with this view, to the action of a court of chancery. Here, then, is a right given to the plaintiff—a right which a court of law can not enforce, and which the statute declares may be enforced in equity. This right, then, by the statute, is brought within the action of a court of chancery, if it was not within it before. It is, therefore, an equitable right, made so by the statute, and which the circuit court, equally with a state court, may enforce, by the exercise of its chancery powers.

In the language of the supreme court, in the above cited case of Clark v. Smith, the legislature having created a right, and, at the same time, prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason is perceived why it should not be pursued as in the state courts. This authority covers the whole ground. Had the question, now under consideration, been before the supreme court, language more appropriate to its decision could not have been used. The right was created, and declared to be an equitable one. A court of chancery can act upon such right, in accordance with established principles, and the modes peculiar to its organization. But the supreme court say, even the forms of proceeding authorized by the statute, may be followed by the federal court, if not inconsistent with the rules of chancery. It is the characteristic of a court of equity to regard substance more than form. Having jurisdiction of a subject matter, in the language of the late Chief Justice Marshall, it will exercise it upon its own principles. We think the present bill is clearly sustainable under the statute, which gives to the complainant the discovery and the relief prayed for in his bill. And we are also of the opinion, that the bill is sustainable on the general principles of equity, independently of the statute. It would, indeed, be a reproach to the administration of justice, if a debtor, by converting his estate into choses in action or stocks, or, if his estate consisted of such property as can not be reached by an execution, he should be able to hold it in defiance of his creditors. At common law, an equitable estate can not be sold on execution; but who ever doubted that it might be sold, by a decree in chancery? And, in the case of Vanness v. Hyatt, 13 Pet. [38 U. S.] 300, the supreme court say, that an equitable interest in personal property is governed by the same rule. Being satisfied on the first ground, it is unnecessary to examine this one. It would not be difficult to show that both on principle and authority, the second ground is sustainable. The demurrer must be overruled.

Case No. 8,517.

LORWAY v. LOUSADA.

[1 Lowell, 77; 1 Am. Law Rev. 92.] [1]

District Court, D. Massachusetts. April, 1866.

CONSUL—FEES—ACTION TO RECOVER BACK—FEDERAL JURISDICTION—SHIP'S PAPERS.

1. The district court has jurisdiction of a suit brought by an alien against the consul of his nation, residing within the district, to recover the amount of official fees improperly exacted.

2. The act of congress of March 3, 1817 [3 Stat. 362], requires masters of British ships to deposit certain papers with the consul of his government within forty-eight hours of his arrival in a port of the United States. It seems, that for receiving these papers, and recording the time of their reception, the consul may charge a fee.

3. There is no such statute requiring the consul to certify to a redelivery of the papers to the master.

Assumpsit brought April 11, 1865, by [James Lorway] an inhabitant of Nova Scotia, against [Francis Lousada] the British consul, to recover back certain fees paid to him by the plaintiff under protest, in order to obtain his ship's papers from the consul; and which fees, the plaintiff alleged, the defendant had no legal right to demand. The defendant filed a plea to the jurisdiction of the court, to which the plaintiff demurred.

C. T. Russell, for plaintiff.

C. G. Thomas, for defendant.

LOWELL, District Judge. This is a suit by an inhabitant of one of the British provinces of North America against her Brittanic majesty's consul at Boston, and the pleadings raise the preliminary question, whether an action will lie here, between these parties, to recover back an alleged excess of fees exacted by the defendant for an official service. Whether the facts would show that any overcharge has in fact been made, is not now the question; but, supposing one to have been made, and that the payment was not such as the law would presume to have been voluntary, the point raised is, that no action can be maintained in our courts.

That foreigners, even transiently here, may sue and be sued by citizens and by each other in our courts of common law and equity, is now the better opinion, and is in accordance with the law of England. Story, Confl. Law, § 542; 2 Kent, Comm. 64; Westl. Priv. Int. Law, § 120 et seq. Such actions are constantly brought in our state courts, and this general practice meets the approval of jurists. A late French writer has said, that the other nations have just cause of complaint against France, in that her laws deny to strangers the right to sue each other in France; a privilege which is allowed, he says, in almost all civilized countries. Foel. Dr. Int. § 127, &c.

Courts of admiralty, it is true, exercise a considerable latitude of discretion in entertaining suits between strangers; and they are guided to some extent in the particular case by the nature of the controversy, whether it involves a question of general law, or only of the local law of the foreign country. This distinction perhaps arose out of the great diffidence with which courts of admiralty in England were formerly accustomed to approach questions of local law, whether domestic or foreign. However this may be, it is now the better opinion, in this country at least, that where circumstances make it either necessary or highly convenient that the jurisdiction should be retained, as for instance when the voyage of a foreign vessel is broken up here, a court of admiralty will take the case, whether the law which it will be bound to administer happen to be local or general. In short, the question is one of discretion in the exercise of an admitted power, and not of the power itself. See, per Taney, C. J., Taylor v. Caryll, 20 How. [61 U. S.] 611; The Havana [Case No. 6,226]; The Whilhelm Frederick, 1 Hagg. Adm. 138; Patch v. Marshall [Case No. 10,793]; The Jerusalem [Id. 7,293]; notes to 2 Pars. Mar. Law, bk. 3, c. 3. And the remark of Mr. Justice Curtis in Patch v. Marshall [supra], is to be understood, I have no doubt, in reference to a court of admiralty and its jurisdiction, which alone was involved in that case. One other assumption of fact was made by both parties at the argument, which was, that by the law of England, if an overcharge, such as is here alleged, had been made, and the payment was compulsory, an action would lie against the officer to recover the excess; and it has not been shown, that such an action must by the English law be brought in the home courts. Assuming this to be so, I am of opinion that such an action may be maintained here, there being no treaty provision to the contrary.

So far as the official character of the defendant is concerned, it has long been settled as the law of England and America, that consuls may be sued, and even arrested, for debt or damages. Wheat. Int. Law, 423; 1 Phillim. Int. Law, 240. And see Foel. Dr. Int. § 191; Mass. Droit Commer. No. 446; Pard. Droit Commer. No. 1448; Davis v. Packard, 7 Pet. [32 U. S.] 276; [Vincent v. Baker, 3 Maule & S. 384.] [2] If the defendant owes a debt, however small, to one of his countrymen, it can be sued in this court. Is there any thing in the nature of this supposed debt to put it on a different footing? I am unable to see any such difference. All the reasons of propriety and convenience are the same. The defendant for many purposes has his domicile

[1] [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission. 1 Am. Law Rev. 92, contains only a partial report.]

[2] [From Am. Law Rev. 92.]

here, where the cause of action, too, arose, and where the witnesses may be supposed to be. Story, Confl. Law, § 69; Westl. Priv. Int. Law, § 139. Indeed it is not easy to see how any effective suit could be maintained in any other forum. If the laws of England allow one of their consuls to be sued at home, while residing abroad, the service upon him must be made by aid of some local rule, allowing a substituted if not a fictitious service; and a judgment so founded could hardly furnish the ground of an action out of England. In the case of some not important consulates, the office is exercised by our own citizens, who have neither real nor fictitious residence elsewhere; and in other cases the controversies may arise with our own citizens. The rule of necessity in many cases, and of convenience in all, is plainly in favor of the jurisdiction here. It must be admitted, that the mere fact of the defendant being a consul is unimportant, because consuls are liable to suit; nor is it more important that the plaintiff is a foreigner, for alien friends may freely sue in our courts; nor that the plaintiff is a British subject, for he may have suit against his consul somewhere. And the only point strenuously argued was that a court here cannot or ought not to pass upon the proper exercise of the consul's duties. No doubt our government, in all its departments, is bound to accord to the consul, after the executive authority has received him, the free exercise of all his consular authority, such as may exist by custom, treaty, or general international law. But, after he has done an act professedly official, I see no reason why an individual may not try the question here, whether the act was within the scope of his authority. I perceive no greater objection to a court undertaking to construe the English law in a case of this kind than in any other in which it may be involved between party and party, nor any reason of comity that should forbid it. International comity is rather on the other side. All nations are supposed to desire that justice should be done between their own subjects, and international law does not in the case of consuls exempt them from the jurisdiction of the courts at the place of their residence. For these reasons I must overrule the plea to the jurisdiction. Demurrer sustained.

At a later term, the case was tried to a jury, and the evidence tended to show that the action was prosecuted at the request and expense of the government of Nova Scotia to test the legality of a small fee which the consul usually charged to provincial vessels. The whole overcharge declared for was fifteen shillings, agreed to be equal to $3.63; but it was said that three thousand vessels a year were subjected to it in the port of Boston alone. It was made up of two charges of seven and sixpence, for certificates of entry and clearance and the registration of them, of which the former was said by the defendant to be required by the laws of the United States, and the latter to be authorized by usage. The statutes and orders in council of Great Britain regulating the fees of consuls were proved on behalf of the plaintiff; and the defendant introduced evidence of a long established usage at Boston, New York, and Philadelphia, in his favor. The case was argued by the same counsel as before.

In charging the jury, LOWELL, District Judge, said:

So far as this case turns on the laws of Great Britain, we must decide it merely upon the evidence before us, trusting that any mistakes we may fall into will be corrected by the official persons who may be called upon to consider the effect of our judgment upon the usages of the consul's office here and in other ports; for it is said to be rather for the examination of these usages than for the recovery of the very trifling sum at issue, that this action is prosecuted.

It is admitted that the sums of money now sued for were paid by the plaintiff, not only under protest, but under compulsion, in order to recover his ship's papers which were in the defendant's possession. This being so this action will lie, if the exaction was illegal. The laws and orders in council of Great Britain have been given in evidence, and you will decide (no question of construction being involved in the issue) whether the charge of seven shillings and sixpence is the lawful fee for each certificate of the kind given in this case, and whether such certificates are required to be given by those laws or orders. If you find no such certificates mentioned, your next inquiry will be whether the plaintiff made any such request in respect to the second certificate, as is mentioned in the order of May, 1855, to authorize services to be rendered which are not required by law. If you find either a request by the plaintiff, or a legal duty imposed on the consul, you will find for the defendant on this part of the case; otherwise for the plaintiff.

The first certificate stands upon other grounds more familiar to us. By a statute of the United States, passed March 3, 1817 (3 Stat. 362), and still in force, the master of every foreign ship and vessel must deposit his register and the clearance and other papers granted by the officers of customs at the port from which he came with the consul of the nation to which the vessel belongs within forty-eight hours of his arrival in an American port, and must deliver to the collector of the port a certificate from the consul that they have been so deposited; and this under a severe penalty. And the consul is not to deliver back the papers until the master has exhibited to him a clearance in due form from the collector of the port, and this under a penalty of not less than five hundred nor more than five thousand dollars. This right to make the consul the depositary of the ship's papers, is evidently regarded as a

privilege, because the act goes on to say that it shall not extend to the vessels of those nations in whose ports our consuls have not a like privilege. Now it is argued to you very forcibly on behalf of the defendant, that a certificate thus required by our law, and which is necessary for the master in dealing with our custom-house, cannot be refused by the consul and cannot but have been required by the plaintiff, and that its registration was essential for the protection of both parties in fixing the dates of the transaction.

It is argued for the plaintiff, that the statute 17 & 18 Vict. c. 104, § 279, commonly called the merchant shipping act, requires of masters a deposit of papers in the hands of the consul, within exactly the same time of forty-eight hours after arriving at any foreign port, and that by the other laws and orders already referred to, the services of the consul, in respect to the deposit and redelivery of those papers, are to be gratuitous. This is admitted to be true; but it appears by inspection of that part of the merchant shipping act, that the papers there referred to are wholly different from the register and other papers mentioned in our law, being those which relate to the crew, and that the law is looking to the due supervision by the consul of the relation between the master and the men; while our statute touches only those which show the nationality of the vessel and the legality of the voyage, and deals with what may be called the international aspects of the voyage. If this be so, the provision that the deposit of wholly different papers shall not be the subject of a charge, is, of course, immaterial. So far as our law is concerned, then, I rule to you that the first certificate is required to be given; and that the second certificate, namely, that the vessel has been duly cleared, is not required, and is useless for any purposes connected with our port or custom-house. You will apply this law to that of the foreign country, proved as a fact before you, and decide accordingly, under the instructions above given, whether these charges, or either of them, were lawful.

A good deal was said by learned counsel on both sides, about the reasonableness of the charges. It will not be necessary for you to concern yourselves with that question, if you find the case is provided for by the laws and orders given in evidence. If you find it wholly untouched by those laws and orders, and yet, that the services were rendered at the request of the plaintiff, he must pay what they were reasonably worth. But I think it my duty to say to you, that I see nothing in the evidence which would warrant you in coming to that conclusion in respect to the second certificate.

The jury found for the plaintiff for one-half the amount demanded; and in answer to a question by the court, said that the second certificate was not required by the law of Great Britain, nor given at the request of the plaintiff. Judgment accordingly.

Case No. 8,518.

In re LOTHROP.

[5 Law Rep. 456.]

District Court, D. Massachusetts. Dec., 1842.

BANKRUPTCY—APPLICATION FOR DISCHARGE — OBJECTIONS BY CREDITORS—RIGHT TO TRIAL BY JURY.

The only remedy of a bankrupt, where a majority in number and interest of his creditors file their written dissent to his discharge, is to demand a trial by jury.

This matter came up for a hearing upon the bankrupt's application for a discharge. A majority in number and value of the creditors who had proved their debts appeared to resist the application, and file their dissent in writing. A hearing was sought by the bankrupt [George W. Lothrop] before the judge alone, and a preliminary question arose as to his rights under the fourth section of the act [of 1841 (5 Stat. 443)], which provides "that if, in case of bankruptcy, a majority, in number and value, of the creditors who shall have proved their debts at the time of hearing of the peition," &c., "shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be granted to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court at such time and place and in such manner as the court may order; or he may appeal from that decision," &c., "to the circuit court."

George Alexander Smith, for bankrupt, contended that he had a right to be heard in the first instance by the court, and, in case a discharge was refused, then to demand a jury, or appeal to the circuit court.

Charles Theodore Russell, for creditors.

SPRAGUE, District Judge, after remarking that the provision was not free from obscurity, decided, that where a majority in number and value of the creditors file their written dissent to the bankrupt's discharge, the only alternative left to him is to acquiesce in that dissent, or demand a trial by jury; in other words, that the only mode of trying the issue between the bankrupt and the opposing creditors is by jury, and that he is not entitled in this case to be heard by the court, and then, in case of a refusal to grant a discharge, demand a trial by jury, or appeal to the circuit court. This case was accordingly ordered to be heard by a jury.

Case No. 8,519.

LOTHROP et al. v. STEDMAN et al.

[13 Blatchf. 134; 15 Am. Law Reg. (U. S.) 346; 4 Ins. Law J. 829; 12 Alb. Law J. 354; 22 Int. Rev. Rec. 33.] [1]

Circuit Court, D. Connecticut. Oct. 1, 1875.

INSURANCE COMPANY—REPEAL OF CHARTER—PROCEEDINGS IN INSOLVENCY — INSURANCE COMMISSIONER—SUIT BY STOCKHOLDER ALLEGING SOLVENCY—INJUNCTION—CUSTODY OF ASSETS.

1. The legislature of Connecticut, in 1866, chartered a life insurance corporation, reserving, in the charter, a right to alter, amend or repeal it "at the pleasure of the general assembly." A statute of the state, passed in 1871, created the office of insurance commissioner, and provided, that, if it should appear to him that the assets of any life insurance company were less than its liabilities, he might petition the proper court of probate to appoint a trustee to take possession of its property for the benefit of its creditors, and made it his duty to so petition if it should appear that its assets were less in amount than three-fourths of its liabilities. S., the insurance commissioner, petitioned the probate court, setting forth that the assets of said corporation were less than three-fourths of its liabilities, and praying for the appointment of a trustee. After a full hearing on the merits, the petition was dismissed. Thereafter, the legislature, by a joint resolution passed at its May session, in 1875, which contained sundry recitals, resolved, that said charter should, on the 1st of September, 1875, "be and become wholly and absolutely repealed and annulled," provided, that, if the corporation should, before said day, supply the deficiency existing in its assets, and receive from S. a certificate of a specified fact, the charter should remain in full force, and should not, by such resolution, be repealed or annulled, and provided that if S. and the corporation should disagree as to the amount of assets, their value and their sufficiency, two judges of the state courts should determine the amount of such assets, their value and sufficiency, and certify the deficiency, if any, to be paid in, and, if the corporation should, within thirty days after the delivery of such certificate to the secretary of the corporation, pay in such deficiency, such resolution should become inoperative and void; that the decision of the judges should be made, and the certificate be delivered to the secretary before November 1st, 1875; and that, in case the corporation and S. should disagree as to the value or sufficiency of the assets, and the corporation should not supply the deficiency on or before September 1st, 1875, S. should, on that day, take possession of all the assets, books and papers of the corporation, and hold the same "subject to the order of said chief judge, and to be disposed of as provided by law." A statute passed by the legislature at the same session provided, that the title to the assets of life insurance companies, on the repeal of their charters, should vest in the insurance commissioner, who should dispose of them for the benefit of those interested in them, subject to the control of the proper state court. The corporation did not, prior to September 1st, supply, to the satisfaction of S., the alleged deficiency, and disagreed with him in regard to the amount, value and sufficiency thereof. S. prepared to take possession of the property of the corporation, on September 1st, and prior to the investigation by the two judges. The corporation thereupon obtained an injunction ex parte from a state court, to enjoin S., which, after a hearing, was, on motion of S., dissolved. S. also obtained an ex parte injunction from a state court to restrain the officers of the corporation from disposing of its assets. The plaintiffs in this suit, holders and owners of policies of insurance issued by the corporation, filed this bill against S. and the corporation, alleging its solvency, and asking an injunction against S. from taking possession of its assets, and applied for a provisional injunction to that effect: *Held*, that such injunction must be refused.

2. It should be a very clear case to justify a court in deciding that an act of the legislature is invalid, on a motion for a provisional injunction.

3. The principle, that a stockholder of a corporation cannot maintain a bill in equity against a wrong-doer, to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor; and the plaintiffs are only creditors of the corporation.

4. When a charter or a general statute provides that such charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its powers summarily and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and, in such a case, a repeal, like other legislative acts which do thus violate the principles of natural justice, may be reviewed by courts.

5. The decision of the court of probate did not debar the legislature from taking such legislative action as it deemed just.

6. A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into.

7. The legislature has the right, as an administrative measure, to appoint a trustee, to take the assets and manage the affairs of a corporation whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted.

8. The resolution of repeal, in this case, was a legislative act, declaring the repeal and not the forfeiture of the charter, and the recitals in it were not in the nature of judicial findings of fact, but the statement of the reasons which operated upon the legislative mind.

9. By the resolution, in this case, the charter was repealed, but the repeal was not to take effect, or be operative, if a specified event should thereafter take place, which event was uncertain. The designation of the two judges, to determine whether the event had taken place, was not a delegation of the power to determine whether the charter should or should not be repealed, but a delegation of the duty of ascertaining whether a fact existed, upon the existence of which the legislature had determind that the repeal should not go into effect.

10. Even if the charter were in existence and unrepealed, the legislature had the power to take away the custody of the assets of the corporation from its directors, and entrust the custody to an officer of the state, pending an investigation into the company's solvency, and the determination of the fact whether the event had happened on which a repeal of the charter would take place. Such power was derived from the reserved power of amending the charter at pleasure.

11. The effect of the action of the legislature was to make S. a trustee, under the exclusive direction and control of a court of equity, and subject to its decrees.

[This was a bill in equity by William K. Lothrop and others against John W. Stedman

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission. 12 Alb. Law J. 354, contains only a partial report.]

and others. The suit was brought in a state court of Connecticut, and was removed on petition of plaintiffs to this court. Heard on motion for a provisional injunction.]

William D. Shipman and William W. McFarland, for plaintiffs.

Simeon E. Baldwin, for insurance commissioner.

SHIPMAN, District Judge. The American National Life and Trust Company was incorporated by the general assembly of the state of Connecticut in the year 1866, under the name of the American National Life Insurance Company. The eighth section of the charter is as follows: "This resolve may be altered, amended, or repealed, at the pleasure of the general assembly." A statute of the state, passed in 1871, relating in part to life insurance companies, and creating the office of insurance commissioner, provided, in substance, that, if it should appear to the commissioner, from any report, valuation, or examination of any life insurance company, that the assets of any such company incorporated by this state were less than its liabilities, the commissioner should, at his discretion, bring a petition to the proper court of probate, praying for the appointment of a trustee, to take possession of the property of such company for the benefit of its creditors, and, if it should appear that the assets were less in amount than three-fourths of the liabilities of such company, the act made it imperative upon the commissioner to bring such petition without delay.

On November 23d, 1874, Mr. John W. Stedman, then and now insurance commissioner of this state, preferred his petition to the proper probate court, alleging that the result of an examination of the financial condition of the American National Life and Trust Company, and a valuation of its policies and assets, disclosed that the assets of the company were less than its liabilities, and less than three-fourths of its liabilities, and praying for the appointment of a trustee. After a full hearing, said court, having called to its assistance a judge of the superior court, in pursuance of a statute of the state, found "that the allegation that such assets are less than three-fourths of the liabilities is untrue, that the allegation that the assets of said company are less than its liabilities is true, and the court further finds that the deficiency is not such that the prayer of the petition should be granted," and dismissed the petition.

The insurance commissioner presented to the general assembly, at their May session, 1875, a special report upon the affairs of this company, and, at the same session, the legislature passed the following joint resolution: "Whereas the American Mutual Life Insurance Company of New Haven has transferred its assets to the American National Life and Trust Company of New Haven, and has ceased business, said last named company assuming the liabilities of said American Mutual Life Insurance Company; and whereas, it appears from the report of the insurance commissioner relating to the affairs of said American National Life and Trust Company, that the liabilities of said company exceed its assets more than four hundred thousand dollars; and whereas, said company has neglected and refused to render to the insurance commissioner a report of its condition and affairs, as required by law; therefore, resolved by this assembly, that the charter of said American Mutual Life Insurance Company and the charter of said American National Life and Trust Company shall, on the first day of September, A. D. 1875, be, and become wholly and absolutely repealed and annulled; provided, however, that, if said American National Life and Trust Company shall, before said first day of September, 1875, supply the deficiency existing in its assets, and receive from the insurance commissioner a certificate showing that the assets of said company are sufficient to satisfy all outstanding and unpaid debts and claims, and to provide a full reinsurance reserve upon its policies in force, to be ascertained as now required by law, then the charters of said companies shall remain in full force, and shall not, by this resolution, be repealed or annulled; provided, further, if there shall be any disagreement between the insurance commissioner and said American National Life and Trust Company, as to the amount of assets, their value and their sufficiency, the chief justice of the supreme court of errors shall, upon the application of either the insurance commissioner or said company, designate one of the judges of the superior court to sit with him, and they shall fully hear the parties and determine the amount of such assets, their value and sufficiency, and their determination shall be conclusive, and they shall thereupon issue their certificate of the amount of the deficiency, if any, to be paid in; and, if said company shall, within thirty days after the delivery of said certificate to the secretary of said company, pay in the deficiency therein stated, this resolution shall become inoperative and void. The decision of said judges shall be made, and said certificate shall be delivered to said secretary, before November 1st, 1875. And provided further, that, in case of a disagreement between the said company and the insurance commissioner as to the value or sufficiency of its assets, and said company does not supply the deficiency in its assets on or before the first day of September, 1875, the insurance commissioner shall then and thereupon, on said first day of September, 1875, take possession of all the assets, books and papers of said company, and hold the same subject to the order of said chief judge, and to be disposed of as provided by law." At the same session, the legislature passed

a statute in regard to the disposition of the assets of life insurance companies upon the repeal of their charters, providing, in substance, that the title of the assets of any such corporation should vest absolutely, and in fee simple, in the insurance commissioner, who should hold and dispose of the same for the use and benefit of the creditors and policy holders of such company, and such other persons as may be interested in such assets, and divide the avails in a specified order, and be subject to the direction and control of the superior court for the county within which the corporation should be situate. The American National Life and Trust Company did not, prior to September 1st, 1875, supply, to the satisfaction of the commissioner, the alleged deficiency in its assets, and disagreed with that officer in regard to the amount, value and sufficiency thereof. He made preparations to take possession of the property of the company on September 1st, 1875, and prior to the investigation by the chief judge and his associate. The company thereupon brought a petition before the superior court for New Haven county, to enjoin the commissioner against his proposed action. A temporary ex parte injunction was granted, which was dissolved by his honor, Judge Beardsley, on motion of the insurance commissioner, and after a hearing of the parties. A temporary and ex parte injunction has also been granted by Judge Robinson, of the court of common pleas, upon the petition of the insurance commissioner, to restrain the directors and executive officers of the company from disposing of its assets.

Sundry citizens of the state of New York who hold and own policies of insurance which have been issued by said company, or which it is liable to pay by virtue of lawful contracts heretofore entered into, have brought their bill in equity before this court, against the commissioner and said corporation, alleging its solvency, praying that the commissioner be enjoined against taking possession of said assets, and that the company be enjoined against delivering such possession, mainly and principally upon the ground that the resolution of the general assembly which has been quoted, and which is the foundation of the authority of the commissioner so to take possession, is void and of no effect. The reasons which are urged in support of this position will be stated hereafter. The complainants have also moved for the issuing of a provisional injunction to restrain the commissioner from taking possession of the assets of the company until the final hearing of the bill, and, upon this motion, counsel for the complainants and for the commissioner have been heard at length. The only question now to be decided is, whether a provisional injunction should be granted.

The general principles of law which are involved in this case are of great importance, and concern pecuniary interests in this country of no ordinary magnitude, and would justify me in taking more time for the consideration of this motion than I am now able to give. It is proper that the hearing which will soon take place before Chief Justice Park and his associate, in regard to the value of the assets of the company, should not be embarrassed by the pendency of any undecided motions in this court, and it is due to the policy holders in the company, that they should be speedily apprised by the decisions of courts in regard to the management of its property. These considerations demand a prompt decision, and prevent anything more than a succinct statement of the principles which I deem applicable to the case.

It is obvious, at the outset, that the question which I am asked to determine has always been considered by courts one of grave importance. "The right of the judiciary to declare a statute void and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave, that it is never to be exercised except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving, beyond all doubt, that it is so." Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, per Black, J. It should be a very clear case to justify a court in deciding that an act of the legislature is invalid, upon a motion for a provisional injunction—a proceeding which addresses itself particularly to judicial discretion.

The defendant corporation is a stock corporation authorized to issue life policies upon the mutual plan of insurance, but it is not strictly a mutual insurance company, and the policy holders are not necessarily members of the corporation, and have no right to participate in its management. The complainants appear before the court only as creditors of the company. Being citizens of the state of New York, they have a right to bring this bill against the defendants, citizens of Connecticut, and their interest as creditors of the corporation, and cestuis que trust of the fund which is now in the control of the directors of the corporation, entitles them to maintain their suit, if they have suffered injury. The principle, that a stockholder of a corporation cannot maintain a bill in equity against a wrong-doer, to prevent an injury to the corporation, unless it shall be averred, and shall affirmatively appear, that the corporation has refused to take measures to protect itself, does not extend to a bill which is in good faith filed by a creditor.

It is suggested, that the questions in this case are the same as those which are stated in the petition of the insurance company now pending in the superior court, and that they have already been virtually passed up-

on by the decision of Judge Beardsley. While the decision of any judge upon a motion for a temporary injunction is not a controlling authority, yet it is true, that the same general questions which are here presented were discussed in the argument before Judge Beardsley, and the fact that an eminent judge of this state had, in effect, refused the injunction when it was urged by the insurance company, should properly lead me to exercise caution before I granted it in an action which, though brought by the policy holders, the affidavits on file in this case tend to show was instituted at the instance of the company.

The counsel in the case are not seriously at issue as to the principles which are applicable to the repeal of charters by legislatures. A charter is a contract between the state and the corporators, and the corporation takes the grant subject to the limitations which are contained in the act of incorporation. If no power of repeal is reserved, none can be exercised; but, when the charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily, and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and, in such case, a repeal, like other legislative acts which do thus palpably violate the principles of natural justice, may be reviewed by courts. The power of the legislature, therefore, is not unlimited, for the private rights of persons are not subject to an unjust and despotic exercise of power by a legislature, without means of redress. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers." Loan Association v. Topeka, 20 Wall. [87 U. S.] 663. It is always to be presumed that the legislature has exercised its great powers for adequate cause, and the extreme caution with which legislatures ordinarily act upon the subject of the repeal of charters fully warrants such a presumption.

It is to be observed, that this charter, like the majority of Connecticut charters, provides that it may be repealed "at the pleasure of the general assembly." It is unlike the charters in the Pennsylvania cases of Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, and Com. v. Pittsburg & C. R. Co., 58 Pa. St. 46, which provided, that, if the companies should abuse or misuse their franchises the charter should be subject to repeal. There is no question here, whether the legislature is or is not the final judge whether the contingency upon which the authority to repeal is based has occurred. The language of this charter is also unlike the charter which was examined in Allen v. McKean [Case No. 229], which provided that the legislature could alter, limit, restrain or annul the powers conferred, and in which case the court held that a right of absolute repeal was not reserved. The right of repeal is here expressly reserved, is to be exercised at the pleasure of the general assembly, and is subject only to the limitation which I have suggested.

It is not material whether the court of probate had or had not decided that it was not expedient to appoint a trustee. That court simply found that the company was insolvent, but that its assets were not less than three-fourths of its liabilities. The finding or the opinion of the court did not debar the legislature from taking such legislative action as it deemed just.

A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from, or divided unfairly and unequally among, the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights. "The capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied. * * * A law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the state, would as clearly impair the obligation of its contracts, as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts." Curran v. Arkansas, 15 How. [56 U. S.] 312. The legislature has also the right, as an administrative measure, to appoint a trustee, to take the assets and manage the affairs of a corporation whose charter has been repealed, in conformity with the general, just rules which it has prescribed, or with the rules of a court of equity, if no statutory provisions have been enacted. If no trustee is appointed by the legislature, "a court of equity which never allows a trust to fail for the want of a trustee, would see to the execution of that trust, although, by the dissolution of the corporation, the legal title to its property had been changed." Curran v. Arkansas, cited supra. The complainants do not controvert, in the main, the principles which have been stated, but they contend, that, while the legislature had the right to repeal this charter, it has not been in fact repealed; and, if it

has been repealed, that the provisions by which the commissioner was appointed to hold the assets subject to the order of the chief judge, who does not act as a judge, but merely as a committee, and whose directions are not subject to appeal or review, and the provision that the title to the assets shall be vested in the commissioner, are invalid, and that the resolution is void.

(1) It is contended that the preamble is void, because the legislature has no power to find facts which may affect private rights, and that the preamble is so interwoven with the resolution, that, being void, the resolution is void also. It is true, that the facts recited in a preamble of a private statute are not evidence, as between the person for whose benefit the act was passed and a third person, and that a legislature has no power to find facts by legislative enactment, so as to be evidence in suits against persons who were not applicants for the act. Elmondorff v. Carmichael, 3 Litt. (Ky.) 472; Parmelee v. Thompson, 7 Hill, 80. This is an obvious rule of evidence, but it has no application here. If, as is admitted, the legislature had the power to repeal the charter, it had the power to state the reasons which induced it to act. A statement of the reasons was not indispensable to the validity of the repeal, but was proper for the information of the public and of the corporation. This resolution is not a judicial act, finding that a forfeiture of the charter has taken place. If it was, it could well be urged, that a legislature has not ordinarily judicial powers, and that the attempt to exercise judicial functions is void; but, the resolution is a legislative act, declaring the repeal and not the forfeiture of the charter, and the recitals are not in the nature of judicial findings of facts, but the statement of the reasons which operated upon the legislative mind. "The inquiry into the affairs or defaults of a corporation, with a view to continue or discontinue it, is not a judicial act. No issue is formed. No decree or judgment is passed. No forfeiture is adjudged. No fine or punishment is imposed. But an inquiry is had in such form as is deemed most wise and expedient, with a view to ascertain facts upon which to exert legislative power, or to learn whether a contingency has happened upon which legislative action is required." Crease v. Babcock, 23 Pick. 344.

(2) The complainants insist, that the legislature must of itself determine whether an enactment shall or shall not be a law, and cannot delegate the power to make or repeal laws; and that the attempted repeal of this charter is delegated to the insurance commissioner, and is, therefore, void. The resolution provides, that the charter shall be repealed on September 1st, 1875, provided, if the company shall, before that day, receive a certificate that the deficiency in its assets has been supplied, then the charter shall remain in full force; and, in case of a disagreement between the commissioner and the company as to the amount of its assets, the chief justice and his associate shall determine and state the amount to be paid in, and, if the amount so found shall be paid within thirty days, the resolution shall be inoperative and void. I am inclined to the opinion, that, by this resolution, the charter was repealed, but the repeal was not to take effect, or be operative, if a specified event should thereafter take place, which event was uncertain. The commissioner, subject to an appeal to the chief justice and a judge of the superior court, was to determine whether that event had taken place. The legislature, for itself, determined and enacted that the charter should be repealed, provided an event did not occur in the future. The ascertainment and announcement that the event had happened, the legislature entrusted to an officer, or a committee, whom it designated. The legislature delegated to no one the power to determine whether the charter should or should not be repealed. It delegated the duty of ascertaining whether a fact existed, upon the existence of which it had determined that the repeal should not go into effect. "A valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. It is a law in praesenti, to take effect in futuro. The event or change of circumstances must be such as, in the judgment of the legislature, affects the question of the expediency of the law. The legislature, in effect, declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to nobody to judge of its expediency." Barto v. Himrod, 8 N. Y. 483, per Ruggles, C. J.

(3) The complainants further say, that the charter is not repealed until after the decision of Judge Park and his associate; that the legislature has no power, either before or after the repeal, to take the assets of an insurance company out of the hands of its officers, and to transfer the custody of the property to a third person, who is to hold them subject to the order of an individual acting not as a judge, and exercising no judicial functions, and not necessarily guided by the principles of law, and from whose order there is no appeal; and that the resolve is a special and personal statute, prescribing an exceptional and peculiar rule of conduct upon this single corporation, and, therefore, unjust, and in violation of legislative powers. The original resolution which was reported to the legislature contained the first proviso only. As reported, it manifestly provided that the charter should be repealed on September 1st, 1875, unless, upon the happening of a certain event, the repeal should not go into effect. An amendment was added, by which, in case of disagreement between the commissioner and the insurance company, another committee was appointed, to ascertain the amount of deficiency, if any, and,

if the amount so ascertained should be paid in, the resolution should be inoperative and void. It is a question which it is not now necessary to determine whether the charter is already repealed, or whether its repeal occurs at the expiration of the time which is limited for payment of the deficiency, if any there be, which may be found by the two judges, and upon non-payment of the amount. I have already suggested that the true construction is, that the charter is repealed, to take effect or not to take effect, upon the happening of an uncertain event. If the charter is repealed, there can be no doubt of the power of a legislature to appoint some person to act merely as custodian of the assets of the corporation. But, assuming that the charter is now in existence and unrepealed, I am of the opinion that the legislature has the power if in their opinion the public interests and the rights of the creditors of a particular corporation demand it, to take away the custody of the assets of such corporation from its directors, and entrust the custody to an officer of the state, pending an investigation into the company's solvency, and the determination of the fact whether the event has happened upon which a repeal of the charter will take place. It is apparent, from an inspection of the resolution, that the legislature deemed the corporation insolvent, and that the liabilities exceeded the assets $400,000, and also was of opinion that the corporation had not complied with the requirements of law, and that the affairs of the company were in so precarious a position that it was proper to take the unusual step of repealing the charter. But, the legislature was also willing to give the company an opportunity of making good the deficiency, and further was willing not to permit the decision of the insurance commissioner upon the question whether the deficiency had been supplied, to be final, but to entrust the final hearing and determination in regard to the sufficiency of assets to two persons whose judicial position peculiarly adapts them to pass upon disputed questions of fact, and whose official character precludes the suspicion that injustice might be done, and should assure the creditors that their rights are to be guarded. That investigation would necessarily consume time. The question presented itself—do the interests of the cestuis que trust in the property of the company require that, during the investigation, the assets, which, in our opinion, have become seriously impaired, shall remain in the hands of the directors? The legislature decided to place the assets, for the time being, in the custody of an officer of the state, and derived their power so to do from the general power which had been reserved over the affairs of this particular corporation—that of amendment of its charter at its pleasure. "Whatever might be true, if the charter was a close one, the general assembly could impose upon the defendants any additional condition or burden connected with the grant, which they might deem necesary for the protection or welfare of the public, and which they might originally and with justice have imposed." English v. New Haven & N. Co., 32 Conn. 243; Inland Fisheries Com'rs v. Holyoke Water-Power Co., 104 Mass. 446. It is not necessary that the resolution should be styled an amendment. Bishop v. Brainard, 28 Conn. 298. The legislature has reserved to itself the control of this charter, and can modify it to meet any exigency which may arise in the affairs of the corporation; and, when the legislature has determined that the pecuniary interests of the creditors are so imperilled that the necessity of repealing the charter may arise, it would seem that the legislature has the power to provide that the officer who has the oversight of all the insurance companies of the state is the proper person to have the exclusive custody of the assets of this corporation, and act as its treasurer for the time being. The legislature could originally have imposed this condition upon the company. They can impose it at any time when they deem it necessary for the protection or welfare of the corporation.

It is, also, earnestly contended, that the resolution directs the commissioner to hold the assets subject to the order of a committee not acting judicially, and from whose order there is no appeal, and who, by his direction, is not necessarily acting in conformity with principles of law. It is true that the chief justice will act as committee or agent of the legislature, and not strictly in his judicial capacity; and, if the resoution and the general statute in regard to life insurance corporations whose charters have been repealed, placed the assets under the control of a committee, to be disposed of as the committee pleased, and without the control of the courts of the state, such acts would properly be the subject of severe criticism, and might be declared to be inoperative. This resolution simply empowers the commissioner to hold the assets. He cannot sell or dispose of them under the resolution, but is merely their custodian. The chief justice has only authority to notify the commissioner either to return the assets to the company, or that the event has not taken place upon which the repeal of the charter is avoided, after which the commissioner is to be governed by the general statute. He then becomes a trustee under the exclusive direction and control of a court of equity, and subject to its decrees. The assets are not to be managed or disposed of, and the avails are not to be paid, in accordance with the order of a committee, but in pursuance of the general statute and under the direction of the superior court—a court of general jurisdiction and of full chancery powers. The weight of the complainants' argument bore upon this clause of the resolution, which they considered most unjust and prejudicial to their interests. I think that they misapprehend the nature of

the powers of the chief judge over the assets, which is so limited that there is no interference with the rights of creditors.

Upon the argument of the motion, the provisions of the general statute were criticised by the complainants. The bill does not ask for the interference of the court upon the ground of the invalidity of the statute, but the court is asked to prevent the commissioner from taking possession of the assets under the authority of a resolution of the general assembly which is alleged to be void. I do not deem it, therefore, incumbent upon me, at this time, to consider the character of the statute.

The suggestion which has been made in regard to the control of the legislature over those charters in which a power of amendment or repeal has been reserved, applies to the objection that this resolution is a special and peculiar law by which the rights of this corporation are to be jeopardized, differing from the law applicable to all other corporations in like condition. All insurance companies in Connecticut are created by special charter. Each company is under the particular supervision of the legislature, and is liable, in case of insolvency or malfeasance, to be controlled by such action applicable to the special case, as shall serve to protect creditors, or stockholders, or the public.

Sundry affidavits were read for the purpose of showing that Mr. Stedman had not informed the company, prior to September 1st, of the amount of the alleged deficiency, and had not given the company an opportunity to supply the required amount, and had not acted justly towards the company since the passage of this resolution. Counter affidavits were presented by the commissioner. If any steps were to be taken by the commissioner in advance of the action of the company, prior to September 1st—in regard to which I express no opinion—I am not satisfied that the commissioner failed to do whatever the resolution or the statutes, or the duty which he owed to the corporation or to the public, imposed upon him. The corporation does not seem to me to have suffered in consequence of a neglect of the commissioner to keep it informed of his views and wishes.

The motion for a provisional injunction is denied, and the restraining order now in force is vacated.

LOTHROP, The GRACE. See Case No. 5,653.

LOT OF JEWELRY (UNITED STATES v.). See Case No. 15,626.

Case No. 8,520.

LOT OF LEAF TOBACCO.

[The case reported under above title in 2 Ben. 76, is the same as Case No. 15,627.]

LOT OF LEAF TOBACCO (UNITED STATES v.). See Case No. 15,627.

LOTRIDGE (UNITED STATES v.). See Case No. 15,628.

Case No. 8,521.

LOTTIMER et al. v. LAWRENCE.

[1 Blatchf. 613.] [1]

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

CUSTOMS DUTIES—ACT OF 1846—THREAD-LACE—REPEAL ACT 1842.

1. Thread-lace, made wholly by machinery, composed of linen and cotton, first introduced into this country since the tariff act of July 30, 1846 (9 Stat. 42), took effect, and invoiced and known in trade as thread-lace, falls under the head of "thread-laces" in Schedule E, and is subject to a duty of 20 per cent. ad valorem.

[Cited in Benziger v. Robertson, 122 U. S. 213, 7 Sup. Ct. 1171.]

2. The 20th section of the tariff act of August 30, 1842,—5 Stat. 565,—although not repealed by the act of 1846,—see Morlot v. Lawrence [Case No. 9,815],—applies only in cases where an article has not been specially provided for by the act of 1846.

[Cited in U. S. v. United States Tel. Co., Case No. 16,603.]

This was an action against [Cornelius W. Lawrence] the collector of the port of New-York, to recover back an excess of duties paid by the plaintiffs [William Lottimer and Alfred Large,] on an article invoiced as thread-lace, and made wholly by machinery. The plaintiffs claimed that it was chargeable with duty of 20 per cent. ad valorem under Schedule E of the tariff act of July 30, 1846 (9 Stat. 47) as falling under the head of "thread-laces." The duty charged was 25 per cent. ad valorem under Schedule D. The facts of the case and the ground taken by the defendant appear by the opinion of the court. A verdict was taken for the plaintiffs, subject to the opinion of the court on a case to be made.

Elias H. Ely, for plaintiffs.

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

NELSON, Circuit Justice. It is admitted that the article in question in this case is composed of linen and cotton, and it is supposed, therefore, by the defendant, that it comes within the enumeration in Schedule D of the act of 1846 of "manufactures composed wholly of cotton, not otherwise provided for," when that is taken in connection with a clause in the twentieth section of the act of August 30, 1842 (5 Stat. 565). That section provides, that "on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable.

We have already decided at this term, in the case of Morlot v. Lawrence [supra], that this twentieth section of the act of 1842 is still in force, not having been repealed, either directly or by necessary implication, by the

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

act of 1846. But the evidence in this case shows, and it was conceded on the trial, that the article in question here was first introduced into the country since the act of 1846 took effect; and that it is invoiced, and has always been known in the trade, under the denomination of thread-lace. That being so, it falls directly within the description of "thread-laces" in Schedule E.

The goods, then, coming within the list of articles enumerated in that schedule, the case is not one that can be aided by the twentieth section of the act of 1842; because, that section applies only in cases where the article in question has not been otherwise provided for. If it has been specially provided for, that excludes any constructive designation by operation of the twentieth section. Judgment for plaintiffs.

Case No. 8,522.

LOTTIMER v. REDFIELD.

[Cited in Greenleaf v. Schell, Case No. 5,782. Nowhere reported; opinion not now accessible.]

Case No. 8,523.

LOTTIMER et al. v. SMYTHE.

[17 Int. Rev. Rec. 12.]

Circuit Court, S. D. New York. Nov. 14, 1871.

CUSTOMS DUTIES—ACT 1864—SILK CRAPES—PIECE SILKS—SILK NOT OTHERWISE PROVIDED FOR.

This action was brought in 1867 to recover an excess of duty of 10 per cent., collected by the defendant as collector of the port of New York on silk crapes. The defendant claimed said goods were liable to 60 per cent. duty, under the 8th section of the tariff act of 1864 [13 Stat. 210], as "piece silks." The plaintiff claimed the goods were subject to a duty of 50 per cent. under the latter clause of the same section, as being "manufactures of silk not otherwise provided for." Verdict for plaintiffs.

[Cited in Morrison v. Arthur, Case No. 9,842; Arthur v. Morrison, 96 U. S. 110.]

[Action at law by William Lottimer to recover of Henry A. Smythe, collector, an excess of duty paid on certain goods. Tried before a jury.]

Defendant's counsel offers in evidence the opinion of the board of appraisers of the New York custom-house, dated September 15, 1864. (Objected to.) Offered, not as deciding the law, but as a fact that the official board of appraisers, in 1864, passing on this question, whether silks in the piece included crape, decided that it did. Excluded. Defendant excepts.

John Van Arsdale called by the defendant. Sworn. Defendant's counsel offers in evidence the entry made by William Lottimer & Co., the plaintiffs, by the steamship City of Limerick, dated New York, 24th July, 1863. Objected to. Admitted. Plaintiffs except. Defendant's counsel reads from the entry:

No. 601,	1 case silks.
602,	1 case ditto.
603,	1 case ditto.

Also offers in evidence, accompanying the entry, the invoice, and reads therefrom:

No. 601,	25 packets 4-4 folded crape.
602,	20 packets 4-4 folded crape.
	15 " 6-6 "
603,	10,264 1-2 yards 3-4 rolled crape.
	12,354 " "
	12,162 1-2 " "

Also the classification in the custom-house on the invoice:

"Manf. silk, costing under one dollar per square yard, 30 per cent."

On the entry is the classification return from the appraiser's office: "Return—Silks under one dollar."

Q. Did you look up these several invoices and entries? A. Yes, sir. Q. Are these all you could find of the firm of Lottimer & Co. after the act of 1861 [12 Stat. 178], and prior to the act of 1864 [supra]? A. Yes, sir. Q. You are an officer in the custom-house? A. Yes, sir. Q. You are in charge of the record room, where all these papers are kept? A. Yes, sir.

Defendant's counsel offers entry by the steamship Kangaroo, dated 21st January, 1863:

No. 2,009,	1 case silk crape.
2,010,	1 case silk crape.
2,011,	1 case silk crape.
2,012,	1 case silk crapes and neckties.

On the entry is the return from the custom-house: "Silks, under one dollar, from 40 to 30 per cent."

Defendant's counsel also puts in evidence the invoice accompanying the entry:

No. 2,009,	23	packets	4-4 folded crape,	22 inches wide.
	13	"	"	21 inches wide.
	9	"	"	21 inches wide.
2,010,	9	"	"	allow 1-2 yard, 26 inches wide.
	16	packets	4-4 folded crape.	
	20	"	"	27 inches.
	3	"	"	28 1-2 inches.
2,011,	32,623	1-2 yards	3-4 folded crape,	36 inches wide.
	28,458	"	"	36 inches wide.
	20,330	"	"	38 inches wide.
2,012,	28, 39	yards	folded crape	42 inches wide.
	47[illegible]	"	5-4	38 inches wide.
	3	packets	4-4	28 1-2 inches wide.

Defendant's counsel also offers the invoice by the steamship Asia, 15th February, 1863:

Z. 600, 1 case silk crapes.
6 pieces 4-4 colored crape.
"Return silk under one dollar, 1,319 yards, $247."

Also puts in evidence entry of William Lottimer & Co. per steamship City of London, dated 17th May, 1864:

ZZ. 2,033, 1 case silk crape.

Return from the appraiser's office: "Silks under one dollar, 1,620 yards, $1,486.40."

Also the invoice accompanying the entry, dated May 4, 1864, describes the crapes in this way:

Z. 2,033, 163 yards ground Aerophine.
152 1-2 yards light ground Aerophine.
164 yards Bische.
223 yards drab, 99 Vert novo.
160 yards green.
32 yards rose.
99 yards blue.
165 yards Lyon.
160 yards violet.
267 yards, 1,944 1-2 maize.

All under the general head of "Aerophine."

English crapes under one dollar per square yard.

Also puts in evidence the entry by the steamship the City of Washington, dated November 30, 1863, entry of silk crape. Also the invoice describing it as folded crape and folds of rolled crape. Eight entries of folded crape and five entries of rolled crape. The entry is "one case silk crape."

Q. Did you bring up with you all the entries of William Lottimer & Co. you could find between the dates named? A. Yes, sir.

(These entries and invoices are taken subject to the exception of plaintiffs' counsel.)

Defendant's counsel also offers specific entries of A. T. Stewart & Co. and of Lord & Taylor, and other houses than the plaintiffs, of the same form, entered as silk crape—invoice calling it folded and rolled crape—classified as silk. This evidence is not offered with the intention of impeaching or contradicting any witness. Objected to. Excluded. Defendant excepts.

Defendant's counsel puts in evidence the samples shown to the witnesses, as illustrating the testimony of the witnesses who have spoken of them. Plaintiffs' counsel objects to anything which is not black crape. Admitted. Exception. Defendant rests.

Plaintiffs' counsel calls Harrison Millard, who being duly sworn, testified:

By Mr. Curtis: Q. Are you a clerk in the custom-house? A. Entry clerk; yes, sir. Q. How long have you been in that capacity? A. Four or five years. Q. Can you state definitely when you went into that position? A. I could not remember now; it is four or five years ago that I held the position of entry clerk; I have been seven or eight years in the custom-house in other departments. Q. You were there in 1867 as entry clerk? A. Yes, sir. Q. I wish to know according to the custom—the practice in the custom-house—what is the first step a merchant, or his agent, has to do when he comes to make an entry? A. He gives the entry to the entry clerk to pass—that is the first step—containing the invoice and the bill of lading, and the entry made out in due form. Q. Is that paper (handing invoice per City of Baltimore to the witness) what is commonly known as an entry? A. Yes, sir. Q. Suppose the invoice, which a merchant or his agent brings to the custom-house, specifies folded crapes, how is it necessary that he should enter them on the entry paper? A. Folded crapes. Q. Suppose the invoice specified folded crapes? A. You must enter them according—

Defendant's counsel objects on the ground that the form of the entry is prescribed by statute, and cites from Bradley's Digest of the Statute, (sections 2, 3, p. 355), being the act of March 2, 1799 [1 Stat. 657]. Objection sustained. Exception.

Q. Suppose that when the entry specifies folded crapes, when the invoice specifies folded crapes, and the merchant enters them as silk crapes—of what does that inform the entry clerk?

Objected to.

The Court. I cannot conceive that this witness is any more competent to speak of that than a juror.

Mr. Curtis. He is the officer whose duty it is to pass the goods, if the entry is in conformity of law and the requirements of the office.

The Court. Here is a witness called to speak of a transaction in 1867, about the time when he entered upon his duties, and he is asked in reference to an entry of folded crapes, what the language of "silk crapes" informed him. He is no more competent to speak of that than a juror.

Q. Suppose the invoice specifies folded crape and he enters them as crapes, or as folded crapes, would you or not pass the entry in that form?

Objected to.

The Court. The question whether it is a compliance with the law, is a question of law.

Q. When a merchant makes an offer to enter goods at the custom-house by bringing his invoice and his entry, can he or not get possession of his goods until he has paid the highest duty which the entry clerk may require him to pay, according to the specification of the goods in the entry?

Defendant's counsel objects, on the ground that it is a question of law. Objection sustained. Plaintiffs' counsel makes an offer of proof. The court stated that it could only rule on questions. Plaintiffs' counsel excepted.

Mr. Curtis. I offer to prove by the entry clerk, who was in the office at the time the entry in question was made, that it is the practice at the custom-house to require a merchant offering to make an entry of crapes to specify in his entry whether they are made of silk or some other material; that when he has described them as silk crapes in his entry he is required to pay the duty—the highest duty that the law levies on silk goods—and that he cannot be allowed to make the entry until he has paid that highest duty. I further offer to prove by the same witness, that unless the party specifies in his entry in the case of such goods as crapes the material of which they are made, he would not be allowed to make the entry. I further offer to prove by the same witness, that if the entry were to describe the goods as silk crapes, and the party were to offer to pay fifty per cent. duty under the act of

1864, he would not, according to the construction of that act then acted upon in the custom-house have been allowed to enter them at all. That is the substance of the evidence which I offer.

Mr. Davis. Do I understand that that is received by the court as an offer?

Mr. Curtis. It is stated simply as the purpose for which I wish to use the witness.

The Court. Put your questions; if objected to I will rule upon them.

Mr. Curtis. Does your honor decline to rule upon this?

The Court. There is no question upon which to rule.

Plaintiffs rest. Testimony closed.

B. L. Ludington and Geo. Ticknor Curtis, for plaintiff.

Noah Davis, Dist. Atty., for defendant.

WOODRUFF, Circuit Judge (charging jury). The controversy between the parties to this suit is said to be, and no doubt is of importance. An importance extending beyond the small amount which is involved in this particular action. It is important so far as the government is concerned, because it affects the revenue derivable from importations, which are shown on this trial to be of a very considerable amount. It is important, so far as the plaintiff and other importers are concerned, because it affects the amount which they are to pay to the government on importations of large quantities of goods. It is also proper to say that it is a controversy which, although it involves a conflict of interest and a conflict of opinion, is to be viewed not as hostile in any other sense. The government asks of its citizens and residents who import articles of foreign growth and manufacture, that they contribute to the revenue of the government, whatever by law is required; the government should seek, and I trust its officers do seek that and nothing more; and the defendants I trust, as citizens, on their part are willing to pay what the law requires. They ought not to be required and are justified in not expecting to be required to pay more. And, therefore, when a difference has arisen between the government officers and the defendants as to what is the true amount to be paid, it is proper calmly and dispassionately to consider what the government has a right to require, and what it is the duty of the merchants to pay. Upon such a conflict of opinion (and I trust in the spirit I have suggested to you) the plaintiffs here have brought their action to recover back what they claim to be an excess of duty exacted from them by the defendant, when in the office of collector of this port, upon importations of crapes. It has been correctly stated that when the defendant in his official position required, as a condition of giving up the government control and custody of the plaintiffs' goods, that they should pay a sum of money which was assessed thereon, and the plaintiffs objected and protested, and complied with all the proper formalities (which are not now called in question) but submitted and paid, the defendant receiving the plaintiffs' money is bound to justify his exaction; and in this case the defendant has the burden of showing to you, so far as you are called upon to pass upon the facts, that the exaction that he made was a lawful exaction. He seeks to do this by appealing to the act of congress, which has been repeatedly adverted to in your hearing, and he claims that under the law the exaction which he made was not more than was due to the government which in that behalf he represents. The clause of the statute referred to is the section and paragraph which imposes on all dress and piece silks, ribbons and silk velvets of which silk is a component material of chief value, 60 per cent. ad valorem. I understand the defendant or his counsel to rest his justification solely upon that language, and even upon a few words of that language "on all piece silks;" while on the other hand the plaintiff insists that the language "piece silks" does not describe the goods in question at all, and that although they were subject to duty, it is to another duty, at another rate per cent. described in a subsequent clause of the section "on all manufactures of silk, of which silk is the component material of chief value." That presents in very broad, general terms the controversy between these parties, namely, whether the goods that were imported by the plaintiff and which were the subject of the exaction complained of are "piece silks" within the meaning of the first-named clause of this statute, or whether, being manufactured of silk, as it is conceded they are, they are without that description and left to be included in the more general final summing up of the section under the terms "all manufactures of silk not otherwise provided for."

In general the construction and effect of a statute devolves upon the court as matter of law. But sometimes the subject to which the statute relates is of such a nature that a knowledge of facts not appearing in the statute is necessary in order to a just application of the terms of the act—facts which the court cannot judicially know, and which it is for the jury to determine upon the evidence. In other words if there were nothing in the statute before us that involved anything but that which the tribunals of justice were bound judicially to know and take cognizance of, no question could arise which would involve an inquiry by the jury. But it is true of some statutes, and especially or more frequently true of statutes regulating imports that there should be a knowledge of extrinsic facts outside of the statute, in order to give an interpretation and application of the statute to the subject matter of the controversy. That leads to the condition in which this case now stands. The more

general question, as I stated to you, is whether this statute imposes a duty of 60 per cent. upon these goods? The court can interpret the statute when the facts are ascertained; but the statute employing terms the meaning of which the court does not necessarily know, a question of fact arises which is brought here for your determination. That question of fact has been correctly stated to you by both the counsel: Are the goods which were the subject of the exaction now complained of "piece silks" in the sense in which that term is used in the statute, or are they left unprovided for by that language, and therefore do they fall within the concluding paragraph "manufactures of silk not otherwise provided for." I say that is the question, and it is to be answered by an inquiry couched in a somewhat different phrase—are the goods in question "piece silks?" Are they included within the term "piece silks" according to the known commercial use of these terms. The statute uses these terms in their commercial sense. Statutes regulating duties on imports are intended to regulate and control or affect trade and commerce, and are addressed not merely to revenue officers but to merchants and dealers whose interest and whose business are to be affected by those laws—those who import and deal in the subjects upon which duties are imposed—and therefore descriptive terms employed in such statutes are to be taken according to their known signification in trade and commerce. But in reference to this particular case another observation and another rule becomes important; for I understand it to be claimed on the one side and conceded upon the other that the term "piece silks" is not in commercial use as a technical designation of any silks whatever. Another rule therefore becomes important in this particular case, viz., that when general terms are used the terms are to be taken and applied in their ordinary and comprehensive meaning unless it is shown (as I understand it is not claimed to be shown in this instance), that they have in their commercial use acquired a special and restricted meaning. That is to say if "piece silks" is a term of general meaning in its ordinary acceptation and it be not shown that it is a term used in commerce to designate anything save only that the goods are silks, then it is to be taken in its general and natural signification to embrace all silks imported in the piece. I understand it to be also claimed on the one hand and conceded on the other that the term as used in the statute embraces all silks manufactured and imported in the piece, and as distinguishing goods thus imported from goods that are imported in a set form or pattern adapted to a particular and specific use. I understand the counsel for the plaintiff, and in this he exhibits great candor and fairness towards the defendant, to concede that the term "piece silks" does mean silks imported in the piece, and that it does not describe distinctively any kind of silks so imported.

Mr. Curtis. Any one kind.

The Court. Any one kind of silks so imported; and further, that in commercial language there are no silks known as "piece silks." I understand the counsel even to go another step, and there is no doubt about it, that the goods in question are made of silk and are imported in the piece. Now, gentlemen, in this view of the meaning of the term "piece silks" and the absence of any known technical meaning to that term in trade or commerce, I feel constrained to say that it includes all silk goods made and imported in the piece according to its general and its ordinary signification, and that it therefore embraces crape, unless you are satisfied that crapes in trade and commerce—among men concerned in the business of importing and dealing in crape, are not known as silks. Unless crapes are shown to your satisfaction not to be known as silks then (under the concession that crape is imported in the piece and is made of silk), crapes fall within the designation of piece silks and were liable to the duty exacted by the defendant. The defendant on this subject, as you will have perceived, claims, in relation to this term "crape," that these goods, the subject of this importation, are known in trade and commerce as a particular kind of silk, and that the term "crape" is a term of discrimination among silks and nothing else; that although it may be true that popular language (used by the ordinary public in speaking of these goods) employs the term "crape" and nothing else, yet that it is so employed only as a means of discrimination between that and other kinds of silk goods, and that although the consumer when he wants that kind of goods inquires for crape, he does what the consumer does who wants satin, viz.: he inquires for satin; just as also when the consumer wants taffeta, he asks for it by its specific name, and not by its general designation, silk; when he wants gros de nap, he asks for gros de nap; when he wants canton crape, he asks for canton crape, and so through all the long list of silk goods imported in the piece which it is not worth while, nor indeed is it in my power to enumerate. The claim is, that the term "crape" is like the terms "taffeta" "gros de nap," "poult de soit," "canton crape," and various others that have been named here. That although these are distinctive terms, they are distinctive only as a discrimination between kinds of silk, according to the use of that term among importing merchants and those who deal in them, and those to whom the tariff laws are addressed. That they are not used as definitions withdrawing them from the more general term silks as it is used in this country; but that each and all of them, whether designated by one name or the other, are shown by the testimony to be known by those who are engaged in the busi-

ness of importing and dealing in these goods as silks, and each is so known as much as either of them. That presents I think with distinctness and with as much clearness as at present I can, the view which the defendant takes of this subject—that the goods are imported, that they are made of silk, that they are known among commercial men as silks and are imported in the piece, and that although it is true as appears from the evidence that they are more popularly known as "crape," as another kind of silk is known as "taffeta," and another kind as "gros de nap," and another kind as "canton crape," and so on through the list, yet that these are subordinate terms which have grown into use for the reason that persons wishing to get a specific kind of silk employ the term which is best suited to indicate the specific kind of silk goods which they want, and hence have passed into popular use, which is not to be made a test of the interpretation of the statute. On the other hand the plaintiffs insist that crapes are not known in trade and commerce at all as silks; and the counsel for the plaintiffs are perfectly correct when they insist that the question to be determined here does not depend on the mere fact that crapes are made of silk, or that they are made chiefly of silk combined with gums, which the witnesses say are used for stiffening these and other silks; that if the article is not known in trade and commerce under the designation of silks, then it is quite immaterial for the purposes of the claim of the plaintiffs here whether they are made of silk or not. The amount of duty is to be determined by the commercial designation. I say on that subject that the claim of the plaintiffs is entirely correct, nor is it in conflict with the claim which I have stated on the part of the defendant. Both come to the question whether these goods are known in trade and commerce, and especially among those who import and deal in them, as silks or not. That presents precisely the question of fact; it brings this controversy down to a very narrow point, which you are to pass upon in view of the evidence, which I shall not recapitulate.

It is claimed by the defendant that before the particular act of 1864 was enacted, these goods were known and imported as silks, and duty paid on them as silks, and that these plaintiffs concurred in the construction which was given to the previous law, and without objection paid the duty upon them as silks. You have heard the comments of counsel upon both sides in regard to that subject. The plaintiffs are not concluded by it. If they were under a mistake, it could be corrected. It is not claimed on the part of the defendants that the plaintiffs are concluded, and it is insisted on the part of the plaintiffs they are not. The evidence was relied upon as importing to your comprehension and your judgment that crapes were silks, and that they were so understood, and that the plaintiffs paid duty thereon accordingly, and that it was only when the subsequent act was passed, changing the phraseology of the statute and raising a question of a somewhat different character in relation to the amount of duty, that the suggestion has arisen which has led to the present claim. So in regard to the testimony of various witnesses; there is some conflict. Some witnesses called by the plaintiff say that these goods were not known as silks, and that for many years they were not themselves aware that they were made of that material; while, on the other hand, there is the testimony of some importing merchants in New York and Boston, who tell you that, according to their understanding, and in trade and commerce, these goods are silks, —not only manufactured of silk, but that they have always been known in trade and commerce as silks. It is not for me to settle the question of fact in dispute between witnesses, or between parties, or to indicate to you any conclusion which you should draw from the evidence. It is purely a question for you. If the goods in question are not in commercial language known as silks, the plaintiff is entitled to recover; but if they are, the defendant is entitled to your verdict.

Verdict for the plaintiff.

Case No. 8,524.

The LOTTY.

[Olc. 329.] [1]

District Court, S. D. New York. April, 1846.

COLLISION — ADMIRALTY JURISDICTION IN SLIP— FAULT OF PILOT — MASTER — VIS MAJOR— MASTER'S KNOWLEDGE OF ENGLISH.

1. Admiralty has jurisdiction in a cause of collision between vessels when the injury is received in a slip where the tide ebbs and flows between piers or wharves in this port.

2. The master of the vessel on board at the time is responsible for the wrongful act of the vessel, although it was consequential to the neglect or misfeasance of a licensed pilot in securing her improperly to a wharf.

[Cited in The China, 7 Wall. (74 U. S.) 70; Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 Fed. 853.]

3. It is an act of neglect and unsafe to leave a vessel in the winter season during the night, at a wharf on the north side of the city, moored with only a single ⅞ inch chain.

4. It is gross and culpable neglect to suffer her to remain in that situation in a high and increasing wind, augmented to a violent gale, in which her fastenings parted.

5. The authority of a licensed pilot in securing a vessel in her berth is not paramount to that of her master; the latter is deemed in full command, and the acts of the pilot are regarded as done with the direction or approval of the master.

[Cited in Camp v. The Marcellus, Case No. 2,347.]

6. It is not a vis major which excuses a master, that his vessel broke from her fastenings and

[1] [Reported by Edward R. Olcott, Esq.]

caused damages to another in a tempest of wind, when he had warning and sufficient opportunity to protect her from that hazard.

[Cited in brief in The Transfer No. 2, 56 Fed. 314.]

7. A foreign master who understands and speaks English imperfectly, will not be charged upon his declarations or admissions in that language, without clear proof that he well understood the meaning of what is addressed to him and that used by him in reply.

The vessel is prosecuted for damages occasioned by her driving, with great violence, against the steamboat Independence, in one of the slips of this harbor. In the afternoon of the 15th of December, 1845, the bark, a Swedish vessel, arrived in this port, and was moored by the pilot, who brought her in, at pier No. 2, North river, on the south side of the wharf. The steamboat lay on the north side of the opposite wharf of the same slip. She was fastened to the wharf fore and aft by a single chain of only ⅞ inch dimension, and it was admitted at the hearing by the counsel of the claimant and respondent, that she was not secured with a strength of fastening required by the usages of the port, in her position at that season of the year, on the north side of the harbor. A gale of wind of extreme violence from the northwest, set in early that evening, and continued through the night, and at 5 o'clock the next morning, when the master and crew were taking measures to carry out more fastenings further to secure the bark, the forward chain parted, and the bark was carried round by the wind, and driven violently stem on against the steamboat, breaking up her wheel-house and doing great damage, before, by the most active exertions of the crews of the two vessels and others aiding, she could be hauled off.

C. Livingston, for libellant.

B. Blunt, for claimant.

BETTS, District Judge. This action has been contested essentially upon two points. The respondents contend, first, that this court has no jurisdiction of cases of collision occurring at the wharves and piers of the city; and secondly, that the master and bark are exonerated from responsibility, the vessel having been placed and left in that condition by a licensed pilot, who navigated her into the harbor and moored her. The collision causing the damage was a maritime trespass, committed upon tide waters, and as such is, upon general principles, within the jurisdiction of the admiralty. [Manro v. Almeida], 10 Wheat. [23 U. S.] 473. It takes cognizance of cases of collision within harbors, and upon rivers, infra corpus comitatus, where the tide ebbs and flows. Bulloch v. The Lamar [Case No. 2,129]. The doctrine has been declared in numerous cases in this court, and I am not aware of any accredited decision in the United States to the contrary; and no distinction is noted in the authorities restricting the jurisdiction over waters in harbors, not flowing into and out of slips, basins, &c. Laws of Oleron, art. 14; Moxon v. The Fanny [Case No. 9,895]; De Lovio v. Boit [Id. 3,776]; Hale v. Washington Ins. Co. [Id. 5,916]; Bulloch v. The Lamar [supra]; Abb. Shipp. 99, note. Canizares v. The Santissima Trinidad [Case No. 2,383]. I shall accordingly pronounce in favor of the jurisdiction in this case.

Upon the second point there is no foundation for the idea that the authority or responsibility of the master or owners of the vessel was any way lessened by the act of the pilot in mooring her. That of the owners would have remained entire had the collision happened when the vessel was under way under the direction of the pilot, although the command of the master and his personal responsibility may, perhaps, be suspended for the time. Abb. Shipp. 161, note; Jac. Sea Laws, 125; Curt. Merch. Seam. 195, 196, notes; [Bussy v. Donaldson] 4 Dall. [4 U. S.] 206; 9 Wend. 1. But after the vessel was brought safely into port, the authority and responsibility of the master were fully reinstated, and the acts of the pilot in selecting her berth and arranging her moorings must be regarded as directed or adopted by the master. By parity of reason his liability should be the same whilst the pilot is navigating the vessel, when he is not compelled by law to take a pilot. Curt. Merch. Seam. 196, note. I think, accordingly, that it is no matter of defence in this case that the bark was moored by the particular orders of the pilot. No law or port regulation has been shown subjecting the master to the authority of the pilot in respect to the position or fastenings of his vessel after she is brought into port, and consequently the master, equally with his owners, is responsible for damages occasioned through ignorance, negligence or want of due precaution in the pilot in this service.

Although, in the course of the hearing, it was conceded on the part of the claimant and respondent, the evidence had established the fact that the fastenings of the bark were insufficient, and not according to the custom of the port, and the court accordingly stopped the libellants giving further proof to that point, yet, on the argument, it was insisted that the damage was caused by vis major, a sudden and extraordinary tempest, which, in addition to the necessary strain and pressure upon the vessel, had raised masses of boards from the dock and driven them against the rigging, thereby forming a bulwark, which exposed her still more to the violence of the gale, and caused her fastenings to give way. It is sufficient avoidance of that branch of the defence that the gale commenced early the preceding evening, and augmented throughout the night in violence; and accordingly the master was warned in due season of the necessity of active precautions in securing his ship. He neglected strengthening her fastenings for

twelve hours, leaving her in almost a hurricane, with only a single and light chain to confine her. Had the disaster occurred in a sudden squall, striking the vessel without premonition, the defence would have a more urgent equity to favor it; but it was palpable negligence to trust his vessel through the night to a tempestuous wind directly straining her off the wharf, where she was held only by a single and slender chain, which the proof shows to have been no more than the slightest fastening used in a like position in calm weather.

The libellants seek also to sustain their action upon the alleged promise of the respondent to pay the damages. The respondent denies making such promise, and also the authority of this court to take cognizance of verbal contracts of indemnity made after a loss or injury had occurred, if indisputably proved. I do not discuss the question of jurisdiction on this point, because, in my opinion, there is no sufficient proof that the respondent made the alleged agreement. He is a foreigner, who speaks English very imperfectly. The promise set up is no more than the impression gathered by the master and some of the crew of the steamer, from his reply to a statement made by the master of the steamboat, at a time of considerable agitation and excitement on both sides. If the declaration was admitted, and the respondent might be regarded acting with reasonable composure at the time, I think the testimony entirely too vague and conjectural to be accepted as proof that he clearly comprehended what had been said to him, or that his reply to it was correctly understood. The decree will be against the vessel for the expenses of repairing the steamboat, no allowance being made for the loss of the trip, and it must be referred to a commissioner to estimate and report the damages pursuant to these directions.

[See Case No. 2,337a.]

LOUD v. PHILADELPHIA & READING R. CO. See Case No. 8,422.

LOUD, The GEORGIA D. See Case No. 5,333.

LOUDER (UNITED STATES v.). See Case No. 15,630.

Case No. 8,525.

LOUDON v. FIRST NAT. BANK OF WILMINGTON.

[2 Hughes (1877) 420;[1] 15 N. B. R. 476.]

District Court, E. D. North Carolina.

BANKRUPTCY — ILLEGAL PREFERENCE — SUBSTITUTION OF NOTES—KNOWLEDGE OF INSOLVENCY.

1. Where an insolvent, with knowledge of his condition and with intent to give his bank a preference, substitutes small notes, payable immediately, for older and larger ones held by the bank, some of which have already matured, such substitution as a condition for a further loan having been demanded by the president of the bank with knowledge of the insolvent's condition, and thereby the bank is enabled more easily to and does obtain judgment upon said notes, and seize and sell the insolvent's property upon executions issued thereon, such seizure and sale will be declared void, and the amount realized at the sale will be ordered to be paid to the assignee of such insolvent.

[Cited in Brown v. Jefferson Co. Nat. Bank, 9 Fed. 264.]

2. Where a bank demands of a depositor, who has theretofore always been prompt in his payments, and who has a note overdue and others about to mature, which he has made no arrangements to meet, that he shall, as a condition of a further loan which he requires to meet a borrowed note, substitute smaller notes, payable immediately, for those then held by the bank, and also for such further loan, in order to enable it more easily to obtain judgment thereon, *held*, that the demand was made with knowlegde of the applicant's insolvency.

In bankruptcy.

M. Loudon, for complainant.

Adam Empie and W. S. & D. J. Devane, for respondent.

BROOKS, District Judge. This is a bill filed by John Loudon, assignee of Jacob Lyon, in which the complainant alleges as follows: First. That the said Lyon was, on and some time prior to the 8th day of July, 1874, a merchant, and doing business in Wilmington, and was on and before that day indebted to the First National Bank of Wilmington, N. C., in a large sum. Second. That at and before the date mentioned, the said Lyon was insolvent, and being so insolvent, and in contemplation of insolvency and bankruptcy, and with intent to create a preference for the said bank over his other creditors, did procure his property to be seized under executions. That nearly all the property possessed by said Lyon was so procured by him to be seized and sold under executions in favor of said bank, and with intent to evade the provisions of the bankrupt law [of 1867 (14 Stat. 517)], and to prevent his property from coming to the hands of his assignee. Third. That at the time the said Lyon so procured his property to be so seized with the intent aforesaid, he, the said Lyon, well knew that he was insolvent, and that when the preference was accepted the said bank well knew that the said Lyon was insolvent, and that a fraud upon the rights of his other creditors was intended. The complainant therefore insists that the seizure and sales under the executions in favor of the bank were void, that no valid lien was thereby created, and asks a decree of this court for the value of the goods so seized and sold. The defendant corporation answers by its president, E. E. Burruss, in which they admit that Lyon, the bankrupt, was, before and on the 2d July, 1874, indebted to the bank in the sum of three thousand dollars, evidenced by notes as follows:

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

One due on that day for eight hundred dollars, one to be due on the 10th of the same month for eight hundred dollars, one on the 18th of that month for one thousand dollars, and one for four hundred dollars, to fall due on the 14th August, 1874. That after the first note mentioned was due, application was made for the bankrupt to the bank for the further loan of one thousand dollars, with the statement that this sum was desired by the bankrupt to pay a debt then mature in the city of Philadelphia. That the person who made this application for Lyon proposed for him that he would execute his notes for two hundred dollars each, payable instanter, insisting that notes so given would be as good security as the bank could have, as, in case of necessity for such course, judgment could be recovered on such notes in a very short time, and liens created upon the property of the maker. This proposition was declined by the bank, with the suggestion that if Lyon would then execute his notes, twenty in number, for two hundred dollars each, so as to cover his then entire indebtedness to the bank, as well as the one thousand dollars then desired as a further loan, he would be accommodated with the further loan then desired. This proposition of Mr. Burruss was not accepted by the attorney of Mr. Lyon, he assigning as a reason that he had no authority for such a renewal or change of Lyon's existing indebtedness to the bank, but that he would inform Mr. Lyon of the proposition. On the 7th of the same month Lyon came in person to the bank and renewed his request for the further loan of one thousand dollars, stating that he desired it to prevent the protest of debt then mature in Philadelphia. The proposition of Mr. Burruss was then renewed and acceded to by Lyon, and on the next day, the 8th July, Lyon executed to the bank twenty notes for two hundred dollars each, all payable instanter, and for these the further loan of one thousand dollars was extended, and the notes of Lyon for three thousand dollars, as before mentioned, were surrendered to him. The answer further states that, at the time the two hundred dollar notes were executed by Lyon and accepted by the bank, he did not know or have reasonable cause to believe that Lyon was insolvent or acted in contemplation of bankruptcy or insolvency, but on the contrary he, the said Burruss, believed him to be entirely solvent. That the said Lyon had kept an account with the bank for several years, and had always been very prompt in his payments to the bank; that when the proposition for the two hundred dollar notes to be executed in lieu of the notes as they then stood was made by him for the bank, he, Burruss, had no suspicion of the insolvency of Lyon—that such requirement was not made by him on account of any such suspicion. That, when the two hundred dollar notes were accepted, and the old notes theretofore held by the bank were surrendered, they were not accepted with any view to a preference over any other creditor of the said Lyon. But on the contrary he, Burruss, did not know of any other debt due by Lyon, except that which he owed to the bank and that mentioned as due in Philadelphia. That, in proposing the change to be made in the notes, and in accepting the two hundred dollar notes, there was no other purpose on the part of the bank than to obtain the best security he could for the debt due the bank. It is not denied in the answer that Lyon was insolvent when the notes for two hundred dollars were made and substituted as before stated. On the 16th July, 1874, Burruss, on being informed that some of the other creditors had sued Lyon, and that others intended to do so, caused warrants to be issued and served on each one of the twenty notes. Judgments were obtained and executions issued, under which all the goods of Lyon were seized the same day, and (except such as were set apart to Lyon as exempted by the state law) were subsequently sold by the officer to satisfy these claims.

To entitle the plaintiff to recover in this case it is necessary that three inquiries shall be made, and all of these should be answered in the affirmative. First. Was Jacob Lyon insolvent on the 8th day of July, 1874, or did he act in contemplation of bankruptcy or insolvency on that day in executing and delivering the two hundred dollar notes to the bank for the old and larger notes held, at that time, by the bank against him? Second. Was this making and substituting the two hundred dollar notes for the old and larger notes, done by Lyon with intent on his part to create a preference, or allow to the bank an advantage over his other creditors then holding other claims of the character of those then held by the bank? Third. Did the bank, at the time the two hundred dollar notes were so made and accepted, know that Lyon was insolvent, or acted in contemplation of insolvency or bankruptcy, or that a fraud upon the provisions of the bankrupt law was intended?

It would have been as idle and unavailing as it would have been immoral in the respondent to have denied that Lyon was hopelessly insolvent, in fact, when he applied for the further loan of one thousand dollars, and when he executed to the bank the two hundred dollar notes in the place of the larger notes due the bank. There is no evidence to show that he incurred any further debt, after that time, and before the bankruptcy proceedings were commenced against him on the 7th September of the same year, while it is sufficiently proved that there was no property or effects surrendered to the assignee from which any creditor could hope for any dividend. That the debts proved against his estate amounted to over nineteen thousand dollars, in which estimate the four thousand dollars due the bank and some oth-

er debts were not included, when the highest estimate placed upon his property at the time of the seizure of his goods (that placed by Lyon himself) was nine thousand dollars, and out of which his exemptions were to be taken. So the insolvency of Lyon, at the time of his application for the further loan and the substitution of the two hundred dollar notes, as a fact, is unquestionably established. Then was the demand of Burruss, that two hundred dollar notes should be executed and substituted for the larger notes then held by the bank, yielded to by Lyon with a knowledge of his condition, and with a view to give the bank a preference over any of his other creditors? That the requirement was made by Burruss and persisted in by him is abundantly shown by the answer and by the deposition of Lyon; that this demand was yielded to by Lyon with intent on his part to give thereby a preference over his other creditors holding claims of like amounts, is the important part of this second inquiry.

In the examination of this branch of the inquiry two questions are suggested. Did Lyon know that he was insolvent on the 8th July when the two hundred dollar notes were executed by him? Did he know what might result from such substitution, if such circumstances should arise as would incline Mr. Burruss to avail himself of the advantage thereby given? Both these questions must be answered in the affirmative. No one so certainly and fully knew his condition as Mr. Lyon himself, for he was a merchant of sufficient intelligence to conduct his business, keeping a bank account and paying his debts promptly for some years. This requirement of Mr. Burruss—which I will show hereafter was unusual and even extraordinary—was suggested by the anxiety of Mr. Lyon to protect himself from the protest of a debt, which he knew as a merchant would affect seriously, if not destroy, his credit in Philadelphia (the city in which he mainly purchased) and at Wilmington, if not, indeed, in all the country. If Mr. Lyon was so properly anxious about this debt as to make repeated efforts, and in this unusual way to borrow the money to save himself from protest, can it be supposed that he had, even for the time, entirely lost sight of all his other debts, and especially those which are shown to have been then due, or became due and were sued on within the short period of a week thereafter? Intelligent merchants do not lose sight of their debts, and especially do they keep in mind such as mature or are soon to mature. It is not necessary now to apply that strict and technical definition of the term insolvency which the courts so clearly hold as applicable to merchants, traders, and bankers. It is beyond all question true that Mr. Lyon well knew that he was insolvent, and largely so, when he complied with the requirements of Mr. Burruss in substituting the two hundred dollar notes, even according to the most liberal meaning of that term. Then did he with this knowledge substitute his small notes for his larger notes with intent to procure the result which followed? I think it is equally as clear that he did. Mr. Lyon's first and most cherished object was to obtain the loan of one thousand dollars. So it might be said of one who, being embarrassed or insolvent, would make or acknowledge a fictitious debt. He would generally have as his first object to retain his property; to the actual result of his act as to his bona fide creditors he might feel more indifference, and he might even regret such effect as to them. But could it be said that he did not intend that such results should follow his act of creating a fraudulent debt? Persons may, and indeed often do, regret a result which they know will follow from an act which they feel constrained to commit. Lyon knew that he had neither money nor property sufficient to pay his debts, but on the contrary, even upon the most liberal valuation, there was a large deficiency. This was his situation and his information as to his condition when he executed the notes, upon which the very hasty and summary action was taken at the end of one short week thereafter. The result was the seizure of all his visible property on execution in behalf of this favored creditor. So we behold as a result of this act, of which the plaintiff complains, within a very few days the easy and solvent merchant (apparently so, as the respondent insists) changed to a destitute bankrupt, with an estate to surrender to his assignee of not exceeding thirty dollars—not sufficient to meet the most moderate estimate of the costs—to say nothing of the additional exemptions to which the bankrupt is entitled under the bankrupt law. All his property was taken under execution issuing upon the notes so substituted for notes, none of which would have been liable to such summary proceedings—which could not by possibility have been reduced to judgment and execution before the bankruptcy of the debtor. And when Lyon states, as he does in his deposition, that he knew that the effect of such a substitution of the small notes for the larger ones would be to entitle the bank to this summary proceeding, it cannot, I think, be reasonably contended that he did not intend that result. If he did so intend at the time the small notes were substituted, he procured that which resulted from that act —that is, the seizure of his goods under execution with intent to create a preference for an existing debt, and to defeat the provisions of the bankrupt act. "It is the intent with which the new notes were given which must determine the validity of the lien" is the language of Mr. Justice Miller in Little v. Alexander, 21 Wall. [88 U. S.] 500. The learned counsel who argued this case for the respondent urged that when sued on these notes before the justice of the peace, Mr. Lyon had

no defence, consequently he made none—to have entered a false plea would have been immoral and wrong—and insists that this case comes within the principle decided in Wilson v. City Bank, 17 Wall. [84 U. S.] 473. I admit there must be the positive purpose of doing some act forbidden by the statute, and the act relied on and described must be done in the promotion of such unlawful purpose. Mere passive inaction on the part of the debtor is not sufficient, there must be something more than the mere submission to the legal rights of the creditor. The language of the learned justice in Little v. Alexander [supra], in distinguishing that case from that last cited, then relied upon for the same purpose, so well expresses my views in this case that I prefer that to any expression of my own. "But no careful reader of that case will fail to see, that if the debtor there had done anything before suit, which would have secured the bank a judgment with priority of lien, with intent to do so, that the judgment of this court would have been different from what it was." I adopt the view of the court as expressed in Wilson v. City Bank [supra]. The terms "procure" and "suffer," as employed in the bankrupt law, are of very similar import. If Lyon had done no positive act, after he became insolvent, which had the effect to promote the obtaining of these judgments in favor of the bank, in such way and in such time as to create a priority as against other creditors, then it could not be said that he had procured or suffered his property to be seized in violation of this provision of the law.

The remaining question to be determined is: Did the bank know that Lyon was insolvent, or that he was acting in contemplation of insolvency or bankruptcy when he executed the small notes mentioned? In contemplation of law, the bank is held to know that which was known to Mr. Burruss, its president—a gentleman familiar with its business—both the objects to be accomplished by such corporations, and the means by which these objects are attained. Surely a different rule would not be just to apply to corporations. They are only bodies composed of individuals associated for convenience in business, and while they may sue and be sued as individuals, that knowledge which is known to guide and control the conduct of individuals can only be ascertained, when it becomes important in cases affecting corporations, by applying the proper rule to ascertain the motive for individual action. And we know that it is very often the case that, in the conduct of individuals, the motive and knowledge with which a party acts determines the validity or invalidity of his act. "There is no divinity in a corporation which hedges around and protects it from the rules applicable to individuals." Then did Mr. Burruss know that Lyon was insolvent when he received from him his two hundred dollar notes in lieu of the larger notes then held by the bank against Lyon? If he did not, then the preference which resulted was effectual and valid, if he did, then it was otherwise; the judgments, executions, and levies thereunder must be declared void by this court, and the complainant will be entitled to recover. In considering this question, it is clear that we must often, indeed most frequently, resort to the circumstances attending a transaction, to determine the mind, the will, or intention with which the party acted—the stimulant or inducement to the action. The averment in Mr. Burruss's answer, and his statement in his deposition that he did not know, at or before the execution and substitution of the two hundred dollar notes, that Lyon was insolvent, but that on the contrary he believed him to be solvent, I have not overlooked. But I am, nevertheless, required to determine whether this averment is not outweighed by the circumstances attendant upon this transaction, so well known to Mr. Burruss, and which would have influenced the action of any other intelligent business man.

The leading object and purpose of the bankrupt law is the equal distribution of the estate of an insolvent person among his creditors, except only in the cases provided in the law. Any advantage, priority, or preference claimed by a creditor, if not within one of these provisions of the law, is declared void and of no effect. The complainant insists that the lien set up by the defendant is not only not one expressly sanctioned by the law, but, on the contrary, is expressly forbidden by the law, because he says that the respondent acted in the exchange of the notes under such circumstances as imparted to him full knowledge of Lyon's insolvency. It is insisted that Mr. Burruss knows best the information and intent with which he acted. That may be true, if we cannot be impressed more strongly by his statement as to the information under which he acted than we are obliged to be by the circumstances surrounding the transaction, which seem to oppose such statement. Mr. Burruss's statement in the answer is not conclusive, neither is it so as regards his deposition. If it were otherwise, there would be nothing upon this question of knowledge for the court to determine, but to ascertain that the party claiming a lien or priority had averred or testified that the debtor's insolvency was not known to him at the time such priority was created. If that be correct, a mere affidavit of the party to that effect would be as effectual as that statement in an answer or deposition. What are these circumstances? Mr. Lyon was and had been a merchant, and the corporation defendant a bank doing business in Wilmington for several years. The merchants in that city, with but two exceptions stated, purchased their goods on credit. Lyon had kept an account with the bank for some years, and had always been prompt in his pay-

ments. Now he stands indebted to this bank in the sum of three thousand dollars, not a large sum, it is true, for a merchant in good standing to owe a bank. But a part of this debt, eight hundred dollars, is then past due; then, according to all banking rules, the name of such a debtor stands dishonored; there is no part of this indebtedness of Lyon to the bank evidenced by notes for an amount within the jurisdiction of a justice of the peace. Under all these circumstances Mr. Lyon makes application to the bank for a further loan of one thousand dollars. Mr. Lyon states in his deposition in substance as follows: On the 7th of July I made this application, when Mr. Burruss replied, "You are now laying over in bank," to which Lyon rejoined, "I know that, but I must have one thousand dollars," and stated that the purpose for which he desired it was to pay a debt then due in Philadelphia, "which is a borrowed note, and which has to be paid." The money was not then loaned. An agent or attorney of Lyon's called at the bank, and stated that for the one thousand dollars then desired, he, Lyon, would execute to the bank two hundred dollar notes, and that would be as good security as could be desired, for then, if necessary, he, Burruss, might warrant and obtain judgment, execution, and lien upon his property in a very short time. Mr. Burruss declined, but proposed that if Lyon would execute two hundred dollar notes for the sum he owed the bank as well as the one thousand dollars then desired, he would make the further loan. This proposition the agent of Lyon was not authorized to accept, but said he would inform Mr. Lyon, who soon thereafter returned to the bank, when the proposition of Mr. Burruss, respecting the two hundred dollar notes for the existing debt, was renewed. Lyon says, "I told him I don't like to give two hundred dollar notes, unless he promised me not to push them, and give me a chance to pay them off as fast as I can. All this he promised me faithfully." That which followed material to this inquiry has been already stated. Now it is seen that Mr. Burruss had certain and positive information of the insolvency of Lyon, according to the construction of that term by the highest tribunals of our country as applicable to merchants and traders.

In the case of Toof v. Martin, 13 Wall. [80 U. S.] 40, Mr. Justice Field expresses very distinctly what is meant by the term insolvent or insolvency when applied to merchants. In that case it was contended that if the debtor could not pay his debts in the ordinary course of business, that is, in money as they fell due, he was insolvent. That learned judge says: "The rule thus laid down may not be strictly correct as applied to all bankrupts. The term insolvency is not always used in the same sense; it is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used, in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of his business. It is in this latter sense that the term is used when merchants and traders are said to be insolvent, and as applied to them it is the sense intended by the act of congress." And can this court apply a different meaning to that term in determining as to the condition of Mr. Lyon? Had Mr. Burruss a right, in determining upon his condition, to apply a different construction? I think the facts of the case show conclusively that he in fact followed this construction in the estimate he then made of Mr. Lyon's condition. Never before in all his dealings with the bank had Mr. Lyon been required to make two hundred dollar notes—not even for present loans. It was not usual to require that of any of the customers of this corporation, when it would have been in violation of no law to have done so for loans then made, without regard to the pecuniary condition of the borrower. Why, then, did Mr. Burruss make and persist in this extraordinary requirement of this prompt customer, unless he saw a necessity for that advantage he might thereby gain in a race of diligence with the other creditors in respect to that existing debt? If convenience merely was to be promoted by any change of the existing debt, consolidation would have been suggested, and one note would have been taken for the whole, instead of fifteen little papers. Then there was another significant circumstance which was not without force, sufficient to have aroused the apprehensions of any bank officer with the information before him. Here was one note for eight hundred dollars past due, and another of that amount to be due in two days, and not only no provision being made for their payment, but evidences afforded by the conduct of the debtor that they would not be soon paid at least, for he was then resorting to unusual and even extraordinary means to borrow the further sum of one thousand dollars to pay a borrowed note to prevent a protest, and which, to use his own language, "had to be paid." And here, too, was this further fact, that besides these there was another note of one thousand dollars to mature in ten days thereafter, and another still which would only mature at the remote period of thirty-six days. Under these circumstances it seems to me that it would be a reflection upon Mr. Burruss as a bank officer, that I am disposed to avoid, if I should find that he was not apprehensive about the safety of the debt, and that when the requirement of the small notes was made, it was not made in view of the very contingency which was so near at hand, and upon the first blush of which Mr. Burruss so promptly acted. If this was all by accident, and not designed, it must be admitted that there was in this case a series and very close connection of most fortuitous circumstances, that render the case peculiar. But it is insisted that Mr. Larkins and other witnesses examined for the respondent believed Mr.

Lyon was solvent. While this is true, what did Mr. Larkins know of the condition of Lyon? True it is that Mr. Larkins is an intelligent gentleman, and the cashier of another bank in Wilmington, yet Lyon had not dealt with his bank. He knew nothing of any debts he owed, or how he was prepared to pay them. And so with the others who testified for the respondent as to Lyon's solvency. If Mr. Larkins had known of Lyon's indebtedness to the defendant bank, that a part of it was past due (which means dishonored), much of it not due in many days to come, and that Lyon was so pressed upon other debts as to accept even a further loan of money upon the extraordinary terms required by the bank, I am sure Mr. Larkins would never have said that he believed him solvent; certainly he would not in view of the proper meaning of that term as applicable to merchants. It cannot be said that so intelligent a gentleman as Mr. Burruss acted without a motive, indeed he states that his purpose was to obtain for the bank the best security he could. In arriving at this conclusion I have not failed to consider the effect of the amendment of June 22, 1874 [18 Stat. 178], and I recognize that which some of my brethren do not, a difference between the terms "reasonable cause to believe" and "knowing."

The judgment of the court was, that the complainant recover of the defendant the sum of four thousand dollars, the value of the goods sold under the executions in favor of the bank, upon the two hundred dollar notes, which were substituted for the larger notes held by the bank.

Case No. 8,526.

LOUDON v. SCOTT.

[1 Cranch, C. C. 264.] [1]

Circuit Court, District of Columbia. Nov. Term, 1805.[2]

SLAVERY—BROUGHT INTO STATE—FAILURE TO TAKE OATH.

A slave brought into Alexandria in 1802, by a person removing from Maryland, and omitting to take the oath within sixty days after his removal, is entitled to freedom under the act of the 17th of December, 1792, although the person bringing the slave was not his owner.

This was a suit for freedom, under the Virginia act of 17th December, 1792. Charles Scott, senior, the defendant's father, came to live in Alexandria, in March, 1802, from Maryland, and brought with him the plaintiff [the negro Loudon], who has remained here ever since he first came, and was hired out by the defendant's father, who received his wages. In June, 1803, the defendant, Charles Scott, Jr. (the owner of the plaintiff), came also to reside in Alexandria, from Maryland; and on the 5th of July, 1803, took the oath required by the statute to be taken by the owner of the slave.

Mr. Jones, for defendant, contended that the negro is not free unless brought in by authority of his owner. It has been decided by the case of McDaniels's negroes, that where the master does no act which subjects him to the penalty, the negro is not entitled to his freedom.

THE COURT instructed the jury, that if they should be satisfied, by the evidence, that the plaintiff was brought from Maryland, into the county of Alexandria, in the year 1802, by the defendant's father, who exercised acts of ownership over him, and hired him out as his slave, and that the plaintiff has been kept in the said county, for one whole year thereafter, or so long at different times as amount to one year, before the bringing of this action, then the plaintiff is entitled to his freedom, although the jury should be satisfied that he was the property of the defendant, at the time he was so brought in, and that the defendant took the oath on the 5th of July, as stated in the certificate.

Verdict for plaintiff.

Reversed by the supreme court of U. S. 3 Cranch [7 U. S.] 324.

LOUGHERY (UNITED STATES v.). See Case No. 15,631.

Case No. 8,527.

In re LOUIS et al.

[3 Ben. 153; [1] 2 N. B. R. 449 (Quarto, 145); 2 Am. Law T. Rep. Bankr. 75; 16 Pittsb. Leg. J. (O. S.) 45.]

District Court, S. D. New York. Feb. 29, 1869.

PREFERENCE BY BANKRUPT WHILE INSOLVENT—DISCHARGE.

1. Where a firm was carrying on business in different places in Ohio and Tennessee, and their paper went to protest about April 1st, 1867, and about the same time some of their establishments were seized by the government of the United States for alleged violations of the internal revenue law [13 Stat. 223], and within a short time thereafter they transferred to seven different creditors four stocks of goods and their real estate, towards payment of the debts due by them to such creditors: *Held*, that, on the facts, the bankrupts were insolvent when such transfers were made.

[Cited in Graham v. Stark, Case No. 5,676.]

2. Such transfers of goods were giving fraudulent preferences, contrary to the provisions of the 39th section of the bankruptcy act [of 1867 (14 Stat. 536)], and discharges must be refused to the bankrupts.

[Cited in Re Doyle, Case No. 4,051; Re Warner, Id. 17,177; Re Hannahs, Id. 6,032.]

[In the matter of Adolph Louis and Henry Rosenham, bankrupts.]

G. & M. Sackett, for bankrupts.

H. H. Rice, for opposing creditors.

BLATCHFORD, District Judge. The first nine specifications filed in opposition to the

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

[2] [Reversed in 3 Cranch (7 U. S.) 324.]

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

discharge of the bankrupts are, that the bankrupts, early in April, 1867, at Cincinnati, Ohio, while insolvent, transferred to various creditors of theirs, seven in number, real estate of theirs in Kentucky, Iowa and Texas, two stocks of goods in Memphis, Tennessee, a stock of goods at Nashville, Tennessee, and a stock of goods at Bolivar, Tennessee, for the purpose of preferring such creditors and of preventing such property from coming to the hands of an assignee in bankruptcy; that the transfers of the stocks of goods were made in a lump to each creditor, without any inventories being made; and that such transfers were fraudulent and void under the bankruptcy act.

The paper of the bankrupts first went to protest about the 1st of April, 1867. They were then in fact insolvent; but, professing to believe that they were not, they commenced immediately, and continued during April and May, 1867, to turn out their property in payment of debts due to certain of their creditors, to the exclusion of others. Their indebtedness on the 1st of April, 1867, was about $500,000. By the 1st of June, 1867, according to the evidence, they had in that way paid off from $300,000 to $400,000 of such indebtedness. When their paper so went to protest, they were engaged in business as general merchants, as copartners, under the name of A. Louis & Co., dealing in wines, liquors, dry goods, and boots and shoes, with their headquarters at Cincinnati, Ohio, and branches at Memphis, Tennessee, Nashville, Tennessee, and Bolivar, Tennessee. Their assets consisted of merchandise, real estate, bank stocks, insurance stocks, book accounts and bills receivable. They had two stocks of goods at Memphis, one at Nashville and one at Bolivar. Their business at Cincinnati was manufacturing and rectifying spirits and dealing in wines and liquors. Their stock of whiskey at Cincinnati was seized by the United States about the 1st of April, 1867, with their manufacturing and rectifying establishment there, for alleged infractions of the internal revenue laws. The property remained under seizure till the latter part of May, 1867. The effect of the going to protest of their paper, and of the simultaneous seizure of their property at Cincinnati, seems to have been to break up their business everywhere, for, within a week or so thereafter, they turned out to creditors the four stocks of goods referred to, and their real estate in Kentucky, Iowa and Texas. One of the stocks of goods at Memphis was transferred towards payment of a debt of $100,000, and the other towards payment of a debt of $60,000. The stock of goods at Nashville was turned out towards payment of a debt of about $25,000, and the stock of goods at Bolivar towards payment of a debt of about $28,000. The property seized by the government was turned over, about the 23d of May, 1867, on a compromise made with the government, to a person who paid to the government on behalf of the bankrupts, $15,000, and became endorser on two notes of theirs, each for $5,000, given to the United States, payable in one and two years, respectively. It is not quite clear whether other property of the bankrupts was turned out as security to the same person. When they suspended payment, they made out no balance sheet. They carried on no business at Cincinnati after their suspension, but they paid many of their creditors with the proceeds of collections made from parties who owed them, and out of the other assets beforementioned. Their petition in bankruptcy was filed February 29th, 1868. It sets forth debts due by the firm composed of the bankrupts, amounting to nearly $90,000, and eighteen debts due to sixteen creditors in Cincinnati and two in New York City, the amounts of all of which eighteen are put down as unknown. Among these eighteen are the creditors to whom the four stocks of goods and the real estate before-mentioned were transferred. All of the debts due to the eighteen creditors are either for notes of A. Louis & Co., endorsed and paid by such creditors, or for money loaned to A. Louis & Co. by such creditors. There are no copartnership assets set out in the petition, except about $85,000 of debts due to the firm on open account, from creditors, nearly three hundred in number, scattered all over the United States, and a lease of real estate in Cincinnati, valued at $30,000 and mortgaged for $29,500. The individual debts of the bankrupt Louis are put down at a little over $2,000, and his individual assets at $1,000 worth of household furniture, mortgaged for $800. The individual debts of the bankrupt Rosenham are put down at $3,400, and one debt, amount unknown, due to a firm in New York, and his individual assets at $150 worth of wearing apparel.

On the foregoing facts, I must hold, not only that the bankrupts were insolvent on and after the 1st of April, 1867, but that they had good grounds for believing themselves insolvent, and that they acted on such belief in making the preferences they did among their creditors. After the 1st of April, 1867, they were not able to pay all their debts in the usual and ordinary course of business, as persons carrying on trade usually do, and their business was broken up. All this they knew. This constituted insolvency, within the meaning of the bankruptcy act, and they, therefore, not only had reasonable grounds for believing themselves insolvent, but, in judgment of law, they knew they were insolvent. With this knowledge, they, as one of them testifies, struggled along and paid along until the latter part of May. In doing so, they made the preferences referred to, intending to pay the favored creditors, whether the others should receive anything or not. This was a giving of fraudulent preferences under section 29, contrary to the provisions of the act, being directly contrary to the

provisions of section 39 of the act. This whole subject is thoroughly discussed and disposed of by Judge Fox, of the district court for the district of Maine, in a very full and able opinion,—In re Gay [Case No. 5,279], —in which I concur. The bankruptcy act was in operation, so as to make these transactions of the bankrupts a fraud on the act, from and after the 2d of March, 1867. Perry v. Langley [Case No. 11,006]. The first nine specifications are, therefore, sustained, and discharges are refused.

Case No. 8,528.

In re LOUIS et al.

[7 Ben. 481.] [1]

District Court, S. D. New York. Oct., 1874.

BANKRUPTCY—COMPOSITION WITH CREDITORS—SUFFICIENT SECURITY.

1. A resolution of creditors accepting a composition proposed by bankrupts, provided for the payment of the amount at various times, such payment to be guaranteed by a satisfactory bond, in a penalty named, executed to three persons named, who were the committee appointed by the creditors in the investigation of the affairs of the debtors: *Held*, that it must be understood that the bond was not only to be given to the three persons named, but was to be satisfactory to them.

2. The provision was sufficient, and the resolution must be confirmed.

[In the matter of Solomon Louis and others, bankrupts.]

James Dunne, for debtors.

BLATCHFORD, District Judge. The resolution of composition in this case, after providing for a composition of thirty-seven and a half cents on the dollar, to be paid in cash, as follows, one-half in 60 days after the filing of the statement and the recording of the composition, and one-half in 90 days after the filing of the statement and the recording of the composition, goes on to provide that such payment shall be guaranteed by the giving of a satisfactory bond, in the penal sum of $20,000, to three persons who are named in the resolution, and are stated therein to be the committee appointed by the creditors in the investigation of the affairs of the debtors, within 5 days after the filing of the statement and the recording of the resolution. This is a sufficient provision. It must be understood from it, that the bond is not only to be given to the three persons named, but is to be satisfactory to them, and that they and they alone are to decide upon its satisfactory character. This obviates the objection stated in the case of In re Reiman [Case No. 11,673], to the confirmation of the resolution of composition in that case.

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

LOUIS, The (CROSSLEY v.). See Case No. 3,436.

Case No. 8,529.

The LOUISA.

[3 Ware, 130.] [1]

District Court, D. Maine. March, 1857.

COLLISION—STEAMER AND SAIL VESSEL—PRIMA FACIE FAULT—RULE OF PASSING.

1. When a steamer and sailing vessel are approaching each other in such a direction that there is danger of a collision, the sailing vessel has the right of way, and should hold on her course, whether she has the wind free or is close hauled.

2. It is the duty of the steamer to take the necessary precaution to keep out of her way. If she does not, and a collision happens she will prima facie be deemed in fault.

3. When two vessels are approaching each other so that there is danger of their meeting, the general rule is that each vessel is to keep to the right.

4. This in all ordinary cases is the rule whether both are sailing vessels or both steamers, or one is a steamer and the other moved by the wind.

In admiralty.

Mr. Butler, for libellant.

Mr. Rand, for respondent.

WARE, District Judge. The Forest City steamer, in the regular trade between Portland and Boston, in the evening of the 16th of February left the wharf at Portland on a trip to Boston, and about half-past twelve the next morning, when about 10 miles south of the Isle of Shoals, she came in collision with the brig Louisa, on her passage from Boston to Portland. She sustained some injury by the collision, and this trial is brought to charge the brig in the damage. The steamer was on a course S.S.W., with the wind dead ahead, and the Louisa on a course N.N.E., directly before the wind. Both were in the track usually taken by vessels between these ports when the wind is favorable. There is some difference in the testimony as to the state of the weather at the time of the collision. The first part of the night, it is agreed, was foggy and dark. But according to the testimony from the steamer, some time before 12 o'clock the fog cleared away so that the stars were seen, and continued so until after the collision. The pilot says that with his night glass he saw the brig two miles ahead, and kept her in view till the time of the collision; that shortly before he passed a steamer from Boston for Portland, and saw her lights at the distance of four or five miles; and that at the time of the collision a steamer's lights might be seen six or seven miles. On the other hand, the mate of the brig, who was at the helm, says that at the time the fog was dense and the stars hid, and that he did not see the steamer's lights until she was within three-quarters of a mile. On the whole evidence, my opinion is that if there

[1] [Reported by George F. Emery, Esq.]

had been a proper look-out on board the brig, such as there ought to be in so great a thoroughfare for vessels, the steamer's lights would have been sooner seen.

There are some principles of law applicable to cases like the present, so well established that they ought to be generally known, and for the safety of navigation observed. It is a general rule when a steamer and a sailing vessel are approaching each other, so that there is danger of a collision, that the sailing vessel has the right of way, and she is bound to hold on her course, and it is the duty of the steamer to take the necessary precautions to avoid a meeting. If this is not done, prima facie she will be deemed in fault. It has been so repeatedly decided by the supreme court. St. John v. Paine, 10 How. [51 U. S.] 557; The Oregon v. Rocca, 18 How. [59 U. S.] 570; Crockett v. Newton, Id. 581.

Another general rule is that where both vessels are approaching in directly opposite directions, with the wind fair, and there is no danger of a collision, each vessel is to pass to the right, and this rule is applied in all ordinary cases, whether both are sailing vessels or both steamers, or one moved by the wind and the other by steam. There are peculiar cases that form exceptions to all general rules. But in all ordinary cases it is of great importance to the security of navigation that these general rules should be observed. Then each party, knowing what he is bound to do, and what he has a right to expect of the other, there is no danger of their acting at cross purposes, but both concurring in the same mode of guarding against danger, a collision is avoided with ease and certainty. But as it must sometimes happen that the danger may be avoided with equal ease and certainty by either one of two manoeuvers, if there be no general rule governing the discretion of the pilot, there being no opportunity for consultation, they are just as likely, without any impeachment of their judgment, to choose opposite manoeuvers, which will be sure to produce a collision, as they are to concur in the same, and thus avoid it. And hence the importance of known rules of navigation. Thus, when two steamers are approaching each other directly ahead, by a regulation of the Trinity masters, each is required to put her helm a-port and pass to the right, though it might be just as easy, perhaps, to pass to the left as to the right. The Shannon, 1 W. Rob. Adm. 463. The high court of admiralty adhere with inflexible rigor to these general rules, and it was said by the Trinity master that if they had always been observed in practice, it would have prevented a great number of accidents that have occurred. Our supreme court seem disposed to uphold them with equal constancy. St. John v. Paine, 10 How. [51 U. S.] 581, 583. If, as is justly observed by Mr. Justice McLean, in the case of The Oregon v. Rocca, 18 How. [59 U. S.] 572, where this rule of passing to the right was drawn in question, the courts allow exceptions, unless in extreme cases, the mind of the helmsman immediately becomes doubtful and hesitating, and more danger will result to navigation by leaving the matter to the judgment of the pilots, than by enforcing the general rule in all cases where it is practicable.

Let us apply these well-known established rules of navigation to the present case. The vessels were approaching each other in precisely opposite directions. The brig was sailing in a course N.N.E. immediately before the wind; the steamer was on a course S.S.W., with the wind dead ahead, but a steamer being moved by paddles, and not by the wind, is always considered as sailing with a fair wind. The pilot of the steamer says that when he first saw the brig she was 2½ points over the steamer's larboard bow. If so, and both vessels had continued their course, one would have passed to the larboard of the other, that is to the right. But the pilot changed the course of the steamer two points to the right, which would give the brig more room. This was just what the rules of navigation required of him if there was a possibility of a collision. The mate of the brig says that he first saw the steamer's light directly ahead at the distance of about three-fourths of a mile, and immediately changed his course two points to left. But the rules of navigation required him, if he knew it to be a steamer's light, to hold on his course, and as the steamer carried four lights, he could hardly with common attention have mistaken it for the light of a sailing vessel. If he mistook it for the light of a sailing vessel, then he should have put his helm a-port and passed to the right.

It appears to me that in any view that can be taken of the case, the brig was in fault. Decree that the brig is liable for damage.

LOUISA, The, v. The BELLA DONNA. See Case No. 11,292.

LOUISA, The (PACKARD v.). See Case No. 10,652.

Case No. 8,530.

The LOUISA A.

[Cited in Frates v. Howland, Case No. 5,066. Nowhere reported; opinion not now accessible.]

Case No. 8,531.

The LOUISA AGNES.

[Blatchf. Pr. Cas. 107.] [1]

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

PRIZE—SPECIAL CLAIM — BLOCKADE — NOTICE TO NEUTRALS—INTENTION TO VIOLATE—DECEPTIVE REPRESENTATIONS—ACTUAL WRONGDOER.

1. A claimant in a prize suit cannot put in a special claim or answer leading to issue other

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

than the one simply of prize or no prize, without the assent of the United States attorney or the special order of the court.

2. In order to affect a neutral with the penal consequences of a violation of a blockade, it is necessary for him to have been sufficiently informed of its existence.

3. An attempt by a neutral vessel to enter or evade a blockaded port, with knowledge or notice of the blockade, is a culpable violation of it, although no warning in writing is given to such vessel.

4. If a vessel approaches a blockaded port with knowledge of the blockade, and with the intention of violating it, her subsequent departure under the compulsory direction of a blockading cruiser does not reintegrate her to the state of an innocent trader, and she may still be arrested for the offence.

5. An attempt, on the part of a neutral owner, to mislead a blockading force by a deceptive representation of his vessel's papers, amounts to fraudulent misconduct, which justifies the confiscation of the vessel.

6. Every dissemblance in the papers will, in the judgment of the prize court, be regarded as intended to conceal what could not be safely disclosed, and as affording evidence that the destination of the vessel was falsified with a design to defraud.

7. The question discussed as to the proper method of investigating, in prize cases, acts of misconduct committed by captors on the prize property and the officers and crew of the vessel subsequent to their arrest.

8. The general rule in respect to captures by public ships is that the actual wrongdoer alone is responsible for any wrong done or illegality committed on the prize, excepting acts done by members of the seizing vessel in obedience to the orders of their superiors.

9. This court established this practice: That the right of reclamation for damages, in cases of captures made by public vessels, must be pursued by the parties averring the grievance and tort committed upon them, by plea and proof, which admit of counter allegations and full evidence under them.

10. An affidavit annexed to a claim is extrajudicial, and is not testimony in the cause.

11. A fraudulent attempt to violate a blockade warrants a condemnation, although the claimant may be able to show that the captors have been guilty of irregularities and wrongs towards the prize or its ship's company subsequent to capture.

12. Vessel and cargo condemned for an attempt to violate the blockade. Claimants ordered to sue out a monition to the captors, and file and serve the allegations and proofs on which they claim damages.

In admiralty.

BETTS, District Judge. The vessel above named, and cargo on board, were captured on the 9th of September, 1861, by the United States ship-of-war Cambridge, off the coast of Virginia or North Carolina, and sent into this port as lawful prize, and here libelled, in the name of the United States and the naval captors, on the 13th of September, charged "with being engaged in an unlawful voyage, and employed in an illegal trade, and being lawful prize of war." Josiah Slanghenright, as owner of the vessel, and James A. Moran, as owner of the cargo seized, interposed each a separate claim, by the same proctor, on the 21st of November thereafter, averring that they are British subjects, resident in Nova Scotia, and denying that the vessel and cargo are lawful prize; and each appends to his claim his test oath to the right of property alleged in his claim, and each also adds thereto a deposition of Robert Nichelson, the master of the vessel, detailing various particulars respecting the voyage, and prays that the deposition or schedule may be received as part of such respective claims. The papers found on board of the vessel at the time of her seizure prove her to be the property of Slanghenright, registered in his name at the port of Lunenburgh, Nova Scotia, June 15, 1859, and freighted by Moran, the other claimant, with a cargo of merchandise, at Halifax, where her crew was shipped, and she was cleared, August 21, 1861, for the United States. The voyage named in the shipping articles was "to a port or ports in the United States, and back to the port of Halifax."

On the hearing of the suit, the charge on the part of the libellants was, that the voyage was illegally and fraudulently undertaken, with the intent to violate the blockade of the port of Wilmington, in North Carolina, or some other blockaded port in the rebel states. The defence was, that the voyage was a lawful one, destined to a port in the United States, free to the commerce and trade of British subjects. The affidavit of the master of the vessel, attached as a schedule to the respective claims, "to be taken as a part of each claim," was also set up and insisted upon by each claimant as legal proof in his behalf. That deposition made allegations of misconduct committed upon the ship's company of the prize vessel by the captors after her seizure, namely: That the master and two of his crew were separated from the prize, and sent without her, to their serious inconvenience and wrong, to Baltimore, and from there, by railroad cars, to New York; that the writing desk of the master was improperly opened on board of the United States ship-of-war whilst he was thus detained; that papers were abstracted from it by the captors; and that two of the seamen on the prize were placed in irons, and sent with her so ironed to New York by the captors. These allegations are not admitted by the libellants, or otherwise established by direct proof on the part of the claimants. If the claimants may be allowed, at the discretion of the court, to vary the usual procedure in prize suits, by putting in special claims or answers, leading to issues other than the one simply of prize or no prize, this manifestly cannot be done without the assent of the United States attorney or the special order of the court. The papers filed in this instance by both claimants are without such warrant or authority, and must, therefore, be limited in their effect to mere denials of the cause of arrest.

The case, upon the preparatory proof, is prima facie adequate to demand the condemnation of the vessel and cargo seized. The facts made to appear in those proofs are concisely these: The vessel and cargo were both owned by British subjects, residents in Nova Scotia. The papers on board of the vessel when she was arrested duly authenticated those facts, as also that the voyage was projected and entered upon, and the vessel and cargo cleared from the port of Halifax on the 21st of August, 1861, bound for the United States of America. The crew were shipped on the same day "for a port or ports in the United States, and back to the port of Halifax." On the 6th of September she was boarded, from the United States ship Susquehanna, off Cape Lookout, (as stated in the deposition of the master of the schooner, interposed, as aforesaid, by the claimants, as part of their respective claims,) and warned not to enter any port between Cape Henry and the Gulf of Mexico; and on the 9th of September she was boarded for the third time, and then arrested by the United States ship Cambridge, thirty miles south of Cape Henry, on a course the reverse of that on which she was first boarded, and then sent, under charge of a prize master, to this port. The first entry in the log of the vessel was of her departure from Halifax, Friday, August 23; and the last, on Sunday, September 8, was the note of her log, "Lat. b. obs. 36° 07′. On the preceding day, September 7, the last entry in the log was a note of latitude 35° 42′, and an obscure remark: "At 8 a. m. we was boarded be a man warr ship 36 to the N. of Cape Hateras." The log is inartificially kept, apparently by an illiterate man, and supplies no means of fixing accurately the time or points of the progress of the vessel along the coast. The next entry, on Tuesday, September 10, 1861, was apparently by the prize master, which reads: "He went on board the schooner as prize master at 1 p. m. lat. 36° 37′ N., long. 76° 45′ W." The movements of the vessel and her reckonings are not stated with perspicuity in her log, but it is very manifest she had gone entirely clear of and below the capes of Virginia, and away from any direction towards Baltimore, and was tracing her way within a few miles along the coast of North Carolina, indicating a purpose to make a port in that vicinity. It is observable that the log indicates no other purpose of aiming for Baltimore than the heading to each page of its entries. The invoice of the cargo, and the bill of lading of the same, and the clearance, were dated at Halifax, the 21st of August. The shipment was consigned to order, accompanied by a letter of instructions from the owner to the master, stating that his "main object will be to get into a port of North Carolina." If that is effected, he is directed to communicate with Mr. Flann, of Wilmington, with respect to a return cargo, which, it is desired, should be chiefly of spirits of turpentine. He is further instructed, if he does not succeed in getting into a Southern port, to proceed to Baltimore, and there deliver his cargo to Messrs. Crown & Jones. The owner further remarks, in the letter, that "he loaded a schooner for Wilmington in June last, but, through the bad conduct of the captain, she arrived at Baltimore." The witnesses examined in preparatorio testify that the vessel was solely under the authority and charge of the shipper of the cargo. This evidence would, by itself, denote, most unmistakably that the voyage was planned and prosecuted, to the time of capture, with the single purpose of carrying the vessel and cargo into one of the Southern and blockaded ports.

Two defences upon the merits are interposed by the claimants, and one in point of form against the validity of the capture. The formal one is, that the vessel was entitled to be warned off the blockaded port, and that, on such warning being given, she became discharged of all culpability by having immediately obeyed the notice, and changed her course, under the direction of the blockading vessel, for Baltimore, and continued that course for a succession of days, until her ultimate arrest. This objection would be of avail, under the general law, in case her approach to the blockaded ports was innocent, and in ignorance of their condition, without regard to the prerequisite of warning supposed to be connected with the imposition of blockades by the proclamation of the president; because the doctrine that, in order to affect a neutral with the penal consequences of a violation of blockade, it is necessary for him to have been sufficiently informed of its existence (The Rolla, 6 C. Rob. Adm. 367), is not contested in this suit, nor has it been in any previous prosecutions here. The rule administered in this court has been, both before and since the act of congress of August 6, 1861 (12 Stat. 326, § 3), that an attempt by a neutral vessel to enter or evade a blockaded port, with knowledge or notice of the blockade, was a culpable violation of it, although no warning in writing was given to such vessel. The act itself, committed by a neutral, in fraud of a belligerent right, carries with it the consequence of condemnation, whatever plausible pretences may be alleged for the visit. Upt. Mar. Warf. & Pr. 192.

If any question still remains as to that interpretation of law of blockade, anterior to the one imposed upon the ports of North Carolina, April 27, 1861, it does not appear to me that such uncertainty continues since the enactment of the above statute ratifying and affirming all acts, proclamations, or orders of the president after March 4, 1861; that, accordingly, the offence will have been completed in this instance, if the schooner approached a blockaded port with knowledge of the blockade and intending to violate it; and that her subsequent departure under

the compulsory direction of a man-of-war does not reintegrate the faulty vessel to the state of an innocent trader. Of the fact of knowledge and purpose chargeable upon the vessel and cargo, the evidence is positive and explicit on the face of the letter of instructions from the owner for the voyage and the shipper of the cargo before referred to. The knowledge of the blockade possessed by the claimants was not alone imputable to them because of the vicinity of Halifax to North Carolina, and the general state of commercial intercourse between those sections; there was, also, beyond the letter of instruction to the master, before cited, the letter from the shipper, of the same place and date, to his consignee in Wilmington, North Carolina, which says: "I have loaded the bearer (master of the schooner) with a cargo, in the hope that she may find her way into your port or some place in the Southern States;" and which, after directing the mode of investing the proceeds in tar, spirits of turpentine, &c., &c., contains this declaration: "I loaded a schooner for your port in June, but through the bad conduct of the captain, she arrived at Baltimore. Captain Nicholas has my confidence," &c. This implies, most forcibly, a full knowledge that the adventure was set on foot to a port then being in a state of blockade, and that the undertaking was meant, by the aid of former experience, to defeat and escape the force and effect of the blockade. These considerations displace all excuse of a want of warning or of innocent acquiescence. The vessel must be regarded as departing from the port sought, because of her forcible interception in attempting to enter it unlawfully, and not because the warning so received first apprised her of the illegality of the act.

The defence upon the merits that the voyage was not an illicit one, but was honestly undertaken and prosecuted to a loyal port of the United States, is wholly supplanted and falsified by the proofs referred to. Those items of proof demonstrate that the real and primary destination of the vessel was directly from Halifax to Wilmington, in North Carolina, an entry into which latter port was to be effectuated by the violation of its known blockade. The misrepresentation of the fact, entered upon the face of the log, must be understood as intended to deceive the captors. Each page of that document, from the inception of the voyage to the arrest of the vessel, is headed "A journal of a voyage from Halifax towards Baltimore;" and, on the evidence, that assertion was intended to create the false belief and confidence that the shipping articles and clearance on board, which named the destination of the vessel to be "a port or ports of the United States," or "bound for the United States," meant that she was destined and bound for the port of Baltimore. That conclusion would be a very natural one on the exhibition of the papers to a boarding officer, and thus a fraudulent deception would be imposed upon him. An attempt on the part of a neutral to mislead a blockading force by a deceptive representation on his ship's papers amounts to fraudulent misconduct, which justifies the confiscation of the vessel. Indeed, every dissemblance in the papers will, in the judgment of a prize court, be regarded as intended to conceal what could not be safely disclosed, and to afford evidence that the destination of the vessel is falsified with a design to defraud. The Mentor, Edw. Adm. 207. In this instance, the bold and positive written instructions to the master to make his voyage to Wilmington or other Southern port dispenses with all reasoning from presumption as to the purpose and object for which the voyage was undertaken. It merits remark, also, that small confidence can be placed in the statements made by the mate and steward on the preparatory examination, that, when they shipped at Halifax, they supposed the vessel to be bound for Baltimore, and agreed for that voyage solely; because they both distinctly stipulated in the shipping articles for a voyage to "a port or ports in the United States," and nowhere named Baltimore as contemplated in the contract; and, also, because it is palpable from the log and from the knowledge they possess from the course of the vessel from Cape Henry to the place of her being turned back, and from that point along the coast, that they must (the mate, and most probably the steward) have well known, when they gave their testimony, that the vessel was destined for a blockaded port. These men admit, on their examination, that they were aware, when the shipping agreement was entered into by them, that the ports of Virginia and North Carolina were under blockade, and that the fact was of general notoriety in Halifax. The unsuccessful efforts of the claimant, acknowledged in his letter of August 21 to his consignee in June previous, to evade the blockade of Wilmington, brings home to him direct notice of the fact of such blockade.

Upon all these facts and circumstances, it seems to me that the evidence is conclusive that the voyage was instituted and prosecuted by the claimant with a premeditated design to evade the blockade, then efficiently supported, at the port of Wilmington, North Carolina. The actual presence of adequate force stationed before the ports where the arrest was made, and the authoritative proclamation of the blockade, are sufficiently established, and, accordingly, the claimants show no exemption from capture because of insufficiency of notice to them, or want of legal warning of the blockade, nor that their return backwards towards Baltimore amounted to an acquittance of the culpable misconduct of the vessel and cargo in undertaking to run the blockade.

A further ground of exoneration from the arrest is also suggested and earnestly

pressed, namely, that the capture is made illegal and void by acts of misconduct committed by the captors upon the prize property and the officers and crew of the vessel subsequent to their arrest. This objection has been urged as a conclusive defence to this suit, with the allegation that several cases, in addition to the present one, are still awaiting the consideration of the court, in which that cause of defence is more flagrant, and strenuous appeals are addressed to the court to redress the wrongs and losses inflicted upon neutrals by the course of conduct pursued during the present war by national vessels in the assumed enforcement of the law of blockade. The court will indulge in no general denunciation or stigma of the supposed malfeasances of public vessels in the performance of their duties in relation to prizes, but will carefully examine the facts brought to its attention, and endeavor to uphold and enforce with strict justice the legal rights and responsibilities of all parties implicated in prize proceedings brought before the court. It is to be presumed that the officers and crews of the navy are disposed to conduct themselves in obedience to their instructions, and to the rules of maritime law, in executing their war powers, in making prizes; and the rule and practice of prize courts fix their responsibilities and the manner in which they are to be enforced, in case injuries are sustained for misconduct on their part, whether the capture is sanctioned and carried into effect by the court, or is declared nugatory and unjustifiable.

In a case of that character recently before the court—The Jane Campbell [Case No. 7,205]—it was deemed expedient to refer the subject to the inquiry of the prize commissioners, to ascertain whether the imputations of malconduct made against the officers and crew of a public vessel were well founded, and to report the amount of injury received therefrom by the owners of the captured property, or the persons connected with the vessel seized. In that case the capture was disaffirmed, and the vessel and cargo were restored to the claimant, but the right to relief for injuries sustained from the wrongful acts of the captors was not regarded as dependent upon the acquittal or condemnation of the prize. That relief was proffered to the party who made suggestions to the court of loss and injury sustained by him from the captors of the vessel and cargo, in the proceedings after the capture; and it was granted on motion, without other formality of procedure, as incident to the cognizance of the subject of prize then before the court, but without admitting that to be the only or best method of adjudicating the matter; and there was, in that case, direct evidence of wrongful embezzlement of the prize property by the captors, whilst it was in their possession. A summary method of redress may be less appropriate to cases resting on charges of wrongful conduct, in prize proceedings by officers and crews of public vessels, than against private cruisers, because the latter, beyond their relation and subjection to the court as suitors therein, are usually under express stipulations by contract for good conduct, and to indemnify parties suffering from their misbehavior in making prizes, which place the private cruiser and its armament under the direct discretion of the court, and particularly so when, as in the present case, the grievances imputed to the captors consist almost exclusively of personal torts committed to them. The pleadings in a prize action involve, directly, no further question than that of prize. The Adelaide, 9 Cranch [13 U. S.] 284; The Fortuna, 1 Dod. 83. The parties on the trial of that issue are not legally required, if they may be permitted, to litigate any point except that, and the probable sequents to it. In a qualified sense, the consideration whether the unlawful acts of captors, after the seizure of property as prize, do not render the arrest of it void, may be regarded as characterizing, vitally, the capture, and thus become intrinsically admissible evidence in defence against the conviction and forfeiture of the property. But yet that ground of defence need not necessarily be directly connected with the capture itself, or with the liability of the property to capture as prize, but may, and most probably will, spring out of facts wholly disconnected with either of those particulars.

The general rule in respect to captures by public ships is, that the actual wrongdoer alone is responsible for any wrong done or illegality committed on the prize, excepting acts done by members of the seizing vessel in obedience to the orders of their superiors. The Mentor, 1 C. Rob. Adm. 179; The Diligentia, 1 Dod. 404; 2 Wheat. Append. 13. The liability of the officer is not constructive, and affixed to him solely on account of his superiority of command, but arises from his immediate orders or authority in the transaction. The Eleanor, 2 Wheat. [15 U. S.] 345. Embezzlements of the cargo seized, or acts personally violent or injurious perpetrated upon the captured crew or improperly separating them from the prize vessel, or not producing them for examination before the prize court, or other torts injurious to the rights or health of the prisoners, may render the arrest of the vessel or cargo as prize defeasible, and also subject the tort-feasors to damages therefor. But the law does not constitute those acts or omissions legal bars to the suit, and it is plain that the course of investigation into those matters would not naturally be anticipated from the shape of the prize suit, nor could they be inquired into with that fulness befitting the gravity of the imputations or their importance to the public service, or the rights of individuals, so well and

satisfactorily in summary and incidental proceedings as in actions founded directly upon the injuries complained of.

The practice of prize courts supplies a cause of procedure under claims for redress, in cases of that description, which seems more proper to be pursued against public ships, when the consequences may also lead to other results than an award of pecuniary compensation to parties complaining of wrongs done them. A solemn monition may be directed to those using the authority of the government in seizing property at sea, compelling them to respond before the court to parties aggrieved by their acts for every wrongful use of authority confided to them; and thus, by pleas and allegations, the special grievances will be specifically charged and contested before the court, and the evidence pertinent to the contestation can thus be collected and laid before the court on both sides. The Eleanor, 2 Wheat. [15 U. S.] 345; The Magnus, 1 C. Rob. Adm. 31.

Merely interposing a statement of grievances by way of schedule attached to the claim of ownership, and the test oath which enabled a party to contest a libel of information in a prize suit, is not placing the controversy before the court in such an authoritative shape that parties are at once compellable to treat the allegations or suggestions as in litigation thereupon. It may well afford foundation for either party to appeal to the discretion of the court to proceed and render justice in the matter summarily, in the exercise of that pervading jurisdiction which envelopes prize proceedings. But, when there is reasonable cause to look for more thorough representation of the occurrence referred to than will commonly be obtained from ex parte statements, given under impressions likely to be colored by the excitement of sudden capture, and the risks and inconveniences following it, I consider it the more reliable course of practice to require the evidence to be furnished under pleas and allegations, when it is offered in bar of the rightfulness of a capture as prize, or as foundation for an award of compensation in damages, because of irregularities or culpabilities of captors who are in the public service in making the seizure or dealing with the prize property whilst in their possession. In The Magnus, 1 C. Rob. Adm. 31, Sir William Scott says that "the proof required was of the most solemn nature, by plea and proof." The proceedings by pleas and allegations admonish the parties of the difficulties of their situation, and call for all the proofs their case can supply. Wheat. Mar. Capt. 284.

It is to be remarked, in this case, that no evidence has been given on the examinations in preparatorio, or upon the papers of the vessel, showing any unlawful or irregular conduct of the captors in making the prize, or in the subsequent treatment of her crew or of the property arrested. The affidavit of the master, referred to as part of their claim by the claimants, is extra-judicial, and not testimony in the cause, and, if allowed by the court as notice to the libellants of charges impeaching the legality of the capture, cannot avail as testimony in the suit on the hearing. The like evidence was not permitted to have that effect in the case of The Jane Campbell [supra]. It was there only recognized as a basis for after summary proceedings, to establish the justness of the allegations, under the implied reserve that it could not, per se, sustain a decree against the captors for torts.

Two notes in the log-book, apparently entered by the prizemaster after the arrest of the schooner, state that he placed the mate and steward in irons on taking command of the vessel, and in the afternoon took the irons off for the day, replacing them for the night, and the next morning again removing them; alleging it to be discretionary with him to keep the men in irons day and night. No allusion is made by the men to the occurrence on their examination; and in such posture of the transaction the inference may be no stronger that the act was tortuous and unjustifiable than that it was an excusable precaution against menaces or well-suspected refractoriness of the prisoners. It is manifest, also, that separating the master and others of the crew, and not bringing them with the prize into port and before the court, was not necessarily culpable of itself, and may have been justifiable from the condition of the vessel or that of her crew.

No other violation of the rights of the claimants, or of their own legal obligations by the libellants in seizing the vessel, is attempted to be shown by the proofs before the court than the alleged irregularity of capturing her after she had been twice previously arrested and discharged by public ships for the same offence. Such relinquishment of an arrest by a captor, whether the first in order of time, or any after one in a series of consecutive arrests, whilst the vessel is in transitu, endeavoring to carry out a voyage illegal and culpable in its inception and purpose, amounts to no acquittance or condonation of the offence; and she remains under all her antecedent liabilities to the law, in like manner as if no imperfect interception of her voyage had been attempted. Great circumspection and precaution will, undoubtedly, be exacted in authorizing a second arrest, if any bona fide change of property intervenes between the arrests. The Eliza and Katy, 6 C. Rob. Adm. But when the arrest was already justified by the facts, it would be a very trivial irregularity for one ship to correct the immediately previous errors of others, in releasing improvidently, once or again, a captured vessel taken in flagrante delicto. No just exception, therefore, lies to sending a vessel in to be proceeded against in prize, because she had been in manual custody, on the charge previously, and liberated by the seizing officers without the mandate of a proper prize court. As before indicated, the

proofs before the court in the suit supply adequate cause for the condemnation and forfeiture of the vessel and cargo, and sentence to that effect is, accordingly, ordered to be entered. The fradulent attempt on the part of the claimants to violate the blockade incurs this judgment in favor of the United States, although the claimants may be enabled to show that the captors have been guilty of irregularities and wrongs towards the prize or the ship's company, subsequent to her capture. The government, on general principles, would not be debarred from vindicating their rights under the law of nations, against the criminal vessel and cargo, if it were proved that the captors, after making the prize, had, on their part, been also guilty of irregular and culpable conduct towards the prize property or crew. In that respect the court will sedulously administer the same measure of relief to injured parties, against captors acting in the public service, that is supplied by the law in relation to private cruisers. Yet, there may be reasonably observed differences in the method of enforcing it, because, in the case of public vessels, the ship's company are subject to the direction and authority of officers outside of those commanding the particular one engaged in the capture, and may be entitled by law to exemptions from personal responsibility, which could not be set up by the voluntary wrongdoer. Besides, the act for the better government of the navy subjects any person in the navy, for misconduct in relation to prize property, to forfeiture of his share of the capture, and such further punishment as the prize court shall impose. 2 Stat. 46, art. 8. In such cases, it seems to me, there is a special fitness in requiring that the right of reclamation for damages, in cases of capture made by public vessels, should be pursued by the parties averring the grievance and tort committed upon them, by plea and proof, which admit of counter allegations and full evidence under them. This will be the course of practice to be hereafter followed in like cases, unless otherwise specially ordered by the court.

It is accordingly directed that, within ten days after the entry of this decree, and notice thereof to the proctors for the claimants, they sue out a monition to the captors in this suit or their proctors, and file in court and serve on such proctors the allegations and proofs upon which relief is claimed in such proceedings, and that the captors, through their proctors, be allowed twenty days to file their answer and proofs in reply thereto, each party being entitled thereafter to bring the matter to a final hearing before the court, on two days' notice in writing. If the conditions above stated are not fulfilled, either party, upon the default of the other therein, shall be entitled to have final judgment entered in the suit, and take such after proceedings therein as are consonant to law and the practice of the court.

LOUISA BARBARA, The (UNITED STATES v.). See Case No. 15,632.

Case No. 8,532.

The LOUISA JANE.

[2 Lowell, 295.] [1]

District Court, D. Massachusetts. Dec. Term, 1873.

SALVAGE — NO COMPENSATION AGREED — ESTABLISHED BY USAGE—ABSOLUTE AND CONTINGENT CONTRACTS.

1. Persons who assist a vessel in distress at the request of her master or owner, with no definite arrangement for compensation, must ordinarily be paid as salvors.

2. If the rate of payment is established by the usage of a port well known to both parties, the payment for salvage services may be affected or controlled by such usage.

3. The distinction sometimes drawn between absolute and contingent contracts for salvage services is misleading, and of no practical importance.

4. A contract, whether absolute or contingent, for services in saving property on the sea or in a harbor, does not oust the jurisdiction of this court of a proceeding, in rem or in personam, brought by the contractor himself.

[Cited in Chapman v. The Greenpoint, 38 Fed. 671; The Roanoke, 50 Fed. 577.]

Libel of Moses B. Tower and the Boston Tow-Boat Company, for services rendered in raising the schooner Louisa Jane, a pilot-boat of Boston, which had been sunk in the harbor near Fort Independence, Dec. 17, 1873, by a collision. The libellants asked for meet and suitable salvage. No appearance having been entered for the schooner, the court proceeded, after the return-day, to assess damages ex parte, as usual. The evidence thus taken disclosed that the libellant Tower considered himself entitled by contract to a certain amount, though it should equal or exceed the value of the schooner. Thereupon an amendment of the libel was ordered by the court, with notice to the master and supposed owner of the pilot-boat. Mrs. Louisa Jane Fowler, wife of the master, appeared and claimed the schooner, and made a deposit for costs; and, by consent, the case was heard without the formality of an answer. Much oral evidence was taken concerning the services performed and their value, and the usage of the port of Boston in such cases.

F. Goodwin, for libellants.

A. Wellington, for claimant.

LOWELL, District Judge. It was supposed by the libellants, when they brought this action, that in all cases of services in the nature of salvage the suit should be brought for salvage, and the contract, if there were one, should be given in evidence to regulate the damages. This is the practice in England, and there is no special objection to it when

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

the action is defended; but in this case the libellants' claim might possibly exceed a salvage reward, and so the frame of the libel might have misled the owner of the vessel. It was for this reason that the amendment was ordered, if the libellant intended to insist on his contract.

It has been often decided in this circuit that persons who go to the assistance of a vessel in distress, at the request of her master or owners, but with no definite arrangement for compensation, must ordinarily be presumed to go as salvors, and not as contractors or laborers to be paid a quantum meruit. Hennessey v. The Versailles [Case No. 6,365]; The Independence [Id. 7,014]; Adams v. The Island City [Id. 55]; The Susan [Id. 13,630]. The case of The Independence was very fully considered by the learned judge, and his decision was affirmed at Washington, though by a divided court. Its doctrine is doubted by Mr. Parsons (2 Pars. Shipp. & Adm. 308 [Ed. 1869] and note 4); but has been followed by Mr. Justice Clifford and Judge Sprague, in the cases above cited, not only as having been settled, but as rightly settled. The point, after all, is one of fact; and the facts proved here are wholly different from those which appeared in the cases cited. It seems that in this port there has grown up within ten or fifteen years past, and perhaps in consequence of those decisions, a regular wrecking business, conducted, in large part, by the libellant, Tower, relative to vessels that are beached or sunk within reach of assistance from Boston; that the libellant's charges are tolerably well fixed, on a liberal scale, certainly, but still upon a sort of quantum meruit, and that they are not higher than may be accounted for by their peculiar nature, and by the necessity of constant readiness on the libellant's part to perform them, on instant notice, at all times and seasons; and that they are paid without much reference to value saved or risks run, or any thing but the time and means actually employed.

It is admitted that the usage may govern this case; but whether the usage is to pay when the service is unsuccessful, is not clear, and is not admitted. This uncertainty concerning the contract makes it proper for me to examine the law of salvage as regulated by contract; and the examination must be somewhat careful and elaborate, because there are several dicta of eminent judges which have been understood to deny the jurisdiction of this court, at least in rem, over a contract for saving property at sea, when the pay was to be absolute, without regard to success.

The earliest of the remarks to which I refer was made by Mr. Justice Curtis, in The Versailles, ubi supra, and they are reiterated and expanded in The Independence [supra], where it is said by the court: "When, therefore, the subject-matter of a contract is a mere attempt to save property, and when the owner or his representative, or both, become personally liable by the contract to pay either an agreed sum or a quantum meruit for the labor and service rendered, without regard to the results, the parties do not contemplate, nor engage in, a salvage service, but quite a different service. . . . Such a contract is inconsistent in its nature and objects, and the liabilities which grow out of it, with a salvage service. As Lord Stowell declared in The Mulgrave, 2 Hagg. Adm. 77, it is a case of contract, and not one of salvage. I do not intend to be understood, however, that a case in which a contract exists may not also be a case of salvage. The parties may agree on the amount of a salvage compensation, or on the principles upon which it shall be adjusted; and such agreements, fairly made, no advantage being taken of ignorance or distress, are readily upheld by the courts; (citing certain cases). Nor do I intend to express any opinion on the question whether the admiralty has jurisdiction in rem to enforce a contract for assisting a vessel in distress, which are not salvage services."

A similar division of possible contracts is made by the learned judge in The Susan [supra], in which he calls a contingent agreement by the name of "salvage," and refuses that name to one in which the pay is to be absolute. He, however, makes no question about jurisdiction; and neither of these cases decided any such point: they decided, as I have said, that a salvage service, in the strictest sense, is to be inferred, when no definite bargain of any sort is made. Then, there are three cases in which salvage suits have been dismissed, and in which the courts have, to a greater or less extent, appeared to rely on the fact that the payment was not to be contingent on success. The Whitaker [Case No. 17,525]; Squire v. One Hundred Tons of Iron [Id. 13,270]; The Marquette [Id. 9,101]. I shall show hereafter that these cases do not decide the point now under consideration, because they were all suits by sub-contractors, or laborers under contractors, and not by the contractors themselves.

The differences between contract and salvage are very marked, and pervade the whole subject; but they are nearly as important where the contract is contingent, as where it is absolute; and they are not, in this country, jurisdictional differences. Mr. Justice Curtis, as we have noted, cites The Mulgrave, 2 Hagg. Adm. 77; but he is not accurate in citing it as an absolute contract for payment at all events. The report clearly shows, I think, that the contract was contingent, though nothing turned on that point, and it was not mentioned in the argument or the judgment. Lord Stowell, in contrasting contract and salvage, in his decision of that case, was adverting to the point, only too well established at that time in England, that the admiralty was not permitted to hold pleas of contract. Even seamen, whose general right

to sue in that court was never denied, could not recover there any thing which was due by usage, or by any contract which was at all out of the usual course of shipping articles. It is my impression that the judges of the queen's bench imagined that Dr. Scott and Dr. Robinson, who certainly held a lieutenant's commission, had been promoted from the forecastle of a man-of-war, and could not understand a usage or stipulation that was not familiar to every foremast hand. At all events, they were prohibited from enforcing them; and, whenever ship owners became bankrupt, a painful failure of justice was likely to occur, by reason of the inability of a whalesman, or any other sailor whose contract was peculiar, to enforce his just rights against the ship itself. The Sydney Cove, 2 Dod. 11; The Mona, 1 W. Rob. Adm. 137; The Riby Grove, 2 W. Rob. Adm. 52; The Debrecsia, 3 W. Rob. Adm. 33. The last of these unfortunate cases was The Harriet, 1 Lush. 285, decided in March, 1861. In May of that year, parliament came to the relief of the admiralty court, made it a superior court of record, and in many other respects strengthened and enlarged its powers, and in section 10 of the statute gave it jurisdiction of "wages due under a special contract." 24 & 25 Vict. c. 10. It had already, in August, 1840, given the court power to deal with all claims and demands whatsoever in the nature of salvage or towage, or for necessaries supplied to a foreign vessel. 3 & 4 Vict. c. 65, § 6. In commenting upon the act of 1861, soon after its passage, a learned author said: "The jurisdiction of this court did not (before the statute) extend to rights and questions arising upon contract. It determined the reward of merit and the compensation for injuries; but stipulated rights, though held in view in advancing to a result, never formed the basis of its proceedings:" Macl. Shipp. (1862) Supp. 56. See the remarks of Dr. Lushington in The Ocean, 4 Notes, Cas. 33.

We see, then, that until the reign of the present sovereign of Great Britain the distinction between service and contract, whether the service were in the nature of salvage, or wages, or any thing else, was often a most important jurisdictional distinction; and, in contrasting salvage and contract, Lord Stowell was referring to something which went to the very power of the court. And so he has usually been understood, and the case has been often cited in that sense. Dr. Lushington, however, who was of counsel in the case of The Mulgrave, has explained it away to a considerable extent. He says it only decided that when the defendant in an action for salvage sets up a valid contract, and pays the money into court, the decree goes for him, as in any other case of a good tender. The Catherine, 6 Notes Cas. Supp. 43. Since this decision there have been a great many cases of the same sort; and it is the practice in England for the libellants (or whatever they are called) to demand salvage in all cases, and, if they rely on a contract, to give it in evidence, very much as at common law a plaintiff would introduce a promissory note under a count in indebitatus assumpsit. If, on the other hand, the owner of the property desires to set up the contract, he does so, together with a tender. The True Blue, 2 W. Rob. Adm. 176; The Jonge Andries, Swab. 226, affirmed, Id. 303; The Henry, 15 Jur. 183; The Crus. V., Lush. 583; The William Lushington, 7 Notes Cas. 361.

The English practice is certainly very ingenious. It appears to be understood that a valid contract bars an action for salvage, even since the act of 1840; but the courts will not admit it as a bar, unless the money due under it is paid into court for the use of the plaintiff. It has not been directly decided since 1840 whether the court could entertain a suit founded distinctly on a special contract for saving property wrecked or in distress at sea. The act, using the expression, "demands in the nature of salvage and towage," would seem to be sufficient; but so late as 1861 it was decided that there was no jurisdiction of a special contract for towage. The Martha, Lush. 314. However, the practice avoids all such questions.

In this country, though the distinction between contract and salvage must always be of great consequence in awarding the damages, it is not, and never has been so, in a jurisdictional point of view. Thanks to the great jurists, who were called upon to interpret the grant of admiralty jurisdiction contained in the constitution, we have retained a great part of the powers which anciently and of right belong to this court. We hold pleas of all maritime contracts, absolute or contingent, without being obliged to resort to fictions or indirections of any sort.

It cannot be doubted that a contract to raise a vessel, sunk in navigable waters, is a maritime contract. And the mode in which payment is to be made cannot, in this country, have the least bearing on that question. A payment in gold is quite as much within our cognizance as one in pearls gathered from under the sea, though that difference would probably have been vital in the eyes of the old common law of Lord Coke's time. A payment absolute cannot convert a maritime contract into one not maritime, though a contract of either kind may give a concurrent jurisdiction to the courts of common law. Many maritime contracts, such as those for freight, seamen's services, &c., are, or formerly were, contingent upon the completion of the adventure; but many others are not, or are sometimes contingent and sometimes not, according to circumstances.

A contract for saving wrecked property being maritime, the property saved is hypothecated for its fulfilment. This is so of all maritime contracts, whether contingent or absolute. The apparent exception of supplies to a domestic ship is an accident, the

relic of common-law usurpations, and confined to the jurisprudence of England and the United States, in the latter of which the several states have taken great pains to correct it. Indeed, I consider the lien for towage to be quite decisive of this case. This contract was, in great part, an agreement for towage, and in the rest for the use of lighters in similar work; and I am not aware of a case in which it has been held, or even argued, that such a contract does not create a maritime lien.

The only case in which the point has been directly adjudged is The A. D. Patchin [Case No. 87], in which the contract was absolute, and an argument was addressed to the court founded on that circumstance. Judge Conkling's able opinion in support of the jurisdiction in rem in that case was in all respects sustained by Nelson, J., and has never been directly questioned or met, excepting by a query of Curtis, J., which is by no means an expression of opinion, as I shall show.

Mr. Justice Story, in his well known remarks in The Emulous [Id. 4,480], takes no such distinction, but speaks alike of all contracts. "I take it to be very clear," says the learned judge, "that whenever the service has been rendered in saving property upon the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved, or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt; in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage service and a salvage compensation."

I will now consider the cases, which at first sight seem to be adverse to the jurisdiction. They are three.

1. The Whitaker [Cases Nos. 17,524, 17,525]. There Holbrook had agreed to launch a stranded vessel for $900, and, after trying and failing to accomplish any good result, he employed Otis, who worked with his men, and succeeded; but thinking they had earned more than the agreed sum, they libelled the vessel (which was owned in Maine) as material-men. The court dismissed the libel, on the ground that if they were material-men, which he evidently did not consider them to be, they had no lien, because they worked under one who had no power to bind the vessel beyond $900 in any event, and he intimated that some one might recover that sum in an action for salvage. In the second suit, which was for salvage, a decree was entered for Otis and Holbrook for $900; but the men who had worked by the day under Otis were not admitted to be salvors, and this for the reason that their contract clearly showed that they looked to Otis personally for their pay in all events, whether the vessel were saved or not. In that case, is a head-note, which appears to lay down the general proposition that an agreement to labor for an agreed compensation, to be paid at all events, displaces a claim for salvage. But it is evident that all that the case decides is, that day-laborers, under a contractor who has undertaken to save a vessel for a fixed sum, cannot be joined with the contractor in suing the vessel for that sum. The decision, therefore, in the second case of The Whitaker [supra] was substantially the same as in the first; namely, that Otis had no power to impress the vessel with liens, whether they were called by one name or another. It is, in this respect, precisely like The True Blue, 2 W. Rob. Adm. 176, where two smacksmen had undertaken to relieve a vessel for a certain sum, and afterwards engaged other smacks to assist them; and it was held that these assistants must look for their compensation to their immediate employers, and not to the vessel saved. If it were otherwise, the original contractor might involve the property to an amount exceeding the whole contract price. So in the case at bar, if Tower had undertaken the job for a fixed price, or for a fixed proportion of the value saved, the tow-boat company, knowing the facts, could not be permitted to assert a lien which might override the agreement. As the contract here was for a quantum meruit, I do not know that there is a valid objection to the tow-boat company being a party plaintiff jointly with Tower, to the extent of what is reasonably due for its part of the services. This depends on whether Tower had any express or implied authority to employ such services on account of the owner. In The Whitaker and The True Blue [supra], the contract being for a fixed sum, there could be no implied authority to subject the vessel or her owners to any other or different payment.

2. The Marquette [Case No. 9,101], decided by Judge Longyear. That case was like The Whitaker, and a sub-contractor, who had bargained with the contractor for pay at all events, was not allowed to libel the vessel alone. The learned judge cites The Whitaker and The Independence, and explains the former case very clearly. He does say, as one reason why the libel cannot be maintained, that the pay was not to depend on success, and this form of contract, he says, creates only a personal obligation, and not a lien. This is true in the case of a sub-contractor, and is probably all that is intended.

The last case is Squire v. One Hundred Tons of Iron [Case No. 13,270], where the libellant had let out certain tools to a wrecker, and Judge Blatchford held that he had no action in the admiralty, personal or real. This appears to be like the other two cases.

That this is the true significance of these

decisions, is shown by several cases in England, in which the direct question was litigated whether a contractor could proceed in the admiralty for his reasonable compensation, as well as for the money expended in saving a wreck; in all of which the decision was favorable to the jurisdiction. The discussion was most elaborate in The Happy Return, 2 Hagg. Adm. 198, though that was not the first case of the kind. There a merchant was employed under a power of attorney from the owner of the vessel, with the consent of the underwriters, to save whatever could be rescued from a sunken ship. His payment does not appear to have been contingent upon success. Sir C. Robinson decreed in his favor for his expenses, and a reasonable compensation for his services, though he said it was not a case of salvage, strictly so called. A similar course was followed in The Traveller, 3 Hagg. Adm. 372; The Watt, 2 W. Rob. Adm. 70; The Purissima Concepcion, 3 W. Rob. Adm. 181; The Favorite, 2 W. Rob. Adm. 255; and there are others. In The Favorite, Dr. Lushington is reported to have said, "Although I cannot view his services in the strict character of salvage services, but rather of a successful and meritorious agency," &c., decreeing for the plaintiff.

It will be observed that in none of these cases were the laborers, or sub-contractors, or furnishers of materials, made parties to the action; and, if they had been, I have no doubt their asserted liens would have been rejected, for the reason that they had contracted with a person, and under circumstances which repelled the inference that any lien was or could be stipulated for; as in The Whitaker and The Marquette.

When Mr. Justice Curtis, in giving judgment in The Independence [Case No. 7,014], speaks of a contract to bar salvage, he must have had reference only to its preventing the court from assessing a salvage compensation on the usual liberal rule of the maritime law. Indeed, he twice expresses himself so, though there are other passages which have been understood to bear a wider meaning. But that I am right in my construction of his language is clear from this, that, when he comes to speak of the jurisdiction in rem, he carefully avoids expressing an opinion, and refers to The A. D. Patchin [Id. 87]. I understand in the same way the expressions used by the court in Coffin v. The John Shaw [Id. 2,949]; Adams v. The Island City [Id. 55]; The Camanche, 8 Wall. [75 U. S.] 448.

I conclude, therefore, that whether the libellant Tower was to be paid at all events or not, which is doubtful, yet in either case he can recover against the vessel the sum due him under his contract.

The judge then examined the evidence of services, and made up the account by items, awarding in all $966.60.

Cas No. 8,533.

The LOUISA SIMPSON.

[2 Sawy. 57;[1] 14 Int. Rev. Rec. 165.]

District Court, D. Oregon. Oct. 7, 1871.[2]

CONGRESS MAY AUTHORIZE THE PRESIDENT TO PROHIBIT THE INTRODUCTION OF SPIRITS INTO ALASKA—IMPORTATION INTO ALASKA.

1. Congress had power to authorize the president to regulate or prohibit the introduction of distilled spirits into the district of Alaska, under penalties, as prescribed by act of July 27, 1868 (15 Stat. 241).

[Cited in U. S. v. Nelson, 29 Fed. 207.]

2. Distilled spirits are imported into the district of Alaska, when brought from an American port, outside of said district into the waters, within the headlands of Point Hope and Cape Prince of Wales, and there unladen or disposed of, or with the intent to so unlade or dispose of them.

[Cited in The Kodiak, 53 Fed. 129.]

This suit was brought to enforce a forfeiture of the schooner Louisa Simpson and cargo for a violation of section 4 of the act of July 27, 1868 (15 Stat. 241), extending the laws relating to customs, commerce, and navigation over the territory of Alaska, and the executive order of February 4, 1870, in pursuance thereof.

Joseph N. Dolph, for libellant.
William Strong, for claimants.

DEADY, District Judge. The libel in this case was filed September 19, 1870. On October 10, thereafter, an amended libel was filed, wherein it is alleged that on July 17, 1870, at the port of Kotzebue Sound, in the district of Alaska, in waters navigable from the sea by vessels of ten or more tons burden, J. M. Selden, captain of the U. S. revenue cutter Reliance, did seize the schooner Louisa Simpson and cargo, consisting of liquors, tobacco, powder, guns, caps, knives, lead, cotton cloth, ivory, whale-bone, peltries, etc., and report the same to William Capus, collector of customs for said district, at Alaska, who now holds said schooner and cargo, at the port of Portland, in the district of Oregon, as forfeited to the United States for the causes following:

1. That on or about April 19, 1870, said schooner, being then owned in whole or in part by American citizens, sailed from the port of San Francisco, California, and that at said date, and upon said voyage, one Henry Ravens, the master of said schooner, exported from said port of San Francisco, within the United States, upon said schooner, and as part of her cargo, a large quantity of distilled spirits, of the value of over four hundred dollars, destined and intended to be taken and imported into the territory of Alaska, in violation of section 4 of the act of congress entitled, "An act to extend the

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

[2] [Affirmed by the circuit court; case unreported.]

laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia, to establish a collection district therein, and for other purposes;" approved July 27, 1868 (15 Stat. 241); and in violation of the restrictions and prohibitions of the president of the United States, made in pursuance of said act by executive order, February 4, 1870, prohibiting the importation of distilled spirits into or within the territory of Alaska.

2. For that the said distilled spirits of the value and exported and destined as aforesaid, were, about July 17, 1870, found on board said schooner, at Kotzebue Sound aforesaid, the cargo aforesaid, being also then and there on board said schooner.

3. That on or about July 17, 1870, said distilled spirits of the value, and exported as aforesaid, "were imported into said district of Alaska, were used and attempted to be used and landed from said schooner, at Kotzebue Sound and elsewhere in said territory, and were there found upon said schooner; said schooner, at the same time, having on board the cargo aforesaid, in violation of said section 4 of the act of congress, and the restrictions and prohibitions of the president aforesaid."

4. That said schooner being of twenty tons or more burden, and owned as aforesaid, was, about July 17, 1870, "found with the cargo or lading aforesaid on board, trading between district and district in the United States, and between the ports of San Francisco, in the collection district of San Francisco, and in the fourth coasting district and Kotzebue Sound, and other places in the collection district of Alaska and fifth coasting district, in the United States, having on board distilled spirits, other than ship's stores, without being enrolled and licensed, and without applying for or being furnished by the collector of the port of the United States, at which she took in her said cargo, with a certified manifest containing the marks and numbers of packages, the names of shippers, consignees, and port of delivery, and without receiving a permit, as required and in the manner provided by statute; she, the said schooner, having, upon her said voyage, cleared from the port of San Francisco for the foreign port of Plover Bay, and not for any port or place within the United States."

5. That part of the cargo aforesaid, consisting of 395 gallons of distilled spirits was, between April 21 and July 17, 1870, drawn from casks duly stamped and gauged, and put into other casks and packages containing not less than ten gallons, and intended for sale, without such last mentioned casks or packages being stamped or marked, as by law provided, and was so found in the district of Alaska on or about July 17, 1870.

6. That on or about July 17, 1870, the Louisa Simpson was used by the master thereof to convey and transport from off the coast of California, in the Pacific Ocean, to Kotzebue Sound, in the district of Alaska, three empty casks or pipes from which distilled spirits had been drawn, and which were duly stamped and marked, without such stamps or marks being effaced or obliterated, as provided by law.

On October 10, 1870, Henry Ravens, the master of the Louisa Simpson, appeared and filed two separate but similar answers to the libel; one on behalf of the owners of the schooner, and the other on behalf of the owners of the cargo.

The answers admit the allegations of the libel, except as follows:

They deny that the schooner sailed for the district of Alaska, or that the distilled spirits aforesaid, or any part thereof, were intended to be imported into the district of Alaska, or were landed or attempted to be landed or used therein. They allege that the schooner sailed for Plover Bay, in the Arctic Ocean, in the empire of Russia, but about June 11, 1870, while off the river Anadyr, in Asia, was caught "in the ice, and drifted about helplessly" in the Arctic Ocean, until July 1, when she came out of the ice, about twelve miles west of Cape Douglas, in the district of Alaska; that being then short of wood and water, the master attempted to make Port Clarence in said district, for the sole purpose of obtaining a supply of such articles, but being prevented by the ice from so doing, he made for Cape Prince of Wales for the same purpose, when he met a four knot gale and floating ice from N. N. W., to avoid the dangers of which, he put in under the cape, and anchored in two fathoms of water, about four miles from shore; that while lying here at anchor, some Indians came off shore with whom he traded for some wood, but not sufficiently for the voyage, and a sea carried away the windlass, when he proceeded to Kotzebue Sound, the nearest "land-locked harbor," from necessity, and solely for the purpose of repairing damages to the vessel, and obtaining wood and water for the voyage.

They deny that the schooner, or officers, or crew thereof, were engaged in trading, or did trade between district and district in the United States; they admit the transfer of the distilled spirits from the large to the small packages, as alleged in article 5 of the libel, but allege that the same took place on the open sea, and without the jurisdiction of the United States, and was made for the convenience of trading in the Russian possessions; they admit the conveyance in the schooner of the three empty casks, without having the stamps or marks effaced, as alleged in article 6 of the libel, but allege the schooner brought such casks within the limits of the United States contrary to the intention of the owners and master, by stress of weather, as aforesaid.

Section 4 of the act mentioned in article 1

of the libel, and under which this seizure was made, enacts: "That the president shall have power to restrict and regulate, or to prohibit the importation and use of firearms, ammunition, and distilled spirits into and within the said territory. And the exportation of the same from any other port or place in the United States, when destined to any port or place in the said territory, and all such arms, ammunition, and distilled spirits exported, or attempted to be exported from any port or place in the United States, and destined for such territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition, and distilled spirits landed, or attempted to be landed, or used in any port or place in said territory, in violation of such regulations, shall be forfeited; and if the value of the same shall exceed $400, the vessel upon which the same shall be found, or from which they shall have been landed, together with her tackle, apparel and furniture, and cargo, shall be forfeited; and any person willfully violating such regulation shall, on conviction, be fined in any sum not exceeding $500, or imprisoned not more than six months."

The section further provides that "bonds may be required for a faithful observance of such regulations," from "any vessel departing from any port in the United States," having on board any such articles, and "destined to any place in said territory," or when there shall be reasonable ground of suspicion that such articles are intended to be landed there, in violation of law. 15 Stat. 241.

Section 5 of the same act enacts: "That the coasting trade between the said territory and any other portion of the United States, shall be regulated in accordance with the provisions of law applicable to such trade, between any two great districts."

On February 4, 1870, the president, in pursuance of the foregoing section 4, made the following regulation: "The importation of distilled spirits into and within the district of Alaska is hereby prohibited, and the importation and use of fire-arms and ammunition into and within the islands of St. Paul and St. George, in said district, are also prohibited under the pains and penalties of law."

On February 8, 1870, in pursuance of this executive regulation, and to "insure its faithful execution," the secretary of the treasury instructed the collectors of customs "to refuse clearances to all vessels having on board distilled spirits, for ports or islands" in the district of Alaska; and that vessels clearing for any port, and "intending to touch, trade, or pass within the waters of Alaska, with distilled spirits or fire-arms, and ammunition on board," should give a sufficient bond, conditioned that such spirits should not be "landed upon or disposed of within the territory of Alaska," and that said arms and ammunition should not be landed, etc., upon either of the islands aforesaid.

Ravens, the master of the schooner, was indicted by the grand jury of the district for willfully violating the foregoing executive regulation concerning the importation of distilled spirits, and tried thereon on November 17, and days following, but the jury having failed to agree, they were discharged without giving a verdict. This cause came on to be tried on November 29, and by the stipulation of the parties, the judge's notes of the testimony of the witnesses examined on the trial of the master, were read in evidence.

The master, Ravens, and crew, consisting of William Smith, first officer, Horatio Thatcher, second officer, and Harry Beers and John Park, seamen, were examined as witnesses; also, Lieutenant Mason of the cutter Reliance, who brought the schooner to this port, and Henry Hirst of San Francisco, a half owner of the cargo.

The testimony is voluminous, and comes mostly from the mouths of interested witnesses or actors in the transactions. All the witnesses belonging to the schooner, except Park, impressed upon my mind the conviction that they testified with a deliberate purpose, to clear the vessel and cargo; at least so far as they could, by suppression of the truth, or not remembering it.

Park appears to have had the education and training of a superior seaman, but had fallen into intemperate habits. Under the influence of liquor, he had some words with the second mate, who appears to be a very ordinary seaman, after the seizure, and while the schooner was still lying at Chamisso, in Kotzebue Sound, for which the master reported him to Mason as mutinous, who sent him on board the Reliance in irons. This conduct on the part of the master doubtless angered Park, and, as he states, led to his informing Selden, on the voyage to Sitka, of the nature of the business and transactions in which the schooner had been engaged. The circumstances considered, it is not reasonable to suppose that the master had Park sent to the Reliance on account of his altercation with Thatcher, at Chamisso. There was nothing in that circumstance to justify his charging Park with mutinous conduct. But this shows, that for some reason, the master, after the seizure, wished to get rid of Park. It is quite probable that he feared Park might remember more than was desirable, and therefore, he procured him to be separated from the schooner, for the purpose of avoiding the effect of his testimony, or disclosures in any inquiry that might be made before the collector at Sitka or elsewhere, concerning the business of the schooner in the waters of Alaska, at the time of the seizure.

The cutter did not sail directly for Sitka when she left Kotzebue Sound, but the schooner did; and at the time it was supposed that the former would not reach Sitka for some time after the latter had left there, or been disposed of by the collector. As it turned out, the schooner was beating out of Sitka, on her way to this port, as the cutter went in.

Park was thus left behind; but the steamer Wright coming into port, he worked his way down on her, bringing a letter from the collector to the district attorney. He states that he came on his own account, to recover his wages from the Louisa Simpson.

Taking into consideration the character of the witnesses, their relation to the transaction complained of, and the parties implicated, or their interest in the subject matter, as well as the manner of giving their testimony, and its intrinsic probability or otherwise, I find the facts of the case to be as follows:

The schooner Louisa Simpson being of 90 56-100 tons burden, and owned by Samuel Winant; cleared from the port of San Francisco on April 20, 1870, under an American register, obtained at said port, on said date, for the "Arctic Sea." At least so the manifest was first made out. Subsequently, however, but when or by whom done does not appear, a line was drawn across the words "Arctic Sea" with a pen, and the words "Plover Bay" written immediately after, in a different hand and ink. The oath of the master, however, endorsed on the manifest, states unqualifiedly that the schooner is bound to the "Arctic Sea." No explanation having been made or offered of the erasure and addition in the caption of the manifest, it is reasonable to conclude that it was illegal or unauthorized, and that the schooner did in fact clear, as the master states in his affidavit, simply for the "Arctic Sea." But no particular consequence is attached to that fact, beyond this: It tends to show that the voyage was undertaken without any very definite destination, or with the intention to be governed by circumstances in that respect.

As appears from the manifest, the cargo consisted of the following articles:

5 cases tobacco—weight not given—value		$ 500
10 " powder— " " " "		500
1 bale blue demings, 977 yds.	"	120
1 " prints.....1,150 yds.	"	120
1 " drill's.....999 yds.	"	140
48 guns	"	300
2 pipes alcohol.....400 gal.	"	400
Total		$2,000

In addition, it appears from the evidence that the following articles not on the manifest, were found on the schooner at the time of seizure:

274,800 percussion caps valued at	$274 80
170 lbs. lead, valued at	10 50
365 empty bottles	3 68
600 bottle corks	2 00
25 papers glove needles	1 00
4 pairs scissors	2 00
Total	$293 98

The ship's stores were not on the manifest, and were some dozens of porter, two cases of cognac brandy, and among them a barrel of whisky containing 25 or 30 gallons.

Although the manifest states that there were 400 gallons of alcohol in two pipes, Hirst, the half owner of the cargo testifies, that from the bills rendered him by the distillers, of whom it was purchased, they only contained 129 and 130 gallons respectively; and that the same was 42 above proof, or contained 92 per centum of pure alcohol. This statement as to the gross contents of the pipes corresponds very nearly with the estimate made by both Smith and Park, and I conclude that such is the fact. This would give 259 gallons of spirits in the two pipes, which was equal to 476 gallons of proof spirits, or liquor only containing 50 per centum in bulk of pure alcohol.

About June 1, and just before going through a passage in the Aleutian Islands, called the Seventy-Two Pass, the master, assisted by Park, drew the alcohol out of the pipes, and mixed it with about an equal quantity of water, put it into packages or kegs containing from 5 to 15 gallons each, for the purpose of trading with the Indians to the northward. In his testimony, the master attempts to make it appear that he changed the liquor from the pipes into the kegs because the former were leaking. But all the circumstances of the case go to show that this is an after thought and a falsehood. The contemporaneous entry in the log-book speaks of the master's being engaged in arranging the trading goods, and stowing casks, etc., and nothing is said of the pipe's leaking. He says that he thinks the pipes leaked 25 or 30 gallons, but could not tell how, when, or where. He could not reach the spirits through the bung hole with his finger, but could with a stick four or five inches long. It is not probable that the pipes were even full in the first place, and there may have been some loss from evaporation, or through the pores of the wood, enough to have scented the hold of the ship or immediate vicinity of the pipes, but if it was only four inches from the bung to the liquor, the outage would not exceed eight gallons to the pipe.

From the Seventy-Two Pass, the schooner sailed northward, towards the gulf of Anadyr. About June 13, and in latitude 61, she encountered ice—got into it, and drifted about with it, until about July 1, when she came out south by west of King's Island, and distant between 30 and 50 miles. During this time, it appears that the schooner was near enough Emma Harbor or Plover Bay, on the Arctic coast, to sight land. The master here, then, tells another incredulous story, to the effect, that while fast in the ice, a native chief of his acquaintance came off from Emma Harbor, and was on board for an hour or two, and got a large assortment of goods, except liquor, to sell for the master, on shore, on commission. No memorandum was made of the transaction. The master is unable to specify, with any certainty, what kind or what amount of goods were furnished. No other person, so far as appears, witnessed or ever heard of the arrival or departure of this Asiatic apparition, and I have no doubt that Ravens invented the whole story, to account for the goods not found in the vessel at the time of seizure.

On getting free from the ice, the schooner

sailed for Port Clarence, as the master states, to obtain wood and water, but failed to make it on account of the shore ice. Thenceforward she was beating about between the Diomede Islands and Chamisso Isle, near where she anchored on July 16, and was seized on the day following. The schooner first came to anchor on the north side of Cape Prince of Wales, about 25 miles from the point near a place called the Grave-Yard. Here the master traded with the Indians, receiving from them furs, ivory, bone, etc., in exchange for goods, including whisky. He also traded with them for similar articles at Port Blossom and Chamisso Isle. Park is the only witness who testifies positively to the traffic in liquor, but he does so unqualifiedly and with reasonable certainty as to the circumstances of time, place, quantity, etc. I have no doubt that his testimony on this point is substantially true. True, the master contradicts him, but I think he has shown himself to be unworthy of credit. The other members of the crew testify that they did not see any traffic in liquor, or don't know that it took place. But they would not swear that it did not take place, while the reluctant and evasive manner in which they answered the questions put to them on this point, was well calculated to make the impression that, notwithstanding their real or pretended ignorance of the matter, they were morally certain, at least, that the Alaska Indians obtained considerable quantities of ardent spirits from the deck of the Louisa Simpson, between July 1 and 17.

Thatcher, the second mate, does admit that once, when the Indians were on deck, he passed up a five-gallon keg of liquor, by command of the master, but says he passed it down again, and that he don't know whether any liquor was taken out of it or not, but volunteers an opinion in the negative. No particular reason is given for passing the keg up from the hold to the deck and back again, without making any use of its contents. The master admits that he received quite a quantity of fur, ivory, and bone from an Indian chief, while at the Grave-Yard, but says that he took these articles on freight to San Francisco, where he was to dispose of them for money, which he was at some time and in some way to return to this confiding Indian. This is a very silly story, and void of all probability —particularly when it is understood that the master had no definite idea of ever returning to that country, and that the Indian had no reason to believe that he would ever see or hear of him again.

The report of the appraisers of the cargo, which was read in evidence, and the correctness of which was not questioned, shows that there were only 319 gallons of proof spirits on board the schooner when brought to this port, and there is no reason to believe or suppose from the evidence that there was any more at the time of the seizure at Chamisso Isle. Deduct this from the quantity of spirits in the two pipes—when reduced to proof, 476 gallons—and the difference is 155 gallons. This 155 gallons was disposed of during the voyage, and before the seizure. The claimant does not attempt to account for it, except by the improbable supposition that it had leaked out of the pipes, before the reduction of the spirits at Seventy-Two Pass.

Notwithstanding the positive statements of the master, and the disingenuous denials and equivocations of the crew, to the effect that no liquor was disposed of to the Indians, this indisputable fact remains, that 155 gallons of proof spirits were taken out of the cargo of the schooner while she was in the waters of Alaska; and I have no doubt that it was traded to the Indians at the Grave-Yard, Cape Blossom, and Chamisso Isle. No other human beings were met with on the voyage, except the alleged Asiatic chief, when the schooner was in the ice, and the master states positively that he did not furnish him any spirits.

The report of the appraisers also shows that the tobacco, cotton goods, etc., together with the spirits on the manifest, had been disposed of, in the aggregate, to the value of $698.70—more than one half of the whole amount, and that there was found on board the schooner, ivory, bone, furs, and oil of the value of, I think, at a low estimate, $787. The absence of the one, accounts for the presence of the other. The spirits and other goods were traded to the Alaska Indians, in and about Kotzebue Sound, for the latter.

Again, the principal reason given for going out of the vessel's way into Kotzebue Sound, turns out to be substantially untrue. As has been stated, in his answer, the master alleges that, while lying at anchor under the lee of Cape Prince of Wales, a sea carried away his windlass, which so disabled the vessel as to compel him to put into the sound —the "nearest land-locked harbor"—to repair damages. On the trial, it was admitted on all hands that the windlass was not carried away, but that only the port windlass bitt was started, and from the evidence as well as the nature of the case, I am satisfied that this accident occurred while letting go the anchor without sufficient chain, and not by the shipping of a sea, as stated in the answer. Nor did the accident render the vessel unseaworthy, or make it necessary to take her into the sound to repair damages. When a vessel is riding at anchor, the strain or draft is upon the bulkheads of the windlass, and not the bitts.

Lieutenant Mason of the Reliance, who brought the schooner to this port, testified positively that the starting of this bitt did not render the vessel unseaworthy, or make it necessary to take her into port. Nor does the master appear to have thought so at the time, for no effort was made to repair the accident, until after the seizure, when at his

request, the carpenter of the Reliance drove a bolt through the lower end of the bitt, into the bulkhead. More than this, when the Reliance was discovered coming into Chamisso Bay, the master of the schooner had the Indians sent off her deck, and the fur which had been traded for, taken below and stowed in the casks, from which the spirits had been drawn, with a view, and for the purpose, as the circumstances satisfy my mind, of concealing the evidence of his traffic with the natives, from the officers of the cutter.

Taking these circumstances all together; the failure to account for the spirits disposed of between the time of leaving San Francisco and the seizure, and the fur and other Indian goods acquired in Kotzebue Sound; the falsity of the reason given for going into the sound at all, and particularly to Chamisso Isle, and the concealing of the fur, etc., on the approach of the revenue officers, and there can be little, if any doubt, but that the master had disposed of his missing liquor to the Alaska Indians, in Kotzebue Sound, for the furs, etc., found on the schooner, contrary to law, as he well knew. In addition, there is the positive and direct testimony of Park, to the same effect.

This constitutes a violation of the executive order, and the act of congress. Indeed, the simple act of taking these spirits within Kotzebue Sound, was such a violation, because it was an "importation of distilled spirits into and within the district of Alaska."

The phrase "district of Alaska," as used in this act and executive order, in my judgment, includes that portion of the sea along its coasts, which lies inside of a line drawn from the promontory of Point Hope, to the Cape Prince of Wales. But wherever the schooner appears to have come to anchor east of this line, as at the Grave-Yard, Cape Blossom, and Chamisso Isle, she was not to exceed four miles from the shore, and at these points at least, she must be held to have come within the district.

Admitting that the schooner had been within the district, the master alleges in his answer, as an excuse therefor, that he was driven thither by the stress of weather. The proof does not support this allegation, but the contrary.

Admitting its truth, however, for the purpose of the argument, it does not follow that the introduction of the spirits into the district was not unlawful, although it might be a good reason for the remission of the forfeiture incurred thereby; and certainly it does not justify or excuse the subsequent voluntary sale, disposition, and unlading of the spirits while in the district. Such use or disposition of spirits, not only casts suspicion upon the truth of the alleged excuse, but is itself an importation within the district, within the meaning of the act and order, and therefore illegal.

Counsel for claimant insists that the executive order of February 4th, 1869, is void, because congress cannot confer power on the president to make such a regulation. No authority was cited in support of this extaordinary proposition, and the argument in support of it was little else than the assertion of counsel to that effect. I see no reason to doubt the power of congress to authorize the president to make this regulation prohibiting the importation of pure spirits into the district of Alaska, under such penalties as congress may have prescribed. In fact, it is simply authorizing the president to determine and declare when and how far section 4 of the act of July 27, 1868, should go into effect. It is believed that an examination of the legislation of congress will disclose many instances of like authority and duty imposed on the president, and that the power to do so has never been seriously questioned.

There must be a decree for the libellant condemning the vessel and cargo as forfeited to the United States, for the cause stated in the third article of the libel. As to the other causes of forfeiture stated in the libel, it is not necessary to express an opinion upon them.

The vessel and cargo having been delivered to the respective claimants on bond, a decree will also be entered that the libellant recover off the obligors in said bonds respectively, the sums of $4,300 and $3,064, the appraised values respectively of said vessel and cargo, and that, unless the same is paid into court within ten days therefrom, that libellant have execution therefor.

Case No. 8,534.

The LOUIS DOLE.

[5 Biss. 172.] [1]

District Court, N. D. Illinois. July Term, 1870.

COLLISION—DUTY OF APPROACHING TUGS—WHERE RIVER BEGINS—RULE OF THE RIVER.

1. Where tugs are approaching on converging lines, and one gives the signal to pass a-larboard, to which the other answers that she means to pass a-port, and the first repeats her signal, the first has not the right to presume from a failure to answer her second signal that the other has yielded her course, but should proceed cautiously, and not run across the lines of the other. She must take notice of the fact that there is danger of a collision, even though the other tug may be in the wrong place and on the wrong course.

2. The rules of river navigation apply with full force on the Chicago river to the extremity of the pier.

3. Outgoing tugs should keep south of the center of the channel, and incoming tugs to the north of it. A tug going out along the North pier is in the wrong place, and chargeable with the consequences.

Libel for damages caused by collision.

BLODGETT, District Judge. I have very carefully considered the testimony in this

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case. The libel in this case alleges that the tug Evans, on the night of the 7th of July, 1869, was coming into the Chicago harbor, having been out on the lake with a tow, and when about midway of the North pier, east from the slip or outer harbor on the north side, she came in collision with the tug Louis Dole; that the Evans was guilty of no negligence on her part; that the collision was caused solely through mismanagement on the part of the officers and crew of the Dole, whereby a large amount of damage was sustained by the Evans, for which the libel is brought.

The evidence in the case is substantially this: On the evening in question, the Evans had been out into the lake with a tow, had rounded to and was coming up the harbor. The tug Louis Dole passed through the draw of Rush street bridge and went down the harbor, keeping close along the North pier, and when near the west end of the extension she heard a signal from the Evans, one blast of the whistle, indicating the fact that the Evans had discovered the Dole and wished to pass on the starboard side of the Dole coming up. The Dole responded to this signal from the Evans by a signal indicating that she did not or could not give way and allow the Evans to pass to the starboard. The Evans responded to that signal by a further signal that she could not go to the port of the Dole, and put her own helm hard a-port, and went toward the North pier. The result was that the two tugs came in collision.

There is a mass of testimony, very much of it contradictory in its character, as to the relation which these vessels bore to each other when they mutually discovered each other, and also the distance they were from each other. The weight of the testimony, taking into consideration its credibility and probable truth from all the surrounding circumstances, satisfies my mind that the Evans was within about sixty feet of the North pier at the time she discovered the Dole, and from three to four hundred feet to the eastward of her, and that the Dole was from six to twenty feet from the North pier; that the relation of the two vessels was such as to bring them within the rules and regulations prescribed by the law in regard to vessels approaching each other upon converging or intersecting lines, and that the Evans not only had the right of way, but it was her duty to go to the starboard of the Dole. They were both so close to the pier that I think it was clearly manifest that they were approaching each other on converging or intersecting lines. The question is, what was their respective duty under the circumstances?

The law fixes that they are each to give way. Where they are both steam vessels the rule of the road to be observed is, that each is to go to the right. The Evans indicated, on the first discovery of the Dole, her intention to obey this rule, and gave the signal which is required for that purpose, which was understood by those on board the Dole. The Dole, for some reason not very satisfactorily explained, refused to yield the way to the Evans, and indicated by a signal well understood on board the Evans its desire to keep on its course and pass, of course, on the port side of the Evans. The Evans at once responded to this signal by a signal indicating that she would not give way or yield the right which the rules and sailing regulations gave her to go to the starboard. No further response was heard on board the Evans as to whether they would yield or not.

The question then is, had the Evans a right to suppose that, having insisted on its right to go to the starboard, the Dole had yielded, although they had first indicated their wish or desire to pass upon the other side; and had those in the management of the Evans the right to assume that the Dole had abandoned its intention to pass upon the port side by not responding to their second signal?

I do not think that the mere failure to respond to the second signal of the Evans was enough to justify the Evans in running recklessly and without due care across the bows of the Dole under the circumstances; there might have been some supervening and controlling cause which prevented absolutely the Dole from going to the starboard, and therefore it should have been and was the duty of those in charge of the Evans, on being apprised of the location of the Dole and their disinclination to go to the right, to proceed with caution. But the evidence shows that the Evans did proceed with caution; that putting their helm a-port so as to go to the starboard, the Evans shut off and proceeded slowly, and finally reversed its wheel as they saw the Dole was not changing its position. The two vessels came together in such a manner as to indicate that neither of them were moving very rapidly at the time the collision actually occurred, and the fault in the whole matter—the proximate cause—seems to me to lie in the fact that the Dole was upon the wrong side of the stream.

It is contended on the part of the respondents that this was the open lake, and that the rules of the river do not apply there; but I apprehend that the moment the channel is obstructed by the North pier, you are within the harbor of the city, and the rules of river navigation apply with their full force. The evidence in this case, even if evidence were wanted on the subject, goes to show that the true course for tugs descending the harbor, going into the lake, is along the middle of the stream, or south of the thread of the stream, while the course for tugs ascending is along the North pier. This is only the usage, but it would seem to be the law of the case, as applying the law of the road, the laws of river navigation and harbor navigation, to the conduct of vessels operating

within the waters of Chicago harbor. It is true there was open water to the south of this pier and that vessels could go to a wide range to the south, limited only by their draft of water; but the range to the north was limited by the North pier, and it was in the route where returning tugs, or tugs with tows, or vessels coming into the harbor, would naturally be. A tug going down,—going out of the harbor,—with the entire range to the south of them unobstructed, should certainly—whether it is a matter settled by usage or not (and if not settled now, it should be hereafter)—understand they are not in the right place when they are hugging the pier. The ordinary rules of the way apply to the river and harbor as far as the harbor is controlled by the artificial structure for the purpose of making the harbor, and vessels navigating the waters there are governed by the ordinary rules of river and harbor navigation.

When the tug Dole started down the harbor and held her course in close proximity to the North pier, they must have known that they were within the route usually occupied by vessels and by tugs coming up the harbor. They were, therefore, in the wrong, —they were in the wrong place,—and bound, of course, for the consequences of that wrong.

I cannot say that the Evans is entirely blameless in the matter, because I think that when she discovered that the Dole was there, no matter from what cause, whether by her own disregard of the rules of navigation or from any other reason, the fact that she was there became a patent fact to those in control of the Evans, and they were bound to take notice of it and to manage their craft accordingly, and to approach the place where the Dole was with due caution. The Evans was running at a pretty rapid rate of speed at the time she signaled the Dole, and seems to have kept up that speed for some time at least.

I have come to the conclusion that it is a proper case for the division of the damages which were received by the two vessels. I think that the Dole was guilty of negligence in being alongside the North pier in the route usually traversed by vessels coming into the harbor, and that her negligence consisted in being out of place; that the Evans was guilty of negligence in running at too rapid a rate of speed and of going to the starboard after receiving the Dole's signal that she, the Dole, wished to pass on the port side. There may have been a reason, I do not say that it existed in this case, but I say that it might exist, why a tug cannot obey the sailing regulations; but it is enough for the purpose of this case that the Evans notably disregarded all the circumstances.

It is to be borne in mind that this was in the night-time, that the parties could not see each other, and I think it was reckless on the part of the officers of the Evans to rush her into collision with the Dole, notwithstanding the fact that the Dole was out of place. I shall therefore decree that a reference be made to the master to ascertain the amount of damages sustained by the two boats, and that those damages be borne equally by them.

Case No. 8,535.

The LOUISETTA.

[2 Gall. 307.] [1]

Circuit Court, D. Massachusetts. Oct. Term. 1814.

PRACTICE IN ADMIRALTY — COSTS — CLAIM UNDER ATTACHMENT—CAUTION.

1. Practice as to costs and charges, where several parties intervene for separate interests.

[Cited in The Mary Anne, Case No. 9,195.]

2. Where a party claims under an attachment, he must file a caution in court, to hold the proceeds remaining after satisfying prior claims.

[Cited in The Mary Anne, Case No. 9,195.]

This vessel was seized and libelled on behalf of the United States, afterwards libelled for seamen's wages, sold on interlocutory order, and finally decreed to be restored.

Mr. Hubbard, of counsel for owners and claimants, now moved the court for a direction to the clerk to pay over the proceeds, or at least so much thereof, as would compensate him as counsel, the clerk having doubts as to his authority to pay them over, because he had understood there were attachments upon the same property, returnable to the state court. There was no evidence of any attachment made; and it appeared, upon inquiry, that the party, claiming under the attachment, had done nothing more than to file a copy of his writ with the marshal.

THE COURT said, they could not take notice of any attachment, unless a caution was filed in court; and Welsh, of counsel for the claimants under the attachment, was directed to file such a caution.

The Louisetta was taken into custody under the seizure by the United States in June. The libel on behalf of the seamen was served in August. The marshal had charged these libellants with the custody fees from the time the warrant on their libel was served.

Mr. Hubbard, for the owners and claimants, and Mr. Welsh, for the seamen, contended that the vessel, being already in the custody of the United States under their seizure, and there having been an appeal from the decree of the district court, so that it was necessary for the United States to retain the property in custody, this was properly a charge to the United States, and ought not to be borne, either by the owners, to whom restitution was decreed, or by the seamen.

THE COURT confirmed this reasoning, and said, the expenses must be borne by the United States, there having been probable cause, which excused the collector.

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

Case No. 8,536.

The LOUISIANA.

[1 Ben. 328.] [1]

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

PRACTICE IN ADMIRALTY — ISSUING COMMISSION — ORAL EXAMINATION.

1. Where witnesses on the part of a vessel libelled for collision were brought to New York, and their depositions might have been taken before their departure, but were not, and the claimants afterwards, learning that they would not return to New York, applied for a commission to England to examine them, but failed to comply with rules 105, 106, and 107 of this court in making the motion, and the libellants were willing to waive the objection of irregularity in the motion, on condition that they might be allowed, in addition to putting written cross interrogations, to cross-examine the witnesses orally: *Held*, that the oral examination of witnesses on a commission is eminently conducive to a true understanding of the facts of a case, especially a collision case.

2. To order such an examination is not a new practice, and is within the power of the court.

3. This was a proper case for making an order for such oral examination.

In admiralty.

BLATCHFORD, District Judge. This is a motion for a commission to examine at Liverpool, England, on written interrogatories and cross interrogatories to be annexed to the commission, such witnesses for the claimants as may be brought before the commissioner. The libel is filed to recover damages for a collision between the Prussian bark Louisa and the British steamship Louisiana, at sea. The moving affidavit does not disclose the name of any witness proposed to be examined, further than to say that the claimants desire to examine "Richard Mills and others, late composing part of the crew of the steamship Louisiana," nor does it state any fact expected to be proved by any of the witnesses. Besides, the affidavit for the motion is not made by any of the claimants or by their proctor, but is made by the advocate for the claimants, and no excuse is given for this. In these particulars, rules 106 and 107 of this court are violated. So, also, rule 105 is violated by the delay in making this motion. The libel was filed April 27th, 1867, and the answer June 4th, 1867. The affidavit for this motion was not made until August 2d, 1867, and no excuse is shown for a non-compliance with rule 105 as to the time of making this motion. It must be understood hereafter, that the rules prescribed by the court for the conduct of its practice, must be strictly observed, or a satisfactory excuse be furnished for not observing them. In this case, the marked violation of rules 106 and 107 would be a sufficient ground for denying the present motion, were it not that the libellants express a willingness to waive the benefit of those rules, on condition that the granting of the commission be accompanied with certain restrictions. Mills was the second officer of the Louisiana, and he and the others whose testimony is sought, were brought to the port of New York in the Louisiana immediately after the collision. Their depositions might have been taken here de bene esse. The only excuse offered for not doing this is, that the proctor and the advocate for the claimants advised them that it was better to postpone the examination of those witnesses until after the witnesses for the libellants should be examined, and that they must be sent back to New York. The claimants did, in fact, take at New York, de bene esse, the depositions of four of the officers of the Louisiana who were on board of her at the time of the collision. It is now announced that the witnesses in question will not return to New York before the trial of the case. Under these circumstances, the libellants express a willingness to waive their objections to the granting of the motion, provided they be allowed, in addition to putting written cross interrogatories to the witnesses, to cross-examine them orally under the commission. Such a practice is one eminently conducive to a true understanding of the facts of a case, particularly a collision case, where the witnesses on board of the two colliding vessels scarcely ever agree as to the circumstances attending the collision. It is a practice which is not new (Clayton v. Yarrington, 16 Abb. Pr. 273, note); and, being one calculated to promote the dispensation of justice, it ought to be observed in a proper case. This court has full control over the mode of procedure to be observed in executing commissions for the taking of testimony. Ben. Adm. § 531; Betts, Adm. p. 86 et seq. In the present case, the neglect of the claimants to examine the witnesses orally in New York, when they had an opportunity of doing so, in which event the libellants would have enjoyed the privilege of orally cross-examining such witnesses, ought not to be allowed to work a possible benefit to the claimants or a possible injury to the libellants. Let an order be entered for the issuing of a commission for the examination, before the United States consul at Liverpool, of such witnesses on the part of the claimants as shall be named in the commission, on written interrogatories and cross interrogatories to be annexed to the commission, the libellants to be at liberty, in addition, to cross-examine such witnesses orally by counsel before the commissioner, the commission to contain a direction to the commissioner to take and reduce to writing such oral cross-examination, and to certify and return it with the commission.

[At the subsequent trial of the case, it was decided that both vessels were in fault. Case No. 8,537.]

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

Case No. 8,537.

The LOUISIANA.

[2 Ben. 371; 1 Am. Law T. Rep. U. S. Cts. 72.] [1]

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

COLLISION OFF THE IRISH COAST — STEAMER AND SAILING VESSEL — DARKNESS — SPEED —VESSEL APPROACHED FROM BEHIND SHOULD SHOW A LIGHT—PORTING IN HASTE.

1. Where, on a dark night, a bark, close-hauled on her starboard tack, heading S. W. by W., having proper lights set, and making no change of her course, was struck on her port side by a steamer, which came from a direction abaft the bark's beam: *Held*, that, prima facie, the steamer was in fault, and the burden was on her of showing the contrary.

2. Where a steamer was running seven and a half knots an hour, heading W. by N. half N., having two men on the lookout, an officer on the bridge, and two men at the wheel, and a red light suddenly came in sight, bearing two points on the starboard bow, and the helm was at once put hard-a-port, and her engines were slowed, stopped, and backed, and the course of the steamer changed a point, but the officer, finding that a collision was inevitable, ordered the helm hard-a-starboard, with a view of lessening its effects, but before the order could be obeyed, a collision took place with a bark, the witnesses testifying that the bark could not be seen sooner, owing to the haziness of the night, and the bark's lights being hid from view by her screens, in the direction from which the steamer approached: *Held*, that it was sufficient, to show that the steamship was in fault, that she was running seven and a half knots an hour, on a coast where vessels were numerous, in weather so thick and hazy, that a red light, which came suddenly into view, was supposed by the officer in command to be half a mile off, but was, in fact, so near, that though her engines were immediately stopped and backed, the collision occurred.

[Cited in The Colorado, Case No. 3,028; The Hansa, Id. 6,037; The City of New York, 15 Fed. 629; The Alberta, 23 Fed. 812.]

3. A steamship, when approaching another vessel so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse; but it is a fault in her to change her course, in ignorance of the true course and position of the other vessel.

[Cited in The Free State, Case No. 5,090; The Monticello, 15 Fed. 480.]

4. This steamship was in fault in porting her helm in ignorance of the course and position of the other vessel, and that fault contributed to the collision.

[Cited in The Western Metropolis, Case No. 17,439.]

5. The bark was also in fault, when she saw the steamship, as she did, approaching in such a direction that her regulation lights were not visible to the steamship, in not indicating her presence to the steamship by showing a visible light.

6. The damages must, therefore, be apportioned.

[This case had been previously heard upon motion of claimants for commission to examine certain witnesses in Liverpool. The motion, upon consent of libellants, was allowed, subject to right of cross-examination. Case No. 8,536.]

C. M. Da Costa, for libellants.

W. R. Beebe and C. Donohue, for claimants.

BLATCHFORD, District Judge. This is a libel for a collision, filed by Ferdinand L. Hansen and others, owners of the Prussian bark Auguste Louise, against the British steamship Louisiana. At the time of the collision the steamer was on a voyage from Queenstown, in Ireland, to New York, and the bark was bound from Queenstown to Tralee, on the west coast of Ireland. The collision occurred between nine and ten o'clock p. m., on the 5th of April, 1867, in the Atlantic Ocean, off the coast of Ireland, at a point about eight miles from Mizzenhead, a promontory on the southwest coast of Ireland. The bark was on her starboard tack, close-hauled, heading southwest by west, the wind being northwest by west. Her speed was about four knots an hour. She had her proper green and red regulation lights set and burning, the Prussian laws, on the subject of lights on vessels, being then and now the same as those of Great Britain and the United States. The steamer came from a direction abaft the beam of the bark on her port side, and the course of the bark was not at all changed down to the time of the collision. The steamer struck the bark nearly amidships, on her port side, and the bark soon sank, and was totally lost.

This statement of facts shows that the collision was, prima facie, the fault of the steamer, and the burden is thrown upon her of showing that she was not in fault. The case set up in the answer, is, that the weather was thick and hazy, thickening and lighting up at intervals; that the steamer had two men on the lookout forward, one on each bow, an officer on the bridge, and two men at the wheel; that the course of the steamer was west by north half north; that, while running on this course, and at a speed of seven and a half knots an hour, a red light came suddenly in sight, at but a short, although uncertain, distance, bearing two points on the starboard bow, its distance being supposed by the officer in command to be about half a mile, but being, in fact, much less; that the officer at once gave an order to put the steamer's helm hard-a-port, which was done, and her engines were almost immediately slowed, stopped, and backed at full speed, and the course of the steamer was changed one point; that, finding that the collision could not be avoided, and with a view of neutralizing its violence and the directness of the blow, the officer ordered the steamer's helm to be put hard-a-starboard, but, before that order could be obeyed, the collision took place; that, when the light was first seen, it was determined to be that of a sailing vessel, but, her sails not being in view, it was impossible to determine the exact course she was on, and the only course that could properly be adopted by the steamer was to port, and slow, stop and back, which was done,

[1] [Reported by Robert D. Benedict, Esq., and here reprinted by permission. 1 Am. Law T. Rep. U. S. Cts. 72, contains only a partial report.]

and the headway of the steamer almost, if not entirely, overcome; that, as the vessels approached each other very close, and at about the time they came in actual collision, it was discovered that the steamer was following the bark, coming up and angling toward her port quarter; that, when the lights of the steamer were first seen by those on board of the bark, at the distance of two miles, the lights of the steamer bore from the bark about six points abaft the beam, and bore, substantially, that position, up to about the time of the collision; that the lights of the bark were hidden from the steamer by the screens and sails, so that they could not be seen until too near to avoid the collision; that the collision was not caused by the fault or negligence of those on board of the steamer; and that, had those on board of the bark, when they saw a steamer approaching them on the port quarter, six points abaft the beam, given any indication of their whereabouts, as it was their duty to have done, the collision could easily have been avoided.

It needs no testimony, in addition to this answer, to establish the fault of the steamer. Here is a steamer, running at a speed of seven and a half knots an hour, in weather so thick and hazy, that a red light, on another vessel, which comes suddenly into view, is supposed by the officer in command to be about half a mile off, but is, in fact, much nearer, so near, that, although almost immediately the engines of the steamer are slowed, and stopped, and backed at full speed, a collision occurs, and the other vessel is run down by the steamer and sunk. This state of things alone is sufficient to show fault on the part of the steamer, causing the collision. Every steamship is bound, when in a fog, to go at a moderate speed, on peril of condemnation for damage caused by a collision, if she does not. The law on this subject, as deduced from settled decisions, was laid down by this court in the case of The D. S. Gregory [Case No. 4,099], in these words: "No positive rate can be prescribed. What would be a moderate rate of speed under one state of facts, would be an immoderate one under another. A steam vessel must, in a fog, reduce her rate of speed to a moderate rate or abide the consequences of an immoderate one, unless some special reason is shown for maintaining the rate of speed adopted." "In such a fog her speed ought to have been as much less than it was, as would have been sufficient to enable her to avoid the vessel at anchor. She ought not to have gone so fast as not to have been able, by slowing, stopping and backing, to avoid a collision; and, if the fog was so thick, that, at the speed she had, with all the precautions she used, she could not avoid the collision, the conclusion is irresistible, that her speed was not that moderate speed in a fog which is required by the well settled rules of navigation." In the case of The Great Eastern, 11 Law T. (N. S.) 5, in July, 1864, the judicial committee of the privy council lay down the law to be, that it is the duty of a steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision taking place. In that case, every thing was done on board of the Great Eastern, after the other vessel was reported, that could be done, to avoid the collision, but without success. But the court held, that the speed of the Great Eastern was what rendered the contact inevitable, that she was to blame for such speed, and that it was her duty to proceed at no greater speed than, having regard to the state of the weather, made it possible to avoid the collision. The supreme court of the United States have held substantially the same view. In Newton v. Stebbins, 10 How. [51 U. S.] 606, it is said, that it may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered. In McCready v. Goldsmith, 18 How. [59 U. S.] 90, the court say, that no fixed and inflexible rule can be laid down as it respects the rate of speed of steam vessels navigating waters greatly frequented by vessels; that this must depend upon the circumstances attending each particular case; that these may justify a rate deemed prudent navigation at one time, that would be wholly unjustifiable at another; and that, in thick weather, and in a track where other water craft are usually to be met, a steam vessel must slacken her speed to such an extent as, with reference to the ability of discerning another vessel at the time, and the capacity of the steam vessel to control and stop her own forward movement, will enable her to avoid a collision. The same doctrine was held in Rogers v. The St. Charles, 19 How. [60 U. S.] 108, 111.

Now, the case set up by this steamer as a defence, in her answer, is, that the weather was so thick and heavy, that, although she had a sufficient lookout, and used every precaution, by slowing, stopping, and reversing her engines, when she discovered the light of the bark, to avoid a collision, she could not do so, because she was so close upon the bark. The defence is the fault. The rules of navigation are now so well settled, that there is no excuse for the habitual and persistent disregard of them which appears in almost every case of collision where a steamer is concerned. But, as was said by the supreme court in McCready v. Goldsmith, 18 How. [59 U. S.] 91, the only precautions which those in charge of a steam vessel seem to think they are bound to observe in navigation, are those which concern the safety of their own vessel. And even those precautions are too often disregarded, from a disposition to maintain unabated speed and take the risk of collisions.

In this case, the engineer in charge of the engines of the steamer testifies, that when he received a signal from the officer on deck, to stop the engines, he obeyed it immediately, by shutting off the steam; that the next signal, to back at full speed astern, followed immediately after the signal to stop, and was obeyed; that it took only a few seconds to put the engines at full speed astern, after the order; that about eight or nine revolutions astern had been made before the collision, the blow of which he felt; and that, with the speed of the steamer, and the sea and the weather such as they were at the time of the collision, it would, on a signal to stop and reverse at full speed, take about three minutes after the receipt of the signal to get sternway on the vessel. A speed of seven and a half miles an hour, is a mile in eight minutes, and three-eighths of a mile, or six hundred and sixty yards, in three minutes. The answer states, that when the light of the bark was seen, it was supposed by the officer in command to be half a mile off, but was, in fact, much less. That officer, Mills, in his testimony, says that he now thinks that, when he caught sight of the light, it was not more than one hundred and fifty or two hundred yards off, and that the speed of the steamer was seven and a half knots an hour. This steamer was, therefore, on the testimony of her own officers, running at a speed which required her to pass over a space of six hundred and sixty yards, or three-eighths of a mile, before she could, with every exertion, get sternway on from her full forward speed, in a night so thick and hazy that, with all proper lookouts, neither the hull nor the sails of a vessel could be seen at a greater distance than two hundred yards. She was doing this on a coast where vessels are numerous, and where the sudden coming up of fogs in intermittent banks is a frequent occurrence.

But there was another fault on the part of the steamer. The answer says, that, when the light of the bark was first made, it was determined to be that of a sailing vessel, but, her sails not being in view, it was impossible to determine her exact course, and that the helm of the steamer was at once put hard-a-port, and her course was changed one point. Mills says, in his testimony, that when he caught sight of the red light, he thought it was the light of a vessel crossing his bow from his starboard side to his port side—that is, the light of a vessel heading between southward and eastward, and not the light of one heading between southward and westward, and that, therefore, he ported; that if he had known at the time how the other vessel was heading, he would have starboarded instead of porting; that when he did find out how she was heading, he gave orders to starboard; that if, when he sighted the light, he had known which way the other vessel was heading, he would have cleared her; but that, when he did find out how she was heading, he was too close to her for starboarding to be of avail. Miller, who was at the wheel of the steamer, says that he received the order to put the helm hard-a-port, and obeyed it, and changed the course of the steamer one point, and then received an order to starboard, and got the wheel only partly over to starboard, when the collision took place. The starboarding did not affect the course of the steamer, and the order to starboard was given by Mills, when, and as soon as, he discovered the way in which the bark was heading. Therefore, the porting and the change of the steamer's course one point thereby, all took place before those in charge of the steamer had any knowledge of the true course of the bark, but after her light was sighted. A steamship, when approaching another vessel, so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse, but it is a fault in her to change her course, in ignorance of the true course and position of the other vessel, if such fault contributes to a collision, even though she also stops and reverses. The steamer here did right in stopping and reversing, and appears to have done so promptly, but she did wrong in porting without knowing the course of the other vessel. The James Watt, 2 W. Rob. Adm. 270; The Northern Indiana [Case No. 10,320]. Mills testifies, that if he had starboarded, instead of porting, he would have cleared the bark. It was not a fault not to starboard, but it was a fault to port. Did the porting contribute to the collision? I think it plain, on the evidence, that it did. The order to starboard was given almost at the moment of collision. At the time of the collision, the change by porting had been one point. Therefore, if the order to port had not been given, the course of the steamer would have been, at the time of the collision, one point more to the westward, than it was, in fact. The witnesses on the bark say, that the course of the steamer in striking was a little from aft, and the answer sets up that the steamer approached from six points abaft the beam of the bark. Mills testifies, that starboarding, instead of porting, would have cleared the bark. The change of course, by starboarding, would have been to the same extent, during the same time, as by porting, that is, one point. Consequently, by starboarding instead of porting, the steamer would, at the time of collision, have headed two points more to the westward than she did in fact. Now, if one point change to the westward, by starboarding, would, according to the testimony of Mills, have avoided the collision, it is clearly to be inferred, that no change at all, by porting, would also have avoided it, especially in view of the claim on the part of the steamer, that she approached from six points abaft the beam.

The only fault alleged against the bark is, that she did not indicate her whereabouts to

the steamer, by some signal in addition to her red light. It is, I think, established, by the weight of evidence, that the red light of the bark came into the view of those on the steamer by its being opened to view suddenly as the steamer came up from aft, and not by its being made visible through the clearing away of haze or fog. This must be so, or else the testimony of those on board of the bark, that they saw the lights of the steamer for some time before she struck them, must be disbelieved. I am satisfied that the steamer's lights were seen from on board of the bark a considerable time before the red light of the bark was descried by the steamer. As soon as those on board of the bark perceived that there was real danger of collision, they blew a fog horn. But it is urged that they should have shown a light at the stern of the bark when they saw a steamer approaching from aft, from such a direction as to shut out from the steamer the view of the port light of the bark. I think this was the duty of the bark. The obligation upon the steamer, as a vessel overtaking the bark, to keep out of the way of the bark, did not relieve the bark herself from the obligation resting on her, on a night so dark as this was, from fog or haze, that the hull and sails of a vessel could not be seen at a greater distance than two hundred yards, and with a steamer, whose lights were seen for some considerable time, approaching from aft, in a line of direction very much the same as that in which the sails of the bark were braced, and from a quarter boding danger, as evinced by the use, on the bark, of her fog horn, and when the bark must have known that her port light could not be seen by the steamer, and that, so far as the steamer was concerned, it was as if the bark had no light, to adopt the precautions required by the ordinary practice of seamen and the special circumstances of the case. Under the present regulations, it is the duty of those who see any chance of an approaching collision, to take all reasonable means, consistent with the regulations, to avoid it, such means depending on the circumstances of the case. The Hannah Park v. The Lena (Nov. 1865) Holt, Rule Road, p. 61. A proper precaution in this case, as is shown by the evidence, would have been the exhibition of a flash light or a blue light. That this would have been effective is shown by the evidence that the steamer's lights were seen from the bark at a distance so great, that if the steamer had seen a light exhibited from the bark at the time it ought to have been exhibited, the steamer would have been able to entirely stop her headway before reaching the bark. There is nothing in this view that violates the requirements that a sailing vessel, under way, shall carry only the green and red lights, nor is there any thing in the objection that the exhibition or flashing of a white or blue light might have caused the bark to have been mistaken for a fishing vessel, or an open boat, at anchor or stationary. All the requirements in regard to lights, and fog signals, and steering and sailing rules, must have a sensible construction; and it is expressly provided by one article, that nothing in the rules shall exonerate any vessel from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. The neglect of the bark was a fault which contributed to the collision, and the bark must be held to the consequences of that neglect. Her fault, however, does not excuse the fault of the steamer. There is nothing in the rules of navigation that exonerates a vessel from the consequences of her violation of any of those rules, when such violation contributes to a collision. The violation of others of those rules, by the other colliding vessel, does not constitute such exoneration. As both vessels were in fault, there must be a decree apportioning equally the damages caused to the libellants by the collision.

LOUISIANA. The (BLACK v.). See Case No. 1,461.

Case No. 8,538.

LOUISIANA ex rel. MONCURE v. DUBUCLET.

[5 Reporter, 201;[1] 10 Chi. Leg. News, 132.]

Circuit Court, D. Louisiana. Dec., 1877.[2]

CIVIL RIGHTS ACT—CONSTRUCTION — PRIVATE INFRINGEMENT OF RIGHTS.

The act of April 9, 1866 (Civil Rights), was intended to protect against legal disabilities and legal impediments, and not private infringements of the rights secured, through prejudice or otherwise, when the laws are impartial and sufficient.

[See note at end of case.]

This is a case which was transferred from the Sixth district court of the parish of Orleans, and is before the court on a motion to remand. It is a suit in which the plaintiff [state of Louisiana ex rel. John C. Moncure] seeks to recover from the defendant [Antoine Dubuclet] the office of treasurer of the state of Louisiana. The removal is asked upon two grounds. The first is already disposed of in the case of Johnson v. Jumel [Case No. 7,392]. The second ground of removal is, that the relator is a man of color, and that he cannot enforce his rights in the judicial tribunal in which the cause was pending before its removal. The provision which the petitioner invokes is the "Act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," passed April 9, 1866, found at 14 Stat. 27. Section 1 enacts: That all persons born in the United States are citizens, and have

[1] [Reprinted from 5 Reporter, 201, by permission.]

[2] [Affirmed in 103 U. S. 550.]

the same right (among other things) to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. Section 3 provides that the district and circuit courts shall have exclusive jurisdiction of all cases, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section; that if any suit, or prosecution, civil or criminal, has or shall be commenced in any state court against any such person, for any cause whatever, such defendant shall have the right to remove such cause for trial to the proper district or circuit court, in the manner described by the act relating to habeas corpus and regulating judicial proceeding in certain cases, passed March 3, 1863 [12 Stat. 755], which act makes a cause removable by the filing of a verified petition with the ordinary bond.

[It is to be observed that section 3 of the act of April 9, 1866, as to the right to remove, provides "that any cause, civil or criminal, affecting persons who are denied, or cannot enforce in the state courts any of the rights secured to them by the first section of this act may be removed. The question in the first instance is, what rights are secured by the first section of this act? So far as this case is concerned, it is the full and equal benefit of all laws and proceedings for the security of person and property, the same as is enjoyed by white citizens; that is to say, that persons of color and aliens by birth are to have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.] [3]

The affidavit in the case states that the petitioner cannot enforce his rights to hold and retain his office," but it does not state whether this is in consequence of any law, statute, ordinance, regulation or custom, or whether it is in consequence of an individual or a party, or a race prejudice.

[The cause, in consequence of this general affidavit, which arrested the state tribunal from proceeding any further in it, is here to be dealt with, and a plea in abatement would be a proper method of presenting the question which is here made by motion, and which presents an issue which is triable according to the usages of the common law.][3]

BILLINGS, District Judge (after stating the facts as above). I shall follow the opinion of Mr. Justice Bradley in the case of Texas v. Gaines [Case No. 13,847], in which he concludes as follows: "We think it is intended to protect against legal disabilities and legal impediments, the free exercise of the rights secured, and not private infringements of these rights through prejudice or otherwise, when the laws themselves are impartial and sufficient." There is no doubt but that the defendant here intended by his affidavit, to admit that the laws and methods of proceeding in the courts of Louisiana were without any discrimination on the ground of race, for the laws and the constitution make them available to all races alike. If there be any discrimination from other sources than the system of laws, or the methods by which they are put in operation, it would not be a good ground for removal under the law of congress. Let the case be remanded.

[NOTE. This case was taken upon error to the supreme court, which affirmed the judgment of the circuit court remanding the case. Mr. Chief Justice Waite delivered the opinion of the court, setting out in full the petition of Dubuclet, and showed that the same does not show a cause "arising under the constitution or laws of the United States." According to the showing of the petition, the petitioner's right to office depends on the laws of the state. In considering the effect of section 2010, Rev. St., which gives one who "is defeated or deprived of his election" to such an office as Dubuclet holds the right of suing for his office in the federal courts, the learned chief justice said: "Dubuclet, instead of being defeated or deprived of his election, is now in office under his election duly declared, pursuant to the laws of the state, and exercising all the duties of his place, and enjoying all its privileges. This section provides for an original suit by one out of office to get in, but not for the removal of a suit against one in office to put him out." 103 U. S. 550.]

LOUISIANA, The (HANEY v.). See Case No. 6,020.

LOUISIANA, The (MENDELSOHN v.). See Case No. 9,421.

LOUISIANA (NORTHWESTERN UNION PACKET CO. v.). See Case No. 10,344.

LOUISIANA v. U. S. See Case No. 3,097.

LOUISIANA (WOOD v.). See Case No. 17,948.

Case No. 8,539.

LOUISIANA INS. CO. v. NICKERSON.

[2 Lowell, 310.] [1]

District Court, D. Massachusetts. March, 1874.

PRACTICE IN ADMIRALTY — ARREST FOR DEBT — STATE LAWS — STIPULATION WHEN NOT LIABLE TO ARREST — GARNISHMENT OF CREDITS — RULE OF COURT.

1. The statute of 2d March, 1867 (14 Stat. 543), makes arrests for debt, whether on mesne process or execution, depend upon the laws for similar arrests in the states respectively, and applies to admiralty proceedings.

[Cited in The Hudson, 15 Fed. 176.]

2. This court will not order a defendant to give a stipulation to the action, under pain of imprisonment, in a case in which he is not liable to arrest.

3. By a rule of this court, passed in 1855, a warrant to attach the goods and chattels, or, in default thereof, the credits, of the defendant, may be granted in cases in which an arrest cannot legally be made.

[Cited in The Bremena v. Card, 38 Fed. 147.]

[3] [From 10 Chi. Leg. News, 132.]

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

4. It is within the power of the court to make such a rule.

In admiralty.

R. H. Dana, Jr., for libellant.

F. W. Hurd and O. W. Holmes, Jr., for respondents.

LOWELL, District Judge. The admiralty rules of 1845, adopted and established a simple system, like that then in use in some of the districts, by which the plaintiff in a personal action in the admiralty could always obtain security for his debt or damages when the defendant was able to give it; because he could arrest the person of the defendant, or, if he could not be found, his goods and chattels, or failing these his credits, to the amount sued for, and the person or property thus attached was held to answer the suit, unless the defendant should give bail to the action; that is to say, not only to abide the orders of the court, but to pay the debt. Rules 2, 3, and 4. This practice has many features of resemblance to that obtaining in actions at common law in the United States, excepting that it retains from the ancient times of prohibitory legislation the inability to attach land or any interest therein by process out of the admiralty. It differs too from that with which we are familiar in New England, in not permitting an attachment in all cases, whether the defendant can be found or not. Out of this restricted right of attachment grows the present application to obtain a stipulation by order of the court, which could not be required under any of the forms of process expressly mentioned in the admiralty rules, because the defendant was found in the district and was personally served with the monition, and was not liable to arrest under the statute of March 2, 1867 (14 Stat. 543), which, as both parties admit, has adopted the limitations of the state practice in the matter of arrest for debt, in the admiralty courts as well as in others.

The argument in support of the motion, if I understand it, is that the ordinary process in admiralty, in personal actions, whatever may be its form, is intended to enforce the appearance of the defendant; and that, when he has appeared, he is to stipulate for debt and costs before being permitted to answer. The ancient authorities cited by counsel seem to bear out the argument, considered purely as an historical one; and there are remarks of Mr. Justice Johnson, in the leading case of Manro v. Almeida, 10 Wheat. [23 U. S.] 473, to a like effect. But the decision in that case virtually was that the effects attached might be held to satisfy the decree in the case of an absent defendant. Clarke v. New Jersey Nav. Co. [Case No. 2,859]. It has long since ceased to be the practice of the courts of the United States, to consider an attachment of property as intended merely to secure an appearance, or that a defendant is bound to give security, unless to release his person or property from arrest. The simple and reasonable American practice was that the plaintiff might secure himself by arresting the body of the defendant, or in some cases by attaching his property, and those he would hold to respond to the judgment or decree, and it was a privilege of the defendant to relieve his person or his estate by giving security, if he were able and willing to do so; or, finally, the defendant might be merely summoned to appear and answer. This, as we have seen, was the system sanctioned by the rules of 1845; but it did not originate with them. The practice of the First and Second circuits—which at that time, before admiralty jurisdiction had spread to the lakes, had a great part of the business of the whole country—was substantially similar to this. And in fact the courts of common law and admiralty did not differ greatly in this matter, though in equity attachment of the person was and is still used to enforce an answer when discovery of facts within the personal knowledge of the defendant is needed. No doubt there may be similar process in the admiralty for a like purpose. When the defendant was once before the court, whether by summons, citation, or however otherwise, he was not required to plead, unless he chose, but might suffer default, and the matter of the suit or plaint or libel or bill would be decreed against him.

This general course of practice has had its simplicity much marred by the statutes abolishing and limiting arrest of the person. Judge Ware, in one of his most learned opinions, decided, in 1835, that, in actions for damage, the usual condition of the bond or stipulation of a defendant who was found within the district was and should be to appear and abide the decree; a condition which would be satisfied by his surrender, and that he was not bound to stipulate to the action. Lane v. Townsend [Case No. 8,054]. The rules of 1845, as we have seen, authorized the marshal to take bail for the debt, and not merely to appear and abide. It is the opinion of a learned writer that this rule is permissive only, and that the marshal would be justified in taking bail for the defendant's appearance; though, when the defendant had appeared, he supposes the court would require him to give bail to the action, unless he could prove his inability to find sureties, in which case he would be excused from all but the bond to abide. Conk. Adm. Prac. (2d Ed.) 90, 91. In 1850, the supreme court passed rule 48, which provides among other things that, when a warrant of arrest is executed, the marshal and the court shall take bail only in those cases in which it is required by the laws of the state where an arrest is made upon similar or analogous process from the state courts. Following that, Judge Sprague, in November, 1855, promulgated a rule for this district, authorizing the marshal to strike out from the bond mentioned in admiralty rule 3, the words: "to

pay the money awarded by the court to which the suit is returnable, or in any appellate court," and insert in their stead: "and not depart without license." Then came the law of 1867, putting the arrest for debt, whether on mesne process or execution, in all courts of the United States on the footing of similar arrests in the state courts of the respective districts, which has always been treated as applying to admiralty proceedings, and was so treated by the plaintiff when he took out and executed his citation without arrest.

The plaintiff now asks me to order security under pain of imprisonment. Such an order would amount to a revival of imprisonment for debt in a more oppressive form than that which was abolished; for it would be the substitution of a mere order on motion for the old warrant of arrest, which had its regular order and incidents, and well-settled course of procedure. In all essentials its effect and purpose would be exactly similar. Motion denied.

After this motion was denied, it was discovered that Judge Sprague, in 1855, had made a rule that, whenever the defendant in a personal action cannot be lawfully arrested, the process may be a warrant to attach his goods and chattels to the amount sued for, or, if such property cannot be found, his credits and effects in the hands of the garnishees named therein. The libellants thereupon moved for such a warrant, and the motion was spoken to by the same counsel, on the question whether the rule was ultra vires.

LOWELL, District Judge. The power of this court to make a rule concerning process is denied. The supreme court have undoubted power to regulate the whole matter by the statute of 23d August, 1842, § 6 (5 Stat. 518); but this court has an equally undoubted power under the act of 8th May, 1792, § 2 (1 Stat. 276), unless the rule is either inconsistent with some action of the supreme court, or that court have avowedly covered the whole ground in any particular instance. The forty-sixth admiralty rule recognizes this power, but does not create it.

So in bankruptcy the supreme court have full power over the matter of practice and forms and modes of proceeding; and there is no reservation in the statute of any power to the district or circuit courts, and I have seen a dictum of one district judge that those courts could make no rules in bankruptcy. But every circuit and district court, excepting perhaps that of the learned judge in question, has made such rules, and it is perfectly well understood that the power is derived either from the inherent authority of the courts, or from the act of 1792, above cited; or at all events that it exists. The only question therefore is whether the supreme court, by giving authority to begin all personal actions by a warrant to arrest, or an alternative to attach goods, &c., if the defendant cannot be found, intended to say that in cases where arrest was illegal, and so the defendant could not be found for any useful purpose of arrest, there should be no attachment. I think not. If this be the law, there is now no mode of obtaining security in a personal action, unless the debtor is not found. This may be in accordance with the law of some of the states, but it has never been so in New England. Such a construction would leave the case of a corporation defendant unprovided for in any event; for such a person can never be arrested. Before the rule was passed, Judge Sprague had authorized a warrant of attachment to issue against a domestic insurance company. Pettingill v. Gloucester Mutual Fishing Ins. Co., Records, vol. 38, p. 800. Such an attachment appears to have been issued in Atkins v. Fibre Disintegrating Co. [Case No. 602]; and no objection was taken on the point now under consideration,[2] though the warrant did not come within the letter of the rule of the supreme court, and indeed, as I have said, is open to the same criticism as is made now upon Judge Sprague's rule.

Supposing, however, which I do not, that the rule of the supreme court covered the whole ground in 1845, congress has since passed a law which necessarily destroys the uniformity of practice, because it adopts the different laws of the various states on the subject of arrest; and thereby ex necessitate repeals so much of the rule of the supreme court as authorizes such arrest in all cases, and this seems to me to throw upon the district courts the right to adapt their processes anew to the changed practice, until the supreme court shall take some further order in the premises. Second motion granted.

Case No. 8,540.

LOUISIANA PAPER CO. v. WAPLES.

[3 Woods, 34.] [1]

Circuit Court, D. Louisiana. April Term, 1877.

CORPORATIONS—STOCK NOT FULLY PAID UP—GENERAL CORPORATION LAW—ASSESSMENTS—LIABILITY TO CREDITORS.

The general law under which a corporation was organized declared: "No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him." The charter of the company prescribed in what installments forty per cent of the stock should be paid, and then declared: "The balance on each share, or any portion of such balance, shall not be called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the company." *Held*, that after payment by a

[2] The supreme court has since upheld the attachment in that case. 18 Wall. [85 U. S.] 272.

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

stockholder of forty per cent of his stock, he was not liable to the company, or its creditors, for the residue or any part thereof, unless the same had been called for by a vote of three-fourths of the stockholders.

[Error to the district court of the United States for the district of Louisiana.]

The action was brought in the district court by the trustees in bankruptcy of the Louisiana Paper Manufacturing Company, to recover of the defendant [Rufus Waples], who was a stockholder in the company, a balance alleged to be due and unpaid on his subscription of stock. [Case unreported.] The company was established under a general law of this state (Rev. St. p. 183) which provided for the organization of corporations for works of public improvement, manufacturing and other purposes, by the adoption of a charter by the stockholders, and which directed that every charter should contain, among other things, the name of the corporation, its domicile, a description of the business which it proposed to carry on, a statement of the amount of the capital stock, the number of shares, the amount of each share, and the time when and the manner in which payment on stock subscribed should be made. The law also provided that the charter of corporations organized under it should be recorded in the office of the recorder of mortgages and published in a newspaper at the domicile of the corporation, once a week for at least thirty days. The statute also declared: "No stockholder shall ever be held liable or responsible for the contracts or faults of such corporation in any further sum than the unpaid balance due to the company on the shares owned by him." The third section of the charter of the Louisiana Paper Manufacturing Company declared, "the capital stock of this corporation is hereby fixed at the sum of sixty thousand dollars, divided into six hundred shares of one hundred dollars each; twenty-five dollars on each share to be paid at the time of the organization of this corporation, and five dollars on each share in thirty days, five dollars in sixty days, and five dollars in ninety days after said organization. The balance on each share, or any portion of such balance, shall not be called for, unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation. The defendant subscribed twenty-five shares, and paid up the installment of twenty-five dollars and the three installments of five dollars each, mentioned in said third section, making a total of forty per cent. of the stock subscribed. The suit was to enforce the payment of the remaining sixty per cent. of the stock for the benefit of the creditors of the corporation. No meeting of the stockholders had ever been held to give their assent to the calling in of the unpaid sixty per cent. of the stock subscribed, nor had such assent been given. The defense was that the sixty per cent. sued for was subscribed and to be paid only according to the terms of the charter, on condition that it should not be called in unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation, and that such assent had never been given. The district court charged the jury that there was no liability of the defendant beyond the forty per cent. of his stock paid up, unless the remaining sixty per cent., or some part of it, had been called in by the assent of three-fourths of the stockholders, for the purpose of increasing the business of the corporation. This charge is assigned for error.

J. Ad. Rosier, for plaintiff in error.
L. Madison Day, for defendant in error.

WOODS, Circuit Judge. This is not the case where there has been a subscription of stock, and the by-laws or other regulations adopted by the stockholders or directors prescribe how the subscriptions shall be called in, or the charter itself declares in what installments the directors may call in the stock payments. In such a case, there can be no doubt that the entire stock subscribed, whether called in by the directors or not, is a fund for the satisfaction of the debts of the corporation, and its payment can be enforced. Such regulations only pertain to the administration of the affairs of the corporation. In this case the charter, which was required to be recorded in a public office, and published in a newspaper at the domicile of the corporation, prescribed the installments by which forty per cent. of the stock subscribed should be paid, and then declared that the residue, or any portion thereof, should not be called for unless with the assent of three-fourths of the stockholders, and then only to increase the business of the corporation.

The rule with regard to unpaid subscriptions of stock is this, that whatever sum is subscribed by the stockholders, and held out to the public as the stock of the corporation, is liable to be called in for the payment of its debts, even though the directors may refuse to make the call. Purton v. New Orleans & C. R. Co., 3 La. Ann. 19. The power conferred upon directors to call in installments upon the shares, is a discretionary power; but that discretion is merely modal relating to the time and manner of making payments. When the wants of the company require those payments, it becomes the duty of the directors to cause them to be made, as much so as to require payment of debts due the company. It is not discretionary with the directors to say whether or not the debts of the company shall be paid when they have the power to compel payment. Ward v. Griswoldville Manuf'g Co., 16 Conn. 601. These doctrines are well established. Do they apply to the

case in hand? It is to the charter of a corporation that reference is to be made to determine the rights of the public. Stark v. Burke, 9 La. Ann. 341.

Now, looking at the charter of the Louisiana Paper Manufacturing Company, what was the contract which the public was advised the stockholders had entered into with the corporation? Not to pay their subscriptions absolutely, nor to pay them when, in the discretion of the directors, it might be necessary for the wants of the company. No obligation was assumed to pay any more than forty per cent. of the stock subscribed, unless upon the vote of three-fourths of the stockholders, and then for a particular purpose. Clearly, as between the corporation and the stockholders, the unpaid stock above forty per cent. could not be called in except on the terms prescribed by the charter. The public, the creditors of the corporation, are in no stronger position than the corporation itself, for the charter which informed the public of the amount of the capital stock of the corporation, also gave notice that the stockholders were under no obligation to pay more than forty per cent., except on their own vote, carried by a majority of three-fourths, and for a particular purpose. If the directors had called a meeting of the stockholders to vote on the question of calling in the unpaid sixty per cent. of the stock, and the stockholders had refused their assent, would it have been the duty of the directors, would they have had any power, to call it in, notwithstanding the adverse vote? Clearly, not. Is their duty to call in the stock any clearer, or their power any greater because no such meeting has been called and no such vote taken? The stockholders have made their contract with the corporation, the public have been explicitly advised of its terms, and the stockholders, therefore, can only be held to perform what they have agreed to do. The company can claim no more, nor can the creditors of the corporation say they have been misled.

In my judgment, the stockholders are not liable to pay the unpaid sixty per cent. until the same has been called in by a three-fourths vote of the stockholders, for the purpose of increasing the business of the corporation. Such residue is not due until after such a vote, and the law of this state declares that the stockholder of an incorporated company is only liable to the company for the unpaid balance due to the company on the shares owned by him. The following authorities have been consulted, and tend to sustain the views expressed: Burlington & M. R. R. Co. v. Boestler, 15 Iowa, 555; Penobscot & K. R. Co. v. Dunn, 39 Me. 587; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318; Carlisle v. Cahawba & M. R. Co., 4 Ala. 70. It results from these views that there was no error in the charge of the district court. Its judgment is, therefore, affirmed.

LOUISIANA STATE LOTTERY CO. (DA PONTE v.). See Case No. 3,569.

Case No. 8,541.

LOUISIANA STATE LOTTERY CO. et al. v. FITZPATRICK et al.

[3 Woods, 222.] [1]

Circuit Court, D. Louisiana. April Term, 1879.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—CHARTER OF PRIVATE CORPORATION—LOTTERY COMPANY—CHARTER ACTED UPON—INJUNCTION TO STAY PROCEEDINGS IN STATE COURT—LOTTERY PENAL LAWS.

1. The act of congress, approved March 3, 1875 [18 Stat. 470], "To determine the jurisdiction of circuit courts of the United States, and for the removal of causes from state courts, and for other purposes," enlarges the jurisdiction of the circuit courts to the full limits authorized by the constitution.

2. A bill in equity which alleged that a state had, by legislative act, chartered a lottery company with the right to exercise its functions for twenty-five years, the lottery company to pay to the state the sum of $40.000 annually, and had passed a subsequent act repealing the charter of the company, and making it a penal offense to carry on the business authorized by the charter, and which charged that said repealing act impaired the obligation of the contract between the state and the lottery company, disclosed a case arising under the constitution of the United States, of which the circuit court had jurisdiction, irrespective of the citizenship of the parties.

3. The settled doctrine in the United States is that the charter of a private corporation is a contract, the obligation of which cannot be impaired without an infraction of the constitution of the United States; that a grant of franchise is in point of principle identical with a grant of other property; whether the consideration be large or small is not essential, for the motives or inducements which caused the legislature to pass the act cannot be examined to impair its validity.

4. Every valuable privilege given by a charter which conduced to make it acceptable and to promote an organization under it, is placed beyond the power of the legislature, unless the power be reserved at the time the charter is granted.

5. Where a charter conferring the right to draw lotteries has taken the form of an absolute contract, the responsibility of its creation rests with the legislature; the courts must treat it as carrying the obligation which its terms import.

6. A mere license to draw lotteries, which is not inseparable from the essential functions of a corporation, and which has not been acted upon, and under which no rights have been vested, may be repealed by any succeeding legislature of the state by which it is granted.

7. But where such license has been acted on, and under it rights have been vested, it cannot be withdrawn by the legislature to the prejudice of those rights. The power of the legislature to recall or modify it is to that extent gone.

8. The grant of a privilege to draw a lottery made to an individual, where no rights have become vested, can be revoked.

9. But where a corporation has been called into existence by a state legislature, for a definite object, declared in the act creating it, and has powers and faculties given to it which are in their nature and operation pertinent to its sole object and necessary to its very existence, its rights and franchises cannot be swept away by a repealing act of the legislature of the state which created it.

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

10. An act of the legislature created a corporation to continue twenty-five years, and then to be dissolved, with a grant of the sole and exclusive privilege of drawing lotteries for the said period, and for the object expressed in the charter, to make of the business a source of revenue to the state, with power to collect capital, issue shares, and to be controlled by directors chosen under the charter, and required the corporation to pay quarterly in advance a specific sum of money to the auditor of state. *Held*, that a charter having these provisions could not be repealed by the legislature.

11. Section 720, Rev. St., which declares that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state," has application only to such proceeding as had been commenced before the jurisdiction of the federal court attached.

12. It is the duty of a federal court to interfere to defend the franchises of a corporation from invasion, though disguised in form and to be effected through state officers clothed with statutory power.

[Cited in dissenting opinion in Chaffraix v. Board of Liquidation, 11 Fed. 647. Cited in M. Schandler Bottling Co. v. Welch, 42 Fed. 564.]

13. As an unconstitutional law has no inherent force either to authorize or protect, and therefore no claim to be obeyed and no power to divest rights, the agents of its administration, of whatever name or character, may be called to answer and are individually responsible.

[Cited in M. Schandler Bottling Co. v. Welch, 42 Fed. 564.]

14. Generally, courts of equity do not deal with matters of crime, misdemeanors or offenses against prohibitory laws, but they will interfere, by injunction, to stay proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation.

[Cited in M. Schandler Bottling Co. v. Welch, 42 Fed. 564; Louisiana v. Lagarde, 60 Fed. 192.]

[Cited in Crights v. Dahmer (Miss.) 13 South. 237, 238.]

15. Where a charter, such as is described in head note 9, is repealed by the legislature, and the exercise of the rights and franchises conferred by the charter is made a penal offense: *Held*, that the officers of the state charged with the enforcement of the penal laws would be enjoined from arresting or otherwise interfering with the officers and agents of the corporation for acts done by them in the exercise of the rights conferred by said charter.

[Disapproved in Crights v. Dahmer, 13 South. 237, 238.]

In equity. Heard upon motion for injunction pendente lite.

The bill was brought by the Louisiana State Lottery Company, a Louisiana corporation, Charles T. Howard, a citizen of Mississippi, and John A. Morris, a citizen of New York, against Allen Jumel [John Fitzpatrick], and twelve other citizens of Louisiana, and against the city of New Orleans. It was filed April 1, 1879. The case made by the bill was substantially as follows: On August 11, 1868, the legislature of Louisiana passed an act entitled, "An act to increase the revenues of the state and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force." [Laws 1868, p. 24.] This act was approved, and took effect as act No. 25, on August 23, 1868. The following are the sections which are material to the controversy raised by this suit:

"Section 1. Be it enacted, etc, that whereas many millions of dollars have been withdrawn from and lost to this state by the sale of Havana, Kentucky, Madrid and other lottery tickets, policies, combinations and devices, and fractional parts thereof, it shall hereafter be unlawful to sell, offer or expose for sale, any of them, or any other lottery, policy or combination ticket or tickets, devices or certificates, or fractional parts thereof, except in such manner or by such persons, their heirs, executors and assigns, as shall be hereinafter authorized.

"Section 2. That the following named persons, to wit: Robert Bloomer, Jesse R. Irwin, John Considine, Charles H. Murray, F. F. Wilder, C. T. Howard, Philip N. Luckett be, and they are hereby constituted and declared a corporation for the objects and purposes, and with the powers and privileges hereinafter specified and set forth:

"Articles of Incorporation.

"Article 1. The name and title of this corporation shall be the Louisiana State Lottery Company, and the domicile thereof shall be in the city of New Orleans, in the state of Louisiana.

"Article 2. The objects and purposes of this corporation are: First. The protection of the state against the great losses heretofore incurred by sending large amounts of money to other states and foreign countries for the purchase of lottery tickets and devices, thereby impoverishing our own people. Second. To establish a solvent and reliable home institution for the sale of lottery policies and combination tickets, devices and certificates, fractional parts thereof, at terms and prices in just proportion to the prizes to be drawn, and to insure perfect fairness and justice in the distribution of such prizes. Third. To provide the means to raise a fund for educational and charitable purposes for the citizens of Louisiana.

"Article 3. The capital stock of this corporation shall be one million of dollars, represented by ten thousand shares of one hundred dollars each.

"Article 4, section 1. The company shall have the right to commence operations when one hundred thousand dollars of the stock is subscribed and paid in.

"Section 2. All powers of this corporation shall be vested in a board of directors, to consist of seven persons, each of whom shall own at least ten shares of the capital stock.

"Section 3. The corporation shall have the right to sue and be sued, to plead and be impleaded, and to appear in any court of justice, and to do any other lawful act such as any person or persons might do for their own defense, interest or safety.

"Section 4. The president of the board of

directors shall be the proper person upon whom to serve citations, notices and other legal process wherein this corporation may be interested.

"Article 5, section 1. The corporation shall pay to the state of Louisiana the sum of forty thousand dollars per annum, which sum shall be payable quarterly in advance, from and after the first day of January, 1869, to the state auditor, who shall deposit the same in the treasury of the state, and which sum shall be credited to the educational fund, and said corporation shall be exempt from all other taxes and licenses of any kind whatever, whether from state, parish or municipal authorities.

"Section 2. The corporation shall furnish bonds to the auditor in the sum of fifty thousand dollars, as security for prompt and punctual payment of the sums set forth in the preceding section.

"Section 3. That any person or persons selling, or offering or exposing for sale, after the thirty-first day of December, 1868, any lottery, policy or combination tickets, devices or certificates, or fractional parts thereof, in violation of this act, and of the rights and privileges herein granted to this corporation, shall be liable to said corporation in damages in a sum not exceeding five thousand dollars, nor less than one thousand dollars for each offense, recoverable by suit before any court of competent jurisdiction.

"Section 4. That this corporation shall be and continue for and during the term of twenty-five years from the first day of January, 1869, for which time it shall have the sole and exclusive privilege of establishing and authorizing a lottery, or series of lotteries, and selling and disposing of lottery tickets, policy, combination devices and certificates, and fractional parts thereof."

By virtue of the provisions of this act, the Louisiana State Lottery Company was immediately organized, and has continued up to the time of filing this bill to do and perform what the said act required and authorized. On January 1st, 1869, it paid to the auditor of the state the sum of ten thousand dollars, and a like sum on the first day of every succeeding quarter year, up to and including January 1st, 1879, amounting in all to more than $400,000, and tendered to the auditor of state, on April 1, 1879, the like sum of $10,000. This last named sum the auditor of state refused to receive, but the lottery company was willing to pay the same and all succeeding installments provided for in said act as the same should fall due. The said lottery company also gave bonds, with sureties, as required by said act, which are held by the auditor, for the prompt and punctual payment of the sums required by said act to be paid. The lottery company has collected and maintained a capital greatly exceeding one hundred thousand dollars, has purchased buildings, established agencies, and made large expenditures in its business and paid heavy charges and losses on account of the same, amounting to more than one million of dollars, in the full confidence of the validity of the grant made by said act, and that the same constituted a commutative contract between the lottery company and the state of Louisiana. The said $400,000 paid into the state treasury by the lottery company has been applied year by year under the appropriations of the general assembly to educational and sanitary purposes. At the session of the general assembly which began in January, 1879, an act was passed which was approved March 27, the purpose of which was to repeal the charter of the lottery company and make the business authorized thereby unlawful. Section 1 of this act repealed the act approved August 23, 1868, by which the lottery company was incorporated, and all other laws passed in the interest of the lottery company. Section 2 declared "that the Louisiana State Lottery Company be and the same is hereby abolished and prohibited from drawing any and all lotteries, or selling lottery tickets either in its corporate capacity or through its officers, directors, stockholders, members or agents directly or indirectly." Section 3 declared "that whoever shall sell, barter or exchange, give or otherwise dispose of, or offer to sell, barter, exchange, give or otherwise dispose of, directly or indirectly, personally or through an agent or agents, either for himself or others, or shall draw any lottery or have any connection with or interest in the drawing of any lottery in this state, or shall have in his possession within this state, with intent to sell or offer for sale or with intent to barter or exchange, or give or otherwise dispose of any lottery tickets or shares, or fractional part thereof, or lottery policy or combination, device or any other writing, certificate or token, intended or purporting to entitle the holder or bearer, or any other person, to any prize, or share, or interest in any prize drawn or to be drawn in any lottery, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be condemned for each offense to and shall suffer imprisonment in the parish prison or jail, as the case may be, not exceeding sixty days, or fined not exceeding one hundred dollars, or both, at the discretion of the court; one-half of such fine to go to the informer, and the other half to the city of New Orleans, or the parish in which said offense is committed, as the case may be." Section 4 declared "that every person who shall set up or promote any lottery in this state, or shall assist or be interested therein, or shall aid by printing or writing, or shall in any way be concerned in setting up, promoting, managing or drawing of any lottery, or shall in any house, shop or building owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing any such lottery, or the sale of any lottery tickets or share of a ticket, or any other writing, certificate, bill, token, or other de-

vice, purporting or intended to entitle the holder, bearer, or any other person, to any prize or share of or interest in any prize to be drawn in a lottery, shall be guilty of a misdemeanor, and on conviction shall suffer imprisonment not to exceed sixty days, or a fine not exceeding one hundred dollars, or both, at the discretion of the court, for each offense, one-half of such fine to go to the informer and the other half to the parish or the city of New Orleans, as the case may be, in which such offense is committed."

The charge of the bill was that this repealing act was an impairment of the obligation of the contract between the lottery company and the state of Louisiana, contained in the act of August 11, 1868, and was in violation of the constitution of the United States, and therefore null and void. The bill further alleged as follows: "The several defendants are officers of the state, concerned in the enforcement of the laws of the state, without regard to the supreme law of the land, and, unless restrained by order of the court, they will engage in the arrest of every agent, servant, clerk or tenant of the lottery company, and that the machinery of the penal code will be by them set in motion to enforce the said repealing act of March 27, 1879, and destroy the rights of the lottery company under an act of August 11, 1868." The prayer of the bill was that the charter granted by the act of August 11, 1868, to the lottery company, might be established and declared valid, and operative and binding as a contract between the state of Louisiana and the lottery company; that said repealing act of March 27, 1879, might be declared inoperative to impair the force and effect of said contract and charter, or the franchises, rights and faculties therein conferred; that the penal enactments contained in said repealing act might be declared unconstitutional, invalid and inoperative, and that all of the defendants might be enjoined from ordering or allowing any prosecution, arrest or seizure of the plaintiffs or any of their agents or servants, customers or persons in any manner connected with the lottery company for doing or performing or being concerned in any act or acts of the drawing of lotteries or the sale or purchase of tickets of said lottery company, and from interfering with them by prosecution, or otherwise in the doing of any act or carrying out any purpose authorized by the charter of the lottery company. The case came on for hearing on the motion of the complainants for an injunction pendente lite, according to the prayer of the bill.

John A. Campbell, Thomas J. Semmes, and Joseph P. Hornor, for complainants.

H. N. Ogden, Atty. Gen., and J. C. Egan, Asst. Atty. Gen., of Louisiana, for defendants.

Mr. Semmes argued:

1. Lotteries, unless so declared by positive law, are neither immoral nor unlawful. The mere establishment of a lottery is not a matter of absolute right or wrong. The prohibition of lotteries depends upon the public policy of the state, as enunciated in its laws. The public policy of Louisiana, as thus expressed, was not opposed to lottery schemes until the constitution of 1845. Prior to that time acts had been passed authorizing lotteries for the benefit of an academy, of a lyceum, of a church, and for the opening of canals and repairing of roads. The constitution of 1864 expressly authorized the vending of lottery tickets under certain regulations prescribed by the legislature. The constitution of 1868 was silent on the subject of lotteries, and left the matter to the discretion of the legislature. When the act incorporating the Louisiana State Lottery Company was passed in 1868, there were laws on the statute book authorizing lotteries to be drawn and lottery tickets to be sold. These facts are referred to to show that the act of setting up of a lottery or selling lottery tickets is not a thing of itself immoral or improper—not condemned by law or religion or morals.

2. The creation of a corporation by a state legislature, for any purpose not prohibited by the constitution, is a contract between the state and that corporation. The mere franchise to be a corporation is a contract between the state and the corporation. Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518.

3. The contract between the state of Louisiana and the lottery company, as expressed in the act of incorporation, was that the company should have a corporate existence for twenty-five years; that it should have the franchise to set up lotteries and sell lottery tickets, and that it should have the exclusive right to do these things for the period aforesaid.

4. A lottery franchise, granted by the legislature, is a valid contract. Gregory v. Trustees of Shelby College, 2 Metc. (Ky.) 589; State v. Hawthorn, 9 Mo. 389; Davis v. Caldwell, 2 Rob. (La.) 271.

5. Under the act of March 3, 1875, every suit arising under the constitution or laws of the United States, and in which the amount in controversy is over $500, can be brought in the circuit court, irrespective of the citizenship of the parties.

6. A case involving the construction of a law or treaty, or the constitution of the United States, and which construction becomes necessary to the disposition of the case, is a case arising under the constitution or laws of the United States. Cohens v. Virginia, 6 Wheat. [19 U. S.] 264; Mayor v. Cooper, 6 Wall. [73 U. S.] 252; Miller v. New York [Case No. 9,585].

7. The aid of a court of chancery will be given for the purpose of preventing an unlawful act, though it be also a criminal act, if it has a tendency to destroy the property or business of the complainant. State v. Fagan, 22 La. Ann. 547; Louisiana State Lottery Co.

v. City of New Orleans, 24 La. Ann. 86; Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551; Dixon v. Holden, L. R. 7 Eq. 488.

8. A court of equity will enjoin the officers of a state from the execution of an unconstitutional law, where the tendency is to impair the constitutional rights of the complainant. Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738; Davis v. Gray, 16 Wall. [83 U. S.] 203; Crane v. McCoy [Case No. 3,354]; Mason v. Rollins [Id. 9,252]; Shimer v. Morris Canal & Banking Co., 27 N. J. Eq. 364; Lutes v. Briggs, 5 Hun, 67; Stage-Horse Cases, 15 Abb. Pr. (N. S.) 51; Brown v. Trustees of Catlettsburg, 11 Bush, 435; Cherokee Nation v. State of Georgia, 5 Pet. [30 U. S.] 77; Williams v. Mayor, etc., of Detroit, 2 Mich. 560.

9. This bill is not an attempt to enjoin proceedings in a state court, and the injunction asked is not prohibited by section 720, Rev. St. Proceedings cannot be stayed until they have been commenced. Fisk v. Union Pac. R. Co. [Case No. 4,830].

Mr. Ogden:

1. The public policy of Louisiana is opposed to gaming, for the Code withholds any action for the recovery of money won upon a bet, except in particular cases where the tendency is directly to promote the material interests of the state.

2. If the act of March 3, 1875, to determine the jurisdiction of circuit courts of the United States, etc., is so construed as to vest the circuit courts with jurisdiction over a suit between citizens of the same state, the act is unconstitutional. Alexander Hamilton, in the Federalist.

3. This suit does not fairly come within the provisions of the act of March 3, 1875. It is not a case arising under the constitution and laws of the United States, but of the state of Louisiana. The constitution and laws of the United States may be drawn in question in the litigation, but it will not be pretended that they will necessarily be drawn in litigation.

4. This suit is essentially an attempt to remove the criminal proceedings in the state courts to this court for adjudication. It is, therefore, not a suit of a civil nature, to which alone the act of 1875 applies.

5. The injunction prayed for is to stay proceedings in a state court, and is prohibited by section 720, Rev. St. Supervisiors v. Durant, 9 Wall. [76 U. S.] 415; Campbell's Case [Case No. 2,349.]

6. The injunction asked for is against the state district attorney, who has no other functions except to represent the state in proceedings in her courts, and two recorders, who are committing magistrates of the state.

7. No decision can be found to sustain the claim of the complainants to an injunction to stay criminal proceedings in a state court. The case of Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738, stops very far short of an authority for what is demanded in this bill.

8. The assumption that a police officer can be enjoined in advance from making an arrest, upon warrant, under a general law of the state demanding punishments for crime, strikes down the whole sovereign power of the state.

9. If there be a wrong, the remedy in the case is very simple. The parties arrested have the right to the writ of habeas corpus whenever an arrest is made without warrant of law. There is, therefore, no necessity for the exercise of the extraordinary and unprecedented power invoked by the bill.

10. If the injunction prayed for in this case can be allowed, then it ought to be allowed in every other case where a person who expected to be charged with crime appeared and alleged that he would be injured by arrest in his property and rights, and that the arrest would be in violation of the constitution and laws of the United States.

Mr. Egan, on the same side:

1. The sum of $40,000 required by the charter of the lottery company to be paid by it to the state, is not in consideration of the privileges and franchises conferred by the charter, but is in lieu of all taxes and licenses, whether imposed by state, parish or municipal authorities.

2. If the setting up and drawing of lotteries is a lawful business, then the act of August 11, 1868, which confers the exclusive right upon the lottery company to carry on this business in the state of Louisiana for the period of twenty-five years, is unconstitutional and void. Slaughter-House Cases, 16 Wall. [83 U. S.] 36.

3. If a grant of power is in violation of the fundamental law, it cannot be valid in one part and invalid in another. U. S. v. Reese, 92 U. S. 214.

4. The act of August 11, 1868, confers upon the lottery company a mere license to set up lotteries and sell lottery tickets, and does not amount to a contract. The license could be withdrawn, and it would be no violation of a contract to do so. Burroughs, Tax'n, 148, 149.

5. The inherent right of sovereignty to abate a nuisance cannot be alienated. Coates v. New York, 7 Cow. 585.

6. The general power of the legislature to legislate for the protection of the life, health, safety and morals of the inhabitants of the state, cannot be the subject of an irrevocable grant by it. O'Leary v. County of Cook, 28 Ill. 534; Dingman v. People, 51 Ill. 277; Lowe v. Williams, 94 U. S. 650; Moore v. State, 48 Miss. 147; Metropolitan Board of Excise v. Barrie, 34 N. Y. 663.

7. If arrests are made under the act of March 27, 1879, it can only result in affecting the liberty of the persons arrested, and they have adequate remedy under the laws of the land. No corporation whose rights

are remotely connected with the arrests can, by seeking an injunction, paralyze the criminal laws of the state.

Mr. Campbell, for complainants, in reply:

1. The constitution of the United States and the laws of congress sanctioned by it are the supreme law of the land. Every officer of the state legislature, executive or judicial, is not only bound as a citizen, but as an officer of the state, to observe that constitution and those laws as supreme. The constitution of the United States confides to the government of the United States judicial power to decide all cases at law or in equity arising under the constitution and laws of the United States, and the treaties made or to be made under their authority, and the act of congress of March 3, 1875, determines that the circuit courts of the United States shall have original cognizance of all cases of the description mentioned in that clause of the constitution. The jurisdiction conferred by this act is independent of the condition or state of the party to the suit. It depends entirely upon the subject matter or causes of the suit. The test of jurisdiction is and must be some right or claim arising under the supreme law of the land. The jurisdiction comprehends all cases at law or in equity under the article. The power of the government to have the constitution and laws of the United States and their treaties authoritatively expounded and enforced by the courts of its own nomination and appointment, admits of no controversy or doubt, and the act of March 3, 1875, appoints the circuit courts as the instruments to do this. The power of congress to do this has been determined in numerous cases by the supreme court of the United States. Martin v. Hunter, 1 Wheat. [14 U. S.] 304; Cohens v. Virginia, 6 Wheat. [19 U. S.] 264; Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738; Ableman v. Booth, 21 How. [62 U. S.] 506; Mayor v. Cooper, 6 Wall. [73 U. S.] 247.

2. The charter of the Louisiana State Lottery Company is unquestionably a contract. The charter was not granted as a gratuity, but for a valuable consideration, part of which has been paid and the residue is to be paid.

3. Every concession of a franchise confers rights which cannot be resumed without reservation of power to do so in the grant. It does not belong to the legislature to destroy the concession. It is a contract, the obligation of which cannot be impaired. Wales v. Stetson, 2 Mass. 143; Enfield Toll-Bridge Co. v. Connecticut River Co., 7 Conn. 28; Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518; Terrett v. Taylor, 9 Cranch [13 U. S.] 43; 2 Kent, Comm. 306; Cooley, Const. Lim. 279.

4. The charter of the lottery company is not a mere revocable license. A license is usually a permission or authority to do some act in respect to the property or business of another person. If the property be in land, the notion of any estate or right in the land is not conveyed by the use of the word "license." The owner may revoke the license. In matters of taxation, the license is usually a receipt for the assessment as paid, and affords evidence that the licensee has performed the demands of the law. In this class of licenses it is held that the licensee cannot complain of any change in the laws on the subject. A licensee is not obliged to use his license, and, generally, any person may obtain one. There is no exclusive right conveyed. Calder v. Kurby, 5 Gray, 597. This corporation is established for a term of years. It is bound to collect capital, which may be divided into assessable shares. There is a continuing payment, to last during the life of the corporation, and an exclusive privilege to run during the same period. All of these legislative acts impose upon the state the obligation of a contract, which a subsequent legislature cannot impair. Bank of Pennsylvania v. Com., 19 Pa. St. 144.

5. Lottery grants are not an exception to this rule. State v. Phalen, 3 Har. (Del.) 441; Gregory v. Trustees of Shelby College, 2 Metc. (Ky.) 589; State v. Sterling, 8 Mo. 697; Freleigh v. State, Id. 606.

6. The supremacy of the constitution of the United States is not to be undermined or subverted by any ingenious form of enactment framed for the purpose.

7. Where officers charged with the administration of the criminal law become agents for those who impair the obligation of contracts, or who deprive men of life, liberty or property before a hearing and without process, there is no reason why they should not be restrained by preventive process from the courts. Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738; Davis v. Gray, 16 Wall. [83 U. S.] 203; Board of Liquidation v. McComb, 92 U. S. 531. The cases that have been cited show that the power of the court of chancery is co-extensive with the wrongs which property may suffer, and that when there is a possession supported with title, an invasion of that right, in a manner to produce irreparable mischief, under color of a law or right by a public officer, and there is no adequate mode of hindrance or redress, an injunction will issue. Wood v. City of Brooklyn, 14 Barb. 425; Cherokee Nation v. State of Georgia, 5 Pet. [30 U. S.] 77.

Mr. Ogden filed a supplemental brief, in which he argued:

1. The lottery is gambling on the most extensive scale, and in the most pernicious form, and gambling of every kind has been reprobated by the common judgment of mankind, and must, therefore, be regarded as immoral.

2. The question is whether the action of a legislature, in granting franchises to a body

of men proposing the establishment of an immoral business in a community, ties the hands of all succeeding legislatures. Can a valid contract be made by a legislature for the establishment of an immoral business? Are not the right and power to protect the physical and moral health of the people inalienable rights of government? The authorities show that the courts have almost invariably so considered them. Calder v. Kurby, 5 Gray, 597; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657.

3. That clause of the constitution of the United States which forbids a state to impair the obligation of contracts, has no reference to any such contract as that set up in the bill, but to contracts by which perfect rights, certain definite, fixed private rights of property were vested; contracts as to property, and not involving any question of public policy upon which the police or other great powers of the state could be called into operation. Butler v. Pennsylvania, 10 How. [51 U. S.] 402.

Mr. Campbell filed a brief in reply:

1. The repealing act complained of does not for the first time prohibit lotteries. By the charter of the lottery company and other acts, all other lotteries were prohibited. The repealing act was simply designed to abrogate the charter of the lottery company, and prohibit its business in common with all other lotteries.

2. In those clauses of the constitution on which complainants rely, to wit, "No state * * shall pass any * * law impairing the obligation of contracts;" "Nor shall any state deprive any person of life, liberty or property without due process of law," there is no exception or reservation of cases, the prohibition is universal. The inquiry is, therefore, what cases are included in the terms of the prohibition? To ascertain this we must resort to the decisions of the supreme court of the United States. The following cases touch this question: Fletcher v. Peck, 6 Cranch [10 U. S.] 87; Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 526; Sturges v. Crowninshield, Id. 122; Planters' Bank v. Sharp, 6 How. [47 U. S.] 301.

3. It is not denied that corporations may be required to conform to such regulations of a police character as the legislature may see fit to impose. There is a distinction between powers conferred upon corporations by contract and such as belong to them as corporations. The latter may be controlled by the legislature, as natural persons may be, but the former cannot be disturbed without compensation. The following are cases which show what character of regulations the legislature may impose on corporations: Winona & St. Peter R. Co. v. Blake, 94 U. S. 180; Chicago, etc., R. Co. v. Iowa, Id. 155. The following cases show the subordination of police laws of a state to the constitutional commands and prohibitions: The Passenger Cases, 7 How. [48 U. S.] 283; Toledo W. & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37; Thorpe v. Rutland & B. R. Co., 27 Vt. 140; Com. v. Farmers' & M. Bank, 21 Pick. 542.

4. The present constitution of Louisiana has a clause pronouncing contracts for the sale of persons to be null and void, and notes given for slave property before the war were annulled by the state courts. But the supreme court of the United States overruled these decisions, and held that the law having recognized such a right, and the contracts having been made under the laws, they were legal and valid: Osborn v. Nicholson, 13 Wall. [80 U. S.] 661; Wilmington, etc., R. Co. v. King, 91 U. S. 3. A similar decision was made in respect to the clause in the constitution of this state, which prohibited a recovery on contracts the consideration of which was confederate money. Delmas v. Ins. Co., 14 Wall. [81 U. S.] 661; Wilmington, etc., R. Co. v. King, supra.

5. The cases in Missouri, Kentucky and Delaware maintain that there may be a vested interest in the existence and continuance of a lottery grant which the legislature cannot destroy or abridge. The supreme court of Louisiana recognizes the same rule. Davis v. Caldwell, 2 Rob. (La.) 271.

6. When an act of incorporation has been accepted and rights have vested, the inquiry is pertinent, whence does the legislature acquire a power to divest them. The franchises and rights granted by the general assembly are not to be revoked at the pleasure of that body, or by any convention assembled to make a constitution. See remarks of Chief Justice Shaw in Com. v. Farmers' & M. Bank, supra. See, also, remarks of Chief Justice Taney in Ohio Life Ins. & Trust Co. v. Debolt, 16 How. [57 U. S.] 416.

7. The final question is, whether the complainants have made proper parties to the suit. The defendants are those who are immediately implicated in the infliction of injury under the obnoxious law. Has the state armed these defendants with a commission to destroy a contract made by herself, to deprive the complainants of their rights by an arbitrary exertion of power, without process of law, and this in violation of the constitution of the United States? The court is asked to restrain the defendants, and the complainants are told that the mere fact that the state commands is a sufficient answer. The states having waived the exemption which their sovereignty gave to them from control of the judicial power by their delegation to the courts of the United States, of all cases in law or equity arising under the constitution and laws of the United States, with the grant of authority to hear and determine such causes, it follows that to execute their agency all the usual instruments for effectuating the entire adjustment of the controversy accompany the grant. In respect to cases in which the state is immediately interested, it is competent to sue the agents of the state. Osborn

v. U. S. Bank, 9 Wheat. [22 U. S.] 738; Chicago, etc., R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago, etc., R. Co., 94 U. S. 165; Board of Liquidation v. McComb, 92 U. S. 531.

BILLINGS, District Judge. The complainants have filed their bill in the circuit court of the United States, under the permission conferred in an act of congress, approved March, 3, 1875, which vested those courts with "original cognizance of all suits of a civil nature, at common law or in equity, arising under the constitution and laws of the United States, or treaties made, or which shall be made, under their authority." 18 Stat. 470. The civil jurisdiction of this court was by this statute enlarged to the entire extent of the judicial power delegated to the congress by the terms of the constitution. Prior to this statute the jurisdiction of this court depended, in a great measure, upon the condition or character of the parties, and upon particular laws of the United States; this statute vests a jurisdiction of all cases which may involve the enforcement of the constitution, laws and treaties of the United States in their determination. The jurisdiction thus acquired comprehends suits which the United States or its officers or agents may bring in the discharge of official duty under the constitution, laws or treaties, and such as may be maintained against them because of official acts or obligations. Besides these are embraced the cases between individuals and corporations where the constitution, laws or treaties of the United States shall form the immediate and determining cause of the controversy, and this fact is exhibited to the court in such a form that the court can take cognizance of it. Until the question is so submitted, and is thus made, the judicial power does not attach. Prior to this enactment the powers, which the congress had not bestowed upon the federal courts by legislative provisions, were dormant because that authority had not designated the tribunal which should be authorized to employ them. This interpretation of this clause of the constitution is announced in Martin v. Hunter, 1 Wheat. [14 U. S.] 304; Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738; Ableman v. Booth, 21 How. [62 U. S.] 506; Cohens v. Virginia, 6 Wheat. [19 U. S.] 264; Mayor v. Cooper, 6 Wall. [73 U. S.] 247; and U. S. Bank v. Roberts [Case No. 934]. The plaintiff, the Louisiana State Lottery Company, was incorporated in the year 1868 by the general assembly of Louisiana, and was endowed with corporate rights and privileges to be enjoyed for the term of twenty-five years. The bill charges that these were enjoyed without disturbance until the first of April, 1879, under the authority of the act of incorporation. The bill avers that above four hundred thousand dollars have been paid, according to the charter, into the state treasury; that the auditor had refused to accept the payment due on the 1st of April, and there is an offer to make that payment and all others as they become due. The cause of the refusal is the enactment by the general assembly in March, 1879, of a statute which repeals in terms the charter of incorporation, abolishes the corporation and imposes penalties to affect all who should carry on the business which the company had by its charter been empowered to conduct. The coplaintiffs aver an interest in and a right to some of the privileges of the corporation by assignment. The bill charges that the repealing act impairs the obligation of a contract and divests rights of property without process of law; and that the general assembly has violated the prohibitory clauses of the constitution, and that the officers and agents of the state, who are defendants in the bill, have already commenced to enforce this unconstitutional and injurious statute, so as to threaten irreparable injury. These facts, thus averred, disclose a case arising under the constitution of the United States.

The supreme court of the United States, in respect to the clause of the constitution, embodied in the act of congress determining the jurisdiction of the circuit courts, say: "The power under consideration is given in general terms. No limitation is imposed. The broadest language is used. All cases so arising are embraced. None are excluded. How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The constitution is silent upon the subject. They are remitted without check or limitation to the wisdom of the legislature (congress)." Mayor v. Cooper, 6 Wall. [73 U. S.] 247. The act of 1875 (18 Stat. 470) grants to the circuit courts "original cognizance" of all such cases. The court say: "A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends upon the right construction of either." * * * "It is the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals. In cases arising under them properly brought before it, this court is the final arbiter. The decisions of the courts of the United States, within their sphere of action, are as conclusive as the laws of congress made in pursuance of the constitution. This is essential to the peace of the nation and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences." Mayor v. Cooper, supra.

A case arising under the constitution having been presented to the circuit court, the question comes up whether the case be one in which the plaintiffs have a title to an in-

junction. It is not denied that the general assembly did grant the act of incorporation, that a corporation was organized and has existed until the abrogating act of March, 1879, was adopted. It is not denied that the payment of $40,000, quarterly in advance, was made to the auditor, and that a bond with sureties was given to secure that sum as the charter requires; nor that the required capital has been paid in; nor is there any question that the act of the legislature repealing the charter is the only obstacle to the continuance of the corporation; nor that all the departments of the state government have sanctioned its validity. Louisiana State Lottery Co. v. Richoux, 23 La. Ann. 743; Acts 1875, No. 17 (approved April 3) p. 44. It was decided shortly after the constitution of the United States was made that "the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute unless a power for that purpose be reserved to the legislature in the act of incorporation." Wales v. Stetson, 2 Mass. 143. The supreme court of the United States and the courts of the states have concurred in this opinion with a degree of unanimity which hardly any other opinion has obtained. The settled doctrine of the United States is that the charter of a private corporation is a contract the obligation of which cannot be impaired without an infraction of the constitution of the United States; that a grant of franchises is, in point of principle, identical with a grant of other property; whether the consideration be large or small is not essential; for the motives or inducements which caused the legislature to pass the act cannot be examined to offset the validity of the act. Of the sufficiency of the consideration the legislature is the only competent judge. Every valuable privilege given by the charter, and which conduced to make it acceptable, and to promote an organization under it, is placed beyond the power of the legislature, unless the power be reserved at the time when the charter is granted. Dartmouth College v. Woodward, 4 Wheat. [17 U. S.] 518; State Bank of Ohio v. Knoop, 16 How. [57 U. S.] 369; Hawthorne v. Calef, 2 Wall. [69 U. S.] 10; The Binghamton Bridge, 3 Wall. [70 U. S.] 51. The court is asked by the attorney-general of the state to hold that the contract, if such it be, which has been made by the state on the one part, and the incorporators of the complainants' corporation on the other part, was of no binding force, and could be set aside by the legislature of the state on account of its subject matter, to wit, for the reason that the franchise was for the drawing of lotteries. I have examined with great care the view that has been taken both in the federal and the state courts of the United States as to the binding force of contracts made by the legislature upon the subject matter of drawing lotteries. The authorities are overwhelmingly against the position taken by the attorney-general and his associate, and while lotteries are reprobated as having an immoral tendency by the courts, and they have not cast about to strain inferences to uphold grants with reference to them, nevertheless, where the grant of the right to draw lotteries has taken the form of an absolute contract, the courts have treated the responsibility of its creation as resting entirely with the legislature, and have dealt with it as carrying the obligation which its terms import.

I shall first view the grant of plaintiffs as if it were a mere license and independently of the considerations which spring from the fact, that the plaintiffs are a corporation, and afterwards shall show what further inference is to be derived from that fact. I shall first consider the question with reference to the fact that the plaintiffs had a license granted to them by the legislature for the period of twenty-five years to draw lotteries. In this connection, I find two propositions adhered to with well nigh entire uniformity by the courts of the states and of the United States: First, that a mere license to draw lotteries, which is not inseparable from the essential functions of a corporation, and which has not been acted upon, and under which no rights have been vested, may be repealed by any succeeding legislature of the state in which it is granted; and, secondly, that where a license to draw lotteries has been acted upon, and under it, rights have been vested, it cannot be withdrawn by the legislature to the prejudice of these rights, and the power of the legislature to recall or modify it is to that extent gone. In our own state, in the case of Davis v. Caldwell, 2 Rob. (La.) 271, the supreme court say: "The permission to draw a lottery is not per se a contract, and until it has been accepted and rights have been acquired under it, is perfectly within the control of the legislature." In the state of Missouri the question was very fully discussed in the case of State v. Hawthorn, 9 Mo. 389. The defendant Hawthorn had been indicted for selling lottery tickets in a lottery for the benefit of the St. Louis Hospital. In 1833 the legislature of Missouri had authorized a sum of money to be raised by a lottery drawn by commissioners. In 1835 an agreement was made between the commissioners and Gregory, by which the commissioners, after reciting the act of 1833, agreed to dispose of the said right of drawing schemes of lotteries, and for the consideration of two and a half per cent. on the sales of tickets in that state, transferred to the said Gregory the sole and exclusive right to draw such scheme or schemes. On August 23, 1841, Gregory assigned this contract, and his assignee appointed the defendant Hawthorn his agent for selling lottery tickets in Missouri. In December, 1842, the legislature passed an act repealing all laws authorizing the drawing of any lottery, or the sale of any lottery tickets

within the state of Missouri, and imposed heavy penalties upon any one violating its provisions. The only question raised in the case was whether this last mentioned act, so far as it affected the present defendant, was contrary to that clause of the constitution of the United Sates which prohibited a state from passing any law impairing the obligation of contracts. In the lower criminal court the judgment had been in favor of the defendant, and the supreme court of Missouri, in affirming that judgment, say: "We are aware that it is at all times a delicate task for a court to question the validity of legislative enactments; it is certainly an unpleasant one where the court feels every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals. These considerations, however, cannot be permitted to discharge us from the performance of a duty imposed by the constitution, and especially where reason and justice unite with the constitutional prohibition in teaching that a legislature can no more violate a contract made by themselves, or under their authority, than they can rescind or alter or impair the obligation of one made between private individuals." In Phalen v. Com., 1 Rob. (Va.) 713, a license had been granted, in the year 1829, to draw lotteries for the purpose of deriving a certain amount of money for improving the Fauquier & Alexandria Turnpike Road. The provision originally contained no limit in time and was limited only in amount. In 1834 the legislature of Virginia passed an act declaring it should not be lawful to draw any lottery within the commonwealth after the first of January, 1837, but providing that nothing in the statute should interfere with the contracts already made or with contracts to be thereafter made for the drawing of lotteries, which provision was not to extend beyond the first of January, 1840. The question there was whether the defendants' authority was derived prior to the repealing act, and the court held that it was not. But in considering the question, and with reference to the character of a legislative permission to draw a lottery, the court, at page 724, say: "A franchise may consist in personal privilege or exemption, or in rights or privileges connected with personal or real estate; and in the latter aspect it is a species of incorporeal hereditament. The one under consideration may be properly characterized as a liberty or license to effect a particular purpose by prescribed means; which may or may not, at particular periods of its existence, and by reason of the rights and immunities which have sprung from its exercise, give rise to an implied contract, or obligation for preserving it, and guarding it from injurious modifications, or become an element of private property beyond the reach of the power of government, without due compensation."

In the state of Delaware the legislature had granted a lottery privilege to certain managers, with power to draw lotteries until a certain sum was raised, and a right to sell the grant. The grant had been sold for a valuable consideration and the legislature sought, by a subsequent act, to subject the parties who were vending lottery tickets under the license so assigned to penalties. The superior court of the state of Delaware, in the case of State v. Phalen, 3 Har. 441, held that the act imposing a penalty and attempting to repeal the grant was void. The court, at page 454, say: "Independent of the constitution of the United States, the act (the annulling act), although clearly contrary to right and incapable of being sustained, yet as an act of a sovereign power may be valid, for it is not always that power regards right, and experience teaches that power unlimited often tramples upon and disregards private right. But when we turn to the clause of the constitution of the United States which appears there inserted as a shield and defense against all legislative action by a state impairing the obligation of contracts, we feel authorized to say not only that the legislature had no right, but they had no power to regulate in the manner attempted by the act of 1841 (the repealing act) the existing contract of 1839." And they say: "Hence we are of opinion that the act of the legislature of the state of Delaware of 1841, so far as the same affects the contract of the defendants, made in 1839, purchasing the rights and privileges of drawing a lottery under the act of 1827, is a violation of the latter clause of the tenth section of the first article of the constitution of the United States, and therefore we adjudge and declare the same, in relation to the said contract, void and of no effect." In the state of Kentucky the court of appeals, in the case of Gregory v. Trustees of Shelby College, 2 Metc. 589, held that the power of the legislature to repeal a grant of a lottery privilege to individuals, and thereby withdraw the privilege, where no rights had been acquired under the act by which it was created, nor any liability incurred in consequence of its passage, was clear and unquestionable, but where vested rights had been acquired under the grant, before the passage of the repealing law, such repealing law must be regarded so far as related to those vested rights as unconstitutional and inoperative. The court say, at page 598: "Although the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued under it, and though lotteries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason are almost universally denounced by the law making power in the different states of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such

rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant, before the passage of the repealing law, then to the extent of such rights at least that law must be regarded as unconstitutional and inoperative." In the case of Com. v. Simmons, the circuit court in the state of Kentucky, in a decision rendered during the present term, have followed this case of Gregory v. Trustees of Shelby College, supra.

If we turn now to the supreme court of the United States we find that, in the case of Cohens v. Virginia, the whole law of the right to review the decision of a state court of last resort in a criminal cause, by the supreme court of the United States, was determined and turned upon the question whether a grant by congress of a right to draw lotteries in the District of Columbia had any force beyond that district, and prevented the operation of the criminal law of the state of Virginia in a case where the sale of a ticket had been effected in that state. The whole matter was discussed without an intimation anywhere that the rights of the party before the court, who invoked its power to review, were to be in the slightest degree affected by the fact that his whole exemption was under a grant relating to a lottery. In the case of Phalen v. Virginia, 8 How. [49 U. S.] 163, which, in the state court, I have referred to as reported in 1 Robinson, the supreme court, at page 168, while condemning in strong language the immoral effects of lotteries, says: "When the legislature of Virginia passed this most salutary act for the suppression of lotteries, they, with commendable caution, protected all vested rights." Where, therefore, rights had become vested even under a license to individuals to draw lotteries, according to the settled law of the United States, those rights cannot be disturbed by a mere repealing act of the legislature. But it is not alone with reference to lotteries and contracts with reference to lotteries that the immorality of the consideration has been invoked. Very many of the states of the Union which had been engaged in the insurrection, after the reconstruction, upon the ground of the immoral and pernicious character of the consideration of such contracts, by provisions inserted in their constitutions, declared all contracts wherein slaves, or the currency of the so-called Confederate States was the consideration, should be treated as absolutely void. Those cases went to the supreme court of the United States, and that court, looking simply at the declared policy of the state as to the alleged immoral and pernicious consideration at the time the contracts were made, held that the contracts, when made, had the sanction of competent authority, and that the courts must, therefore, enforce them. Osborn v. Nicholson, 13 Wall. [80 U. S.] 654; Boyce v. Sable, 18 Wall. [85 U. S.] 546; Delmas v. Insurance Co., 14 Wall. [81 U. S.] 661; Wilmington, etc., R. Co. v. King, 91 U. S. 3.

Where rights have become vested, I know of no distinction which would allow states to recede from contracts, or avoid contracts which they have made, more than can individuals. States at all times can and should make advances to higher and still higher ground, with the view of protecting public and private morals. But they owe a duty, not only founded in natural justice but happily enforced by the supreme power of the constitution of the United States, in all their advances to recognize and protect rights which have become vested and obligations to which they have lent their own sanction. But the objection against the claim of the learned solicitors for the defendants is even more insuperable, which springs from the fact that the repealing law whose validity their line of argument requires them to sustain, strikes, so to speak, at the functional privileges or faculties of a corporation. It is true, as was intimated by the supreme court in the case of Boyd v. Alabama, 94 U. S. 645, that a grant of a privilege to draw a lottery made to an individual, where no rights had become vested, was capable of revocation. It may also be true, where, as in the case of Moore v. State, 48 Miss. 147, a corporation is created for agricultural and scientific purposes, that its essential powers and faculties, viewed as a franchise, must be tested by these purposes, and that if a license to draw a lottery is given by a legislature to such a corporation, it may be held and treated as a license granted to an individual as to its revocability, though it cannot be true as seems to be held as a sort of condition of the decision in that cause that a state convention possesses any more authority to impair the obligation of contracts than is possessed by a state legislature. Both are alike subject to the constitution of the United States. But where a corporation has been called into existence by the legislature of a state for a definite object, explicitly declared in the act creating it, and has powers and faculties given to it which are in their nature and operation pertinent to its sole object, and indeed necessary to its very existence; to maintain that the privileges of such a corporation, where there had been no judicial inquiry, and indeed where there was no allegation of ground of forfeiture, could be swept away by a repealing act of the legislature of the state that created it, is to assail well nigh every case decided in the courts of the United States, and of the states which compose them in which the sacredness of charters and of the contracts embodied in them have been adjudicated upon.

It must be borne in mind, that when the thirteen united colonies declared their independence, in their justification of that step, which they put into the form of what is called the Declaration of Independence, among other reasons which they assigned for their action

in thus separating themselves from the king of Great Britain was, "that he had taken away their charters." The sacredness of the charters which emanated from the sovereign was intimately associated in the colonial mind with the administration of a government in which rights should be properly respected and the obligation of contracts justly observed. And when the colonies became states, and the states set up their systems of jurisprudence, the idea of the inviolability of the rights of corporations, which were set forth in their charters, whether those charters came from the king or from the legislature, was well nigh immediately and unanimously announced, and has been with equal unanimity adhered to. Chancellor Kent, in his Commentaries (volume 3, p. 458) says: "Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of a subject. They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. The government cannot resume them at pleasure, or do any act to impair the grant without a breach of contract." And, again (volume 2, p. 306), he says: "A private corporation, whether civil or eleemosynary, is a contract between the government and the corporators, and the legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation judicially ascertained and declared." I think this statement of the law, with reference to the franchises or privileges of a corporation, presents the universal American law upon that subject.

In the case of Com. v. Farmers' & M. Bank, 21 Pick. 542, Chief Justice Shaw has clearly defined that which is inviolable in the grant of corporate existence and corporate faculties, so far as relates to this case. "It may be conceded," he says, "that an act of incorporation is to be considered to be a contract between the government, on the one side, and those who accept the act and become a corporation and their successors on the other side; and the corporate power granted cannot be revoked or annulled by an after act of legislation, unless a power has been reserved for that purpose, or with the consent of the corporation. But, applying this rule practically, it is necessary to consider how far, and to what subjects, this contract extends. It is clearly a stipulation on the part of the government that the corporation shall be and continue a corporation for an indefinite time, or for a term limited in the act, unless sooner forfeited for some cause recognized by existing laws as a cause of forfeiture; that their constitution, organization and mode of action, as prescribed by the charter, shall not be annulled or changed by the legislature; that members shall not be added or removed; that modes of election, expulsion or suspension of members shall not be altered; and that whatever belongs to their organic constitution and action, as bodies politic, shall continue and be determined by the terms of the charter. In addition to which the powers specially granted to them are not to be withdrawn or diminished." In Calder v. Kurby, 5 Gray, 597, a permission had been given to an individual to sell spirituous liquors for one year for the sum of one dollar as a license fee. The court held that this was a mere license and therefore revocable by the state. The court, at page 598, say: "The whole argument of the counsel of the plaintiff is founded on a fallacy. A license authorizing a person to retail spirituous and intoxicating liquors does not create any contract between him and the government. It bears no resemblance to an act of incorporation by which, in consideration of a supposed benefit to the public, certain rights and privileges are granted by the legislature to individuals, under which they embark their skill, enterprise and capital." Cooley, in his Constitutional Limitations (page 279), says: "Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purpose of the corporators, are held to be contracts between the legislature and the corporators, based for their consideration on the liabilities and duties which the corporators assume by accepting them, and the grant of a franchise can no more be resumed by the legislature, or its benefits diminished or impaired, without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself." Again, at page 577, he says: "The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under the pretense of regulations, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." If now we turn to the averments of the bill, we find that the franchise which was granted for twenty-five years has been acquiesced in by every department of the state government for eleven years; that a corporation has been formed whose stock, in shares of one hundred dollars, exceeds one hundred thousand dollars; that upon the faith of this grant, for this period of twenty-five years, the complainants' corporation has already paid into the state treasury $400,000, and has furthermore, expended upwards of one million dollars, and that the co-complainants claim, by assignment, an interest in the grant. Here, then, are rights of an extraordinary magnitude, which are completely vested, and which, ac-

cording to the authorities which announce the settled law, and have been cited above, were beyond the reach of legislative withdrawal, and which remain vested in the corporation, notwithstanding the repealing law.

It remains further for me to consider the rights held by the Louisiana State Lottery Company, viewed as a corporation, and to ascertain how far the rights which are asserted in the bill are a corporate franchise, and as such absolutely irrevocable. The determination of the nature and extent of the stipulations and their operation and effect, must be derived from the language of the act of incorporation. If the concessions in the charter do not convey an interest—a property in the privileges or franchises, but amount to only a license in fact and confer only a revocable authority, then independently of the rights which had become vested—the plaintiffs have not established a ground for a suit. A license at common law was revocable if a certain time was not fixed, or if no interest in the property passed. But in this act of incorporation the corporate faculties and privileges, by express words and necessary implication, are vested for a term of twenty-five years. The quarterly payments are to be paid and secured for all that time. The corporation must collect a capital of not less than $100,000 within a limited period, and might enlarge it so as to amount to $1,000,000. The powers to make rules and regulations are liberal, and the corporation might do whatever individuals might for its convenience and safety. The conditions impose burdens without any reference to the emoluments to be received, and compel the possession and use of capital.

A license for trading purposes is commonly given to any who comply with the conditions and the term of time as limited, and there are no obligations imposed to perform acts under it. So the ordinary statutes respecting lotteries confer an authority not coupled with any estate or interest for the purpose of raising certain sums of money by the sale of tickets, or of the lottery scheme for some favored object of legislative or public patronage. The act of 1868, on the other hand, constitutes a corporation to continue in being for a prescribed term and then to be dissolved and liquidated. There is a grant of sole and exclusive privileges of an unusual character for the whole term and the precise object is expressed to make of the business a source of revenue for the state, and the corporation is required to pay quarterly, in advance, a sum of money to the auditor. The corporation must collect capital and may issue shares of stock, and is controlled by directors to be chosen under the charter. These are qualities and attributes which do not belong to a corporate body holding by a legislative contract. State v. Phalen, 3 Har. [Del.] 441; Gregory v. Trustees of Shelby College, 2 Metc. (Ky.) 589; State v. Sterling, 8 Mo. 697; Calder v. Kurby, 5 Gray, 597; Freleigh v. State, 8 Mo. 606. A grant having these characteristics cannot be repealed by the legislature. Bank of Pennsylvania v. Com., 19 Pa. St. 144; State Bank of Ohio v. Knoop, 16 How. [57 U. S.] 369. The repealing act of 1879, then, is not operative to take away the privileges and rights of the Louisiana State Company. The American authorities are adverse to the legislature having any such right. Not only do the qualities which are impressed upon the corporation by its charter and the faculties given to it under that charter make that instrument when construed by admitted principles a contract, but a succeeding legislature has in terms expressly declared it to be such. In Act No. 17, approved April 3, 1875, at page 44, the legislature of Louisiana says: "An appropriation to the board of administrators of the Charity Hospital of $100,000 for the support and maintenance of the said institution, payable as follows: From the annual revenues received from the Louisiana State Lottery Company, which are hereby transferred to the Charity Hospital—$40,000—provided that the contract made between the state and the Louisiana State Lottery Company shall not in any manner be affected or impaired by the transfer."

The question of right having been established as well as that of the wrong committed by the enactment, the question remains to be considered whether the existence and enjoyment of these franchises and rights of the plaintiffs can be protected by the use of the writ of injunction. It is urged by the attorney-general that the prohibition of the Revised Statutes (section 720), which is section 5 of the act of 1793 (1 Stat. 334), which prohibits courts of the United States from staying by injunction proceedings in any court of a state, should prevent this court from granting an injunction in this cause. The case of Supervisors v. Durant, 9 Wall. [76 U. S.] 415, is cited. In that case all that was decided was that "it (the question presented in that case) was not a question as to which court first obtained possession of the case." Because, the effort having been in that case to restrain, as a proceeding in a state court, a mandamus to levy a tax to satisfy a judgment obtained in a United States court, it was held that the circuit court having already rendered judgment could not be restrained from collecting it, that the question, therefore, did not turn upon priority of jurisdiction. In Live-Stock Ass'n v. Crescent City Co. [Case No. 8,408], Mr. Justice Bradley, after quoting this section, and giving it as a reason for refusing an injunction so far as related to suits already instituted, granted an injunction against "commencing or prosecuting any other suits than such as were then pending," and against "suing for any fine or penalty imposed," etc. In Fisk v. Union Pac. R. Co. [Id. 4,830] Judge Blatchford holds that the provision that "a writ of injunction shall not be granted to stay proceedings in

any court of the state," has application only to such proceedings in the state court as had been commenced before the federal jurisdiction attached. He gives two reasons for this conclusion: (1) That this restriction must be construed along with the provision of section 14 of the act of 1789 (1 Stat. 83); that "the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions;" and (2) that if the federal courts had not power to restrain parties from thereafter instituting proceedings in a state court, a defendant could in many ways defeat the jurisdiction and action of the federal court after it had obtained full jurisdiction of the person and of the subject matter. I see no answer to this reasoning. This prohibition of the statute does not stand in the way of complainants obtaining this writ if their case entitles them to it. The question becomes the broad one whether according to the established principles of equity jurisdiction, they can lay claim to the writ. A large capital exists for employment and was collected under terms of the contract. Without protection from the strong hand of their antagonists this capital cannot be longer employed and those rights must be abandoned. The purpose of the state is to destroy the corporation and to resume its corporate franchises. The combination, strength and persistent purpose of a police force controlled by the state and city authorities, unless checked by the power of the court, would necessarily be irresistible. If that force be employed in derogation of rights secured by the supreme law of the land, the charge in the bill that the act would be tyrannical and oppressive is established. The supreme court of the United States has said, in a less aggravated case, "Moral obligations never die. If broken by nations or states, though the terms of reproach are not the same with which we are accustomed to describe the faithlessness of individuals, the violation of right is not the less." Dodge v. Woolsey, 18 How. [59 U. S.] 331. It is certain that this case, if occurring between individuals, would authorize the interposition of a court of equity. Where a party, under color of title, proposes to inflict irreparable mischief, and the recovery of damages is inadequate or uncertain, and the protection of the specific right is a surer mode of doing justice, an injunction will issue. Bonaparte v. Camden R. Co. [Case No. 1,617]. This tribunal should interfere to defend the franchise of a corporation from an invasion, though disguised in form and to be effected through state officers clothed with statutory power. Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738. A court of equity will protect an exclusive right from those who attempt to participate in the profits. Livingston v. Ogden, 4 Johns. Ch. 48. The legislation of the congress and the jurisprudence of the United States have applied this remedy with great freedom to support and sustain rights which have been held under statutes. In the adjustment of claims under treaties or laws of the United States, injunctions are allowed to keep the money secure till the title is settled. Clark v. Clark, 17 How. [58 U. S.] 315.

The statutes in respect to patents and copyrights confer equity jurisdiction in accordance with which inventors and authors may secure the fruits of their inventive powers. In some cases injunctions are allowed against the United States; and there are cases in which the United States has obtained injunctions, to defend its own right, from the circuit courts. U. S. v. Duluth [Case No. 15,001]; U. S. v. Louisville & P. Canal Co. [Id. 15,633]; New Orleans v. U. S., 10 Pet. [35 U. S.] 622. The case of Emperor of Austria v. Day, 3 De Gex, F. & J. 217, is an instructive one upon this subject. Kossuth, with a view to continue his war with Austria for the dominion of Hungary, prepared in England an enormous number of notes signed by him in the name of Hungary, which he proposed to introduce for circulation, as money, into that kingdom. There was a motion before the lord chancellor and the lord justices of Great Britain for an injunction. Lord Justice Turner, speaking to the question of jurisdiction, says: "I agree that the jurisdiction of this court, in a case of this nature, rests upon injury to property, actual or prospective, and that this court has no jurisdiction to prevent the commission of acts merely criminal or merely illegal, and which do not affect any rights of property; but I think there are here rights of property quite sufficient to found jurisdiction in this court. I do not agree to the proposition that there is no remedy in this court, if there be no remedy at law; and still less do I agree to the proposition that this court is bound to send a matter of this description to be tried at law. The highest authority upon the jurisdiction of this court, in enumerating the cases to which the jurisdiction of this court extends, mentions cases of this class, where the principles of law by which the ordinary courts are guided, give no right, but, upon the principles of universal justice, the judicial power is necessary to prevent a wrong and the positive law is silent." The principle laid down is that where the law in principle acknowledges that there is a wrong and there is no adequate or specific remedy, an injunction may be obtained.

The cases cited from the Reports of the Supreme Court of the United States are pregnant with significant meaning upon this subject. The state of Ohio enacted that a branch of the Bank of the United States was established and had continued its operations in that state contrary to a law of that state, and that, if it continued to do so, it must pay an annual tax of $50,000. An injunction was allowed by the circuit court of the United States. In that case, as in this, the authority of the court to hear the cause

or to grant the relief was challenged. On appeal, the supreme court answered: "They could perceive no ground on which the proposition can be maintained, that congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends." This is the answer that the supreme court gave to the suggestion that judicial power, in such cases, must first be exercised in the tribunals of the state and not in the courts of the United States. The same court, in the same case, determined the principles of equitable jurisdiction in such cases. The court say: "Injunctions are often awarded for the protection of parties in the enjoyment of a franchise, but the defendants deny that one was ever granted in a case like this; although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded. The interference of the court in this class of cases has most frequently been to restrain a person from violating an exclusive franchise by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened? * * * The same conservative principle which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases trespass, and in many cases destruction, will, we think, apply here." Osborn v. U. S. Bank, 9 Wheat. [22 U. S.] 738. The same state of Ohio, at a later period, passed laws to cripple the operations of her own banks and introduced into the state constitution provisions contrary to the conditions and contracts embodied in their charters. The circuit court of the United States in Ohio allowed an injunction upon the officers of the state from enforcing the state enactments; and the supreme court of the United States says "that the jurisdiction of chancery extends to inquire into and enjoin, as the case may require to be done, any proceedings by individuals in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise or the denial of a right growing out of it, for which there is not an adequate remedy at law." Dodge v. Woolsey, 18 How. [59 U. S.] 331. One of the objections answered was that it is contrary to sound policy that the collection of the state revenue should be arrested by the instrumentality of a writ of injunction issuing from the circuit court of the United States.

The bill of the plaintiffs in this suit shows the undisguised purpose of the general assembly of the state to denude the corporation not only of franchise, right and privilege, but of corporate existence, and that, too, contrary to the precise and definite language of the act of incorporation. This was attempted to be done by the mere fiat of the general assembly without any regard to the forms or processes of law. The general assembly did not seem to have called to mind that there were constitutional limitations, both state and federal, upon their omnipotence. Besides this they engrafted upon the act, so as to carry out their purpose of destruction and to give effect to the sections which breathe extermination, penal enactments. All of the acts, agencies and instruments for conducting the business which the corporation was formed to conduct under the legislative guarantees and sanctions are made criminal and stigmatized as misdemeanors if maintained or done. The general assembly did not appear to have heard the voice of the constitution of the state under which they were convened, which commanded that no law impairing the obligation of a contract should be passed; nor the more commanding tones of the people of the United States forming the American Union, that no state shall pass such a law, nor deprive any person of life, liberty or property, without due process of law. The supreme court of the United States have said: "There is no more important provision of this constitution than the one which prohibits states from passing laws impairing the obligations of contracts. And it is one of the highest duties of the federal tribunals to take care that the prohibition shall be neither evaded nor frittered away. Complete effect must be given to it in all its spirit." Murray v. Charleston, 96 U. S. 432. The Act No. 44, which repeals the act passed in 1868 for the establishment and organization for a term of twenty-five years of a corporation, for which a price was stipulated and has been paid, and which arbitrarily abolishes the charter and prohibits the business it was established to conduct, in the light of the decisions of the supreme court of the United States and of this state, must be pronounced to be inoperative and without authority; that the corporation is not abolished, nor its rights, privileges and franchises resumed by the state. The relief prayed for in the bill is due the plaintiffs.

The question remains, have the plaintiffs a title to ask a restraining order upon the defendants? The defendants to a bill like the present one cannot have any estate or interest in the subject-matter, to wit, the rights and franchises of the corporation in possession or expectancy which a decree can affect. The purpose of the legislative act complained of is purely destructive. The agencies selected to execute it are those of mere force. They are commanded to crush out the rights and privileges without any honoring of the bounds of property, though the constitutions of both the Union and the state may surround it. The state is not amenable to any suit, and is shielded by the immunity from any process or legal responsibility. But as an unconstitutional law has no inherent force either to authorize or protect, and, therefore, no claim to be obeyed and no authority to

divest rights, the agents of its administration, of whatever name or character, may be called to answer and are individually responsible. The cases of this sort are numerous. Davis v. Gray, 16 Wall. [83 U. S.] 203; Board of Liquidation v. McComb, 92 U. S. 531. The affidavits filed show that the police officers are the selected ministers for this purpose. Notwithstanding the fact that a hearing of this motion was ordered, these agents were afterwards active, and had made arrests prior to the restraining order and the hearing. The officers of the state plainly contemplated the use of this force. The bill charges it, and these affidavits supply the corroborating proofs. The argument on behalf of the state claimed for this force an authority and an exemption beyond what they are entitled to. This immunity or exemption from all responsibility to the court for acts done in divesting rights of property, and in disregard of the obligations of contracts under a violent law of the state, is apparently a fort which the defendants hope successfully to maintain. Writers on equity jurisdiction properly say that the court of chancery does not deal with matters of crime, misdemeanors, offenses against prohibitory laws, nor questions of mere morality. But there is this reservation, that it is only when those matters are not connected with rights of property with respect to which the court has jurisdiction. Circumstances may confer a jurisdiction. Attorney General v. Cleaver, 18 Ves. 211; Macaulay v. Shackell, 1 Bligh (N. S.) 96. In Springhead Spinning Co. v. Riley (L. R.) 6 Eq. 558, the vice chancellor says: "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation." In the case of Osborn v. U. S. Bank, supra, the prayer of the bill was to restrain Osborn, an officer of the state of Ohio, from executing a law of that state, made for the great oppression and wrong of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The supreme court said: "The true inquiry is, whether an injunction can be issued to restrain a person who is a state officer from performing any official act enjoined by statute, and whether a court of equity can decree restitution if the act be performed." Assuming that the act of the legislature of Ohio was unconstitutional, the question was whether the plaintiffs were entitled to relief in a court of equity against the defendant and to the protection of an injunction. The court answered that the legislature of Ohio had passed a law for the avowed purpose of expelling the bank from the state, and had made it the duty of the defendant (the auditor) to execute it as a ministerial officer. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges, so far as they were exercised in the state. The application to the court was to interpose its writ of injunction to protect the bank, "not from the casual trespass of an individual who might perform the act threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respects the state of Ohio." The gravamen of the bill was the invasion of the chartered rights of the bank, derived from the laws of the United States, under color of a warrant from the state of Ohio, directed to its officer for the precise purpose of destroying those rights. Would the remedy have been changed if the legislature of Ohio had made it a crime or misdemeanor to establish or maintain the bank, or for one of its officers to perform any function in its behalf whatsoever? The chartered rights and privileges held under the constitution and laws of the United States were, in either case, the objects to be destroyed. In either case the constitution and laws that established them were to be subverted and frustrated. In both cases there was the right to protection from the same court, because there was no other court fully adequate to afford a remedy.

The case last cited is in all respects analogous to the case before this court. There is no dissimulation nor concealment in respect to the purpose of Act No. 44. The act is framed for the single purpose to revoke the rights and privileges granted to the plaintiffs, and to resume the control over them, although the charter was designed to confer upon the corporation these rights. If that charter contains a contract, as to which there can be no rational doubt, the nullity of that repealing act is made manifest. Whenever any constitution or law of a state comes in conflict with the supreme law of the land, that constitution or law must yield. The case may be briefly stated thus: The constitution has prohibited any state from passing any law impairing the obligation of contracts, and has delegated to the federal judiciary the authority to enforce this prohibition; this authority has, by the congress, so far as relates to cases of property, been assigned to the circuit courts. Is the prohibition to be evaded and the jurisdiction declined because the forbidden law of the state, while subverting rights of property, seeks to give overwhelming effect to such subversion by placing the execution of the law in the hands of the criminal officers? If this be true, so far as relates to preventive justice, it must be equally true of remedial justice in the federal tribunals. It would follow that the prohibitory provision of the constitution could, so far as relates to any real remedy for injury to property, be evaded, and the constitutional check rendered unavailing at will by any state. Can this be so? Is not the principle as stated in Os-

born v. U. S. Bank, supra, by the supreme court, conclusive of this case as of that? The court there said: "The counsel for the appellants are too intelligent, and have too much self-respect to pretend that a void act can afford any protection to officers who execute it," and cannot, not only the principle which the court in that case enunciate, but the very language which they employ, be adopted as equally decisive of this case as of that, when they say: "The circuit court of the United States has jurisdiction of a bill brought by the United States for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded under the unconstitutional laws of a state; and as the state itself cannot, according to the eleventh amendment to the constitution, be made a party defendant to a suit, it may be maintained against the officers and agents of the state who are intrusted with the execution of such laws."

The officers of every state of the United States, whether executive or judicial, owe to the constitution of the United States a fealty, an homage, an obedience, surpassing that which they owe to their constituents of the state. The people of the United States, composed of all the peoples of the separate states, have adopted the constitution, and have ordained that the terms of that instrument and the laws and treaties made pursuant to it, shall have obedience, anything in the constitution or laws of any state to the contrary notwithstanding. Gibbons v. Ogden, 9 Wheat. [22 U. S.] 1; Dodge v. Woolsey, 18 How. [59 U. S.] 331. The supremacy of this constitution, from the very frame of the government, in cases like this before the court, must be maintained by the courts of the United States. The judicial power was organized so that controversies arising under the constitution and laws, which assumed a judicial form, should, in some cases, originally, and in all cases, finally be determined in the courts of the United States, in order that in every state the constitution and laws should be understood and obeyed in the same manner. M'Culloch v. Maryland, 4 Wheat. [17 U. S.] 316; Ableman v. Booth, 21 How. [62 U. S.] 506. The court acquired jurisdiction of this cause on the first day of April, 1879, by the filing of the bill and by a motion made upon notices served on the same day on defendants for the allowance of a restraining order preliminary to an application for an injunction. The court made an order upon that day. The defendants, or some of them, afterwards, on the 5th day of April, obtained warrants of arrest in the name of the state, the precise purpose of which is to destroy the rights and privileges which were granted in the act number twenty-five of 1868, described in the bill, and to anticipate and defeat the effect of any restraining order or writ of injunction.

The power of a court of chancery to restrain persons subject to the jurisdiction of the court, and parties to a cause pending before it from taking proceedings in other courts, whether domestic or foreign, to defeat the ends of such proceedings, is indisputable. The power rests upon the fact that every court has an authority to defend its jurisdiction and to restrain persons subject to this authority from acts calculated to defeat it. An assignee of an insolvent estate may obtain an injunction upon a creditor who shall send to another state and attach property of the insolvent so as to obtain a priority. So a court may restrain a corporation from making a surrender of its charter while it is a defendant, the object being to defeat the suit. Fisk v. Union Pac. R. Co. [Case No. 4,830]; Dehon v. Foster, 4 Allen, 550. Nor is there anything in the fact that a defendant is an officer and supposes he is performing an official duty which would constitute a reason for withholding the exercise of this jurisdiction. The jurisdiction is conservatory, and is employed where a wrong is attempted under color of law, and with an appearance of right, to inflict permanent and incurable mischief. The remedies at law are, in general, adequate to defend persons from violence and lawlessness. The unoffending citizen is entitled to be protected by the state through its punitive laws. But when the state itself errs and its legislature visits, by a law, constantly recurring penalties upon all the officers and agents of a corporation, it gives rise to a question of the rightfulness of the law, viewed in its operation upon franchises—upon property. For, since a corporation is an artificial being, and can only act through its representatives, any law which forbids, under penal sanctions, every conceivable corporate act of officers and agents, must assail the value and existence of its privileges, and if that law be unauthorized, its operation may be restrained and the property, which is by the constitution exempted from its power, may be protected by the proper process of the courts. Wood v. City of Brooklyn, 14 Barb. 425; Frewin v. Lewis, 4 Mylne & C. 249.

The states may define crime, affix penalties, arraign and punish those who commit the prohibited acts. Where there is no right of property involved, the circuit courts have no jurisdiction to deal at all with any criminal process of a state, however void may be the law from which it emanates. Such case can be submitted to the constitutional tests only by being brought from the state court of last resort before the supreme court of the United States. But in a case which, as does this, involves the right of property, in which an invasion of those rights is sought to be effected through processes based upon a law of a state, void, because unconstitutional, it makes no difference whether the void law is found in a criminal or civil code, or whether the process which is sought to be made the instrument of injury bears the seal of a

police magistrate or the signature of a state auditor. Both are void because resting upon a prohibited and void law of a state. Those who issue and use them may be sued at law for damages, and in proper cases of equitable jurisdiction those who threaten to use them may be restrained by injunction. In the case of Cohens v. Virginia, supra, the supreme court held that the restraining power of the constitution could be exerted through that court in civil and criminal causes, and upon states in their efforts to pass civil or criminal laws which were prohibited. In matters as to which jurisdiction is confided to the circuit courts, namely, in civil causes, the jurisdiction is equally comprehensive so far as relates to the character of the state laws, and is necessarily established by the same reasoning. It is true the review by a writ of error to the state court of last resort would defeat the unconstitutional law so far as an authoritative declaration of guilt or innocence was concerned; but would afford neither redress nor protection so far as the plaintiffs' rights of property are concerned. The jurisdiction of the circuit courts in the cases included in the statute commences where the invaded rights of property commences, and only ends where they end. The case is a peculiar one. The circuit courts of the United States have original cognizance of all cases in law or in equity arising under the constitution of the United States. This jurisdiction was granted that rights—civil rights—arising under the constitution should be protected, not only ultimately, but also in the first instance, by the courts of the United States. No suit or suits, which can be brought at law, will secure protection to the plaintiffs. The mischief will be permanent and irreparable unless there be a relief in equity. The party that originates the wrong is exempt from the jurisdiction of the court. Unless jurisdiction in equity be obtained, then the supreme law is defeated and its provisions frustrated. The constitution has already enjoined the state from committing the wrong by impairing the obligation of its contract. But this injunction is defied, and we are told that because the infliction of the injury is done in the name and by the direction of the state there can be no inhibition nor restraining order. To hold this would be to subordinate the constitution of the United States to the authority of a legislative act, and to disregard the great mandate of that constitution which commands that "the judges in every state shall be bound thereby, anything in the laws of any state to the contrary notwithstanding." The motion for injunction pendente lite, as prayed for, must prevail. Ordered accordingly.

LOUISIANA STATE SEMINARY (FEATHERMAN v.). See Case No. 4,713.

LOUISVILLE (BIGELOW v.). See Case No. 1,400.

Case No. 8,542.

The LOUISVILLE v. STROUT et al.

[19 Hunt, Mer. Mag. 186.]

Circuit Court, E. D. Louisiana. May 27, 1839.[1]

COLLISION—DRIFTING VESSEL—IMPROPER ANCHORAGE.

[The evidence showed that the passes at the mouth of the Mississippi river are well known to be intricate and difficult of navigation and liable to varying currents. Should the wind die away, a vessel caught in one of them is sure to drift and become unmanageable. This happened to the L., a sail vessel, which entered the pass with a good wind, which died away while she was therein, leaving her helpless. While in this condition she drifted against the H., a vessel anchored in the main thoroughfare. *Held*, that the L. was not guilty of any fault; that the fault was wholly with the H. in anchoring in an improper place.]

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

[This was a libel by Jonathan Strout and others against James Foster and others, claimants and owners of the ship Louisville, to recover damages for injury resulting from a collision. From a decree of the district court in favor of plaintiffs (case unreported), defendants appeal.]

McKINLEY, Circuit Justice. This case comes before this court upon an appeal from the decree of the district court for the Eastern district of Louisiana. The appellees, owners of the ship Harriet, filed their libel in the court below for collision, and upon the trial the court rendered a decree in favor of the libellants for $2,701.07. By the evidence, it appears that the Harriet had passed over the bar through one of the passes or outlets at the mouth of the Mississippi river, outward bound, on the 26th of May, 1836, and came to anchor near the bar, the Louisville lying below, a distance of several miles, weighed anchor, with a fresh and favorable wind for coming in through the same pass. As she approached the bar the wind died away, and the current being stronger than usual, owing to a strong wind from the south the night before, she drifted and ran afoul of the Harriet. These passes, it appears, are intricate and difficult to navigate, and subject to counter and under currents. If the wind die away when a ship is coming in, she is certain to drift and become unmanageable. Knowing these facts, a prudent master would never anchor his vessel in the thoroughfare of one of these passes. The evidence shows, however, that the master of the Harriet did anchor his vessel immediately in the thoroughfare, and that, too, after having been run afoul of by another vessel, about a year before, at or near the same place. There are four possibilities under which a collision may occur: First, it may happen without blame, being

[1] [Affirmed in 1 How. (42 U. S.) 89.]

attributable to either party, as when the loss is occasioned by a storm, or any other vis major. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, when there has been a want of due diligence or skill on both sides. In such case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to entire compensation from the other. The Woodrop-Sims, 2 Dod. 83. The third rule here laid down, it appears to me, applies with great force to the case under consideration. The misconduct on the part of the master of the Harriet in anchoring his ship immediately in the thoroughfare is fully made out by the proof; while, on the contrary, there is no fact proved going to show mismanagement, want of skill, or negligence on the part of the master of the Louisville. It is true that the opinions of some nautical men, found in the evidence, show that it was possible for the Louisville to have avoided a collision had everything been done that it was possible to do. But the law imposes no such diligence on the party in this case. So far as the Harriet was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass. The master of the Harriet having obstructed it, with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellee of the right of action against the appellant. 3 Kent, Comm. 230. It was insisted by the counsel for the appellees, that the Harriet being at anchor, and the other ship under sail, that the latter was therefore liable. It is true, if a ship at anchor, with no sails set, in a proper place for anchoring, and another ship under sail, occasions damage to her, the latter is liable. But the place where the Harriet anchored was an improper place, and therefore the appellees must abide the consequences of the misconduct of the master. Wherefore it is decreed and ordered that the decree of the district court be reversed, and held for naught, and that the appellants recover of the appellees their costs in this behalf expended; and it is further decreed and ordered that this case be remanded to the district court, with instructions to dismiss the libel of the libellants.

[This case was appealed by the libellants to the supreme court, and was there affirmed upon a divided court. No opinion. Strout v. Foster, 1 How. (42 U. S.) 89.]

LOUISVILLE & P. CANAL CO. (UNITED STATES v.). See Case No. 15,633.

LOUISVILLE CEMENT CO. (KING v.). See Case No. 7,798.

LOUNSBURY (UNION MANUF'G CO. v.). See Case No. 14,368.

Case No. 8,543.

In re LOUNT.

[11 N. B. R. 315;[1] 7 Chi. Leg. News, 155.]

District Court, N. D. Illinois. Jan., 1875.

BANKRUPTCY — FAILURE OF CREDITOR TO APPEAR UPON CITATION—EFFECT OF CITATION—DEFAULT AGAINST CREDITOR.

1. Where a creditor fails to appear and submit to an examination of the claim he has proved against the bankrupt's estate under an order of examination, given in accordance with general order 34, in bankruptcy, the register should consider the objections to the claim as admitted.

2. The citation throws upon the creditor the burden of supporting his claim by further proof than that already filed.

3. It does not necessarily follow that any injustice would be done by taking the default of the creditor, because either party may "for satisfactory cause" review the action of the register before the court.

[In the matter of Ira A. and Charles W. Lount, bankrupts.]

BLODGETT, District Judge. It appears from a certificate of the register, before whom this case is pending, that on the 17th day of December last the register, at the request of the assignee, made an order for a re-examination of the claim theretofore proved up against said estate by Franklin Lount, and fixed the 4th day of January, 1875, at one o'clock p. m., as the time for a hearing and re-examination of said claim, of which order and time and place of hearing due notice was given said creditor; and that on the day fixed for said hearing the assignee appeared, but said creditor did not appear, and no testimony or proof was offered by said assignee. The register submits these facts to the court, and asks instruction as to the proper order to be entered by him in the premises. The last paragraph of the 34th rule in bankruptcy provides: "When the assignee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the register, to whom the case is referred, for an order for such re-examination; and thereupon the register shall make an order fixing a time for hearing the petition, of which due notice shall be given, by mail, addressed to the creditors. At the time appointed the register shall take the examination of the creditor, and of any witnesses that may be called by either party: and if it shall appear from such examination that the claim ought to be expunged or diminished, the register, if no objection be made, may order accordingly. If objection

[1] [Reprinted from 11 N. B. R. 315, by permission.]

be made, the register shall require the parties then, or within a time to be fixed for that purpose, to form an issue to be certified into court for determination. If the petitioner is in default in making up said issue, the petition shall be dismissed; if the creditor whose claim is re-examined is in default in making said issue, the claim may be diminished or expunged by the register. All orders thus made by the register may be reviewed by the court on special petition, and upon showing satisfactory cause for such review."

I think it clear that if the creditor fails to appear and submit to examination, as required by the notice given under this rule, the register may expunge or diminish the claim by default. The citation throws upon the creditor the burden of supporting his claim by further proof than that already filed, and is intended to give the objecting party the privilege of examining the creditor in regard to all facts necessary to a full understanding of the claim. The palpable intent of the rule is to secure the personal attendance of the creditor for examination before the register, or such action on the part of the creditor as will secure his examination elsewhere if he is unable to attend before the register. If a creditor is unable to attend in pursuance of the notice, he should take steps to procure a postponement until he can attend, or the taking of the examination elsewhere, before another register or commissioner, if need be. But if the creditor make default, I do not see what can be done by the register, save to expunge or diminish the claim according to the allegations or objections of the assignee. The register is to act unless objection is made by one of the parties, and if it appears to him the claim ought to be expunged, he shall order accordingly. And, in most cases, I think the failure of the creditor to respond to the notice should be construed as an admission that this claim should be expunged or diminished as alleged by the assignee. "If the creditor whose claim is examined is in default in making up the issue, the claim may be diminished or expunged by the register."

A creditor, it will be seen, may be defaulted and his claim expunged even after his examination has taken place, for default in making up the issue; and it seems full as reasonable to default him for failure to appear in the first instance. And it does not follow that any injustice would necessarily be done by such action, because either party may, "for satisfactory cause," review the action of the register before the court. My opinion and advice to the register therefore, in the case submitted, is, that he should expunge or diminish the claim according to the allegations of the assignee against it. In other words, he should consider the objections against the claim as admitted.

LOUSADA (LORWAY v.). See Case No. 8,517.

Case No. 8,544.

LOUTE v. ALLEGHENY COUNTY.

[10 Pittsb. Leg. J. 241; 2 Pittsb. Rep. 411.]

Circuit Court, W. D. Pennsylvania. Dec., 1862.

MANDAMUS — EFFECT OF JUDGMENT UPON FUND IN COUNTY TREASURER'S HANDS.— ATTEMPTS TO EVADE JUDGMENT — CONTEMPT — WARRANTS IN PAYMENT OF TAXES.

1. Upon service of a mandamus execution upon county commissioners, as prescribed by the act of assembly of Pennsylvania of 16th April, 1834, it is their duty: (1) If there be any money in the treasurer's hands unappropriated by previous orders, to cause it to be paid to the party. (2) If there be not money enough in the treasury to satisfy the whole judgment, to pay it out of the first money received. (3) If the taxes of the current year are insufficient to pay the judgments and other expenses of the county, to assess and collect on the next year a sufficient sum for this purpose.

2. The judgment of the court is an appropriation of all the money in the treasury, not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the controller; and also of the first money thereafter received for the use of the county.

3. The commissioners will be held guilty of contempt should they seek to evade the process of the court by dividing the funds to be collected by taxes and appropriating them before their collection.

4. After service of the mandamus execution, the treasurer has no authority to receive county orders of a subsequent date in payment of taxes.

5. The provision of the act of 1st January, 1862, requiring the treasurer of Allegheny county to receive warrants in payment of taxes, was not intended to repeal any of the provisions of the act of April, 1834, nor can it relieve the treasurer from the proper application of the county funds in the order of their appropriation as previously made.

6. It can have no retroactive effect; nor can the legislature be presumed to intend to aid public officers in an astute scheme to evade the performance of their official duties.

Rule for attachments for contempt against the county officers.

Hamilton & Acheson, for plaintiff.

R. B. Carnahan, S. H. Geyer, and J. P. Penney, for county officers.

GRIER, Circuit Justice. The plaintiff and numerous other suitors in this court obtained their several judgments against the county of Allegheny to November term, 1861, on interest coupons of the bonds of the county issued for railroad purposes. Mandamus executions, as authorized by the statute of Pennsylvania, were served on the several officers who represent the county in its corporate capacity, to wit, the commissioners, the controller and the treasurer, on the 19th of November, 1861. The act authorizing the process provides that "it shall be lawful for the court in which such judgment may be obtained to issue thereon a writ commanding the commissioners of the county to cause the amount thereof, with the interest and costs, to be paid to the party entiled to such judgment, out of any moneys unappropriated of

such county, or, if there be no such moneys, out of the first moneys that shall be received for the use of such county, and to enforce obedience to such writ by attachment."

The duty of the commissioners, on whom process under this act is served, is plainly set forth: (1) If there be any money in the treasurer's hands unappropriated by previous orders, the exigencies of this writ require that the commissioners cause it to be paid to the party. (2) If there be not money enough in the treasury to satisfy the whole judgment, it is their duty to pay it out of the first money received. (3) If the taxes of the current year are insufficient to pay the judgments and other expenses of the county, it is their duty to assess and collect on the next year a sufficient sum for this purpose. (4) The judgment of the court is an appropriation of all the money in the treasury not not already drawn or appropriated by previous county orders in payment of previous demands audited and allowed by the controller; and also of the first money thereafter received for the use of the county.

Have the commisssioners complied with the exigency of these writs? If they have not, they are guilty of a contempt of the process of the court: (1) It is admitted that they have not paid the judgments, or any part of them, according to the command of the writs. (2) They have issued orders for large sums since the service of these writs, and appropriated the money collected by taxation to other purposes, posterior in order to the appropriation made by law and the judgment of the court. (3) It is clearly shown by the answers of these officers that instead of seeking to make the appropriation required by the exigency of this process, they have been astute in contriving "how not to do it."

Instead of pursuing the straight line of duty required by the law, of including these judgments in the estimates for the next year, and assessing a general tax sufficient to discharge these and all expected demands for county purposes, they have pursued the following plan: they divide the liabilities past and prospective for the coming year, into two classes, and attempt to make a prospective appropriation of the moneys to be collected from taxes, which will exclude the precedent appropriation made by law. To effect this plan, they make an estimate of the expenses of the coming year, including interest on the funded debt intended to be paid, and lay a tax of five mills for this purpose, which is collected and paid in the usual way. Besides this, they assess another tax of twenty-seven mills, which is appropriated to pay the debt on the railroad bonds, one tax intended to be collected, and another not intended to be collected. Such intention is justly inferred, because it is the necessary consequence of this new scheme of dividing the funds to be collected by taxes, and appropriating them before their collection. The law has appropriated the first money that shall come into the treasury to the payment of these judgments. The commissioners by this scheme have nullified the law, and set it at defiance. They have paid out large sums on orders dated since the service of the writs in these cases. The act of assembly of May 1, 1861 [Laws Pa. 1861, p. 450], relating to Allegheny county, provides for the appointment of a controller, and defines his duties. Among others: "He shall, on or before the first day of February, annually, communicate to the commissioners, in writing, a detailed estimate of the receipts and expenditures for the legitimate purposes of the county for the current year, including interest due, and to fall due, on all lawful debts of the county bearing interest, and the commissioners shall, before the 15th day of February thereafter, fix such rate of taxation upon the valuation of the taxable property of the county as will raise a sum sufficient to meet said expenditures."

Here we have the duties of the respective officers clearly stated. The controller was bound to include these judgments among the necessary expenditures. The commissioners were bound to assess a tax sufficient to pay them all. They have no authority to levy and assess two separate and distinct taxes, or "appropriate" any specific portion to be paid out in preference to another. The taxes have no earmark; the five mills and the twenty-seven mills cannot be thus separated and distinguished, the taxes must be assessed from the one general fund when collected in the hands of the treasurer in the order that the drafts are presented to him. After the service of this process the treasurer had no authority to receive county orders of a subsequent date in payment of taxes, and thus divert the funds of the county from the appropriation of them made by law. His countenancing and assisting in a scheme to evade the exigency of these writs, by formation of an association to misappropriate the funds of the county, and hinder them from coming into the treasury, is a disregard of his plain duty and contempt of the process of the court. Whether the provision of the act No. 1 of January 16, 1862 [Laws Pa. 1862, p. 1], requiring the treasurer to receive warrants in payment of taxes, was intended to assist this scheme, concocted and carried into practice by these officers it is unnecessary to inquire. It is a convenient practice, everywhere followed without any legislative authority, but neither the custom nor the law can justify this abuse of it, in order to evade compliance with a legal duty. It is enough to say that this provision was not intended to repeal any of the provisions of the act of 1834, nor can it relieve the treasurer from the proper application of the county funds, in the order of their appropriation as previously made. The provision of the act was wholly superfluous, where it could be obeyed without injury or wrong to third persons, and the court will not construe it as author-

izing officers to evade the performance of their duties and disregard the process of the court. There are many instances in which legislation is obtained, apparently just, which the originators expect to use in a way never contemplated by the legislature. It can have no retroactive effect upon the rights of parties now before the court. Nor could the legislature be presumed to intend by it to aid public officers in an astute scheme to evade the performance of their official duties.

The commissioners have sent in a statement accounting for the fact that while the five-mill tax, appropriated by them to pay other debts and liabilities of the county, was collected without difficulty, only $900 out of an assessment of over $700,000 could be raised to apply to the payment of the railroad coupons. They admit that the proper estimates were sent to them by the controller, but offer no reason at all for dividing the assessment into two distinct portions,—one of five, the other of twenty-seven mills,—or why this scheme of separate duplicates was now for the first time devised, or, if there were to be separate and several funds in the treasury, and a special tax assessed and appropriated to pay each distinct object of appropriation, why they were not twenty instead of two.

The reasons given for not collecting the twenty-seven mill tax were that it would cost over $100 to make out the duplicate, and they had to advertise for contracts to do it. That the contractors made great delay,—furnished their work in instalments, full of mistakes, which took much time to correct, etc. They deny having entered into any scheme to evade compliance with the exigency of the writ, yet confess to a course of proceeding whose only object could be and was to render the process of this court of no effect. In this course of proceeding the treasurer was clearly in collusion. But I do not see any particular act of the controller, which his duty required, that he has failed to perform. He denies any collusion with the association got up to assist the public officers in the plan contrived not to do what the law imposed on them as a duty. For the present I am willing to accept these excuses, lame as they are, for the past negligence (to use a mild term) of these officers, and to test their sincerity. When this case was argued nine months had passed, and but $900 had been raised, which the commissioners contended was applicable to these judgments. I said to them then, I will suspend acting on these motions till January next. If it be true that you are acting in good faith, you shall have time to collect the tax assessed, as you say, for this purpose. If you have not divided these assessments for the purpose charged, you can demonstrate your assertions by your acts. A more painful duty has seldom been demanded of the court than that which we are now called on to perform. But we cannot evade it, or find a contrivance to not do it, except for a certain time. We shall, therefore, postpone the public decision of this matter till next May term. If, in the meantime, the commissioners and treasurer shall have collected the moneys to satisfy these judgments, the rules will be discharged. This will give ample time to the defendants, and if by that time the money be not paid, or some arrangement be made with the creditors, the court will be compelled to consider it as the settled purpose of these officers to treat the process of the court with contempt, and must act accordingly.

The following is the statement of the county commissioners, referred to by Justice GRIER in the foregoing opinion:

Statement. Addressed to the judges of the circuit court of the United States, and verified under oath before H. Sproul, U. S. commissioner:

"On the first day of February, 1862, the controller, in pursuance of the second section of the act passed the first day of May, 1861 (P. L. p. 451), communicated to the commissioners in writing 'a detailed estimate of the receipts and expenditures for the legitimate purposes of the county for the current year, including interest due and to fall due on all lawful debts of the county bearing interest.' (Copy of estimate submitted.) By this estimate it appeared that the sum $118,977.43 was required for ordinary county purposes, including the interest on the funded debt of the county and exclusive of $51,000 funded debt due and maturing in 1862; that the sum of $745,890 would be required to pay the interest due on bonds issued by the county to certain railroad companies due and maturing in the year 1862, and to the 1st of January, 1863, including a large number of judgments obtained in the United States circuit court on coupons and costs of suit. That previously to the 15th day of February, 1862, the commissioners caused to be levied on the assessed valuation of property made taxable a tax of five mills for ordinary county purposes and interest on the funded debt, producing net $123,000. That, for the purpose of paying the interest on railroad bonds above mentioned, they levied a tax of twenty-seven mills, producing net $746,810. These products (as would be observed) exceed the detailed estimate of the controller, allowance having been made for abatements, exonerations, errors and lost taxes. No provision was made for the payment of the funded debt of the county ($51.000), except in the excess of the product of the five mill tax over the sum of $118,977.43, for the reason that payment of a larger portion of it was not required or desired by the holders. The tax of twenty-seven mills was appropriated exclusively to the payment of railroad interest. The five mill tax was to be applied to the payment of the funded interest and the multifarious objects of county expenditure, as would be seen on reference to appended estimates. There appropriations were made and intended to be made at the time of the levy of the taxes, and the twenty-seven mills tax and the five mills were put into separate books or duplicates, under and by the advice of the county solicitor, F. H. Collier, Esq., whose legal opinion on the subject was taken. That the said commissioners, being forbidden by the 11th section of the act above referred to, to make any contract involving the expenditure of over $100, 'unless with the lowest and best bidder, after due notice to be published by the controller,' advertised for proposals, to make out the duplicates for said taxes, sixty-eight in number; and on the 13th of April, 1862, let the contract for the twenty-seven mills duplicates to Mr. (we omit name by request), he being the lowest and best bidder. (The contract, which was in writing, was attached to this statement.) By the terms of said contract the work was required to be performed on or before the 24th of May following. The contract for the five

mills duplicate was awarded in the same manner. Mr. ——— failed to comply with his contract (27 mills duplicates) both as to time and execution. He was repeatedly and earnestly urged to complete the work. He was threatened with forfeiture of his contract, etc. One of the commissioners, Mr. Collins, who resided near the residence of Mr. ———, repeatedly called upon him in regard to the work. He continued to furnish the work in instalments. On inspection it was found to be inaccurate in calculations and many errors were made. The work was found to require careful revision, and much time was expended in rectifying mistakes. Finally an experienced man was employed by the commissioners, at the expense of Mr. ———, to assist in completing the work, which was not accomplished until the 23d of September, when the duplicates, revised and corrected, were passed to the controller, and by him charged and delivered to the treasurer. Mr. ——— was found to be incompetent, although reputed fit for the work, and so believed by the undersigned at the time he was employed. The commissioners did not connive at this delay, but were anxious, and did everything they could to hasten the completion of the work. That the undersigned have not been parties to any scheme, device, combination or contrivance for delaying, hindering, or in any way obstructing the holders of coupons or interest warrants of the railroad bonds from obtaining payment of the same, and especially of the judgments obtained in the United States court. That they never had any connection with an association for the purpose of purchasing county warrants, and never did anything directly or indirectly to advance the interest and objects of said association. That they have no knowledge of said association ever purchasing a single warrant; and they are informed and believe that said association did not continue in existence for a longer period than two or three weeks at furthest. That the only knowledge that they ever had of the existence of the association was obtained by reading their advertisements in the newspapers, and handbills, and hearing it spoken of. That although the duplicates for railroad tax were not fully ready until the 24th of September, by reason of the default of Mr. ———, still no real delay was occasioned by it. The treasurer used the books in the commissioners' office for the purpose, and the amount of the tax was calculated at twenty-seven mills on the dollar, and every man had an opportunity of paying his tax, and some of the railroad tax was paid as early as the 1st of July, 1862, and all persons were called upon by a public advertisement to pay said tax. That in the year 1861, $74,000 was paid on account of judgments obtained in the United States court on railroad coupons, and in 1862 $26,000 was paid on same account, a portion of which last sum was paid out of the five mill tax levied for 1862. That no warrants have been drawn except for bona fide debts due, and all warrants drawn, amounting to about $66,000, since the 4th of January, 1862, were for ordinary county purposes and the interest of the funded debt, and a part of the funded debt itself. And the undersigned would further submit to your honorable court that they have in good faith, and with honest intention, endeavored to comply with the mandates of your honorable court. They never had and have not now any intent, design or wish to evade the mandamus executions (so called) issued out of your honorable court. Having already paid $100 000 in obedience to special writs of execution, they had made, or thought they had made, abundant provisions for the payment of other executions issued, and all the interest due on said bonds and coupons, and they severally dery, on their oaths, that they have lent themselves to any device, scheme or contrivance of any kind, directly or indirectly, to delay or hinder the execution creditors above mentioned. They have discharged, or endeavored and intended to discharge their duties faithfully, according to law, and they submit that the rule to show cause, &c., should be discharged at the cost of the plaintiffs.

"Henry Lambert, Controller.
"Geo. Hamilton,
"David Collins, Comm'rs."

Case No. 8,545.

LOUTREL v. MELLOR.

[The case reported under above title in 1 O. G. 48, is the same as Case No. 5,039.]

Case No. 8,546.

LOVE v. BOYD.

[2 Cranch, C. C. 156.] [1]

Circuit Court, District of Columbia. Nov. Term, 1818.

SLAVERY—POSSESSION FOR FIVE YEARS—DEED TO SLAVE.

In Virginia a person who has been in possession of a slave for five years need not show the deed under which he claims title.

This was an action upon the case [by Richard H. Love] against [Washington Boyd] the marshal of the District of Columbia, for negligently suffering the plaintiff's female slave Jane to escape from his custody to which the slave, who had sued for her freedom, had been committed for safe keeping by order of this court, the owner having failed to give security to have her forthcoming to answer the judgment of the court, according to the provisions of the act of Virginia.

Mr. Swann, for plaintiff, offered parol evidence that the plaintiff held possession of the slave for more than five years under a deed of trust.

Mr. Taylor, for defendant, objected to the parol evidence, and contended that the deed must be produced, and that no possession under the deed can be proved until the deed is produced; and THE COURT (THRUSTON, Circuit Judge, absent) inclined to that opinion; but said that the point might be saved; whereupon the parties agreed that the parol evidence offered by Mr. Swann, should be submitted to the jury; and that if the verdict should be for the plaintiff, and the court should be of opinion that the evidence was not competent, the verdict should be set aside and a nonsuit entered.

Verdict, for the plaintiff, $250.

On a subsequent day THE COURT rendered judgment for the plaintiff on the verdict, being of opinion that five years' possession was sufficient evidence of title without showing the deed under which the plaintiff claimed.

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

Case No. 8,547.

LOVE v. FENDALL'S TRUSTEES.

[1 Cranch, C. C. 34.] [1]

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

INJUNCTION—NOTICE OF INTENTION TO APPLY FOR.

It is not necessary to give notice of the application for an injunction.

Bill for injunction. Objection that no injunction ought to issue until reasonable notice to the opposite party, under Act Cong. March 2, 1793, § 5; vol. 2, p. 228, Folwell's Ed. (1 Stat. 333).

Injunction granted, upon bond and security for costs in the amount of $66.67.

LOVE (GRIGSBY v.). See Case No. 5,827.

Case No. 8,548.

LOVE v. HINCKLEY.

[Abb. Adm. 436.] [2]

District Court, S. D. New York. Jan., 1849.

PILOTS — SANDY HOOK CHANNEL — DOUBTFUL WORDS IN STATUTE—GENERAL USAGE—CRIPPLED VESSEL—REASONABLE EXTRA COMPENSATION.

1. There is no statute in force regulating the compensation payable for pilotage service rendered through Sandy Hook Channel. The former laws upon this subject reviewed.

2. Doubtful words in a general statute may be expounded with reference to a general usage; and when a statute is applicable to a particular place only, such words may be construed by usage at that place.

3. The libellants piloted a vessel partially crippled, but not in immediate peril, nor unnavigable, through the Sandy Hook Channel, and claimed extra fees, as for a vessel in distress, on the ground of usage of the port. *Held*, that the proofs in the cause did not authorize the court to say, that the term distress was by the usage of the port applicable to the condition of the vessel in question.

4. The proofs did not show a usage of charging and paying double fees as a legal right, even for services rendered to a vessel in distress.

5. The libellants were entitled to a reasonable extra compensation to be fixed by the court, for the increased responsibility and effort presumably incurred in consequence of the crippled condition of the vessel.

[Cited in The Cachemire, 38 Fed. 523.]

This was a libel in personam, by William Love and others, against William A. Hinckley, to recover pilotage fees, including compensation for alleged extra services, in the sum of $83.

P. Hamilton, for libellants, cited The Frederick, 1 W. Rob. Adm. 16; The Elizabeth, 8 Jur. 365; The Enterprise, 2 Hagg. Adm. 178, note; The Reward, 1 W. Rob. Adm. 174; The Elvira [Case No. 6,015]; Abb. Shipp. 563.

R. H. Ogden and G. Bowdoin, for respondent.

BETTS, District Judge. The libellants are owners of the pilot boat Mist, of this port, and are pilots engaged in the pilot service through Sandy Hook. About October 12, 1848, one of the libellants, William Love, entered on board the bark Gipsey, at sea, six miles outside of Sandy Hook, and at the request of the master, piloted her into this port. The bark at the time had lost her three upper masts. The wind was easterly and fair, and the bark was brought into port upon it, without difficulty or extra exertion on the part of the pilot.

So far the facts are agreed upon by the pleadings. The libel charges, however, that the bark had suffered other damages, and that she was in a crippled and disabled condition, and in distress. These allegations are denied by the answer. The libellants claim double the accustomed pilotage, amounting to $83, because of the crippled condition of the bark, rendering it more hazardous to navigate her, and subjecting the pilot to greater exposure and responsibility.

The answer insists that the service was no more than ordinary, that it was performed within five or six hours, without extra exertion or skill on the part of the pilot, and that he is only entitled to $41.50, the usual pilotage fees for bringing up a vessel of like draught. There is no statute in force which determines the rights of parties in cases like the present. The act of congress of 1789 (1 Stat. 54, § 4), provides, that all pilots "shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provisions shall be made by congress." No further legislative provision has since been made, and the whole subject of pilot service remains a matter controlled by state laws.

Under the colonial government the business of pilotage through the channel of Sandy Hook was the subject of careful statutory regulation. Those regulations may be found in the act of 1759 (2 Liv. & S. Laws, p. 160, c. 161), which act was continued in force by the act of 1763 (Van Schaick's Laws, p. 433, c. 1215, § 2), and by the acts of 1767 (Id. p. 498, c. 1330), and 1768 (Id. p. 516, c. 1362), until 1775. This act awarded no extra compensation for services rendered to a vessel in distress; but provided that any pilot neglecting or refusing to give all the aid and assistance in his power to any vessel in distress should forfeit his office and pay a fine. Act 1789 (2 Liv. & S. Laws, p. 160, c. 161, § 4).

An early act of the state government, passed in 1801 (2 Kent & R. Laws, p. 133, § 18), and which provided for the appoint-

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

[2] [Reported by Abbott Brothers.]

ment of pilots for the Sandy Hook Channel, by the harbor-master and wardens of the port, contains the earliest provision I find upon the subject of extra compensation in cases of distress, in the laws of the state. That provision is in substance, that the master or owners of the vessel in distress shall pay to such pilot as shall have exerted himself for the preservation of such ship or vessel, such sum for extra services as may be agreed upon; or in default of any agreement, such sum as the harbor-master and wardens shall determine to be reasonable. Section 18. The act of 1837 (Laws 1837, p. 168), which repealed all former laws on the subject of pilots through the Sandy Hook, prescribed a new system, intrusting the power of appointment of pilots to a board of commissioners created by the act. This statute contained, also, new provisions upon the subject of compensation, (sections 30–36,) enacting, among other things, however, that every pilot who shall have exerted himself for the preservation of any vessel in distress and in want of a pilot, should be entitled for any extraordinary services to such sum as should be agreed upon; or in case of not agreeing, as the commissioners should determine to be reasonable (section 39). It is unnecessary, however, to trace the history of the legislation upon this subject minutely, as by act of 1845 (Laws 1845, p. 30, c. 40, § 1), all laws relative to pilots, or pilots through Sandy Hook channel, are repealed; and no law upon the subject has since been enacted.

It seems, however, to be conceded upon both sides, that the usage at this port has continued to be to charge fees for pilotage in conformity with the rates established by the act of 1837, since its repeal; and that $41.50 would have been the legal charge under that act, and would be the charge as since established by usage, for single pilotage.

Upon the part of the libellants, evidence has been given showing a custom and usage, whilst the statute was in force and since, to charge double pilotage on vessels crippled and disabled. Some of the witnesses stated the custom to be, to charge the extra compensation when the vessel was in distress. There was some contrariety of opinion whether the damage which the bark Gipsey had received was to be regarded as putting her in distress; but the majority of the witnesses gave it as their judgment that she was in distress in the nautical acceptation of the term, and stated that the usage was to pay double pilotage for services rendered to a vessel conditioned as she was. Of the five pilots called by the libellants, and who testify to the usage, two had been in the commission but a short period; one for five years and the other since 1842; one other had been in service since 1834; another about thirty years. The time of service of the fifth was not stated. A member of the board of commissioners, and who for twelve years had great experience as a shipmaster and ship-owner, testified that he never knew any usage putting vessels nearly crippled on the footing of vessels in distress, and that a vessel situated as this one was, would not, as he understood the acceptation of the term among owners and masters, be deemed in distress.

All this testimony is open to two remarks. First, the period elapsed since the repeal of the law in 1845 is not sufficient to create a custom or usage in respect to this matter which shall be obligatory upon shipowners and masters. Indeed, it is not proved that an individual case, analogous to the present in its circumstances, has occurred in this port since the passage of the repealing act. A usage in respect to mercantile transactions must be shown to be notorious, uniform, and of long continuance. 2 Kent, Comm. (6th Ed.) 260, and note.

But second, this usage to have any effect must be allowed to control or fix the interpretation of the state statutes; because the practice referred to, if not derived from, must seek its support or sanction in the provisions of section 39 of the act of 1837. There is no evidence that it preceded the enactment. A general statute may be expounded when its words are doubtful, by reference to any general usage with reference to which the law may be supposed to have been enacted. "Where the words of the act are doubtful," says Grose, J., in King v. Hogg, 1 Durn. & E. [1 Term R.] 728, "usage may be called in to explain them." In that case, which involved the construction of an act of parliament applicable to the whole kingdom, it was very properly held that, as a universal law could not receive different constructions in different towns, therefore a statute of general application could not be explained by the usage of this or that particular place. And the cases of The King v. Saltrem and The King v. Harman were cited from the early reports, as showing that it is only by a universal usage, and not by the usage of a particular place, that an act of general application could be expounded. But I should think it entirely consistent with this principle to hold, that a statute may be construed by the usage of a particular place or pursuit, when the act has relation to that place or special business.

It is not shown in this case that there is a fixed and definite sense attached by established usage at this port to the term "distress," which would include a vessel partially crippled and disabled, but in no immediate peril, and not rendered unnavigable. The witnesses examined on the stand do not concur entirely in their description of the custom or usage which they suppose prevails here. It may be considered as doubtful upon the proofs, whether it has not been the usual course for the pilot in boarding a

vessel of this port, in any way crippled or disabled, to state to her master that he should claim double pilotage for her as being in distress. In that case it might be in the option of the master to accept him or not, and if he were allowed to pilot her in, it might be understood to be by agreement for that rate of compensation, and thus bring the case within the provisions of section 39 of the state act, whilst that was in force, and applying to the customary rate of fees since its repeal.

So, had a long uninterrupted practice been shown under the state laws, to charge pilotage for every crippled vessel as for a vessel in distress, such practice would be good evidence of the true meaning of the act. McKeen v. Delaney, 5 Cranch [9 U. S.] 22. But the testimony of the two witnesses who speak most directly in proof of a long practice, does not show that the rate was uniformly charged and paid as a legal right. The one who speaks of thirty years' experience says, that he uniformly mentioned, on boarding the vessel, that he should claim extra pilotage; and it is to be remarked that the state acts always embodied provisions for adjusting pilotage fees when not agreed upon between the master and pilot, by the award of commissioners, by the board of wardens, or other functionaries designated in the various statutes. See the acts already referred to; also, 5 Webs. & S. Laws, 11. It certainly cannot be maintained that the testimony in the case amounts to proof of a long-continued and uninterrupted practice pursued at this port, to charge double pilotage as a legal demand in such cases as the present.

The evidence, fairly weighed, amounts to no more than this, that pilots were accustomed to claim double pilotage when they brought in vessels crippled or disabled, and that it was usually paid. By adverting to the provisions of section 39, it will be perceived, however, that the demand and payment would not necessarily import a concession that the statute gave the pilot a right to the fees; nor would it even imply that the demand was rested upon the statutory grant. Such practice, therefore, although of ever so long duration, would not furnish evidence of a customary construction of the clause upholding a right in pilots to such fees.

The section is in these words: "Every pilot who shall have exerted himself for the preservation of any vessel in distress and in want of a pilot, shall be entitled for any extraordinary services to such sum as the pilot and master, owner or consignee can agree on; or in case of not agreeing, as the commissioners shall determine to be a reasonable reward."

It is plain that to make out a title to extra reward under this enactment, not only must the pilot have exerted himself for the preservation of a vessel in distress, but also that he can only claim a compensation limited to a proper reward for his extraordinary services on the occasion. The vessel in the present case was brought into port without any uncommon efforts on the part of the pilot. Even if, therefore, she had been indubitably in a state of distress, the statute would afford no ground for a claim to extra pilotage; no extraordinary services having been rendered. No practice under the statute could be admitted as dispensing with the two fundamental conditions to the grant of fees; for this would be something quite different from interpretation; it would be allowing usage under a statute to override and annul its positive provisions. No mode of construction, not even the most solemn judicial decisions, can rightfully dispense with the plain and positive terms of a statute; and the reasonable presumption in respect to the supposed usage and custom of this port is, that it was not derived from the directions of the statute, but from its permission given to the parties to stipulate between themselves the rate of compensation, under which an express or virtual agreement between the master and pilot generally fixed the extra reward. In my opinion, no usage independent of statutory authority is proved, authorizing a charge of double pilotage in a case like the present, nor any practice under the statute giving it an interpretation which would include this demand.

There being no rate fixed by statute, of fees payable to pilots in this port, the libellants are entitled to be paid a reasonable reward for the services performed by them. The answer admits that the accustomed compensation, $41.50, for ordinary pilotage, would be a proper allowance in this case; and the consignees express a readiness to pay that sum. All the witnesses for the libellants testify, that some degree of extra care and exertion would be required in bringing in a vessel so situated, in the most favorable weather, as well as some increase of the responsibility of the pilot. For such extra liabilities he is entitled to a reasonable compensation. What amount is appropriate and proper, in such cases, it will always be difficult for the court to ascertain and determine, either by general rules or by any course of specific inquiry and adjudication, in a way likely to establish a criterion acceptable to those interested, or satisfactory to the court itself. The statute made provision for adding four dollars to the usual pilotage fees, on vessels drawing more than ten feet of water, for services rendered between the first of November and the first of April (section 36); on the presumption undoubtedly that more exertion and hazard would be incurred on the part of the pilot, in the case of such vessels, during that season. So also an addition of one quarter to the usual pilotage was allowed, where the vessel was taken charge of out of sight of Sandy Hook light-house. Section 31. These

enactments were devised with a view of adapting the compensation to the degree of risk and skill which might be demanded from the pilot; and for the want of any other acceptable guide, they may perhaps be properly referred to, as indicating the extra reward meet to be allowed for services which import a degree of care and watchfulness beyond that required in ordinary pilotage. It may be noticed, that while the addition of one fourth pilotage was awarded in a class of cases in which an extra service was of necessity rendered, the extra allowance of four dollars was based only upon a presumption, that in the special instances to which it was applied, an unusual exertion, care, or hazard would generally be incurred; and the extra sum was to be uniformly paid, although in the particular case the actual service might not have been increased. As I consider this to be a case for extra reward, only because of greater presumptive risk and exposure to the pilot in managing a crippled vessel, I shall, as a reasonable measure of the quantum meruit, apply to it the rule of increase prescribed by the statute for the class of cases, where, from general facts, a particular enhanced risk was to be presumed, and shall direct that there be added to the accustomed fee of $41.50, the sum of four dollars extra, the former statutory allowance for piloting the larger class of vessels between the first of November and the first of April. The compensation awarded to the libellants is accordingly fixed at $45.50.

The circumstances of the case, however, do not entitle the libellants to plenary costs. The respondents show fair ground for contesting the demand, and the libellants, not showing themselves entitled to more than $50, ought not to recover above summary costs.

Decree accordingly.

LOVE (KANE v.). See Case No. 7,608.

Case No. 8,549.

LOVE v. LOVE.

[21 Pittsb. Leg. J. 101.]

District Court, W. D. Pennsylvania. Jan. 10, 1874.

PETITION OF THE FAIRVIEW DEPOSIT BANK TO TAKE MONEY FROM THE ASSIGNEE.

1. The lien of an execution stayed by order of court is not disturbed.

2. The execution creditor in this case had a valid subsisting lien, unaffected by the subsequent bankruptcy proceedings.

3. A judgment note is not commercial paper.

In bankruptcy.

Register's report:

On the 16th of October, A. D. 1872, John Love, Jr., applied to the Fairview Deposit Bank, a firm doing business in Fairview, Butler county, for the loan of $2,000, which amount the said bank loaned him, taking from him, according to the usual course of business of the bank, a note, with warrant to confess judgment, allowing six per cent. for attorney's commission, for the said sum of two thousand dollars. This sum, less fifty dollars deducted for discounting the said note, he was allowed as a credit upon the books of the bank in which he had been doing business since Sept. 24, 1872, and in which up to that time he had made deposits amounting in the aggregate to over four thousand dollars, but at the time of making said loan had overdrawn his account over eight hundred dollars. There is no evidence of the actual financial condition of John Love at the time, except that he and others told the cashier of the bank that he had a house in Oil City worth twenty thousand dollars, and was doing a large business in Monterey, Clarion county, of which the assignee, at a time when the value must have shrunk largely, testified that the property connected therewith would be worth thirteen thousand dollars at a forced sale. The first deposit of John Love was nine hundred dollars, and his subsequent deposits indicated a business involving the use of a large amount of capital. Subsequent to October 16th, Love continued to do business with the bank, his deposits being, if anything, larger in amount than before, and at one time showing a balance of over two thousand dollars in his favor. He continued doing business with the bank until December 6th, 1872, when there was a balance against him of one hundred and twenty-one dollars, besides interest amounting to seventy-six dollars. During the period he was thus doing business with the bank, he would occasionally make overdrafts, but would invariably tell the cashier of the bank of the same, and request him to take care of them, promising to provide for them immediately, and afterwards fulfilling his promise. In order, however, to assure the cashier of his ability to meet these overdrafts, he showed him bills in his favor amounting to over four thousand dollars.

Before the note in question matured, the cashier notified John Love when it became due, which, according to our calculation, was the 18th of December, 1872. After that there was no communication between the parties, and the bank, after waiting until the 6th of January, 1873, which they deemed a reasonable time for the payment of the same, sent the note to their attorney in Kittanning, with orders to enter it up and collect it. This, with proper diligence, he proceeded to do, and, by execution issued in Clarion county, levied upon personal property of the defendant at Monterey, amounting in value to thirteen thousand dollars. At the time the execution was issued, there is no evidence either that the financial condition of John

Love had changed for the worse, or that the Fairview Deposit Bank knew or suspected that he was in failing circumstances or that he was contemplating bankruptcy or insolvency. On the contrary, the evidence of all the witnesses shows that they believed him to be solvent. On the first day of February, A. D. 1873, proceedings were instituted by Charles J. Love in the United States district court to force John Love into involuntary bankruptcy. Upon this, an order to show cause why he should not be adjudicated a bankrupt was allowed, returnable to February 15, 1873; and February 4th, 1873, an injunction was granted against the Fairview Deposit Bank enjoining them in meantime from proceeding further with their execution. In obedience to this command, the attorney of the bank stayed the execution. He did not, however, abandon his claim thereunder, but twice notified the assignee that he should insist upon the lien of the bank, which, excepting eight hundred dollars for labor under the act of 1872 [17 Stat. 334], was the first upon the property; and on October 31, 1873, the bank filed its petition to be paid by the assignee the full amount contained in their proof of claim. The petition was referred to the register for examination and report. Upon the day appointed for a hearing (October 29th, 1873), it appearing that the assignee had not sold the property, an agreement was made by the assignee and the attorney of the bank, whereby it was agreed that evidence might be taken upon said petition, notwithstanding the assignee had not sold the property; and if the court should be of the opinion that the petitioners were entitled to hold under the execution in that event the sheriff of Clarion county should be allowed to sell upon said execution, or the assignee should proceed to sell the property, and pay the proceeds to said petitioner to the extent of the amount due them, as should be deemed advisable by the court.

1. Are the petitioners now in a situation to demand the redress sought for? The adjudication in bankruptcy was res inter alios acta, in which the petitioners were neither bound nor had the right to interpose exceptions to prevent the injunction against them. Karr v. Whitaker [Case No. 7,613]; Bump, Bankr. 620; In re Dunkle [Case No. 7,160]; In re Bush [Id. 2,222]. The adjudication was merely temporary, and intended to restrain the disposition of the goods and property of the debtors until an order of adjudication could be passed. Bump, Bankr. 41; Bankrupt Act, § 40 [14 Stat. 536]; In re Moses [Case No. 9,869]. Being thus intended to secure the property for the creditors and prevent irreparable injury thereto before the assignee could act, it could work no injury to the claimant. "Actus curiae neminem gravabit. Actus legis nemini facit injuriam." The register is therefore of the opinion that no right of the claimant has been lost through the proceedings that have heretofore taken place, and that, the claimants having stayed their execution in obedience to the injunction of the bankrupt court, the assignee took the property subject to actual valid subsisting liens on the same. Bump, Bankr. 150; In re Schueppf [Case No. 12,471]; In re Campbell [Id. 2,349]; Ex parte Hambright [Id. 5,973]; Armstrong v. Richey [Id. 546].

2. Did the claimant have at the time of the filing of the petition in bankruptcy a valid subsisting lien, unaffected by the provisions of the bankrupt act? The answer to this involves some of the most abstruse questions connected with the bankrupt law (section 39) declares that any person who, "being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, * * * shall give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, * * * or with intent by such disposition of his property to defeat or delay the operation of this act, or who, being a banker, a merchant or trader, has fraudulently stopped and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy": "provided said petition is brought within six months after the act of bankruptcy is committed." There is no question that the petition was filed in time; and the register is therefore required to decide the following questions: First. Did the defendant, when in a bankrupt or insolvent condition, or in contemplation of bankruptcy or insolvency, give the warrant to confess judgment with intent to give a preference? Second. Did he procure or suffer his property to be taken on legal process with intent to give a preference? Third. Being a banker, merchant or trader, did he fraudulently stop or suspend and not resume payment of her commercial paper for the period of fourteen days?

As to the first question, we find there was not only no evidence of bankruptcy or insolvency or contemplation thereof at the time the warrant was given, but the evidence tends to show that the defendant was actually solvent. It is true that, upon the date of the transaction his account was overdrawn; but the evidence is positive that he "borrowed" the money, and that he paid a discount upon the whole amount of the sum loaned, instead of only the part which he had overdrawn. Nor are we to presume that, if the defendant were insolvent and about to give a preference, the bank would undergo the risk of losing twelve hundred dollars, in order to obtain a preference on eight hundred dollars. We therefore have no hesitation in deciding that the transaction was not a preference under the law.

Second. Did he, being insolvent or bankrupt, or being in contemplation thereof, pro-

cure or suffer his property to be taken on legal process with intent to give a preference? There is no evidence that he was insolvent when the execution was issued. It is true that the note in question had been due a few days, and that he had overdrawn his account one hundred and twenty-one dollars, but such an overdraft would be of slight moment in view of the fact that his deposits in two months had aggregated thirteen thousand dollars, and that in the large business between the defendant and the bank such overdrafts had occurred several times before, and the fact that he owed twenty-two hundred dollars would hardly be sufficient to prove the insolvency of a man who was reputed to worth thirty-three thousand dollars. If it did have such a result, we fear that a large portion of the business men of the country would be in an insolvent condition. The testimony shows no change in his condition except in the debts referred to; and all the witnesses concur in their belief of his solvency at the time. They also concur in proving the fact that the proceedings taken to collect the note were instituted and carried on without his knowledge or consent. Even if he were insolvent, we do not think his right to proceed in the usual way to collect his claim would be affected.

It is true in the Case of Black [Case No. 1,457]; followed by in Re Craft [Id. 3,316], and in a number of other cases, it was held that, when an execution was issued after insolvency, it was a suffering of property to be taken under legal process with intent to give a preference, because it was the duty of the defendant to institute voluntary proceedings in bankruptcy. It is hard to perceive how such a duty could arise where neither the creditor nor the debtor knew of the insolvency of the latter; but under the law as it now stands, that a debtor cannot obtain his discharge without paying fifty per cent. of his debts, such a construction would work an intolerable hardship, not only to the creditor, but to the debtor, who would be compelled to undergo large expense and trouble without any recompense. The later cases, however, and especially in this district, have taken another, and, in our opinion, a wiser, view of the subject. In Vogel v. Lathrop [Id. 16,985], it was held that when a note and warrant of attorney was given within four months before proceedings in bankruptcy, being the agreed security for a loan made at the time, and the creditor had no reasonable cause to believe the debtor insolvent, though he knew him to be so on entering the judgment, the judgment was valid. McKennan, J., says: "And I am unconvinced by any argument that it is a sound construction of the bankrupt act to hold that a security free from any infirmity when it was made was given in fraud of its provisions, or to defeat or delay its operation, because a subsequent exigency may have prompted the creditor to avail himself of the means of saving his debt, which the law authorizes him to stipulate for as an essential part of his contract." It is true that this was said of a judgment entered as a lien upon real estate, but the principle applies equally as well to an execution upon personal estate; and the judge afterwards, in the same case, in deciding illegal an execution issued after insolvency, while he recognizes in Re Black [supra], and other cases, is particular to base his decision on the fact of collusion between the creditor and defendant. In Re Wright [Id. 18,071], and Tiffany v. Lucas [15 Wall. (82 U. S.) 410], the principle set forth by Judge McKennan is held still more strongly, and applied to executions; these cases deciding that, although the creditors had reason to believe the debtor was insolvent, an execution without the consent of the debtor was a valid lien upon his property. In the matter the register, Samuel Harper, expressed his dissent from the decision in Vogel v. Lathrop [supra], and in an exhaustive opinion showed the evident inconsistency between holding that judgment on warrant entered after insolvency was a lien upon real estate and that an execution in the same case would be an act of bankruptcy, but, while he expressed his views thus fully, was constrained to decide in conformity with Vogel v. Lathrop. His decision was confirmed, notwithstanding his argument against it. In Marshall v. Knox [16 Wall. (83 U. S.) 551] the reasoning of the court was based upon, and assumed as the law, the principle laid down in Re Wright and in Re Karr and in Re Tiffany [supra]; the court saying that "such a case is similar to that of an execution, in reference to which it has been properly held that, when the levy is made before the commencement of the proceedings in bankruptcy, the possession of the office cannot be disturbed by the assignees. The latter in such case is only entitled to such a residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied." In Wilson v. Childs [Case No. 17,796], and Biddle's Appeal, 18 P. F. Smith [68 Pa. St.] 13, the principle is fully adopted and applied in this district and state. Under both the evidence and the law, therefore, we hold that the lien of the execution was valid, and this, in our view, disposes of the case; but as the court may dissent from us on the law, we proceed to discuss the third question.

Third. It was argued by the assignee that the petitioner's note had been due more than fourteen days before he commenced proceedings to collect it; that this was an act of bankruptcy, of which the petitioner must have knowledge; and that, having such knowledge, his subsequent execution was void. Was this an act of bankruptcy? To be such the default must have been by one who was a banker, merchant or trader, and

the security must have been commercial paper. There is no evidence that the defendant was either a banker, merchant or trader. The commercial definition of a trader is one who makes it his business to buy and sell merchandise or other things ordinarily the subject of traffic and commerce. In re Cowles [Case No. 3,297]; In re Chandler [Id. 2,591]. Certainly there is nothing to show that he, the debtor, came within this definition, and nothing to show that he was a banker or merchant. The security was what is called a "judgment note." Is such a security commercial paper? The term 'commercial paper' is used in the bankrupt act to denote bills of exchange, promissory notes, and negotiable bank checks,—paper governed by those rules which have their origin and are established upon the custom of merchants in the commercial transactions known as the 'law merchant.' In re Nickodemus [Id. 10,254]; In re Hollis [Id. 6,621]; In re Chandler [supra]; In re Stevens [Id. 13,393]. It seems that this does not include a judgment note. In Overton v. Tyler, 3 Barr. [3 Pa. St.] 346, it was decided (Gibson, J., delivered the opinion) that such a note was not negotiable in a commercial sense; and such has been the general opinion of this state since that time. In Zimmerman v. Anderson, 17 P. F. Smith [67 Pa. St.] 421, the decision in Tyler v. Overton seems to be doubted, but it is not overruled, and the distinction is clearly drawn that in the latter case there was no warrant to confess judgment which was the fact in the former.

For the reasons set forth, therefore, we cannot doubt that the stoppage of payment on this note for fourteen days was not an act of bankruptcy, and, not being an act of bankruptcy, could not by itself be notice to the creditor of the insolvent or bankrupt condition of the defendant. The assignee having the property in his possession, it is the opinion of the register, in view of the facts above set forth, that he should be directed to sell the same, and pay from the proceeds thereof the debt of the petitioners, with interest to the day of sale and the cost of his execution, as prayed for in his bill, as modified by the agreement between his attorney and assignee.

To which report and opinion exceptions were filed by the assignee, which were argued before McCANDLESS, District Judge, who, by decree of the court, overruled the exceptions, and affirmed the decision of the register.

LOVE (MANDEVILLE v.). See Case No. 9,012.

LOVE (WHEATON v.). See Cases Nos. 17,484 and 17,485.

LOVEJOY (MURRAY v.). See Case No. 9,963.

LOVEJOY (SHAW & WILCOX CO. v.). See Case No. 12,727.

Case No. 8,550.

LOVEJOY v. WASHBURNE.

[1 Biss. 416.] [1]

Circuit Court, N. D. Illinois. Dec. Term, 1863.

FEDERAL COURTS — JURISDICTION — CITIZENSHIP — JOINT CONTRACTORS — ONE RESIDENT OF SAME STATE AS PLAINTIFF.

1. An action cannot be maintained in this court against joint contractors where one of them resides in the same state with the plaintiff.

2. If one is not served with process he may enter his appearance and join with the other in a plea to the jurisdiction, and the suit will be dismissed for want of jurisdiction.

[Cited in D'Auxy v. Porter, 41 Fed. 69.]

Defendant, E. B. Washburne, was a resident of Illinois and duly served with process. Morrison, a resident of the same state as the plaintiff, was not served, but entered his appearance in the case, and both united in the following plea, in which the facts are set forth: "And the said Elihu B. Washburne and Dorillus Morrison impleaded, &c., jointly come and say that this court ought not to have or take further cognizance of the action aforesaid, because they say that before and at the time of the commencement thereof, the said Dorillus Morrison was, and from thence hitherto hath been, and still is a citizen of the state of Minnesota, and not of the state of Illinois in manner and form as the said plaintiffs in their said declaration in that behalf have supposed and alleged; and they, the said defendants, so impleaded, &c., further say that at the time when, &c., the said plaintiffs were and are citizens of said state of Minnesota, and that the joint and not the several liability to the said plaintiffs in their said action is in and by their said declaration supposed against the said Elihu B. Washburne and said Dorillus Morrison, impleaded, &c., together with one Cadwallader C. Washburne; and this, the said Elihu B. Washburne and said Dorillus Morrison, impleaded, &c., are ready to verify. Wherefore they pray judgment whether this court can or will take further cognizance of the action aforesaid. Sworn and subscribed, &c."

Cyrus Bentley, for plaintiffs.

Kales & Williams, for defendants.

It was formerly held in some of the circuit courts that the averment as to citizenship to give jurisdiction, must be proved in the general issue. The supreme court has, however, established the rule that if the defendant wishes to dispute the allegation he must plead in abatement. Jones v. League, 18 How. [59 U. S.] 76. The plea of the general issue is no traverse of the jurisdictional allegations. Philadelphia, W. & B. R. Co. v. Quigley, 21 How. [62 U. S.] 214. In all bills in equity in the courts of the United States, the citizenship should appear on the face of the bill, to entitle the court to take jurisdic-

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

tion, otherwise the bill will be dismissed. If the citizenship be properly averred, and the defendant means to deny the fact of citizenship, he must take the exception by way of plea, and cannot do it by general answer, for it is a preliminary inquiry. Where the real parties in the record are not citizens of different states, the court has no jurisdiction. Dodge v. Perkins [Case No. 3,954]. A bill in equity to require a judgment lies in the circuit court where the judgment is given, although the original plaintiff resides in, and is a citizen of another state. Such a bill is not an original suit within the sense of the 11th section of the judiciary act of 1789 [1 Stat. 78]. Dunlap v. Stetson [Case No. 4,164].

DRUMMOND, District Judge. The jurisdiction of the circuit court is founded upon the 11th section of the judiciary act of 1789 (1 Stat. 78). The clause "or the suit is between a citizen of the state where the suit is brought, and a citizen of another state," would in the case of a several or joint and several contract authorize a suit against citizens of another state on their several liability, without joinder of citizens of the same state; but in the case of a joint contract where all parties must be joined, the mere omission to serve process on parties residing in the same state with the plaintiff would not confer jurisdiction. Such parties may at any time enter their appearance and the suit will be dismissed for want of jurisdiction.

See Louisville R. Co. v. Letson, 2 How. [43 U. S.] 556; Shields v. Barrow, 17 How. [58 U. S.] 141.

Case No. 8,551.

LOVEJOY v. WILSON.

[1 Cranch, C. C. 102.] [1]

Circuit Court, District of Columbia. Dec. Term, 1802.

WITNESS—INTERESTED IN SUBJECT — TESTIMONY UPON COLLATERAL FACTS—ASSUMPSIT—ACCOUNT —NO ACCOUNT FILED—MONEY LENT.

1. In assumpsit for goods sold and delivered, the defendant may prove a partnership between the plaintiff and the witness by the witness.

2. In a count "for sundry matters properly chargeable in account," if no account be annexed, the words which refer to an account as annexed, may be rejected; and money lent may be given in evidence upon that count.

Assumpsit, for stone and sand sold and delivered. The defendant produced Owen McGlue as a witness to prove a partnership between the witness and the plaintiff, and that this was a joint contract.

Mr. Gantt, for plaintiff, objected that the witness was interested.

THE COURT decided that he was a competent witness to prove the partnership; but should not be compelled to give evidence of payments made by the defendant during the partnership. (Quaere.)

One of the counts, in the case was indebitatus assumpsit, "for sundry matters properly chargeable in account as by a particular account thereof, herewith into court brought, may more fully appear." No account was filed. The plaintiff offered evidence of money lent. The defendant objected that it could not be given on that count.

KILTY, Chief Judge, was of opinion that the evidence was applicable to that count. No account being filed, the words "as by a particular account," &c., must be rejected as surplusage, and then the count will stand as a general indebitatus assumpsit "for sundry matters chargeable in account;" and money lent is a matter chargeable in account.

MARSHALL, Circuit Judge, and CRANCH, Circuit Judge, did not object.

(Quaere as to this point.)

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

Case No. 8,552.

LOVELL v. ALLIANCE LIFE INS. CO.

[3 Cent. Law J. 699; 6 Ins. Law J. 239.]

Circuit Court. E. D. Missouri. Oct. Term, 1876.

INSURANCE—STATEMENTS IN APPLICATION—EFFECT OF MISSOURI STATUTE AS TO MATERIALITY.

This action was brought on a policy for $10,000. The defendant answered that by the terms of the policy, the application with all the statements therein became a part of the policy, and each and every representation made in obtaining the policy were warranties, that among other representations made by the assured, he stated that neither of his parents had ever had consumption, while in truth his mother had died of that disease, and that such representation was a warranty and avoided the policy. The plaintiff demurred on the ground that the policy sued on was executed in Missouri, and after the passage of the act of March 23, 1874 (Laws 1874, p. 89), which enacts that "no misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or under the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case, shall be a question for the jury," and that the defendant had failed to allege that the matter complained of in any way contributed to the death of the assured.

THE COURT held (1) that the application having been made in Missouri, and the policy delivered and the premium paid here, that it was a Missouri contract; (2) that the act comprehended in its term all representations made in obtaining the policy, whether they were technical representations, or warranties.

LOVELL (CURRY v.). See Case No. 3,496.

LOVELL (EDMONDSON v.). See Case No. 4,286.

LOVELL (ELGEE v.). See Case No. 4,344.

LOVELL (JONES v.). See Case No. 7,478.

LOVELL (MACUBBIN v.). See Case No. 8,928.

LOVERING (BAYSAND v.). See Case No. 1,147.

Case No. 8,553.

LOVERING v. DUTCHER.

[2 Hayw. & H. 367.] [1]

Circuit Court, District of Columbia. May 24, 1861.

PATENTS — APPEAL FROM DECISION OF COMMISSIONER—WHETHER EITHER ENTITLED — PUBLIC USE—CONCEALMENT — FOREIGN INVENTION AND USE.

1. Where a question of interference is decided by the commissioner of patents on appeal of the circuit court, the question to be decided by the court under the act of July 4, 1836 [5 Stat. 117], is who is entitled to a patent.

2. Where an invention has been discovered and in public use for two years or more, prior to filing the application for patent as a new discovery in the art, a patent will be denied by this court. Rule also stated when knowledge of the invention had been suppressed and kept a secret for a term of years; and also the rule when a foreign patent has been obtained for the alleged invention.

[Cited in Snowden v. Pierce, Case No. 13,151.]

Appeal [by William C. Lovering] from the commissioner of patents' decision in favor of [W. W.] Dutcher in the interference between the parties relating to improvements for temples for looms.

Mr. Brooks, for Dutcher.

DUNLOP, Chief Judge. I assume that the office was right in holding that the improvements for temples for looms claimed on their application for patents by Lovering and Dutcher were substantially the same, and that the interference was properly declared. It only remains therefore on this appeal to decide whether Dutcher was entitled to the patent awarded to him by the commissioner in his judgment of the 4th of February last. It is insisted in argument by Mr. Dutcher's counsel that the only question in issue before the commissioner or before me on this appeal, is priority of invention, and that if Dutcher was the first inventor the judgment must be affirmed. That all other issues are collateral and not to be noticed. This is a mistake. The 8th section of the act of the 4th of July, 1836, under which my jurisdiction in this case arises is in these words: "That whenever an application shall be made for a patent, which in the opinion of the commissioner would interfere with any other patent, for which an application may be pending, or with any unexpired patent, which shall have been granted, it shall be the duty of the commissioner to give notice thereof to such applicants or patentees, as the case may be, and if either shall be dissatisfied with the decision of the commissioner on the question of priority of right or invention, on a hearing thereof, he may appeal from such decision on the like terms and conditions as are provided in the preceding section of this act, and the like proceedings shall be had to determine which or whether either of the applicants is entitled to receive a patent as prayed for, &c." My authority therefore on this appeal is to determine which or whether either of the applicants "is entitled to a patent as prayed for." An applicant may be the first inventor and still not entitled to a patent. He may have lost his right in various ways, as for instance: 1st. By abandonment to the public. 2nd. Laches, in not applying in a reasonable time for a patent. 3rd. Permitting his invention to go into public use more than two years before his application. 4th. Unreasonably delaying to perfect his invention, till a later diligent original inventor perfects the invention and applies for a patent, &c. My duty therefore is to inquire into all the facts and circumstances given in evidence, which go to invalidate Dutcher's claim.

It appears according to Dutcher's own pretensions and the evidence of his sole witness, Isaac C. Myers, that Dutcher made the invention late in 1854 or early in 1855, and applied it to looms in a factory at North Bennington, Vermont, belonging to Mr. P. L. Robinson, for whom Myers was foreman or superintendent. In answer to the 8th interrogatory in chief to witness Myers, he says, "It was put on to a loom and operated. I could not tell what became of it. I may have left some there after I left, but I cannot say as to that." In answer to the 9th interrogatory in chief Myers says, "They were put there by Mr. Dutcher for trial, and experiment on Dutcher's account." In answer to the 19th, 20th and 21st cross interrogatories he says he left Bennington, Vermont, February the 8th, 1855, does not know how many temples Dutcher constructed, like the new temple, only knows those he put on the looms, and does not know how long they remained on the looms, and whether they were on the looms when he left; also proved that Dutcher had a workshop eighty yards from Robinson's factory, and was a temple loom manufacturer. Mr. Dutcher did not apply for a patent until May the 14th, 1860. His adversary, Lovering, invented the same improvement for temple for looms according to the proof in December, 1859, or in January, 1860, and applied for a patent the 28th of March, 1860. It appears that more than five years intervened between the date of Dutcher's discovery and his appearance at the office to make his claim, and not till five or six months after Lovering's discovery of the same improvement and six weeks after Lovering had actually presented his claim for the protection of a patent. It is not pretended by Dutcher (although Myers testifies his application of the temples to the looms in Bennington, Vermont, in P. L. Robinson's cotton mill, late in 1854 or early in 1855,

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

was an experiment, and on Dutcher's own account); that the invention was not then perfected and complete, on the contrary his counsel, Mr. Brooks, in his argument before me, strenuously insists the invention was as perfect and complete in 1854–5 as it is now. There is no evidence that in the long interval he made any efforts to add to it or improve it, although Myers proves Dutcher was reported well off. Dutcher's invention, as now claimed is the same, without alteration, improvement or addition, as that applied to looms in the Bennington factory in 1854–5.

It seems to me very clear that Mr. Dutcher, by his long delay and gross neglect to give the public the benefit of his invention, by presenting it after it was perfected promptly at the patent office has forfeited all claim now to receive a patent, and this for many reasons.

First. Because more than two years have elapsed since the invention was complete and the introduction into public use in Robinson's factory in 1854–55. Although Myers says the temples were tried as an experiment, and on Dutcher's account, it is admitted by Dutcher's counsel the invention was then perfect as it is now, and the temples were used for some time in Robinson's factory, a public place, open to public inspection without any concealment, and whether Robinson bought and paid for them or not, he had certainly the use of them in his factory. That use, if it showed the temples to be profitable, would lead to the sale of them, and gave Mr. Dutcher prospective profits. Myers says Dutcher was a manufacturer of temples, but whether he made others for sale like those put in use in Robinson's factory he does not know.

Second. If Mr. Dutcher concealed his invention for five years after it was complete, even though he never sold it for profit, or introduced it to public use, he cannot now claim a patent. This, I think, has been settled by the supreme court of the United States in Pennock v. Dialogue, 2 Pet. [27 U. S.] 1. They say: "If an inventor should be permitted to hold back from the knowledge of the public the secret of his invention, it would materially retard the progress of science and the useful arts, and give a premium to those least prompt to communicate their discoveries."

In Kendall v. Winsor, 22 How. [63 U. S.] 322, the supreme court says: "By correct induction from these truths it follows that the inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the constitution or acts of congress. He does not promote, and if aided in his design, would impede the progress of science and the useful arts, and with very bad grace could he apply for favor or protection to that society, which if he had not injured, he certainly had neither benefited nor intended to benefit. Hence, if during such concealment an invention similar or identical with his own could be made and patented, or brought into use without a patent, the latter could not be inhibited nor restricted upon proof of its identity with a machine previously invented and withheld and concealed by the inventor from the public. The rights and interests, whether of the public or of individuals, can never be made to yield to schemes of selfishness or cupidity." Again at page 327, same case, they say: "It is unquestionably right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant, with language, such for instance as an acquiescence in the full knowledge of the use of the invention by others, or he may forfeit his right as an inventor by a willful or negligent postponement of his claims, or by an attempt to withhold the benefits of his improvements from the public until a similar or the same improvement should have been made and introduced by others. Whilst the remuneration of genius and useful ingenuity is a duty incumbent on the public, the rights and welfare of the community must be fairly dealt with and effectually guarded." And the same page: "These cases," referring to Pennock v. Dialogue, 2 Pet. [27 U. S.] 1, and Shaw v. Cooper, 7 Pet. [32 U. S.] 291, "may be regarded as leading cases upon the question of abrogation or relinquishment of patent privileges, as resulting from the party's intention, from abandonment or neglect, or from use known and assented to." I also refer on this point to the case of Spear v. Belson [Case No. 13,223], decided by me on appeal from the patent office, August the 29th, 1859. In that case among other things I said: "The 7th section of the act of 1839 [5 Stat. 354] denies to an inventor who has sold his invention before he has applied for a patent, a right to a valid patent, if such sale has been made more than two years before such application, and I see no reason why an inventor, who has concealed his invention more than two years, and thereby injured the public, should stand on a better footing than the inventor above referred to who sells. The statutory bar to the inventor who sells, would seem by analogy very properly applicable to the inventor who secretes. Mr. Belson has withheld his application not only for more than two years, but for more than five years. His delay in my judgment for this long time amounts to gross and culpable negligence, and forfeits his right to a patent, unless satisfactorily accounted for. If the statutory bar (of two years) is properly applicable by analogy as above suggested, then it cuts off all excuses good or bad, but if I am wrong in this, let us turn to the excuses, &c." In the present case no excuse for the culpable delay has been made by Mr. Dutcher.

Third. The same invention was patented in England. to Elser and Leach, January the 8th, 1859, more than two years before the date of Dutcher's application to the patent

office here. Under the 7th section of the act of 1836, this English patent would have barred Dutcher's case, in the office the same invention had been patented abroad. The words of the section applicable here are: "But whenever on such examination it shall appear to the commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented, or discovered, or patented, or described in any printed publication in this or any foreign country as aforesaid, &c." It is true this provision of law has been modified by the 6th section of the act of the 3d of March, 1839. The 6th section is in these words: "That no person shall be debarred from receiving a patent for any invention or discovery as provided in the act approved on the 4th of July, 1836, to which this is an addition, by reason of the same having been patented in a foreign country more than six months prior to his application, provided that the same shall not have been introduced into public and common use in the United States, prior to the application for such a patent, &c." Now this proviso, it seems to me, still debars Mr. Dutcher. Mr. Dutcher did not make his application for a patent till the 14th of May, 1860. Many months before that time Lovering had invented and used the same temples, and had actually applied to the office for a patent, on the 28th of March, 1860. These acts of Lovering, I think, must be held to gratify the words of the proviso of the 6th section above set forth, introduced into public and common use in the United States, prior to the "application for such patent."

On all these grounds therefore, I am of opinion Mr. Dutcher has forfeited his right to the patent claimed by him. I sustain the appellant's 5th reason of appeal, and do this 24th day of May, 1861, reverse the judgment of the commissioners of date 4th of February, 1861. I am also of opinion that Lovering is not entitled to the patent claimed by him, because he has been anticipated in the invention of Dutcher, and also by the English patentees, Elser and Leach.

Case No. 8,554.

LOVERING v. HEARD.

[1 Cranch, C. C. 349.] [1]

Circuit Court, District of Columbia. Oct., 1806.

COSTS—COUNTIES OF DISTRICT OF COLUMBIA.

A resident of Alexandria, suing in Washington, must give security for costs.

Lovering lives in Alexandria. Motion for a rule on the plaintiff to give security for costs. Granted, after consideration of the laws of Maryland on that subject. Alexandria county is to this county as a separate state, governed by different laws, although under one jurisdiction. Execution will not run from one county into the other. The marshal cannot distrain in Alexandria, for fees due to the officers in Washington county. The modes of collecting fees are different. Rule granted.

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

LOVERING (MATTOCKS v.). See Case No. 9,299.

LOVETT v. BISPHAM. See Case No. 8,985.

Case No. 8,555.

The LOVETT PEACOCK.

[1 Lowell, 143.] [1]

District Court, D. Massachusetts. March, 1867.

SALVAGE—DERELICT—FINAL ABANDONMENT — OCCUPATION BY SALVORS—COMPENSATION.

1. A bark fell in with a schooner three hundred miles from shore in distress. The bark sent provisions, which were returned; the crew of the schooner abandoned her and went on board the bark, which proceeded on her voyage for three hours, when the captain finding the weather more favorable returned to the schooner. The captain of the schooner not being able to induce his men to return to their vessel, the second mate and four men of the bark went with provisions and sails and brought the schooner to port. *Held*, not a case of derelict, as the final abandonment by the owners and the occupancy by the salvors were contemporaneous acts, and the one would probably never have happened unless in a situation where the other was possible, as the boat of the schooner could not take off all her crew.

[Cited in The Cleone, 6 Fed. 525.]

2. The actual salvors succeeded in bringing in the schooner and cargo, valued at $90,000, after thirteen days of severe labor and hardship, and after encountering a gale in the Gulf Stream. One-fourth of the value was decreed.

[Cited in The Maggie Willett, 27 Fed. 521.]

3. The first mate of the bark, who had refused to volunteer, was given the same share only as the other seamen who remained in the bark.

4. Distribution of the salvage.

In admiralty.

J. C. Dodge and T. K. Lothrop, for libelants.

H. C. Hutchins and J. C. Carter, for claimants.

LOWELL, District Judge. On the afternoon of the twenty-first day of January, 1867, the bark Flora Southard, proceeding in ballast from Boston to Philadelphia, and having on board most of the supplies necessary for the voyage to Rio de Janeiro, which she had agreed to undertake from Philadelphia, and valued with her stores at about thirty thousand dollars, fell in with the schooner Lovett Peacock, in distress, in latitude 37° 15′ N. and longitude 70° 30′ W., some three hundred miles from any land. The schooner had a signal flying, and as the vessels came within hail, her master said he was short of bread, flour, and water, had lost his sails, and his

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

crew were exhausted. The master of the bark replied that he could furnish him with bread, but that he had himself lost several sails; he lowered a boat and sent his mate on board the schooner with two barrels of bread, and with orders, as he testified, to inquire into the wants of the schooner, and to bring the master on board for consultation, if he wished to come. When this boat reached the schooner, the mate was told that he need not put the bread on board as the schooner was to be abandoned. The mate carried back to the bark a part of the schooner's crew, and the remainder followed with the officers and the captain's wife in the schooner's boat. When all had been safely received on board, the bark filled away and stood on her course, it being then about eight o'clock in the evening and the weather very threatening. At about eleven o'clock the master of the bark, finding that the wind was going down, put his vessel about and returned to look for the schooner, which had a very valuable cargo of cotton on board, appraised by order of court with the schooner at ninety thousand dollars and upwards. Before daylight in the morning the two masters went on board the schooner, and Captain McIntire of the bark was satisfied that she could be brought in. When they returned to the bark Captain Reagan of the schooner called his men aft and asked them to go in the schooner, and they refused. Captain McIntire then asked his own mate to undertake the service, and he refused; the second mate of the bark consented, and with four volunteers from the bark's crew went on board, with two barrels of bread and two sails, and after thirteen days succeeded in bringing the vessel into Holmes Hole in this district. During three successive days of the thirteen the schooner was obliged to lie to in the Gulf Stream in a severe gale, and the men were almost constantly at the pumps, the officer taking his turn with them both then and afterwards.

The disputed points were, whether the master of the bark took any unfair advantage of his position to obtain the control of the salvage enterprise, and how far the vessel was in peril, and what was the conduct of the schooner's master at the beginning and during the continuance of the salvage service. The master of the schooner swore that he was ready and anxious to proceed on his voyage, but that his men deserted him, and that even then all he wanted was men, provisions, and sails; that sails and men were refused him; that Captain McIntire exaggerated the damage to the schooner in order to discourage him while enhancing the value of his own services.

LOWELL, District Judge. I am entirely satisfied that the imputations on Captain McIntire's conduct are untrue. The only foundation for them is the qualified refusal of sails on the first day, which is satisfactorily explained by Captain McIntire, and which I do not believe had any influence on the result. Upon all the evidence it is clear that master, officers, and men of the schooner thought it prudent and proper to abandon her. She had met a great deal of bad weather; had lost all her large sails, and one of her boats; was much strained and damaged in her upper works, so as to leak badly in heavy weather; her cabin and house were both so injured as to let in the cold and wet; her officers, and a double crew that she happened to have, were exhausted and disabled. Whether Captain Reagan ought to have despaired of his ship, while her hull remained sound, is a different question. His conduct is of importance chiefly in this respect, that if he was, as he would have us believe he was, the promoter of the salvage enterprise, and able and willing to lead it, and the bark's crew were willing to go with him, Captain McIntire certainly had no right to attempt to enhance the service by sending an officer who was not needed; and such conduct would diminish his compensation and perhaps that of his principals, the owners, though it might not affect that of the actual salvors who were no parties to it. This line of evidence, too, has a bearing upon the amount of peril, as it appeared to the parties at the time. The truth appears to me to be that Captain McIntire believed, and openly and without any concealment said, that the schooner could be saved; that in this opinion he differed from all the other persons who had any means of knowledge; that if Captain Reagan did not agree with the majority, he at least presented that appearance, which is all that is important in this case, as it is all that can affect the salvors.

Such being the state of affairs the question arises and has been earnestly argued, whether this is a case of derelict. I cannot think it was, because the final abandonment by the owners and the occupation by the salvors were contemporaneous acts, and the one would probably never have happened unless in a situation where the other was possible, since the boat of the schooner was not capable of taking off all her crew. So that the owners of the saved property must be credited with the chance, whatever it may have been worth, of the schooner making Bermuda, which she was undertaking to do when fallen in with by the bark, and not merely with the chance of a vessel abandoned on the high seas being picked up. I have always strongly insisted upon the distinction between a vessel disabled at sea and one abandoned there, and again between a vessel abandoned at sea and one abandoned on a frequented coast where assistance can be obtained, because an attention to these distinctions seems to me to reconcile many of the most apparently conflicting decisions upon the quantum of salvage. The true point here is, that not merely the risk the vessel is in of present or early damage or destruction must be looked at, but the peril that the owner is in of never re-

covering his property; so that I consider a vessel found floating at sea, however sound she may be and however fair the weather, is in the greatest danger of being lost to the owner; while a vessel much more shattered, with a crew still on board, though willing and anxious to abandon her if they could, is really in a more hopeful state, so far as the owner is concerned,—the accomplished fact of abandonment on the high seas, no matter for what reasons, being a most important one in this respect. Looking thus at the present case it does not appear to be one of derelict in the strictest sense, but it does appear to present a salvage service of a very high degree of merit. I cannot but look at the chances of safety from the point of view of the persons on the spot at the time; and I find that all of them, with the single exception of Captain McIntire (for his second mate had not been on board the schooner when he gallantly offered his services), despaired of saving the property. The plan was conceived by him, and was well and faithfully carried out by the second mate and the four men, with some risk and much exertion and fatigue, continued for thirteen days, and this very valuable cargo has been saved by their exertions from a peril which must by the consent of all be taken to have been very great; for Captain McIntire himself so considered it when he found how bad the weather was during the next few days; and every one else was of that opinion before.

It is therefore a case for very liberal compensation. And I consider that I do not go too far in decreeing, as I do, one-fourth of the net value, or twenty-two thousand five hundred dollars. The distribution will be governed by the circumstances of the case as applied to the general rules in salvage. The owners appear to be entitled to the usual share of one-third; the master, who was the only originator and instigator of the whole enterprise, and the second mate who conducted it to a successful conclusion, giving the work of his hands as well as of his head, and the men who were with him, are all to be highly considered. The men who remained on board the bark are entitled to some share, but they neither underwent the actual hardship and whatever there was of danger, nor were they exposed to much additional labor, for they had the assistance of the shipwrecked crew to some considerable extent in place of those who went in the schooner. The first officer who refused, as he had a right to do, to give the aid of his skill and experience, cannot expect much. Lord Stowell once refused to give any thing to a mate under somewhat similar circumstances. But as the salvors have received the benefit of his services on board the bark, I shall give him the share of a man. The distribution then will be as follows:

To the owners of the Flora Southard, one-third; to the master, one-sixth; to the second mate, one-ninth; to the four men, actual salvors, $1100 each; to the six persons who remained on board the bark (exclusive of the master), the remaining sum of $4350, to be divided between them in proportion to their wages, except that the mate is to rate as an able seaman only.

LOVETT PEACOCK, The (FIELD v.). See Case No. 4,768.

Case No. 8,556.

LOVING et al. v. FAIRCHILD.

[1 McLean, 333.] [1]

Circuit Court, D. Ohio. Dec. Term, 1838.

PLEADING—AMENDMENT—AFFIDAVIT TO PLEA.

This is an action of assumpsit, brought by the plaintiffs [O. Loving & Co.] against the defendant [Oliver Fairchild], as the acceptor of a bill of exchange. The declaration having been filed, the defendant filed his plea of non-assumpsit, without annexing to it an affidavit, as the statute requires, that the instrument on which the action is brought, was not executed by him. And a motion was made by Mr. Fox for leave to amend the plea by annexing such affidavit to it, as the rule of the court, which adopts the statute, requires.

Mr. Wright, opposed the motion.

OPINION OF THE COURT. The present motion cannot be distinguished from other motions, for leave to amend the pleadings. And this court have always been liberal in allowing amendments for the advancement of justice, where they are applied for in reasonable time. Leave is given to amend the plea by annexing an affidavit to it, at the costs of the defendant.

Case No. 8,557.

LOVREIN v. THOMPSON.

[1 Spr. 355.] [2]

District Court, D. Massachusetts. March, 1857.

SEAMAN'S WAGES—MINOR—SUIT BY FATHER—DESERTION — SHIPPING ARTICLES — JUSTIFIABLY SEPARATED — TO WHAT ENTITLED— CHARGES—USAGE.

1. Under the general maritime law, desertion does not necessarily work a forfeiture of all antecedent earnings; it rests in the discretion of the court.

[Cited in Swain v. Howland, Case No. 13,661; The Balize, Id. 809.]

2. Even a statute desertion by a minor, who had engaged in a whaling voyage without his father's consent, is no defence to a suit by the father for his services.

3. The lay in the shipping articles was adopted as the rule of damages, the father not claiming any other.

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

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

4. If during a whaling voyage, a seaman be justifiably separated from his ship, he is entitled to such proportion of the whole proceeds, as the time he served bears to the whole time of the voyage.

[Cited in Antone v. Hicks, Case No. 493.]

5. Certain charges by the owners disallowed, usage notwithstanding.

[Cited in Frates v. Howland, Case No. 5,066.]

In admiralty.

R. C. Pitman, for libellant.

A. Mackie and A. S. Cushman, for respondent.

SPRAGUE, District Judge. This is a libel by a father for the services of his minor son, in a whaling voyage. The son was born in New Hampshire, in the year 1834. Without the knowledge or consent of his father, he left his home in New Hampshire, went to Vermont and Maine, where he remained a considerable time, and thence to Boston. In this city he soon found himself in a shipping office, where he was induced to engage in the whaling service. He was then nineteen years of age, and so stated to the shipping master, who told him, that would not do, he must be twenty-one; he then said he guessed he was twenty-one, which, without further inquiry, was deemed satisfactory, and a contract was made with him. He was carried to New Bedford, and there shipped for a whaling voyage, on board of the respondent's ship, and signed articles at a lay of one one-hundred and ninetieth. He proceeded on the voyage round Cape Horn, to the Pacific and Arctic Oceans, where the ship was nearly filled with sperm and whale oil. On her homeward voyage she stopped at the Sandwich Islands, where the son deserted, being still a minor. The ship then returned, without him, to New Bedford, and the whole proceeds of the voyage were delivered to the respondent.

The desertion is now relied upon as a defence to this libel, and it is insisted by the respondent that all right to any share or compensation was thereby forfeited. But even in case of a seaman of full age, a desertion merely, under the general maritime law, does not necessarily work a forfeiture of all antecedent earnings; it is a matter within the discretion of the court. As against the claim of the libellant, a desertion, even under the statute, is no defence. The son was a minor, both when he formed, and when he dissolved, his connection with this ship.

It is not shown that the desertion occasioned any loss or inconvenience to the respondent, nor is any to be presumed. The ship was only to be navigated home, which requires a smaller number of hands than the taking of whales. This young man rendered faithful and valuable services to the respondent for the term of fourteen months. His time and labor belonged to his father, who now claims compensation therefor. And it is no answer to say that the son refused to perform further service. The claim is as well founded in law as it is in justice.

The next question is, what shall be the amount of compensation to the libellant? The only means furnished by the evidence of determining what that shall be, is the lay stipulated for in the articles; that is not necessarily the rule of damages, in cases like the present, and the libellant might have introduced other evidence, and the court might have adopted a different basis of calculation. But as this case has been presented to me, I shall give to the libellant the stipulated share of the proceeds, making up the voyage in the same manner as in case of a seaman of full age, who has been justifiably separated from the ship before the termination of the voyage. By the articles, if this young man had performed the whole voyage, he would have been entitled to one one-hundred and ninetieth of the proceeds. The libellant is to have such proportion of that one one-hundred and ninetieth, as the time of service bore to the whole time of the voyage.

In the accounts presented by the respondent, several items have been objected to; the first is the charge of commissions for disposing of the oil and bone, and settling the voyage. The obligation to do this is assumed by the owner in the ninth article of the shipping articles; it is a part of his contract, and he has no more right to make a charge against the seaman for performing the contract, than the latter has to make a charge against the owner for performing the duty of a seaman. The ship's husband may charge his co-owners a compensation by commission or otherwise, but that is no concern of the seaman.

The next is a charge of ten dollars for preparing the vessel for sea. This is founded upon the supposition that the seaman, by his contract, is bound to labor in such preparation, and that he has neglected to do so, and thereby occasioned expense to the owner. Where it is proved that the seaman has been called upon to perform that service, and has refused or neglected to do so, it may be reasonable that he should pay such expense, but there is no such proof in the present case. No opportunity was given to this young man to perform this labor himself, although it appears that he was in New Bedford between two and three weeks before the sailing of the vessel, and it would have been better for him to have been employed on board of her, than exposed to the temptations of idleness during that time. This item cannot be allowed.

The next charge is Macomber's bill, which the libellant's counsel says contains a charge of five dollars paid to the former, as a bounty for engaging this young man. That is, in a settlement under a contract, one of the parties charges the other a sum of money paid to a third person, to procure the other to enter into the contract. Such a claim is inadmissible.

The next item is insurance. Before sailing on the voyage, the seaman obtained certain outfits on credit, and gave to the outfitter an order on the owner, which the latter accepted and paid, the owner thereby became a creditor, and beside the personal liability of the seaman, held the proceeds of his voyage as security, and now charges insurance on the amount paid. No insurance was effected at the request of the seaman, or which could in any event enure to his benefit. But the claim is for the risk, that the earnings would not be sufficient to pay for the outfits. That is, when a debtor is ready to pay the whole amount of his debt, a creditor demands a further sum for the hazard, which he originally incurred, of the solvency of the debtor. This charge must be disallowed.

It is urged that all these charges are usual in New Bedford. I have not thought it necessary to receive evidence of such usage, because the claims are of such a character that usage cannot give them validity. A practice to allow them must have had its origin in the ignorance and necessities of the seamen, and could not have arisen between parties standing on equal grounds. Other items in the account were objected to, some on the ground that they were not necessaries for a minor, and others as inadmissible even against an adult, but an agreement between parties precluded the necessity of the court's making any decision thereon. Decree for the libellant.

See Luscom v. Osgood [Case No. 8,608]; Gladding v. Constant [Id. 5,468]; Gifford v. Kollock [Id. 5,409]; Swain v. Howland [Id. 13,661].

Case No. 8,558.

In re LOW et al.

Ex parte BAKER et al.

[2 Lowell, 264.] [1]

District Court, D. Massachusetts. June, 1873.

SEAMEN'S WAGES — FISHING VOYAGE — LIEN ON FISH—PURCHASER OF VESSEL—SUBROGATION—CHARGES.

1. Seamen engaged and serving for a fishing voyage have a lien on the fish for their wages.

2. Where the owners of a fishing-vessel became bankrupt, and afterwards the vessel arrived, and the assignees received the proceeds of sales of the fish,—*held*, they took them subject to the lien of the seamen.

3. Where the assignees sold a fishing-vessel for its full value, without taking into account any secret liens, and the purchasers were afterwards obliged, by a libel against the vessel, to pay wages of some of the fishermen for the preceding voyage,—*held*, the purchasers of the vessel were subrogated to the lien of the seamen against the fish and their proceeds, and might recover of the assignees such proportion of those proceeds as the wages so paid bore to the whole amount of wages.

[Cited in Story v. Russell, 157 Mass. 159, 31 N. E. 755.]

4. In ascertaining the net proceeds of the fish, the assignees were permitted to deduct the necessary expense of recovering a part of the value from an adverse claimant, who had taken the fish by replevin from the possession of the assignees.

Petition by [J. Baker et al.] mortgagees of the fishing-schooner Florence Reed, of Gloucester, praying that the assignees in this case might be ordered to pay out to them a part of the money received for the sale of a fare of fish. The case was, that John Low & Son, the bankrupts, were in possesion of the vessel, and sent her on a voyage to the Grand Banks; and, before her return, the petition in bankruptcy was filed, and the marshal took possession of the schooner and her catch, and turned them over to the assignees, who sold a part of the fish and received the proceeds. The remaining fish were replevied by a writ out of a state court by Alfred & Sylvanus Low, who claimed title through an alleged sale of the catch; but the court decided against them, and ordered a return of the goods, and the assignees received their value from the sureties on the replevin bond. In the mean time, the assignees sold the equity of redemption in the schooner to the petitioners for $350; and afterwards the seamen proceeded against the vessel in admiralty for their wages, and recovered a decree, which the petitioners satisfied. The petition alleged that the fish, or their proceeds in the hands of the assignees, were subject to lien for the wages, and that the petitioners ought to be subrogated to the rights of the seamen. The contract between the bankrupts and the fishermen were for shares of the fish caught by them respectively.

J. C. Dodge and F. W. Choate, for petitioners, cited, to the point that there was a lien, Knight v. Parsons [Case No. 7,886]; Two Hundred and Ninety Barrels of Oil [Id. 14,294]; The Antelope [Id. 484]; and on the doctrine of subrogation, Story, Eq. Jur. §§ 499, 633, 634; Wall v. Mason, 102 Mass. 313; The William F. Safford, Lush. 69; The Tangier [Case No. 13,744].

S. B. Ives, for assignees.

LOWELL, District Judge. Although the fisherman is in many respects like a hired seaman, yet he has a right to say that the proceeds of the fish shall be appropriated to his payment; in other words, he has an equitable lien on the fish, subject, of course, to the absolute right of a solvent owner to convey and give an indefeasible title to the purchaser. It is very like the lien of seamen on the freight, which does not oblige a freighter to see to the application of his money; but, until a payment has been made, the lien may be enforced in the admiralty. The Antelope [supra]. A court of equity would, if necessary, require the assignees of a bankrupt to keep a separate account of the catch of a voyage coming into their hands,

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

and to pay out of it the several proportions due to the master and men. The jurisdiction is likewise vested in the court of bankruptcy, and does not, in my opinion, require a regular bill to be filed; and the parties here have not sought to interpose any technical objection.

The remaining question is, whether the petitioners, having been obliged to pay the wages or shares in order to save the vessel, are subrogated to the lien of the seamen against the fish. The equitable doctrine of subrogation, or substitution, is applied in a great variety of cases, and upon the broad ground that the money or property of one man has gone to pay the debt of another, and that in such case the person paying shall be entitled, in equity, to an assignment of all the securities of the creditor. See The Tangier [supra]. This is a right which the creditor cannot defeat; which nothing, indeed, can defeat but intervening equities. It has very often been applied for the benefit of purchasers. One of the simplest and most common cases is where a parcel of land is subject to an incumbrance, and part of it is sold for a full price, as being clear of incumbrances. The vendee can, in equity, require, as between himself and the vendor, the whole burden to be thrown on the part which remains unsold. That case is closely analogous to this. The difficulties which have arisen in the application of the rule, where the rights of several successive purchasers are in question, and which may depend upon a great variety of considerations, such as express or implied notice, need not engage our attention at this time, because this case presents the most elementary form of the doctrine. And the rule is worked both ways, for vendor or vendee, as the equities of their position may require. The seamen here had two securities; and, if the petitioners had bought the vessel under a contract which bound them to satisfy these debts, and the assignees had then been obliged to pay them, the latter would have the right to resort to the vessel itself, if the personal responsibility of the petitioners were inadequate or unsatisfactory; and if the petitioners, on the other hand, bought without notice, and with no allowance for secret liens, and have been obliged to pay them, they can resort to the fund which has come to the assignees, not in the mass of the bankrupt's assets, but in a distinct form, and with a charge fixed upon it for the payment of these debts. I understand it to be admitted, as matter of fact, that the vessel was bought for her full value, neither party remembering or having any regard to these liens; and the case is therefore made out. The right does not depend on the form of the bill of sale, whether a mere release or a deed with covenants; but that is only one kind of evidence. The true question is one of intent, to be gathered from all legal evidence. As the assignees have been put to expense in recovering the fund, they have a first charge upon it for their reimbursement; and this may prevent the petitioners recovering the full amount of their payments. The prayer of the petition is, that the assignees be ordered to pay over such proportion of the net proceeds received by them from the fish and from the replevin bond, as the shares of the fishermen who have been paid by the petitioners bears to the whole sum so received. Taking net proceeds to mean such as remain after deducting all necessary charges, including those of the replevin suit, the prayer is granted.

Case No. 8,559.

LOW et al. v. ANDREWS et al.

[1 Story, 38.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1839.

SALE—CONTRACT TO DELIVER—STATUTE OF FRAUDS—LEX LOCI CONTRACTUS—LOSS OF GOODS IN TRANSITU—BILL OF LADING.

A contract was made in France between A. and B., by which certain goods were to be procured to be manufactured by A. and transmitted by him through B.'s agents at Havre, with instructions as to their further transmission. Two cases of goods were sent to Havre, and forwarded by B.'s agents with bills of lading in one vessel, the invoice of one of the cases having been sent by a previous vessel. The latter case having arrived in a different vessel from that in which the invoice was sent, was not claimed, and was sent to the public storehouse, where it was burnt. *Held*, that there was no sale by A. to B., but only a contract to deliver goods. That the statute of frauds did not apply, because the contract was made in France. That A. was legally discharged from all control over the goods upon their arrival at Havre. That it was incumbent on B. to show any omission on the part of A. to instruct B.'s agents as to the transmission of the goods from Havre, and that the loss of the goods was in consequence of such omission. That the putting of goods on board a vessel and transmitting bills of lading vested the property in the consignee, though the bill of lading should not arrive. That A. was not bound to send a duplicate invoice, under these circumstances, in the absence of an invariable custom. That B. was guilty of neglect in not making search for the goods, which did not arrive as by the invoice.

[Cited in Cochran v. Ward, 5 Ind. App. 95, 29 N. E. 797, and 31 N. E. 581.]

This is an action of assumpsit to recover the price of a case of black silk cravats, contracted to be delivered under the following circumstances: The plaintiffs are commission merchants, residing in Paris. They receive orders and furnish goods for the American market. The defendants are wholesale dealers in French goods, residing in Boston. Mr. Andrews, one of the defendants, visited France in the autumn of 1836, and contracted with the plaintiffs for a quantity of silk goods, and among them two cases of silk cravats, containing a hundred dozen in each case. The terms of the contract were, that the plaintiffs should procure the goods to be

[1] [Reported by William W. Story, Esq.]

manufactured, should send them to Welles & Greene, at Havre, to be shipped to the house of Mr. Andrews in America. One of the clerks of Low & Berry, who testified to this contract, stated that Mr. Andrews spoke of Welles & Greene as "his agents," and said that they had been directed by him to follow the plaintiffs' instructions as to the shipment. Another clerk testified, that Mr. Andrews directed the plaintiffs to order Welles & Greene to ship them to him at Boston, "through Chadwick & Carrington, at New York." It also appeared that he directed the cases to be marked C. A. 13 and C. A. 14. The plaintiffs immediately transmitted orders to the manufacturers in Germany to have the cravats made, packed in cases, and marked as above, and sent to Welles & Greene, at Havre. It appeared that the manufacturers did not know the defendants in the case, nor for whom the goods were destined. They were made wholly on account of the plaintiffs. They were manufactured, packed, marked, and sent to Welles & Greene, at Havre, by roulage (or baggage-wagon). The letter containing the invoice of the case marked C. A. 13, written by the manufacturers to plaintiffs, was dated December 24, 1836; that containing the invoice of case C. A. 14, was written December 31, 1836. The plaintiffs sent an invoice of the first case (C. A. 13) to the defendants, by the packet Formosa, which sailed from Havre on the 16th of January, supposing that the case would arrive at Havre in time to go by that packet; and they sent an invoice of the second case by the François I., which sailed on the 27th of January. These invoices were duly received. In point of fact, the case marked C. A. 13, did not arrive at Havre until January 18th, and the case C. A. 14, arrived January 24th, and both were sent by the François I. Before they had arrived at Havre, Mr. Andrews had directed the plaintiffs to order Welles & Greene to change the marks on the cases from C. A. to A. & Co., preserving the same numbers, and instructions were accordingly sent to that effect at the time the goods were supposed to be at Havre.

Welles & Greene received the goods by roulage, or a baggage-wagon, changed the marks, had them duly shipped, and sent a bill of lading of both cases to the defendants at Boston, and debited the shipping charges to the defendants, through Welles & Co. of Paris, and the defendants subsequently paid them. The goods were landed at New York; the case A. & Co. 14, was entered at the custom house by Chadwick & Co. (defendants' agents) by the invoice, transmitted by defendants from Boston. They had also entered the case No. 13, by the invoice, as having arrived in the Formosa, but of course did not find it on board of her. Having arrived in the François I., and not being claimed, it was sent to the public store, and there burnt in a fire which consumed the building. The bill of lading, it does not appear was ever received. No duplicate invoice was ever sent of case No. 13. It appeared in evidence, that Low & Berry had no control over the goods after leaving the manufacturers, as they were under the charge of government officers, in their transit across the kingdom of France. It also appeared, that it was a common occurrence for invoices of transit goods, that is, goods sent from Switzerland or Germany through France, to come without the goods themselves; the merchant at Paris writing by the packet, which he supposed would carry them, but that in point of fact they sometimes would arrive too late, and in such case, they were always looked for in the next packet. It did not appear, that it was the general usage to send duplicate invoices. It was not ascertained, that the case No. 13, had arrived in the François I. until after the fire. On examining the manifest of the cargo, and the receipt of the storekeeper, it was found that it had been stored and burnt.

Upon these facts the defendants contended, That the sale was void, there being no memorandum in writing as required by the statute of frauds. That Welles & Greene were agents of the plaintiffs, who were responsible for their omissions and neglects. That the orders of Mr. Andrews were not complied with, as he directed the goods to be shipped to him through Chadwick & Co. That the plaintiffs were guilty of neglect in not informing the defendants, that the case No. 13, did not go by the Formosa, and in not sending duplicate invoices. That there was no such delivery as to vest the property in the defendants. Upon these points, the case was submitted to the jury. Other matters were commented upon, not material to the issue.

George S. Hillard, for plaintiffs.
Bradford Sumner and Charles Mason, for defendants.

STORY, Circuit Justice, in his charge, stated the law as follows: That the statute of frauds did not apply, the contract taking place in France; and besides, that it was a contract by the plaintiffs to deliver goods, and not a sale, the goods not being in existence at the time. That Welles & Greene were the agents of the defendants, and not of the plaintiffs, which appeared from the statements of Mr. Andrews, from his direction as to the change of the marks, and from the fact, that the shipping charges were debited to the defendants and paid by them. That the plaintiffs were legally discharged from all control over the goods after their arrival at Havre. That it was incumbent on the defendants to show, that the plaintiffs had omitted to instruct Welles & Greene to transmit the goods through Chadwick & Co.; and that, in any event, the plaintiffs should not suffer in consequence of that neglect, if the jury were satisfied, that the loss would have

happened, none the less, had the instructions been complied with. That the putting of goods on board a vessel and transmitting a bill of lading would vest the property in the consignee, though the bill of lading should not arrive, and that it is enough to show, that the usual precautions had been taken to insure its being received, without showing the fact itself. That in the absence of any invariable custom, the plaintiffs were not legally bound to send a duplicate invoice on learning, that the case No. 13 had not gone in the Formosa. That the defendants or their agents in New York were guilty of neglect, in not making search for case No. 13, among the cargo of the François I., it being shown, that when goods did not accompany the invoice, they were invariably looked for in the next packet.[2]

The jury found for the plaintiffs.

Case No. 8,560.

LOW v. HAUEL.

[1 Wall. Jr. 345.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 29, 1849.

PRACTICE—FORM OF INJUNCTION.

By the practice of the Third circuit, no money penalty is inserted in an injunction.

Low having obtained a decree of perpetual injunction against Hauel for using certain trade-marks, G. M. Wharton, for the former party, presented a form of injunction in the English form, commanding and enjoining the defendant, "under the penalty of $——, to be levied upon his lands, goods and chattels," henceforth to desist, &c.

Mr. Guillou objected that by the practice of this circuit, as appeared by many injunctions which he had examined on the files, a pecuniary penalty was not inserted except in special cases; the remedy being always by attachment.

KANE, District Judge. It is not usual, in this circuit, to insert a pecuniary penalty, though one is almost always found in the English forms. There was a case here, some time since, where, a penalty being inserted, the matter was said to be misunderstood. The defendant, professing to understand it as an alternative, proceeded to violate the injunction, finding it more profitable, perhaps, to pay the penalty, than to desist from his work. Money penalty not inserted.

LOW (HILL v.). See Case No. 6,494.

LOW (PALMER v.). See Case No. 10,693.

[2] The case of Bryans v. Nix, 4 Mees. & W. 791, contains some remarks of Mr. Baron Parke, very strong to the point of this case when the property vested in Andrews.

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

Case No. 8,561.

LOW v. UNDERHILL.

[2 West. Law J. 360; 3 McLean, 376.] [1]

Circuit Court, D. Illinois. Dec. Term, 1844.

PRINCIPAL AND SURETY — INDORSER ON NEGOTIABLE PAPER—AGREEMENT NOT TO ENFORCE JUDGMENT AGAINST MAKER—RELEASE.

1. If the endorsee of a promissory note, who sues the maker and obtains a judgment, cause an execution to be issued and delivered to the sheriff to execute, and while the execution is in full life, agrees with the defendant in execution, that if he will pay $100 on the judgment, he will give him time on the balance,—the money being paid, it is founded on sufficient consideration to discharge the endorser.

2. The endorsee of a note may be passive, if he please, without risk. He may, after obtaining a judgment, decline issuing an execution; but if he causes an execution to be issued, he must do no positive act to stop its collection; and if an order be given to the sheriff not to levy, it is such an act as will discharge the endorser.

3. An agreement to give time that will discharge an endorser, must be founded on a valuable consideration; but the receiving of a part of the debt, coupled with an agreement to give time, is consideration sufficient, and will discharge the endorser.

[See Bank of U. S. v. Hatch, Case No. 918.]

4. The receiving of part payment from the maker, after the liability of the endorser is fixed, will not discharge the endorser, unless it be accompanied by some other act, impairing the rights of the holder against them, such as giving time.

5. If the endorsee of a note agrees with the maker that, if he will pay him a part, he will extend the time for the payment of the remainder, when the money is paid, the contract becomes an executed contract, and is obligatory. Aliter, if the contract is but executory.

This was an action of assumpsit, brought by the plaintiff [Daniel Low] as the endorsee of two promissory notes against the defendant [Isaac Underhill], the endorser—one note for $762.37, made by Edward Dickinson to defendant, and dated May 5, 1836, at twelve months, and the other for $560, made by Luther Sears to defendant, and dated May 7, 1836, at twelve months, and both endorsed by the defendant to the plaintiff in the state of New York. The notes were made in Illinois, the makers and payee both residing there. The declaration averred that the notes were endorsed by the defendant to the plaintiff in the state of New York, and averred a demand of the maker and notice in the usual form. The defendant plead the general issue, and gave notice under the same of the special matter relied upon. The notice alleged, that after the notes became due, the plaintiff brought suit against the makers, recovered a judgment, caused an execution to be issued and delivered to the sheriff to execute; that after the issuing of the execution, and while they were in full life, the plaintiff, in consideration that the defendants in execution would pay to

[1] [3 McLean, 376, contains only a partial report.]

him one hundred dollars each on the said judgments, agreed that he would extend the time for the payment of the balance due upon the judgments, until the next fall succeeding the time of the payment of the money; that on the 18th day of August, 1839, the said defendants in execution paid to the plaintiff one hundred dollars each on the said judgments, and that in consideration of said sums of money, the said plaintiff agreed to extend the time for the payment of the balance due on said judgments until the next fall succeeding the said payment. And further, in consideration of the payment of said sums of money, the plaintiff further agreed to cause the executions to be returned without being levied upon the property of the said defendants in execution; that the executions were returned without being levied, and that at the time of this agreement, the said defendants in the executions had personal property in their possession sufficient to satisfy the same, and on which the executions would have been a lien, if they had not been returned, and a levy had been made; and alleging, that, in consequence of this agreement to extend the time, and to return the executions without being levied, the debt was lost. The proof fully maintained the defence set up in the notice, and THE COURT being of opinion that the defence was good, so instructed the jury; and a verdict was rendered in favor of the defendant. The plaintiff moved for a new trial.

The case was tried at the December term, 1843, and was continued under advisement till the December term, 1844.

S. Y. Logan and A. Lincoln, for plaintiff, made the following points: (1) An agreement to give time which will discharge an endorser, must be founded on a valuable consideration. [M'Lemore v. Powell] 12 Wheat. [25 U. S.] 554; Chit. Bills (10th Ed.) 413. (2) An agreement to give time, made upon receiving from the maker of a note a part of the sum due, is a nudum pactum; for, by paying a part, the maker of the note did no more than he was legally bound to do; and an agreement to give time by the holder of a note, on receiving part payment, has no consideration to support it, and will not discharge the endorser. Pabodie v. King, 12 Johns. 426; 5 Wend. 501.

E. N. Powell and Wm. F. Bryan, for defendant, made the following points: (1) If the holder of a note for a valuable consideration, agrees to give time to the maker, the endorser is thereby discharged. M'Lemore v. Powell, 12 Wheat. [25 U. S.] 554; Bank of U. S. v. Hatch, 6 Pet. [31 U. S.] 250; Wood v. Jefferson County Bank, 9 Cow. 194; Chit. Bills, 408–423; Story, Bills, p. 499, § 425, note 2; Philpot v. Briant, 4 Bing. 717; Gould v. Robson, 8 East, 576; 4 Miller, 294; English v. Darley, 2 Bos. & P. 61; Hubbly v. Brown, 16 Johns. 70; Story, Bills, p. 512, § 436. (2) An agreement, in consideration of part payment by the maker, to extend the time of the payment of the balance, for a specified time, is binding upon the holder, and discharges all other parties. Gould v. Robson, 8 East, 576; English v. Darley, 2 Bos. & P. 61; Walwyn v. St. Quintin, 1 Bos. & P. 652; Clark v. Devlin, 3 Bos. & P. 365. (3) Although the receipt of part payment by the holder from the maker or acceptor, will not per se discharge the endorser; yet, if it be coupled with an agreement to give time for the remainder, the endorser will be discharged. Chit. Bills (10th Ed.) 418; Story, Bills, p. 512, § 436; English v. Darley, 2 Bos. & P. 61. The case in 2 Bos. & P. is a case directly in point. In that case the endorsee had prosecuted the acceptor to judgment, and took out execution, and then received of the defendant £100 in part payment, and took his bond and warrant for the remainder as a security, but received no additional security, and it was held that it discharged the endorser.

POPE, District Judge. The defence is, that the plaintiff, having obtained judgment against the makers of the notes sued on, and caused execution to be issued and placed in the hands of the sheriff for collection, agreed, that if the defendants would pay one hundred dollars each on the judgments, he would cause the executions to be returned without being levied, and would wait before further action for a certain length of time then agreed upon. The money was paid, the executions returned without being levied, and the delay granted. The plaintiff contends that the promise was void, because not upon a valuable consideration, the payment being no more than their duty, and what they had previously promised to do. The authorities all establish the position, that the promise to extend the time of payment must be on a valuable consideration to discharge the endorser. The cases adjudged are so various and numerous, and so is the application of the principle to many cases, where the shades of difference are very slight, that each case seems at last to have been more influenced by its own intrinsic merits, than by rigidly adhering to the rule.

The position of the plaintiff is, that no one can create a binding obligation to another by discharging a duty. Is this universally true in its application to society? It is man's duty to feed the hungry and clothe the naked; and it will not be denied that he might demand remuneration. These, it will be said, are not perfect obligations. This is true: still the moral obligation is the same as in the case of perfect obligations, which I define to be those enforced by law. The contract in this case is of the latter class, and involves the moral obligation to fulfil his promise, together with the prudential one as affecting his character for punctuality in the performance of his engagements—very im-

portant to him as a man of business, particularly as a merchant. But there is still another—the legal obligation to which the parties look in the last resort. The debtor is morally bound to make reasonable exertions to pay his debts, but not at a ruinous sacrifice. He is not bound to sacrifice property at one tenth or twentieth of its value, to raise the money; and as both parties, at the time of contracting, looked to the courts as open to the creditor for the application of coercive action, the conscience of the debtor is quieted, when he has made every effort which a reasonable man could ask. The contract is violated, the promise not kept. The creditor has taken the matter in hand, and is pursuing the property of the debtor through the courts of law. How stands the moral obligation now? Will it be matter of reproach to the debtor, that he relaxes, and leaves the creditor to pursue his remedy? Judgment is obtained, and execution in the hands of the officer. The creditor, at this stage of the proceedings, says to the debtor, "if you will pay me now a part, I will not levy on your property, will stop the execution, and give further time for the payment of the remainder." The money is paid, no levy is made, execution returned, and delay granted. Can it be said that this contract was not obligatory? Various reasons might be suggested as benefits to the creditor in this arrangement, as that he might expect great gain from the immediate use of the money stipulated to be paid. It may be imagined that he might have a valuable property subject to forfeiture for want of that sum, before the money could be made on the executions; or he might be unwilling to trust it in the hands of the sheriff. The arrangement itself implies that he expected to profit by it. Again, the defendant might deem it for his interest to sacrifice a portion of his property to obtain the indulgence. Gain to one party, or loss to the other, is a sufficient consideration. The contract was an executed contract, when the money was paid, and the execution was returned. In such cases, the consideration is good, but not where the contract is executory: as, if A agrees to accept a part of the debt in full payment. This agreement is not binding, for want of consideration. But if the money be paid and accepted in pursuance of the agreement, it is binding. Lynn v. Bruce, 2 H. Bl. 317; 2 Term R. 24. Again, in Story, Bills, p. 512, § 436, and in Chit. Bills, 418, it is laid down, that the receiving of part payment from one of the parties, after liability of all is fixed, does not discharge the other parties, unless it be accompanied by some other act impairing the rights of the holder against them—such as giving time, &c. This is the present case. If the plaintiff had promised to give time, upon the promise of the defendant to pay a part, he would not be bound by the agreement for want of consideration, as he had in the new promise no more than the defendant had already promised.

It is well settled, that the endorsee may sue both the drawer and endorser, or either, at his option. If he sues the drawer alone, it implies that he deems him solvent; for if he did not think so, why did he select him in preference to the endorser? This has a tendency to lull the endorser into a false security; therefore the plaintiff should in good faith prosecute his suit, and do no act to the injury of the endorser. But the suit is prosecuted to judgment; the liability of the drawer on the note is merged in the judgment, and the note, as to him, is extinguished, and no longer under the control of either party. Suppose the endorser had offered to pay the money to the endorsee, the latter was bound to surrender the note. This he could not do, (at least without the leave of court,) which might be attended with delay, or the endorsee would be entitled to the control of the judgment. This he could not have without the warrant of the plaintiff; this he could not give without a gross violation of faith and confidence between man and man. Lord Eldon, in the case of English v. Darley, 2 Bos. & P. 61, says: "If a holder enter into an agreement with a prior endorser, in the morning, not to sue him for a certain period of time, and then obliges a subsequent endorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued." Suppose there had been no third party in this case, what would be said of the plaintiff, if he had immediately gone on with the executions, and made a levy and sale of the property of the defendants. What would be the judgment of mankind upon it? Most unqualified condemnation for violated faith. I know of no system of morality or ethics, that would screen him from the contempt of mankind; nor can I think that a judge can be required by law to spread a mantle over such treachery. This case has so far been considered on the concession, that the liability and responsibility of the maker and endorser are identical. But this is not so. Of late years a case arose in England, where the court of common pleas decided one way, and the court of king's bench the reverse. It was this A gave his note for the payment of money at a particular place. The question was, whether the plaintiff was bound to allege in his declaration, and prove on the trial a demand at the place. The same question came before the supreme court of the United States, whose decision was, that if the suit were against the maker, no demand at the place was necessary, but if against the endorser, it was necessary, upon the ground that the endorser had not promised to place the money himself, but that the maker would. This decision to some extent has thrown overboard many dicta that every

endorser is a new drawer. See Bank of U. S. v. Smith, 11 Wheat. [24 U. S.] 171.

In the present case, inasmuch as the liability of the endorser as well as the maker was fixed, and the holder had the right to sue either or both, his suing the maker alone, and afterwards giving time after judgment, it is fair to presume that he was solvent, (independent of the testimony on that point,) and the endorser had a right to expect that the money would be made of the maker. He could not expect that the plaintiff would have granted time, if he had doubts of the ability of the defendants to pay. The holder may be passive if he pleases, without risk of discharging the endorser. He may decline to issue an execution, but he must do no positive act to stop the collection. The order to the sheriff not to levy, and to return the execution, is such an act as will discharge the endorser. This is a motion for a new trial, which is always addressed to the discretion of the court. In this case it seems that one of two innocent parties must suffer. If the plaintiff, after suing the makers, had done no act to obstruct or postpone the recovery of the money, the defendant could have had no pretence to exemption from liability. But, as the plaintiff did interfere to stop the execution, he ought to take the consequences. The defendant owed it to himself to know, that the execution was issued; but when issued by the plaintiff, and under his control, a disposition was thereby manifested to pursue the legal remedies against the makers; and he was satisfied with it, or he would have sued the endorser simultaneously with the makers. In this state of the case, the endorser could not have expected that the plaintiff would stop the execution, but the reverse, and therefore might not deem it important to inquire, or provide for such a step. And it was fully established by the evidence, that the makers, at the time of the agreement made to return the execution, had personal property sufficient to satisfy the debt, and on which the executions were a lien. I am therefore clearly of opinion, that the law and the justice of the case are with the defendant, and the motion for a new trial must be refused. Motion for new trial refused.

NOTE. By the laws of Illinois, the endorser of a note can only be made liable on his endorsement, by the institution and prosecution of a suit against the maker, at the first term of court after the note becomes due—unless the maker had left the state, or that the institution and prosecution of a suit would have been wholly unavailing. In the foregoing case, although the notes sued on were made in Illinois, the makers, payee, and the endorser residing there, yet they were endorsed by the defendant in New York; and the endorsement being a new and substantive contract, had to be governed by the law of the place of endorsement. This principle of the law seems to be so well settled, that it was not made a point in the case. Vide Story, Confl. Law, 260, 262; 12 Johns. 142; 12 Wend. 439; 2 Scam. 465; 6 Cranch, 221. The declaration averred that the notes were endorsed in New York, and a demand and notice, and that by the laws of New York endorsers are liable as by the law merchant, so that the case was governed solely by the lex mercatoria.

Case No. 8,562.

LOW v. WAYNE COUNTY SAV. BANK.

[14 Blatchf. 449.] [1]

Circuit Court, S. D. New York. May 18, 1878.

REMOVAL OF CAUSES — JURISDICTION OF FEDERAL COURT—CITIZENSHIP—AMOUNT INVOLVED—ARISING UNDER CONSTITUTION OR LAWS OF UNITED STATES.

Under section 2 of the act of March 3, 1875 (18 Stat. 470), a civil suit brought in a state court, where the matter in dispute exceeds, exclusive of costs, $500, and in which there is a controversy between citizens of different states, may be removed into the circuit court of the United States, even though the case is not one arising under the constitution, laws or treaties of the United States.

At law.

Benjamin Low, in pro. per., for the motion.

Frank & Weiss, opposed.

BLATCHFORD, Circuit Judge. This suit was removed into this court under the provisions of section 2 of the act of March 3, 1875 (18 Stat. 470). That section provides, that "any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district." When this suit was brought in the state court, the plaintiff was a citizen of the state of New York, and the defendant was a corporation created by the state of Pennsylvania. The defendant removed the suit into this court. The alleged ground of removal was, that there was in the suit a controversy between citizens of different states, and that the matter in dispute exceeded, exclusive of costs, the sum or value of $500. The suit was brought to recover $600, for professional services rendered to the defendant by the plaintiff, as an attorney and counsellor at law. The plaintiff now moves to remand the cause to the state court.

It is contended, for the plaintiff, that the statute specifies, first, the kind of causes

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

which are removable, namely, causes involving more than $500, when said causes are also causes arising under the constitution or laws or treaties of the United States; and, second, the persons who may remove the suit. It is also contended, that, even where the matter in dispute exceeds $500, and there is a controversy in the suit between citizens of different states, the suit is not removable, unless, also, the suit arises under the constitution, laws or treaties of the United States. This is not a sound proposition. The proper construction of the statute, is, that, to be removable, the suit must, in all cases, be a suit of a civil nature, and the matter in dispute must exceed, exclusive of costs, the sum or value of $500; and that, in addition, the suit must either be one arising under the constitution, or laws or treaties of the United States, or else must be one in which the United States are the plaintiff or the petitioner, or else must be one in which there is a controversy between citizens of different states, or else must be one in which there is a controversy between citizens of the same state claiming lands under grants of different states, or else must be one in which there is a controversy between citizens of a state and foreign states, citizens or subjects. Under that construction, this case was properly removed.

There is nothing in the decision in the case of Gold Washing and Water Co. v. Keyes, 96 U. S. 199, which sanctions the ground taken on the part of the plaintiff. The ground of removal in that case was not diversity of citizenship, but was that the suit arose under certain specified acts of congress, and the decision was that, in such a case, it must appear by the record that the suit arose, in part, at least, out of a controversy between the parties in regard to the construction or effect of the statutes, on the facts involved. The motion to remand is denied.

LOWBER (BANGS v.). See Case No. 840.

Case No. 8,563.

LOWBER v. SHAW.

[5 Mason, 241.] [1]

Circuit Court, D. New Hampshire. May Term, 1829.

WITNESS—AGENT TO PROVE HIS AUTHORITY—BILL DRAWN UNDER INSTRUCTIONS OF PRINCIPAL.

Where certain merchants had entered into a written contract to subscribe certain sums for a voyage to Africa, &c. and authorized their agent to draw bills for the amount, if he fitted out the expedition, and he drew a bill on one of the subscribers, for the amount subscribed by him, to pay for goods bought for the voyage on the credit of the written authority above stated, which was shown to the payee of the bill; it was *held*, that the agent, though drawer, was a competent witness to prove the facts in a suit brought by the payee against the subscriber, upon a constructive acceptance of the bill, it having been dishonoured, when presented for acceptance.

[Cited in Newhall v. Dunlap, 14 Me. 181, 182; Downer v. Button, 26 N. H. 345. Cited in brief in 42 Me. 463.]

Assumpsit by the plaintiff [Edward Lowber], as payee of a bill of exchange drawn at Philadelphia, by one Edmund Roberts, on the defendant, at Portsmouth, New Hampshire. The bill was dated 12th of May, 1827, for $500 payable to the plaintiff or order, at four months, for value received "being the amount of one share and interest in the cargo of the brig Mary Ann." The declaration contained three counts: 1. On the bill as an accepted bill. 2. For money had and received. 3. For money laid out and expended. Plea, the general issue. At the trial it appeared in evidence, that the defendant, with sundry other merchants at Portsmouth, on the 1st of December, 1826, signed the following paper: "The undersigned, having subscribed the several sums set against our respective names for a contemplated voyage to the eastern coast of Africa and elsewhere, do hereby authorize Mr. Edmund Roberts, of Portsmouth, New Hampshire, our agent and supercargo, to draw on us for the amount subscribed, in case he should complete his arrangements, and fit out the said expedition." The defendant signed, "William Shaw, $500." The bill, when presented to the defendant, on the 29th of May, 1827, was refused acceptance; but the plaintiff contended, that the paper was a constructive acceptance in point of law. The paper being read in evidence, Roberts was offered as a witness to prove, that he fitted out the expedition in the Mary Ann, and drew the bill, and that it was given for powder furnished for the voyage by the plaintiff, upon the faith of the authority of the paper, which was shown to him to procure the credit. The witness was objected to as incompetent from interest, by Cutts and Bartlett for defendant, and the objection was resisted by Mason for plaintiff.

An effort was made to prove a release by the plaintiff to the witness; but it failed from want of proof of the signature of the plaintiff, or of the subscribing witness to the release, which was produced in court.

The defendant's counsel cited 7 Term R. 265.

STORY, Circuit Justice. My opinion is, that the witness is competent without a release. It is the common case of an agent called upon to prove his authority and agency; and that has always been deemed an excepted case. The witness has an equal interest either way. If he drew the bill without authority, and it is recovered from the defendant, then he is responsible over to the latter. If, on the other hand, no such re-

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

covery is had, he is liable to the plaintiff. The witness must therefore be admitted.

He proved the facts above stated. In the farther progress of the cause, the defence turned upon the ground, that the witness had deviated from his authority in the shipments for the voyage, and that the facts were known to the plaintiff. It was admitted, that upon the authorities there was a constructive acceptance of the bill, if taken as the plaintiff contended, and there was no excess of authority in drawing the bill known at the time to the plaintiff. The jury found a verdict for the plaintiff.

LOWBER (TATHAM v.). See Cases Nos. 13,764 and 13,765.

LOWDERMILK (MANNING v.). See Case No. 9,046.

Case No. 8,564.

In re LOWE et al.

[11 N. B. R. (1875) 221.] [1]

District Court, E. D. Michigan.

BANKRUPTCY — SEPARATE ESTATE — PARTNERSHIP ASSETS—INTERESTS OF PARTNERS INTER SE.

1. Separate estate, in the meaning of the bankrupt law [14 Stat. 517] is that in which each partner is separately interested at the time of the bankruptcy. It might have been used, it is true, in connection with and for the benefit of the partnership business; but the term "separate estate," can be applied only to property so used, which belonged to one or more of the partners, to the exclusion of the rest.

2. Partnership assets must be applied to the payment of partnership debts without reference to any disproportion of the interests of the individual partners as between themselves.

On exception of the bankrupt, James Lowe, to the report and account of the assignee.

At the second meeting of creditors it appeared by the assignee's report and account that he had collected out of the partnership assets, and then had on hand ready for distribution, four thousand three hundred and sixty-four dollars and one cent, and that he had partnership assets still on hand undisposed of; and the assignee was directed to pay over to the partnership creditors three thousand five hundred and fifty-eight dollars and forty-two cents of the amount so in his hands, that being the whole amount of claims proved against the partnership. Thereupon the bankrupt, James Lowe, excepted, "for the reason that said report and account credits all the goods, chattels, and merchandise coming into the hands of the assignee in his said report, as if the same were assets of the said Lowe and Richards," and averring "that a large amount of the said goods, chattels, and merchandise, to wit, to amount of five thousand dollars, is the separate and individual property and assets of said James Lowe." The exception was certified by the register to the court for decision, and proofs were taken. The following facts appear:

April 8th, 1873, the said James Lowe and Frank P. Richards entered into partnership in the business of retailing ready-made clothing, cloths, and furnishing goods, and manufacturing clothing, etc., the partnership to continue one year from that date, with a provision for continuing the same for a longer period. By the articles of copartnership it is, among other things, provided "that the stock in trade with which they shall do business shall be the stock which is owned by James Lowe and in his store," etc., "that the said Frank P. Richards shall, at the time this article shall take effect, put into said business nine hundred and forty dollars, to be used as part payment to said Lowe for his interest in said stock, and shall further deliver to said Lowe one promissory note of five hundred and seventy-five dollars, and assign to him, said Lowe, a certain indenture of mortgage, bearing date the 15th day of October, 1868, for the sum of three hundred and five dollars—said note and mortgage to be collateral security for the amount of said note and mortgage;" "that the said Frank P. Richards shall, as soon as these articles shall take effect, own such a portion of the capital stock as said sum of nine hundred and forty dollars shall bear to the price of said stock, when invoiced," and when said note should be paid, Richards' interest was to be increased accordingly; "that the said James Lowe shall have the right to draw from the said stock on hand, or may draw or take from the money and proceeds that arise from the sale of the stock at any time until the stock of the copartnership is reduced so that each shall have the same amount vested in said copartnership business;" and that Richards should assume and pay one-half of certain specified debts contracted by Lowe for goods then in and to come into the stock. September 9th, 1873, the firm made a voluntary assignment of their partnership property and effects to one Lorenzo Palms, for the benefit of their creditors; and thereupon the partners made and signed a memorandum in writing, showing "their respective interests in the property which is jointly owned by them and so assigned." By this memorandum it was "mutually agreed by and between the said James Lowe and Frank P. Richards that the interest of the said Frank P. Richards in said property is five hundred and sixty-nine dollars and seventy-one cents, which amount is to be increased or diminished by his pro rata share of any loss or profits in the business of said firm from the time said business was commenced to this date," etc.; and "that the interest of the said James Lowe in said property is all the balance over and above the said sum hereinbefore mentioned as the in-

[1] [Reprinted by permission.]

terest of the said Frank P. Richards, and the said profit or loss, if any, is to be divided between the said James Lowe and Frank P. Richards, upon the basis of this statement and agreement." Not long after this, the firm was put into bankruptcy on a creditor's petition. The voluntary assignee surrendered to the assignee in bankruptcy all of said property and effects; and the latter has reported the same to the court as partnership assets without any distinction or statement as to the proportions of interest of the respective partners in the same, and Lowe excepted to the report, as before stated.

In support of the exception it was contended that the excess of Lowe's interest in the partnership property over that of Richards was his separate, individual property, and that the assignee ought to have so reported the same. It did not appear by the proofs that Lowe owed any individual debts, but such was conceded to be the fact at the hearing before the court.

Mr. Shumway and Mr. Pond, for the exception.

D. M. Dickinson, for assignee.

LONGYEAR, District Judge. Under the articles of copartnership, as well as the memorandum made at the time of the voluntary assignment, it is clear that the interest of each partner, whatever it was, extended to the entire stock in trade and every item thereof. The only difference between them was as to the amounts of capital owned by each, and the consequent difference in their respective interests in the stock. There was no specific portion or items reserved by Lowe as his separate, individual property any further than might be subsequently selected and withdrawn by him; and no such selection and withdrawal of any portion of the property reported by the assignee as partnership assets appear to have been made. No specific items of the property could therefore have been selected and set apart by the assignee as the separate estate of Lowe, relieved of the interest of Richards. "Separate estate," in the meaning of the bankrupt law, is that in which each partner is separately interested at the time of the bankruptcy. It might have been used, it is true, in connection with and for the benefit of the partnership business; but the term "separate estate" can be applied only to property so used, which belonged to one or more of the partners to the exclusion of the rest. James, Bankr. 187; Ex parte Hamper, 17 Ves. 403; Story, Partn. § 372; T. Pars. Partn. (1st Ed.) 492; Id. (2d Ed.) 510. No specific items of the property reported by the assignee as partnership assets, as we have seen, belonged to Lowe to the exclusion of Richards, and therefore the law as to separate property of individual partners used for partnership purposes has no application to the present case. Partnership assets must be applied to the payment of partnership debts, without reference to any disproportion of the interests of the individual partners as between themselves. Exception overruled.

Case No. 8,565.

LOWE v. The BENJAMIN.

[1 Wall. Jr. 187.] [1]

Circuit Court, E. D. Pennsylvania. April, 1847.

COSTS CONNECTED WITH WANT OF JURISDICTION.

Where a libel is dismissed for want of jurisdiction apparent on its face, costs of suit cannot be awarded to either party, though the costs of the motion to dismiss may be to the party which succeeds. But where, on the face of the libel, the court has jurisdiction, and the want of it, though really existing, is disclosed only by the defendant's answer and the evidence taken in the case, costs of suit may be awarded to the party who succeeds.

[Quoted in The City of Florence, 56 Fed. 236.]

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

Lowe had libelled the canal boat Benjamin in the district court. The libel was in the ordinary form, and set forth, in the usual general words, "the ebb and flow of the tide within the admiralty and maritime jurisdiction," &c., and such navigation as was requisite to give the court jurisdiction of the case. The answer denied the jurisdiction, and stated such facts as to the course of the vessel's voyages, and as to the sort of water that she navigated, as, if true, went to oust the jurisdiction. Evidence was accordingly taken upon these facts, and the jurisdiction was made one point of the case both in the district court and here, where it came from that court by appeal. The district court decided in favour of the jurisdiction [Case No. 8,580]. This court decided against it, and dismissed the libel for want of jurisdiction.

After this dismissal, Mr. Harris, for defendant, moved for costs of the suit.

Mr. Griscom, for libellant, opposed the motion on the ground that, as the libel had been dismissed because the court had no jurisdiction of the case, it was impossible to give costs; for that these could not be given unless the court had jurisdiction over the parties (M'Iver v. Wattles, 9 Wheat. [22 U. S.] 650), which it had been already decided in this very case that they had not.

GRIER, Circuit Justice. It is well settled that where a case is dismissed for want of jurisdiction apparent on the face of the record, the court will award costs to neither party; and this for the reason that the court, manifestly having no jurisdiction, cannot inquire into the facts, and of course can give

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

no judgment. While, at the same time, as the parties are in court for the purposes of the suit, the court will order the costs of the motion, as distinguished from costs of the suit or costs generally, to be paid to the party moving. Ex parte Davis, 5 Cow. 33; People v. Judges of Madison Co., 7 Cow. 423.

But where, on the showing of the plaintiff's writ and declaration, the court has apparent jurisdiction of the subject-matter of the cause, and the want of jurisdiction is first disclosed by the plea and evidence, the defendant ought to have judgment for his costs, in the same manner as if he had succeeded on the trial by the interposition of any other plea: and this for the reason that the parties are in court on the issue, and judgment has been rendered thereon.

The case before us is of the latter sort: The libel showed no want of jurisdiction. It, on the contrary, was regular enough, and the want of jurisdiction was first stated in the answer. Jurisdiction was one of the issues tried, and the subject of evidence and argument on both sides, as well in the district court as here. The parties were before the court, which had jurisdiction of the subject thus presented to them for trial. After some consideration, we can discover no good reason why the defendant should not recover his costs, which, in accordance with a reputable precedent (Thomas v. White, 12 Mass. 370), we decree accordingly.

LOWE v. The INCONIUM. See Case No. 6,995.

LOWE (LETTY v.). See Case No. 8,285.

Case No. 8,566.

LOWE v. McCLERY.

[3 Cranch, C. C. 254.] [1]

Circuit Court, District of Columbia. Dec. Term, 1827.

EVIDENCE—PAYMENT—CANCELLED CHECK—REBUTTING TESTIMONY.

A check drawn by the defendant in favor of the plaintiff, or bearer, with the bank's cancelling mark upon it, and produced by the defendant, is not evidence of money paid to the plaintiff, although it appear by the plaintiff's evidence, that when payment was demanded, the defendant said he had paid it by such a check, and although he produces his own check-book, with a memorandum corresponding with the check, with the additional words "for rent."

Assumpsit for use and occupation. Upon the trial it appeared by the plaintiff's examination of his witness, that when demand of the rent was made, the defendant [James McClery] said he had paid it by a check on the Office of Discount and Deposit, on the 9th of August.

Mr. Key, for the defendant, offered in evidence such a check on the Office of Discount and Deposit with the bank's cancelling mark upon it, payable to the plaintiff [Lloyd M. Lowe] or bearer, and the defendant's own check-book, with a margin corresponding with the check in amount, name, and date, and the words "on account of rent."

Mr. Key contended that the circumstance that the plaintiff's witness had testified that the defendant said he had paid the rent by such a check would justify the admission of the check in evidence.

But THE COURT (MORSELL, Circuit Judge, contra) refused to admit the check in evidence.

MORSELL, Circuit Judge, was of opinion that it might be given in evidence to corroborate the defendant's declaration, and to rebut the presumption which might arise from the defendant's not producing the check.

Verdict for plaintiff $57.15. Motion for new trial overruled.

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

Case No. 8,567.

LOWE v. STOCKTON et al.

[4 Cranch, C. C. 537.] [1]

Circuit Court, District of Columbia. March Term, 1835.

NEGLIGENCE—STAGE OWNERS—CARRYING OFF SLAVES—CUSTOMARY DILIGENCE.

The owners of a stage-coach are liable for the negligence of their agent in suffering the plaintiff's slaves to be taken away in their coach; but not if the agent has used all the diligence which is customary and usual in similar cases.

This was an action upon the case for permitting the plaintiff's slaves to be carried away in the defendant's stage-coach. The slaves were colored persons. A decent, respectable-looking white woman, who gave her name as Powell, came to the stage-coach office of the defendants [Stockton & Stokes] in the morning of that day, or the day before, and told the office-keeper that she wished to take seats for two of her servants, and that they would be there at the time of the departure of the evening stage-coach; and she paid for their passage. The servants came at the time and said they were the persons for whom Mrs. Powell had paid the passage; and they were permitted to take their seats.

THE COURT, at the prayer of Mr. Key, for plaintiff [Elizabeth Lowe], instructed the jury, as in Mandeville v. Cookenderfer [Case No. 9,009], at December term, 1827, that if they believe, from the evidence, that the slaves of the plaintiff were taken away, without her consent, in the stage-coach of the defendants, and that the agent of the defendants, by using due and reason-

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

able diligence, could have prevented their being so taken away, and that the said agent did not use such due and reasonable diligence, then the defendants are liable.

And, at the prayer of Mr. Coxe, for defendants, further instructed them, that if they should believe from the evidence that the defendants' said agent used all the diligence which is customary and usual in similar cases, then the plaintiff is not entitled to recover.

Verdict for the plaintiff, $200. But a new trial was granted upon new evidence discovered, that the woman, who paid for the seats of the slaves, was not named Powell, but Howard, and was the sister of the plaintiff, and resided with her.

LOWE (UNITED STATES v.). See Cases Nos. 15,634 and 15,635.

LOWE, The JOHN. See Case No. 7,356.

Case No. 8,568.

LOWELL v. LEWIS.

[1 Mason, 182;[1] 1 Robb, Pat. Cas. 131.]

Circuit Court, D. Massachusetts. May Term, 1817.

PATENTS—USEFULLNESS — AMBIGUITY — IMPROVEMENT ON OLD MACHINE—CLEARNESS OF SPECIFICATIONS—FIRST IN TIME.

1. The law entitles a party to a patent for a new and useful invention; and by "useful" is meant, not an invention in all cases superior to the modes now in use for the same purpose, but "useful" in contradistinction to frivolous and mischievous inventions.

[Cited in Kneass v. Schuylkill Bank, Case No. 7,875; Whitney v. Emmett, Id. 17,585; Blake v. Smith, Id. 1,502; Hotchkiss v. Greenwood, 11 How. (52 U. S.) 269; Stimpson v. Woodman, 10 Wall. (77 U. S.) 125; Seymour v. Osborne, 11 Wall. (78 U. S.) 549; Doherty v. Haynes, Case No. 3,963; Gibbs v. Hoefner, 19 Fed. 324.]

[Cited in brief in Dickinson v. Hall, 14 Pick. 219, 220. Cited in Dunbar v. Marden, 13 N. H. 318, 319; Robertson v. Thompson, 3 Ind. 190; Rowe v. Blanchard, 18 Wis. 442; Nash v. Lull, 102 Mass. 60; First Nat. Bank of Sturgis v. Peck, 8 Kan. 667; Wilson v. Hentges, 26 Minn. 291, 3 N. W. 340; Tod v. Wick, 36 Ohio St. 393.]

2. The patentee must describe in his patent, in what his invention consists, with reasonable certainty, otherwise it is void for ambiguity. If it be for an improvement in an existing machine, he must, in his patent, distinguish the new from the old, and confine his patent to such parts only as are new; for if both are mixed up together, and a patent is taken for the whole, it is void.

[Cited in Goodyear v. Mathews, Case No. 5,576; Evans v. Hettick, Id. 4,562; Whitney v. Emmett, Id. 17,585; Davoll v. Brown, Id. 3,662; Hovey v. Stevens, Id. 6,745; Hovey v. Stevens, Id. 6,746; Hogg v. Emerson, 6 How. (47 U. S.) 484; Blake v. Stafford, Case No. 1,504.]

[Cited in Davis v. Bell, 8 N. H. 503; Holliday v. Rheem, 18 Pa. St. 467; Tillotson v. Ramsay, 51 Vt 314.]

3. But if the invention be definitely described in the patent, so as to distinguish it from what is before known, the patent is good, although the specification does not describe the invention in such full, exact, and clear terms, that a person skilled in the art or science, of which it is a branch, could construct or make the thing invented; unless such defective description or concealment were with intent to deceive the public.

[Cited in Whitney v. Emmett, Case No. 17,585; Gray v. James, Id. 5,718; Webster Loom Co. v. Higgins, 105 U. S. 588.]

4. As among inventors, he who is first in time, has a prior exclusive right to the patent for the invention.

[5. Cited in Hogg v. Emerson, 11 How. (52 U. S.) 608, on the question of damages in infringement cases.]

This was an action on the case for the infringement of a patent-right. March 23, 1813, Mr. Jacob Perkins obtained a patent for a new and useful invention in the construction of pumps, and afterwards assigned his interest therein to the plaintiff [Francis C. Lowell]. The defendant [Winslow Lewis], became the assignee of a similar patent, taken out in 1817, by a Mr. James Baker; and it was for the constructing and vending pumps under this second patent, that the action was brought. The principal object of both the inventions, was, by dispensing with the box used in the common pumps, to obtain a larger water-way. To effect this, Perkin so constructed the valves of his pump, that they completely filled the area of the shaft, and fell upon its sides in the same manner, as by the old construction they did upon the box; thus leaving the whole of the area, excepting that occupied by the valves themselves, for a water-way. The valves were of a triangular shape, and adapted only to a pump of a square form. This pump seemed to be principally useful, when it was desirable to throw up large quantities of water in a short space of time, and a number of hands could be put to the working of it. The valves of Baker's pump were fitted to a round shaft, and occupied, like the other, the whole of its area; but instead of resting upon the sides of the shaft, were supported by a brass rim, which prevented the friction against the sides of the shaft consequent upon the other construction, and to obviate which, Perkins, since obtaining his patent, had adopted a check-bolt. It appeared, that Baker's invention required fewer hands to work it, and could be applied to the common house-pump.

Mr. Webster and G. Sullivan, for defendant, contended, that the invention of Perkins was neither new nor useful, and therefore, not entitled to a patent. That the specification was so loose and insufficient, as not to answer the requisites of the law in this particular, and the patent, therefore, void on that account; and further, that the invention of the defendant was substantially different from that of the plaintiff.

Mr. Gorham, for plaintiff, endeavored to show, that the improvement invented by Per-

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

kins was entirely new, and highly useful; and the specification sufficient to answer the requisites of the law, which only required, that it should be so particular, as that persons, acquainted with the construction of the same kind of machines, might be able to follow the description of it. And that, although differing in shape and some other unimportant particulars, it was, in principle, the same as that made and recorded by the defendant, under the patent of Baker.

A great number of witnesses were produced on both sides to sustain these positions.

STORY, Circuit Justice (charging jury). The present action is brought by the plaintiff for a supposed infringement of a patent-right, granted, in 1813, to Mr. Jacob Perkins (from whom the plaintiff claims by assignment) for a new and useful improvement in the construction of pumps. The defendant asserts, in the first place, that the invention is neither new nor useful; and, in the next place, that the pumps used by him are not of the same construction as those of Mr. Perkins, but are of a new invention of a Mr. Baker, under whom the defendant claims by assignment. If the plaintiff is entitled to recover, the patent act gives him treble the actual damages sustained by him; and the rule for damages is, in this case, to allow the plaintiff treble the amount of the profits actually received by the defendant, in consequence of his using the plaintiff's invention. The jury are to find the single damages, and it is the proper duty of the court to treble them in awarding judgment. And let the damages be estimated as high, as they can be, consistently with the rule of law on this subject, if the plaintiff's patent has been violated; that wrong doers may not reap the fruits of the labor and genius of other men.

To entitle the plaintiff to a verdict, he must establish, that his machine is a new and useful invention; and of these facts his patent is to be considered merely prima facie evidence of a very slight nature. He must, in the first place, establish it to be a useful invention; for the law will not allow the plaintiff to recover, if the invention be of a mischievous or injurious tendency. The defendant, however, has asserted a much more broad and sweeping doctrine; and one, which I feel myself called upon to negative in the most explicit manner. He contends, that it is necessary for the plaintiff to prove, that his invention is of general utility; so that in fact, for the ordinary purposes of life, it must supersede the pumps in common use. In short, that it must be, for the public, a better pump than the common pump; and that unless the plaintiff can establish this position, the law will not give him the benefit of a patent, even though in some peculiar cases his invention might be applied with advantage. I do not so understand the law. The patent act (Act Feb. 21, 1793, c. 11 [1 Stat. 318]) uses the phrase "useful invention" mere incidentally; it occurs only in the first section, and there it seems merely descriptive of the subject matter of the application, or of the conviction of the applicant. The language is, "when any person or persons shall allege, that he or they have invented any new and useful art, machine," &c., he or they may, on pursuing the directions of the act, obtain a patent. Neither the oath required by the second section, nor the special matter of defence allowed to be given in evidence by the sixth section of the act, contains any such qualification or reference to general utility, to establish the validity of the patent. Nor is it alluded to in the tenth section as a cause, for which the patent may be vacated. To be sure, all the matters of defence or of objection to the patent are not enumerated in these sections. Whitemore v. Cutter [Case No. 17,600]. [1 Robb. Pat. Cas. 28–33.][2] But if such an one as that now contended for, had been intended, it is scarcely possible to account for its omission. In my judgment the argument is utterly without foundation. All that the law requires is, that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society. The word "useful," therefore, is incorporated into the act in contradistinction to mischievous or immoral. For instance, a new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention. But if the invention steers wide of these objections, whether it be more or less useful is a circumstance very material to the interests of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt and disregard. There is no pretence, that Mr. Perkins' pump is a mischievous invention; and if it has been used injuriously to the patentee by the defendant, it certainly does not lie in his mouth to contest its general utility. Indeed the defendant asserts, that Baker's pump is useful in a very eminent degree, and, if it be substantially the same as Perkins's, there is an end of the objection; if it be not substantially the same, then the plaintiff must fail in his action. So that, in either view, the abstract question seems hardly of any importance in this cause.

The next question is, whether Mr. Perkins's pump be a new invention. In the present improved state of mechanics, this is often a point of intrinsic difficulty. It has been often decided, that a patent cannot be legally obtained for a mere philosophical or abstract theory; it can only be for such a theory reduced to practice in a particular structure or combination of parts. In short, the patent must be for a specific machine, substantially new in its structure and mode of operation,

[2] [From 1 Robb. Pat. Cas. 131.]

and not merely changed in form, or in the proportion of its parts. Mr. Perkins's pump is square, and it is agreed, that a piston exactly fitted, and used as in his pump, cannot be found described in any scientific treatise. and has never been seen in operation. The butterfly valve, which approaches very near to it, has certainly been in use, and a triangular shape was well known in the perimeter valves. But the exact structure and position of a valve in a square pump, uniting the triangular and butterfly forms, is not known to have been used at any time previous to his invention, in the precise manner, in which Mr. Perkins uses them. In short, the combination of structure, which he uses, is alleged by the plaintiff's witnesses to be new; and if the jury are satisfied, that it is substantially different from any thing before known in its mode of operation, then the plaintiff has surmounted this objection to his title to a recovery.

An objection of a more general cast (and which might more properly have been considered at the outset of the cause, as it is levelled against the sufficiency of the patent itself) is, that the specification is expressed in such obscure and inaccurate terms, that it does not either definitely state, in what the invention consists, or describe the mode of constructing the machine so, as to enable skilful persons to make one. I accede at once to the doctrine of the authority, which has been cited (MacFarlane v. Price, 1 Starkie, 199), that the patentee is bound to describe, in full and exact terms, in what his invention consists; and, if it be an improvement only upon an existing machine, he should distinguish, what is new and what is old in his specification, so that it may clearly appear, for what the patent is granted. The reason of this principle of law will be manifest upon the slightest examination. A patent is grantable only for a new and useful invention; and, unless it be distinctly stated, in what that invention specifically consists, it is impossible to say, whether it ought to be patented or not; and it is equally difficult to know, whether the public infringe upon or violate the exclusive right secured by the patent. The patentee is clearly not entitled to include in his patent the exclusive use of any machinery already known; and if he does, his patent will be broader than his invention, and consequently void. If, therefore, the description in the patent mixes up the old and the new, and does not distinctly ascertain for which, in particular, the patent is claimed, it must be void; since if it covers the whole, it covers too much, and if not intended to cover the whole, it is impossible for the court to say, what, in particular, is covered as a new invention. The language of the patent act itself is decisive on this point. It requires (section 3) that the inventor shall deliver a written description of his invention "in such full, clear, and exact terms, as to distinguish the same from all other things before known; and in the case of any machine, he shall fully explain the principle, and the several modes, in which he has contemplated the application of that principle, or character, by which it may be distinguished from other inventions." It is, however, sufficient, if what is claimed as new appear with reasonable certainty on the face of the patent, either expressly or by necessary implication. But it ought to appear with reasonable certainty; for it is not to be left to minute inferences and conjectures, from what was previously known or unknown; since the question is not, what was before known, but what the patentee claims as new; and he may, in fact, claim as new and patentable, what has been long used by the public. Whether the invention itself be thus specifically described with reasonable certainty, is a question of law upon the construction of the terms of the patent, of which the specification is a part; and on examining this patent, I at present incline to the opinion, that it is sufficiently described, in what the patented invention consists.

A question nearly allied to the foregoing, is, whether (supposing the invention itself be truly and definitely described in the patent) the specification is in such full, clear, and exact terms, as not only to distinguish the same from all things before known; but "to enable any person skilled in the art or science, of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same." This is another requisite of the statute (section 3), and it is founded upon the best reasons. The law confers an exclusive patent-right on the inventor of any thing new and useful, as an encouragement and reward for his ingenuity, and for the expense and labor attending the invention. But this monopoly is granted for a limited term only, at the expiration of which the invention becomes the property of the public. Unless, therefore, such a specification was made, as would at all events enable other persons of competent skill to construct similar machines, the advantage to the public, which the act contemplates, would be entirely lost, and its principal object would be defeated. It is not necessary, however, that the specification should contain an explanation, level with the capacities of every person (which would, perhaps, be impossible); but, in the language of the act, it should be expressed in such full, clear, and exact terms, that a person skilled in the art or science, of which it is a branch, would be enabled to construct the patented invention. By the common law, if any thing material to the construction of the thing invented be omitted or concealed in the specification, or more be inserted or added, than is necessary to produce the required effect, the patent is void. This doctrine of the common law our patent act has (whether wisely, admits of

very serious doubts) materially altered; for it does not avoid the patent in such case, unless the "concealment or addition shall fully appear to have been made for the purpose of deceiving the public." Section 6. Yet certainly the public may be as seriously injured by a materially defective specification resulting from mere accident, as if it resulted from a fraudulent design. Our law, however, is as I have stated; and the question here is, and it is a question of fact, whether the specification be so clear and full, that a pump-maker of ordinary skill could, from the terms of the specification, be able to construct one upon the plan of Mr. Perkins. The principal objection to the specification in this case is, that it does not describe the check-bolt, or the form, or use, or size of the leather, or the mode of forming its edge and fixing it upon the valve, or the exact position and elevation of the valve. (Here the judge read the specification, and commented on the evidence applicable to these objections; and left it to the jury to say, upon the facts, whether the specification was materially defective, and, if so, whether it was by design to deceive the public.)

Another (and under the circumstances of this case, probably the most material) inquiry is, whether the defendant has violated the patent-right of the plaintiff; and that depends upon the fact, whether the pumps of Mr. Perkins and of Mr. Baker are substantially the same invention. I say substantially the same invention, because a mere change of the form or proportions of any machine cannot, per se, be deemed a new invention. If they are the same invention, then Mr. Perkins, being clearly the first inventor, is entitled exclusively to the patent right, although Mr. Baker may have been also an original inventor; for the law gives the right, as among inventors, to him, who is first in time.

The manner, in which Mr. Perkins's invention is, in his specification, proposed to be used, is in a square pump, with triangular valves, connected in the centre, and resting without any box on the sides of the pump, at such an angle as exactly to fit the four sides. The pump of Mr. Baker, on the other hand, is fitted only for a circular tube, with butterfly valves of an oval shape, connected in the centre, and resting, not on the sides of the pump, but on a metal rim, at a given angle, so that the rim may not be exactly in contact with the sides, but the valve may be. If from the whole evidence the jury is satisfied, that these differences are mere changes of form, without any material alteration in real structure, then the plaintiff is entitled to recover; if they are substantially different combinations of mechanical parts to effect the same purposes, then the defendant is entitled to a verdict. This is a question of fact, which I leave entirely to the sound judgment of the jury.

Verdict for the defendant.

Case No. 8,569.

LOWELL MANUF'G CO. et al. v. HARTFORD CARPET CO.

[2 Fish. Pat. Cas. 472.] [1]

Circuit Court, D. Connecticut. July, 1864

PATENTS—LICENSE TO USE—ROYALTY—PATENT EXPIRED.

1. The Lowell Manufacturing Company, in 1847, licensed the Thompsonville Carpet Manufacturing Company, to use one hundred and twenty-five looms, corresponding to models furnished by the licensors, until August 18, 1860, "and for the additional term of any extension which may be hereafter granted, of any patent now owned by the Lowell Manufacturing Company relative to such looms," for a specified royalty. It appeared that two patents were involved in the construction of these looms, one to a considerable and the other to an inconsiderable extent. The first expired October 23, 1863, and was not extended; the second was extended prior to August 18, 1860. *Held*, that, as to the first patent, no royalty was payable, upon the portions of the loom covered by it, after August 18, 1860.

2. As to the second patent, the improvements claimed therein were not materially useful to the looms used by the Thompsonville Carpet Manufacturing Company, and their successors, and were not used by them to an extent that would justify the interference of the court by injunction.

[Cited in Hoe v. Boston Daily Advertiser Corp., 14 Fed. 916; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 933.]

This was a bill in equity, filed to restrain the defendants from infringing two letters patent granted to Erastus B. Bigelow, one for "improvement in power looms," dated April 10, 1845 [No. 3,987], and extended for seven years from April 10, 1859; and the other for "improvement in Jacquard looms," dated October 23, 1849 [No. 6,806].

The complainants had, in 1847, granted the following license to the Thompsonville Carpet Company:

"This indenture, made this thirty-first day of August, A. D. eighteen hundred and forty-seven, by and between the Lowell Manufacturing Company, a corporation established by the laws of Massachusetts, of the one part, and the Thompsonville Carpet Manufacturing Company, a corporation established by the laws of Connecticut, of the other part, witnesseth: That the Lowell Manufacturing Company, in consideration of the convenants and agreements of the said Thompsonville Carpet Manufacturing Company, hereinafter contained, doth, by these presents, grant, bargain, sell, and assign to the said Thompsonville Carpet Manufacturing Company, the right to own and use for the weaving of two-ply and three-ply carpeting and floor-cloth, but for no other purpose whatever, at their factory in Thompsonville, not less than one hundred and twenty-five nor more than one hundred and fifty looms corresponding to the models hereinafter mentioned, for the remainder of the term of fourteen years from the eighteenth day of August, A. D. eighteen

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

hundred and forty-six, to the eighteenth day of August, A. D. eighteen hundred and sixty, and for the additional term of any extension which may be granted hereafter by the United States, of any patent right now owned by the said Lowell Manufacturing Company, relative to such looms and business as aforesaid; the said Thompsonville Carpet Manufacturing Company yielding and paying therefor to the said Lowell Manufacturing Company, its successors and assigns, by semi-annual payments, on or before the last days of January and July in each and every year during said term and the term of any extension aforesaid, a sum of money which shall always be proportioned to the whole quantity of carpeting and floor-cloth which shall have been actually woven on the said looms, or any of them, during each six months ending on the last days of December and June respectively, during said term and the term of any extension aforesaid, at and after the rates following, to wit: Two cents for each square yard of two-ply carpeting or floor-cloth, and four cents for each square yard of three-ply carpeting or floor-cloth actually woven as aforesaid; and the said Lowell Manufacturing Company, for the consideration aforesaid, doth covenant with the Thompsonville Carpet Manufacturing Company, in manner following:

"First. The said Thompsonville Manufacturing Company, punctually paying the semi-annual sums ascertained as aforesaid, and performing all other convenants and agreements on their part herein contained, shall have the right to own and use during the said term and the term of any extension aforesaid, the said limited number of looms, with all the improvements therein patented, and to be patented, in the business aforesaid, without let or hindrance of the said Lowell Manufacturing Company, or of any person claiming under said company, and shall have the further right to make and use in the said business, during the said term and the term of any extension aforesaid, on the same limited number of looms, any new improvenemt in said machines, for said manufacture, which may be hereafter patented by the Lowell Manufacturing Company, or which may otherwise become the property of said company.

"Second. The said Lowell Manufacturing Company shall and will make and deliver to said Thompsonville Carpet Manufacturing Company, within a reasonable time after the execution of these presents, on receiving from said company the cost thereof, one model loom for the weaving of two-ply carpeting, and one model loom for the weaving of three-ply carpeting, of the most approved construction now known to the Lowell Manufacturing Company, and shall and will also allow the Thompsonville Carpet Manufacturing Company to use, for the purpose of constructing a limited number of like looms as hereinafter provided, all patterns for castings needful for the construction of looms corresponding to said models, it being understood that the patterns are to be used only at the foundry where they may for the time being be by direction of the Lowell Manufacturing Company.

"Third. If it should happen that the said Lowell Manufacturing Company shall, any time thereafter during said term, or the term of any extension aforesaid, sell to any other person or corporation the right to use in the said business the said machinery and improvements in the United States of America, for a less price or rate of payment than is above stipulated, whensoever and so often as any such sale be made at a reduced price, the rate to be thereafter paid during the residue of the said term and the term of any extension aforesaid, by the Thompsonville Carpet Manufacturing Company, shall be also reduced, so that the said company shall always have and enjoy the right of using the said machines and improvements at the lowest rate agreed to be paid therefor by any other purchasers of the said right during the same period, it being understood that this provision is not intended to apply to the use by other parties of any part or parts of such machines and improvements unless by the express permission of the Lowell Manufacturing Company; and the said Thompsonville Carpet Manufacturing Company, in consideration of the premises, doth hereby covenant with the Lowell Manufacturing Company, its successors and assigns, in manner following:

"First. The said Thompsonville Carpet Manufacturing Company will and shall purchase and pay for at cost the two model looms above mentioned, so soon as the same shall be ready for delivery, and within two years thereafter the said company will and shall build, for cause to be built and put in actual operation, at their said factory, not less than seventy-five looms, corresponding to said model looms, and within three years from the delivery of said model looms the said company will and shall build or cause to be built and put in actual operation at their said factory not fewer than fifty more like looms; and it is well understood between the parties that the said Thompsonville Carpet Manufacturing Company shall not be bound to put in operation any greater number than one hundred and twenty-five of said looms in the whole, but shall have the right, at their own option, to build and put in operation at their said factory, at any time during said term, and during the term of any extension aforesaid, any number not exceeding twenty-five of said looms in addition to the one hundred and twenty-five aforesaid, on giving notice in writing to said Lowell Manufacturing Company, of their intention so to do; said looms to be either for two-ply carpeting or three-ply carpeting, or any proportion between the two, as they shall think expedient.

"Second. The said Thompsonville Carpet Manufacturing Company will not and shall not use the said looms, or any of them, nor permit the same to be used for any other species of manufacture than either two-ply or three-ply ingrain carpeting or floor-cloth, nor at any other place than their said factory, nor permit the same to be used by any other persons, except persons employed by them in manufacturing, at their said factory, and for their account, without the consent of the said Lowell Manufacturing Company to any such substitution first had and obtained in writing.

"Third. The said Thompsonville Carpet Manufacturing Company will and shall punctually pay, on or before the last days of January and July in each year during said term, and the term of any extension aforesaid, a sum of money always proportioned to the aggregate product of said looms during the preceding six months ending on the thirty-first day of December and the thirtieth day of June in each year, estimated at the rates above fixed, or at such reduced rate as is above provided for, in case a reduction should occur; and they will and shall, during the said months of January and July in each year make and render true statements in writing of the whole number of square yards of each description of carpeting and floor-cloth actually woven at their said factory during the said preceding six months, by means of said looms, or any of them, and they will and shall keep at their said factory regular and true books of account, showing the number of looms of each description in operation from time to time, and the daily product of each loom, which books shall be kept open at all times during the said term, and the term of any extension aforesaid, to the free inspection of any agent or agents appointed therefor by the directors of the said Lowell Manufacturing Company.

"And it is mutually understood and agreed by the parties hereto, that all the foregoing grants, covenants, and agreements of the said Lowell Manufacturing Company, concerning the use of any machines patented or to be patented, are upon express condition that if the said Thompsonville Carpet Manufacturing Company shall, at any time, fail to pay punctually when due the semi-annual payments aforesaid, estimated at the rate above specified, or at such reduced rate as may be hereafter fixed in the manner aforesaid, if any such reduction should occur, or if they shall fail to make and render true accounts, as above provided, or otherwise fail to perform any of the foregoing covenants and agreements on their part, in such case, and immediately upon the happening of such default, or at any time after, while the same default continues, the said Lowell Manufacturing Company shall have the right, by vote of the directors, and delivery of an attested copy thereof to any officers of the said Thompsonville Carpet Manufacturing Company, or leaving the same at their factory, whether then in operation or not, to terminate this contract, and thereupon all the grants, covenants, and agreements of the said Lowell Manufacturing Company shall become null and void, and the right of the said Thompsonville Carpet Manufacturing Company, and of all persons claiming under them, to any further use of the said machines and improvements, patented and to be patented, shall thereby cease and be determined.

"In witness whereof, the said parties have hereunto interchangeably set their respective seals and subscribed their respective corporate names, the Lowell Manufacturing Company by their treasurer, thereunto authorized, and the Thompsonville Carpet Manufacturing Company by their agent, thereunto authorized, the day and year first above written."

After working under this license for some years, the Thompsonville Carpet Company failed, and, with the consent of complainants, the license was transferred to the defendants, the Hartford Carpet Company, who had purchased the effects of the licensees, and who continued to work and make payments under the license until shortly after August 18, 1860, when they ceased to pay further royalty. The complainants demanded payment, and, upon refusal, passed a resolution revoking the license, and filed their bill.

S. L. Thorndyke, E. W. Stoughton, and B. R. Curtis, for complainants.

Hungerford & Cone, R. D. Hubbard, George Gifford, and Charles O'Connor, for defendants.

NELSON, Circuit Justice. I. We are of opinion, that, upon the true construction of the agreements of August 31, 1847, the respondents were entitled to construct and use the number of looms therein specified, according to the models furnished by the Lowell Company, for the rate of compensation mentioned, until August 18, 1860, and after that period without any further tariff or compensation, with the single exception, in case of the extension of one or more of the patents existing at the date of the agreements. The latter, to wit: the extension, is the only condition upon which the payment of the tariff after the period mentioned, is made to depend. If there was no extension, there was to be no further payment for the use of these looms. This disposes of the patent of October 23, 1849.

II. The patent of April 10, 1845, was extended for the term of seven years from April 10, 1859. But we are of opinion:

1. That this patent was not a patent within the meaning of the agreements of August 31, 1847, it being a patent for improvements in a loom for weaving fabrics other than and different from the two and three-ply carpets;

namely, to weave plaid ginghams and the like; and further, that this was so understood by Mr. Bigelow and the Lowell Company, as is apparent from the proofs in the case.

2. That the improvements claimed in this patent are not materially useful in the looms for weaving the two and three-ply carpeting; or, if so, the respondents have not used them to an extent that would justify the interference of the court by injunction. The improvements included in this patent, and which are claimed to be useful in the power looms represented by the models mentioned in the agreements, and the right to the use of which was covered thereby, are small and limited, compared with the other parts or portions of these looms.

If there be any infringement, injunction would not be the appropriate remedy under the circumstances stated. Decree for the respondents.

Case No. 8,570.

LOWELL MANUF'G CO. v. LARNED.

[Codd. Dig. 341; Cox, Manual Trade-Mark Cas. 241.]

Circuit Court, W. D. Pennsylvania. 1873.

TRADE-MARKS—HOLLOW WOODEN STICK FOR CARPET ROLLS.

[The plaintiffs, manufacturers of carpets, had adopted and used for a long while as a trade-mark an octagonal, hollow, wooden stick, upon which their carpets were rolled. When so rolled, the stick presented at its ends the appearance of two octagonal wooden rings. This stick had become well known in trade as indicating carpets manufactured by the plaintiffs. *Held*, that this stick was a valid trade-mark, for an unauthorized use of which the defendant was liable in damages, and to an injunction to restrain future use.]

The plaintiffs, since 1855, had rolled their carpets upon a hollow stick, which stick, when put into the centre of their rolls of carpet, they claimed to be their trade-mark. The stick consisted of two pieces, ground on the inside, so that when the two pieces were put together they formed a shell with a rectangular opening, and with the corners of the outside rounded off, so that the ends of the stick or shell formed an octagonal ring. This ring was both visible and tangible in each end of each roll of carpet. The stick or shell was made the length of the rolls of carpet, so as to exhibit the rings. The shell was adopted in 1855, and used continuously ever since, by plaintiffs, as a trade-mark, and was registered as a trade-mark in the U. S. patent office in 1871. The defendants, in 1872, commenced to make and sell carpets rolled upon sticks resembling the sticks used by the plaintiffs. The plaintiffs filed a bill to enjoin the defendants from the use by them of such sticks for carpets. The evidence in the case showed that such sticks in rolls of carpet indicated to the public that the goods containing them were made by the plaintiffs; that any one seeing the shells in carpets would suppose them to be the plaintiffs' goods; and that the use by the defendants of said sticks would deceive the public.

HELD BY THE COURT: That said stick, as claimed by the plaintiffs, was a good and valid trade-mark; that they were entitled to its exclusive use; and that the defendants should be enjoined, and pay to the plaintiffs the profits and gains received by them in consequence of their infringement, together with such damages as plaintiffs had suffered thereby.

LOWELL MANUF'G CO. (MORRIS v.). See Case No. 9,833.

Case No. 8,571.

LOWELL NAT. BANK v. TRAIN et al.

[2 Mich. Lawy. 27.]

District Court, W. D. Michigan. 1877.

PARTNERSHIP—COMPROMISE BY INDIVIDUAL PARTNERS—CONTRIBUTION.

1. Under the Michigan statute (Comp. Laws, §§ 6199, 6201), providing for separate compromises of partnership debts with individual members of the firm, the remaining partners of the firm who do not compromise cannot be held liable to the creditor for any more than the balance due him, though their joint ratable proportion of the whole debt exceeds that balance.

2. They would be liable under section 6202 to their co-partners, who by compromise paid more than their proportion, to make contribution; and this shows that their liability to the creditor must be limited in such case to the balance of the debt unpaid.

Champlin, Butterfield & Fitzgerald, for plaintiff.

Holmes & Stone, for defendants.

WITHEY, District Judge. Sixty-seven persons associated by articles under the name of the "Lowell Horse and Agricultural Association," and subscribed $37,000 stock. No attempt was made to create an incorporated company under the state law, and no assertion of corporate rights or powers. The persons were held to be partners. The association owed the Lowell National Bank $5,500 and some accrued interest. Some of the partners were pecuniarily responsible, while others were not responsible. The bank offered a compromise to any who should pay a given rate per cent. which, on the basis that there was $20,000 of responsibility represented, would meet the debt. Thirty-seven paid the required sum upon that basis, and received discharges. By this process, the debt was paid, less $803.69, and the suit was commenced against the remaining thirty members not accepting the terms of compromise, to recover whatever balance the bank was entitled to have. At the trial, in October, plaintiff claimed a verdict for $2,878, that being in the language of the statute,

"their joint ratable proportion" of the original debt for which defendants would remain liable. By consent a verdict was entered for that amount, subject to be reduced upon a motion for a new trial as the opinion of the court should require.

Sections 6199 and 6201 of Compiled Laws contain the controlling provisions, and are substantially in harmony with each other. The former reads: "Provided, however, that in case of such settlement or compromise, the copartners who are not parties to the same shall be discharged from liability to the creditors, except for their joint ratable proportion of such copartnership debt." By section 6201, they are not to be considered as discharged from liability to the creditors except as above provided, i. e. "except for their joint ratable proportion of such copartnership debt."

It is not ascertained that any construction has been given in this state to the statute in question, nor in other states where like legislation exists. A literal construction of the language of the sections referred to would support plaintiff's claims, viz: that the non-compromising debtors are not discharged "except for their joint ratable proportion of the copartnership debt." That construction would lead to this result. If one of three members of a firm settles by compromise, and pays two-thirds of the partnership debt in discharge of his liability, the other two partners remain liable to the creditor for two-thirds of the debt when but one-third remains unpaid, because two-thirds is their joint ratable proportion of the original indebtedness. It may be doubted if the legislature could give a creditor the right to enforce collection beyond the balance remaining unpaid, in any event; but we think no such purpose was designed. It is a cardinal rule of construction that the intention of the law maker constitutes the law. The manifest object of the statute must control, and not the absurd results which would flow from its literal rendering.

We hold that the defendants who did not compromise remain liable for the balance of the joint or copartnership debt, not exceeding their joint ratable proportion of the original indebtedness. If those who did compromise have paid more than their joint ratable proportion of the debt, then those who did not compromise remain liable to the creditor only for the balance still unpaid, even if their ratable proportion would exceed the balance remaining unpaid. Under section 6202 they would be liable to their partners who, by compromise, paid more than their proportion, to make contribution; and this shows that their liability to the creditor must be limited to the balance of the debt unpaid when that balance is less than their joint ratable proportion.

Upon remitting the damages in excess of $803.69, plaintiff will be entitled to enter judgment for that sum.

Case No. 8,572.

In re LOWENSTEIN et al.

[3 Ben. 422; [1] 3 N. B. R. 268 (Quarto, 65).]

District Court, S. D. New York. Oct., 1869.

COSTS IN INVOLUNTARY BANKRUPTCY PROCEEDINGS—MARSHAL'S FEES—SET-OFF.

1. Where a petition in involuntary bankruptcy is dismissed, with costs as against the petitioner, the petitioner's debt against the bankrupt will not be allowed to be set off against the costs.

2. In order to the taxation of charges by the marshal for the keeping of property in such proceedings, under the 47th section of the bankruptcy act [of 1867 (14 Stat. 540)], it must be shown that such expenses are just and reasonable, and have been actually incurred and paid by the marshal.

[Approved in Re Comstock, Case No. 3,075.]

[A petition for adjudication in bankruptcy was filed against Samuel Lowenstein and Rosa Lowenstein by Julius Katzenburg. Upon hearing the petition was dismissed with costs. Case No. 8,574. It is now heard upon appeal from taxation of costs.]

G. A. Seixas, for creditor.

J. H. V. Arnold, for debtors.

BLATCHFORD, District Judge. This is an appeal, by the petitioning creditor, from the taxation of costs by the register, on the dismissal of the petition, in a proceeding in involuntary bankruptcy. The items allowed, and complained of by the creditor, were all of them properly allowed, except the item of $1,007.50, for 403 days, at $2.50 per day, allowed to the late marshal, as expenses of keeping property, from November 11th, 1867, to December 17th, 1868. The item is charged by the late marshal, as expenses. But his affidavit in regard thereto is defective, inasmuch as it only states that such expenses were necessarily incurred by him, and are just and reasonable. It ought to state that they have been actually incurred and paid by him, and are just and reasonable. The 47th section of the bankruptcy act allows to the marshal, for custody of property, "his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses." By the fee bill of February 26th, 1853 (10 Stat. 164), the marshal is allowed the necessary expenses of keeping property attached or libelled in admiralty, not exceeding two dollars and fifty cents per day. The word "expenses" implies an expenditure or payment, and nothing can be allowed as expenses, under section 47, which is not shown affirmatively to have been necessary, and just and reasonable in amount, and to have been

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

actually paid. The rule in admiralty is, that, to authorize an allowance for a keeper, it must be shown that he was necessarily employed, from a prudent precaution in regard to the interests of all concerned in the property; that he actually continued in charge of the property for the time charged; and that the sum charged was not only paid, but was reasonable for the service. The Trial [Case No. 14,170]. The same rule has been applied to the case of a seizure by the marshal of property proceeded against by the United States, by information, as forfeited under the internal revenue laws. U. S. v. 300 Barrels of Alcohol [Id. 16,509]. The proofs taken in the present case, on the taxation before the register, are not sufficiently full as to the necessity for the employment of the keeper charged for, or as to his actual daily continuance in custody of the property. As to his payment, they not only do not show that he was paid the amount charged, but they show that he was paid but a small part of it. The rule laid down in the case last cited is the proper one, and must be followed. It is this: "The sum actually paid a keeper to watch property in custody, not exceeding $2.50 a day, may be taxed by the clerk, upon satisfactory proof that a prudent precaution in regard to all concerned in the property justified the marshal in placing a keeper over it; that the keeper actually continued in charge of it for the time specified; and that the sum charged therefor is reasonable for the service, and has been actually paid by the marshal." The case is referred back to the register, as to this item of keeper's fees, to take further proofs, if offered, and tax the item on the principles above laid down. The motion made by the petitioning creditor, to offset his claim against the debtor against the costs, when taxed, is denied.

Case No. 8,573.

In re LOWENSTEIN.

[3 Dill. 145;[1] 13 N. B. R. 479; 3 Cent. Law J. 82; 33 Leg. Int. 360.]

Circuit Court, E. D. Missouri. Jan 21, 1876.[2]

DISCHARGE OF BANKRUPT—TIME OF APPLICATION—SECTIONS 29 AND 33 OF THE BANKRUPT ACT CONSTRUED.

Under section 29 of the bankrupt act [of 1867 (14 Stat. 531)], where the limitation of time operated as a bar to the bankrupt's right to a discharge at and prior to the amendatory act of June 22, 1874 [18 Stat. 178], the ninth section of that act does not remove this bar.

[In review of the action of the district court of the United States for the Eastern district of Missouri.]

Lowenstein, who applied for a discharge in bankruptcy, was, on his own petition, adjudicated a bankrupt April 29, 1872. Debts were proved against his estate, but no assets ever came to the hands of the assignee. His application for a discharge was not made until September 23, 1874. The only reason given for the delay in making the application for the discharge is that the bankrupt has never been able, although he has diligently tried to do so, to procure the assent in writing of a majority in number and value of his creditors, as was required by the law existing up to June 22, 1874. On the hearing in the United States district court, November 30, 1874, the bankrupt filed the written assent of more than one-fourth in number and one-third in value of the creditors who had proved their claims upon which he was liable as principal debtor, contracted since January 1, 1869. The discharge was opposed by the creditors, and the petition of the bankrupt therefor was denied by the district court, solely on the ground that it was made too late. From the order dismissing the petition for discharge [Case No. 8,576], the defendant brings the case here for review.

N. Myers, for bankrupt.

J. P. Colby, contra.

DILLON, Circuit Judge. Here no assets came to the hands of the assignee, and in such cases the provision of the bankrupt act (section 29) is, that the bankrupt may apply for his discharge "at any time after the expiration of sixty days from the adjudication of bankruptcy, and within one year from such adjudication." Where there are assets, and debts are proved, the application can not be made until after six months; and in such cases there is no provision limiting the application to one year, or any other specified time.

Admitting that, in cases like the present, the delay to apply within the year may be excused,—In re Donaldson [Case No. 3,982]; In re Canady [Id. 2,377]; In re Vorbeck [Id. 17,002]; In re Pierson [Id. 11,153],—still the excuse here offered is no excuse whatever. The year expired April 26, 1873. The petition for a discharge was not filed until September, 1874. The bankrupt says he did not apply before the act of June 22d went into effect, because a majority of his creditors would not consent to his discharge. This did not prevent filing his petition within the year.

The law reducing the number of creditors whose assent was required, did not pass until January 22, 1874, more than a year after the latest time when the petition should have been filed. Section 9 of this act does not apply to ordinary cases, open and pending when it took effect,—In re King [Case No. 7,781]; In re Griffiths [Id. 5,825],—and if the only obstacle to the discharge here sought was the non-assent of a majority of the creditors, as previously required, the bankrupt would—it may be admitted—be entitled to his discharge on complying with the easier requirements, in this regard, of the amend-

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

[2] [Affirming Case No. 8,576.]

atory act. But the other obstacle in the way of his discharge is the limitation of time contained in section 29, and this limitation remains in full force, unaffected by the ninth section of the amendatory act of June 22, 1874, which does not undertake to repeal or modify it. Affirmed.

Case No. 8,574.

In re LOWENSTEIN et al.

[2 N. B. R. 306 (Quarto, 99);[1] 1 Chi. Leg. News, 123.]

District Court, S. D. New York. Dec. 14, 1868.

BANKRUPTCY — PETITION OF CREDITOR — FAILURE TO PAY NON-COMMERCIAL PAPER.

The non-payment, at maturity, of promissory notes that are not commercial paper, is no ground for an adjudication of the debtors as bankrupts, on a petition by a creditor in involuntary bankruptcy. Petition dismissed with costs.

[Cited in Re Nickodemus, Case No. 10,254; Re Chandler, Id. 2,591; Re Bunster, Id. 2,136; Baldwin v. Wilder, Id. 806; Re Carter, Id. 2,470; Re Clemens, Id. 2,877.]

[In the matter of Samuel Lowenstein and Rosa Lowenstein against whom a petition for adjudication of bankruptcy was filed by Julius Katzenberg.]

G. A. Seixas, for creditor.

J. H. V. Arnold, for debtors.

BLATCHFORD, District Judge. The petition in this case was filed November 8, 1867. There are three acts of bankruptcy alleged in the petition. The first is that the debtors, being aware that legal process was about to be issued, to be levied on the stock contained in their store, No. 200 Sixth avenue, New York, at the suit of some one or more of their creditors, removed a great portion of said property, to avoid its being taken on such process. The evidence does not show that the debtors removed any of said property for that purpose, or for any fraudulent purpose, or in any illegal manner.

The second act of bankruptcy alleged is that the debtors transferred said stock to one Eliza Lowenstein, with intent to defraud their creditors, and to defeat the operation of the bankruptcy act. This allegation is not sustained by the evidence.

The third allegation is that the debtors, being merchants, fraudulently stopped and did not resume payment of any of their commercial paper prior to the 8th of November, 1867, when the petition was filed, or fraudulently failed to resume payment, prior to the 8th of November, 1867, of any of their commercial paper, the payment of which they had previously suspended. The Katzenberg note was not commercial paper, and its non-payment, on the evidence, was not attended by any evidence of fraud. The same is true of the Nordlinger note. The Frauenthal notes were not commercial paper. They were not given in the course of, or in connection with, the business of the debtors as merchants, but were given for loans of money. Besides, they were, by agreement of the creditor, suffered to remain unpaid, and their non-payment was not fraudulent. The Battin note was commercial paper, but its non-payment at maturity was with the expressed assent of Battin, and such assent continued until after the petition was filed. If it had not been for such assent of Battin, the suspension of payment of the note which fell due October 3, 1867, would have been fraudulent; for the debtors, if not insolvent, had the means to pay it, as appears from the evidence; and, if insolvent, were bound to go into voluntary bankruptcy. A solvent debtor who has means wherewith to pay commercial paper and does not pay it, is guilty of fraud; and an insolvent debtor who, having commercial paper due, does not go into voluntary bankruptcy, is guilty of fraud. In either case the suspension is fraudulent. The Haviland, Lindsley & Co. notes were not the commercial paper of the debtors, given for the debt of the debtors. The Reiss claim was in an account and not in a note. As to the Blumauer and Rich note, I find no evidence as to whether it was or was not commercial paper, but simply evidence that the debtors, on the 31st of August, 1867, at New York, made a note, payable thirty days after date, for one hundred and fifty-eight dollars and twenty-three cents, not to the order of any person or to bearer, and delivered it to Blumauer and Rich, and that it was not paid at maturity. If it were commercial paper, the non-payment of it was, on the evidence, clearly fraudulent; but I find no evidence that it was commercial paper, or as to what it was given for. The evidence in the case is very voluminous, embracing twenty-four depositions and numerous exhibits. I have gone through it very carefully, with the aid of the elaborate briefs of the counsel for the respective parties, and have come to the conclusion that the petition must be dismissed, with costs.

[This case was again heard upon appeal by the petitioning creditor from the taxation of costs by the register. Case No. 8,572.]

[1] [Reprinted from 2 N. B. R. 306 (Quarto, 99), by permission.]

Case No. 8,575.

LOWENSTEIN v. GLIDEWELL.

[5 Dill. 325; 7 Cent. Law J. 167; 6 Reporter, 454; 10 Chi. Leg. News, 404.][1]

Circuit Court, E. D. Arkansas. June, 1878.

SUBPOENA TO ANSWER CROSS-BILL — SERVICE ON SOLICITOR—BILL AND CROSS-BILL—RIGHT OF VOLUNTARY DISMISSAL.

1. The general chancery rule is that service of subpoena to answer a cross-bill cannot be made upon the solicitor of the plaintiff in the original bill; but to this rule the United States circuit

[1] [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Reporter, 454, contains only a partial report.]

court recognizes two exceptions—one in cases of injunctions to stay proceedings at law, and the other in cross-suits in equity, where the plaintiff at law in the first and the plaintiff in equity in the second case reside beyond the jurisdiction of the court; and this only for the purpose of preventing a failure of justice.

[Cited in Cortes Co. v. Thannhauser, 9 Fed. 228; Gregory v. Pike, 29 Fed. 590; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. 851.]

2. The plaintiffs in the original bill in an equity suit have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs; but where a cross-bill has been filed by defendants and service of process was had thereunder on the plaintiffs, or the latter had voluntarily entered their appearance thereto, then the defendants would be entitled to a decree pro confesso on such cross-bill on a dismissal of the original bill by the plaintiffs after the lapse of the time allowed them by the rules to answer.

[Cited in Markell v. Kasson, 31 Fed. 105; The Eliza Lines, 61 Fed. 322, 324.]

[Cited in Wetmore v. Fiske, 15 R. I. 356, 5 Atl. 376, and 10 Atl. 627, 629.]

3. The bill and cross-bill in equity do not necessarily constitute one suit, and the service of a subpoena on the defendants in the cross-bill is necessary to bring them into court on such cross-bill, unless they voluntarily enter their appearance thereto, which is ordinarily done.

The plaintiffs filed their bill to foreclose a deed of trust on real estate. R. D. Partee and wife, among others, were made defendants, upon the allegation that they had some interest in the said mortgaged premises, or some part thereof, as purchasers, judgment creditors, or otherwise, which interests, if any, have accrued subsequent and are junior to complainants' lien, and subject thereto. Partee and wife answered, alleging they were the owners in fee of the property by purchase from one Christman, from whom Parish, the grantor in the deed of trust, derived his title; that the sale of the premises by Christman to Partee and wife was made long before the conveyance by Christman to Parish, and Parish to plaintiffs; that all these parties had full notice of the purchase by Partee and wife; that a suit for specific performance of the contract for the sale of the property was brought by Partee and wife against Christman in the Pulaski chancery court, and was pending at and before the conveyance of the property by Christman to Parish, and Parish to plaintiffs, and that said parties had notice of the pendency of such suit, and that that court decreed a conveyance of the property from Christman to Partee and wife, the title under such conveyance to relate back to the 20th day of December, 1876.

Partee and wife also filed a cross-bill against the plaintiffs, setting up the same facts set out in their answer, and praying for the cancellation of the plaintiffs' deed of trust, and for a decree against plaintiffs for the rents and profits of the property received by them between the 23d of January, 1877, and the 27th of December, 1877, from the trustee in the deed of trust, who was in possession as such under said deed, and collected the rents of the property and paid the same to the plaintiffs for the period mentioned. The cross-bill was filed February 4th, 1878. No process has issued thereon, and the defendants, who are plaintiffs in the original bill, have not entered their appearance thereto. The plaintiffs in the original bill now move for leave to dismiss the same. To this motion Partee and wife, who are named among the defendants in the original bill, and who are plaintiffs in the cross-bill, object, and they also move for a decree pro confesso on their cross-bill. Plaintiffs claim the dismissal by them of the original bill operates to dismiss the cross-bill.

Erb, Summerfield & Erb, for plaintiffs.
Dodge & Johnson, for Partee and wife.

CALDWELL, District Judge. The plaintiffs in the original bill have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs. 1 Barb. Ch. Prac. 225, 228; 1 Daniell, Ch. Prac. 792. The cause is not at issue on the original bill—no replication to the answer having been filed—and the defendants in that bill, under rule 66, might have obtained an order, as of course, for a dismissal of the suit for this reason.

The motion of plaintiffs to dismiss their bill is granted, and the same will be dismissed at their costs. The motion of plaintiffs in the cross-bill for a decree pro confesso thereon against the defendants therein named is denied. If the defendants in the cross-bill had been served with process, or had voluntarily entered their appearance to the cross-bill, the plaintiffs therein would have been entitled to a decree pro confesso after the lapse of the time allowed defendants by the rules to answer.

The bill and cross-bill in equity do not necessarily constitute one suit, and, according to the established practice in equity, the service of a subpoena on the defendants in the cross-bill, although they are parties in the original bill, and in court for all the purposes of the original bill, is necessary to bring them into court on the cross-bill, unless they voluntarily enter their appearance thereto, which is the usual practice. And the general chancery rule is, that service of the subpoena in chancery to answer a cross-bill cannot be made upon the solicitor of the plaintiff in the original bill. 1 Hoff. Ch. Prac. 355, and note 4.

In the chancery practice of the circuit courts of the United States there are two exceptions to this rule—(1) in case of injunctions to stay proceedings at law, and (2) in cross-suits in equity, where the plaintiff at law in the first and the plaintiff in equity in the second case reside beyond the jurisdiction of the court. In these cases, to prevent a failure of justice, the court will order service of the subpoena to be made upon the attorney of the plaintiff in the suit at law

in the one case, and upon his solicitor in the suit in equity in the other. Eckert v. Bauert [Case No. 4,266]; Ward v. Sebring [Id. 17,160]; Dunn v. Clark, 8 Pet. [33 U. S.] 1; and for application of analogous principles to parties to cross-bills, see Schenck v. Peay [Case No. 12,450].

It not unfrequently occurs that the facts constituting defendant's defences to an action or judgment at law are of a character solely cognizable in equity; and in suits in equity it often happens that the defendant can only avail himself fully and successfully of his defence to the action through the medium of a cross-bill. In suits in these courts the plaintiff is usually a citizen of another state, and hence beyond the jurisdiction of the court, and in such cases defendants who desire to enjoin proceedings at law, and defendants in equity cases who desire to defend by means of a cross-bill, would, but for this rule of practice, be practically cut off from their defences by reason of their inability to make service on the plaintiff in the action. It would be in the highest degree unjust and oppressive to permit a non-resident plaintiff to invoke the jurisdiction of the court in his favor, and obtain and retain, as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled, by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject matter, and against the very party, he had himself first invoked. The reason of the rule would seem to limit it in equity cases to cross-bills either wholly or partially defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject matter of the original bill, are made the basis for the affirmative relief asked. The cross-bill in this case is of this latter character, and, without deciding that this fact alone would preclude the court from directing service of the subpoena on the solicitors of the plaintiffs in the original bill, such an order will not be made after plaintiffs have filed their motion to dismiss their bill—a motion grantable as of course.

Whether the dismissal of the original bill carries with it the cross-bill depends on the character of the latter. If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up, as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiffs in the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition in the same manner as if it had been filed as an original bill. Worrell v. Wade's Heirs, 17 Iowa, 96; 2 Daniell, Ch. Prac. 1556.

The cross-bill in this case is of this character, and it will remain on the docket, and the plaintiffs therein can take such action in relation thereto as they may be advised, but no steps can be taken in the case until defendants are brought into court.

Ordered accordingly.

LOWENSTEIN (PENNINGTON v.). See Case No. 10,938.

Case No. 8,576.

In re LOWENSTONE.

[2 Cent. Law J. 349.] [1]

District Court, E. D. Missouri. May, 1875.[2]

LIMITATION OF ONE YEAR AS TO APPLICATION FOR DISCHARGE IN BANKRUPTCY.

The limitation of one year in section 5108 of the Revised Statutes (old section 29), was not repealed by the act of 1874; and a party, who was not entitled to his discharge prior to the act of 1874, can not claim that fact as an excuse for his failure to apply for his discharge within the year, and avail himself of the less stringent provisions of the amended act.

In bankruptcy.

TREAT, District Judge. Early in 1872, Lowenstone, was, on his own petition, adjudicated a bankrupt. Under the act of congress, as it then stood, his application for discharge should have been made within a year. He could not procure the needed assent of his creditors; and knowing that fact, he made no application. Subsequent to the act of 1874 he proceeded to procure the assent of the smaller number designated by that act, then filed his petition for discharge, and had the same, in the usual course of business, referred to the register. At the meeting of creditors, called for the purpose, some of the creditors entered opposition, and filed specifications based on supposed frauds by the bankrupt, and also upon alleged fraudulent representations, by means of which the assent of creditors was procured. The first enquiry is as to his right, after the year, to be heard at all. Judge Dillon, in Re Donaldson [Case No. 3,982], held that the limitation of the act was not absolute; but that the bankrupt, if satisfactory excuse was shown for failure to apply within the year, might make his application subsequently. That decision was made before the recent amendments. It would be no valid or satisfactory excuse to show that he could not procure the legal assent of his creditors; for if that assent was not to be had, he could not be discharged; and therefore the excuse would be simply that he was not entitled to his discharge. But it is now urged that, not having applied at all, for the reason stated, prior to June, 1874, the recent amendments entitle him now, on an applica-

[1] [Reprinted by permission.]

[2] [Affirmed in Case No. 8,573.]

tion since filed, to the more favorable terms prescribed by those amendments, despite the limitation of one year. To so rule, would be to hold that the act of 1874 repealed the limitation of one year, although nothing to that effect appears in the amendatory act. That limitation is still in force in all cases to which it applies. A voluntary case, instituted since that act, is within the year rule. There is nothing repealing, or rescinding it either as to past or future adjudications. Had the bankrupt applied within the year, and his application been pending when the amendments went into effect, a difficult proposition might have arisen as to the rule to govern such a case. But the question under consideration does not fall within such an enquiry. It is merely whether a bankrupt in 1872, who, knowing he could not comply with the acts of congress which limited him to one year, which limitation still continues, can now, despite said limitation, claim discharge on the sole ground that now, under the new statute, he can do what he could not have done before the new statute was passed. The difficulties are insurmountable. It can not be held that the amendments were designed to do what they do not do expressly or impliedly. The limitation in question has not been altered or removed. The excuse offered is not within the letter or spirit of the decision in Re Donaldson [supra]. The court rules that the bankrupt is not entitled to his discharge on the facts presented, and his application is refused at his costs. Ordered accordingly.

[The decision in this case was affirmed in the circuit court upon review. In re Lowenstein, Case No. 8,573.]

LOWEREE (KNOX v.). See Case No. 7,910.

Case No. 8,577.

In re LOWERRE.

[1 Ben. 406;[1] 1 N. B. R. 74; Bankr. Reg. Supp. 16; 6 Int. Rev. Rec. 115.]

District Court, S. D. New York. Sept. 14, 1867.

BANKRUPTCY—WITHDRAWING PROOF OF CLAIM.

Where an agent of a creditor, who had filed proof of the creditor's debt against the bankrupt, asked leave to withdraw the proof of debt, it being alleged that certain facts had been by error omitted: *Held*, that the proof of debt could not be withdrawn, but that the creditor ought to be allowed and required to amend his proof.

[Cited in Re Montgomery, Case No. 9,729.]

In this case, at the first meeting of creditors, Nathaniel Niles, as agent for Edward W. Seabury, proved and filed a claim of Seabury against the bankrupt [James M. Lowerre], but he was not authorized, by any letter of attorney from Seabury, to vote on behalf of Seabury, in the choice of an assignee. Niles then asked leave to withdraw from file the proof of Seabury's claim. To this the bankrupt objected. It was stated, that Seabury had accepted notes of the bankrupt for $5,000, and agreed to give him a full discharge when they were paid, that the notes were not yet due, and that these facts had, through an error on the part of Niles, been omitted from his deposition in proof of Seabury's claim. On this ground, in part, Niles asked leave to withdraw the deposition. The register thought that Niles ought to be allowed to amend the proof of Seabury's claim, but that he could not, under the circumstances, withdraw from the files the proof already put in. Niles insisted upon his right to withdraw the deposition from the files, and asked that the question should be certified to the judge for his decision.

BLATCHFORD, District Judge. The register is correct in his view. Neither the proof of debt nor the deposition can be withdrawn, but the party ought to be allowed and required to amend his proof. The clerk will certify this decision to the register, Edgar Ketchum, Esq.

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

LOWNDES (PHILLIPS v.). See Case No. 11,103.

LOWNSDALE (FIELD v.). See Case No. 4,769.

Case No. 8,578.

LOWNSDALE v. PORTLAND et al.

[1 Deady, 1;[1] 1 Or. 381.]

District Court, D. Oregon. Jan. 8, 1861.

REAL PROPERTY—SUIT TO QUIET TITLE—PRIVIES—VOID DECREE — OREGON TOWN SITE LAW — TITLE BY OCCUPANCY — DEDICATION TO PUBLIC USES—EXCEPTIONS FOR IMPERTINENCE.

1. A decree in a suit between P., a lot-holder in the town of Portland, and L., C. and C., settlers upon the Portland land claim, declaring a certain strip of land to have been dedicated to the public, cannot be pleaded as an estoppel in a suit by the grantee of L. against the town of Portland, concerning a portion of the same premises—the municipal corporation and P. are not privies.

[Cited in Coffin v. Portland, 27 Fed. 417.]

2. The decree pronounced by the supreme court of the late territory of Oregon, at the term of June, 1854, in the suit of Parrish v. Stephens, [1 Or. 61], is void, because neither party to the suit had any interest in the land in controversy by which the court could obtain jurisdiction to make the same.

3. The decree in the Parrish suit was not a decree in rem, but in personam, and the manner of pleading it cannot change its character in this respect.

4. The act of congress of August 14, 1848 (9 Stat. 323), organizing the territory of Oregon, did not extend the act of May 23, 1844 (5 Stat. 657), commonly called the "Town-Site Law," over the territory; but the first act of congress affecting the title or disposition of lands in Oregon was that of September 27, 1850 (9 Stat. 497), commonly called the "Donation Act."

[Approved in Chapman v. School Dist., Case No. 2,607. Cited in Stark v. Starr, 6 Wall.

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

(73 U. S.) 415; Same Case, Case No. 13,307; Lamb v. Davenport, Id. 8,015. Cited in brief in Lamb v. Davenport, 18 Wall. (85 U. S.) 311. Cited in U. S. v. Tichenor, 12 Fed. 422.]

5. Under section 14, Act August 14, 1848 (9 Stat. 329), which provides that the laws of the United States should be in force in the territory of Oregon, "so far as the same, or any portion, may be applicable," the power is devolved upon the court, when the question arises, to determine what laws are "applicable" and what are not; and in determining this question, the court is not bound by any construction which the administrative department of the government may have given to such provision, in the discharge of its duties.

[Cited in Hall v. Austin, Case No. 5,925; Stark v. Starr, 6 Wall. (73 U. S.) 416; Barney v. Dolph, 97 U. S. 654.]

6. A settler on the public lands in Oregon—prior to September 27, 1850—held the mere possession thereof, under what was known as the "Land Law" of the "Provisional Government of Oregon;" the interest of such settler in the land ceased with his ocupation, and when he abandoned or transferred the possession to another, that other took it as though it had never been occupied; nor could the first settler, by any act of his, charge such lands, in the possession of the second one, with any easement or incumbrance whatever.

[Cited in Chapman v. School Dist., Case No. 2,608; Town v. De Haven, Id. 14,113; Barney v. Dolph, 97 U. S. 657; Bear v. Luse, Case No. 1,179; Dalles City v. Missionary Soc., 6 Fed. 370; Shively v. Welch, 20 Fed. 33.]

7. A dedication to public uses, by a release, upon condition that a pending suit concerning the premises shall be dismissed, does not take effect in case said suit is not dismissed.

8. A dedication to public uses by a release, without covenants, by a person who is a mere occupant of the public land, without other estate or interest therein than the bare possession, does not bind an after-acquired estate in the same premises.

[Cited in Lownsdale v. City of Portland, Case No. 8,579; Myers v. Reed, 17 Fed. 405.]

9. Where an answer to a bill in equity is excepted to for impertinence, if the matter excepted to be in response to the bill, the exception will not be allowed, though the matter be impertinent.

[This was a suit by J. P. O. Lownsdale against the city of Portland, George C. Robbins, Jacob Davidson, A. D. Shelby, Jacob Stitzel, William S. Higgins, J. C. Ainsworth, M. M. Lucas, E. D. Shattuck, Absalom B. Halleck, Orville Risley, and James H. Lappens to quiet title to certain lots in Portland. The case is now heard upon exceptions to amended answer to amended bill.]

George H. Williams and W. W. Page, for complainant.

George H. Cartter, for defendants.

DEADY, District Judge. This is a suit in equity to quiet title. The bill alleges that the complainant is a citizen of Indiana, and seized in fee of lots numbered 1, 2 and 3, in block 74, in the town of Portland, and has been so seized and occupied the same since January 1, 1853; and that about July 1, 1860, he commenced to improve said lots by the erection of wharves thereon, and that he continued to make said improvements without let or hindrance from the defendants until about the time of filing the bill herein—November 9, 1860—when the defendants threatened to destroy and remove the same, and did proceed to put said threats into execution, by arresting his agents and workmen while engaged in erecting said improvements; and that the defendants have no right, title, or interest in or to the premises, and that the proceedings of the defendants impair the value of the premises, and are to the irreparable injury of the complainant. Afterwards complainant filed an amended bill, upon which a provisional injunction was allowed until the further order of the court, enjoining the defendants as prayed for in the bill. To this amended bill the defendants filed an amended answer, to portions of which complainant filed eight exceptions for impertinence.

In considering these exceptions, this answer must be treated as a whole. Much of the matter to which the exceptions go might have been pleaded as pleas, but the defendants under the option given them by the equity rule 39, have pleaded them by way of answer. An answer in equity being necessarily a unit—a whole—the attempt to plead certain parts of it separately, by calling them "counts in equity," does not change its character in this respect. Indeed, such a thing as "a count" is not known to equity pleadings. The phrase belongs to the common law, and even then applies only to the pleadings of the plaintiff. Wherever, then, matters alleged in one of the "counts" in the answer, is contradicted by the allegations in another "count" or portion of the answer, for the purpose of these exceptions such allegation is considered as untrue. The answer denies the service, possession and occupation of the complainant, and then "for further plea and answer," by way of what is called in said answer a "count in equity," pleads a decree of the supreme court of the late territory of Oregon, pronounced at the term of June, 1854, of said court in a suit in equity, wherein J. L. Parrish was complainant and Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman were defendants. The said "count" recites from the pleadings in said suit, that in 1850 said Parrish, having before that time purchased a block of lots fronting on Water street, in said town of Portland, filed a bill in chancery, praying an injunction against said defendants, because said defendants were about erecting buildings on the strip of land adjoining the Wallamet river, in front of said block, to the irreparable injury of said Parrish. That Pettigrove and Lovejoy, the former claimants of the town site, had, in laying out said town, dedicated said strip of land to public use as a levee. That the defendants L., C. and C., answered said bill, denying said dedication, and that upon the hearing, the court aforesaid, found and decreed, that the strip of

land was so dedicated, and that the same was a part of Water street, and perpetually enjoined the defendants from erecting obstructions on the same. The said "count" further alleges that the town of Portland had notice of said suit—that it was a party in interest, and employed one McCabe to appear for it in court; and that the complainant has no other title or interest in the premises than what he has derived from D. H. L., aforesaid, by conveyance long after the commencement of said suit; and that the premises in question are a part of said levee of Water street, declared by said decree to have been dedicated to public use, and that therefore the complainant is estopped to claim the contrary.

This "count" or portion of the answer is excepted to as impertinent, because it appears that the decree therein pleaded was pronounced between different parties; and if this were otherwise, because it appears such decree is void, the court that gave it not having jurisdiction of the subject matter, because, at the commencement of said suit, no law had been passed by congress whereby anybody could acquire any title to or interest in lands in Oregon. On the contrary, the defendants insist that the decree is a valid subsisting decree—that the present defendants are privies of Parrish, and that therefore the decree is a bar to the relief sought by the complainant. The rule of law claimed by defendants is admitted. When a court of competent jurisdiction has determined a controversy or question, the parties thereto, their privies in blood, law and estate, are bound by it, and estopped from asserting in any court the contrary. But the estoppel must be mutual and bind both parties—the party who relies upon it as well as the party against whom it is alleged. It is admitted, that as to the premises in controversy, the complainant is a privy in estate with D. H. L., but denied that the defendants are privies in estate with Parrish. If the parties are privies at all, they are privies in estate. In support of the proposition that the defendants were parties to the Parrish suit, effect is sought to be given to the allegation in this "count," that the defendants were parties in interest therein, and employed counsel to appear for them. If, by the phrase "party in interest," it is meant to assert that the town was a party to the Parrish suit in the usual and legal sense, by being a party on the record, then the allegation is shown to be untrue, because it appears from the answer itself that Parrish was the sole complainant on the record. But if the words are used in the sense that the town had an interest in the question involved in it, by reason of having a like claim to an easement in this or other property similarly situated, then they signify nothing, because to be interested in the question determined by a suit, in no way makes the town a party to it. If, in a suit between A and B, the question is, whether a conveyance of black acre by a deed not duly acknowledged passed the estate to the vender, and there should be a hundred other persons having conveyances to land in the same state, similarly executed, they would all have an interest in the question involved in the suit between A and B, because the law as determined in that case would be the rule for like cases, but still they are not parties to the suit, or in any way estopped by the determination of it.

As to the employment of counsel by the town, the record, as set up in the answer, shows that the counsel spoken of appeared for Parrish, and not for the town. I suppose the fact is that the town, after its incorporation, thinking, so to speak, that it had an interest in the question, or being so advised by counsel, contributed something to stimulate his efforts as the solicitor of Parrish. The case is the same as if the hundred persons in the instance supposed had contributed money to employ counsel to argue B's side of the controversy between him and A, for the purpose of procuring a determination thereof, which, as a precedent, would be favorable to themselves. This would not make them parties to the suit.

But there is a fact stated in the answer which makes it legally impossible that the town could have been a party to the Parrish suit; and that is—the town was not incorporated until 1851—after the commencement of such suit. A party to a suit must be either a natural person or persons or a legal entity, as a corporation created by or in pursuance of law. The town of Portland had no legal existence before its incorporation. How, then, could it be a party to a suit before that time? As well might an unborn child be called a party to a suit. At the commencement of the Parrish suit, there may have been people living in the place called Portland, and in the common parlance of speculators in lots, the "place" may have been called a "city;" but none of these persons except Parrish were parties to his suit, and the municipal corporation since created and styled "the city of Portland," which now represents the inhabitants of the place, as defendant to this suit, did not then exist. Neither is there any privity in estate between the defendants and Parrish. They do not claim through or under him. The suit of Parrish was brought upon the ground of a private right in him to have the levee left open so the public could have free access to his, Parrish's, premises; and that if the defendants, L., C. and C., were allowed to obstruct the levee in front of his premises, and thus prevent the public from reaching his place of business, it would depreciate the value of his property and thus do him a private injury. To my mind it is as plain as that two and two make four, that the town of Portland was not a party to the Parrish suit, nor in any way a privy in estate with him. The town would not be estopped by

this decree, and as estoppels must be mutual, neither can the complainant be.

As to the second point made by the complainant in support of this exception, I do not think that I can take judicial notice that the case of Lownsdale v. Parrish, 21 How. [62 U. S.] 290, is the same as the one pleaded in the answer. But, of course, the principle laid down in that case is applicable to like cases and of binding authority in this court. The supreme court, in that case, dismissed the appeal, because the subject of the controversy as to the parties to the suit had no value. Why had it no value? Because, in the language of the court, "neither party had any title or interest in the land whatever." They had no interest in the land because, says the same authority, "congress passed no law in anywise affecting title to lands in Oregon territory till September 27, 1850," and before that time this suit was commenced. Under this state of facts and law had the territorial court jurisdiction of the subject matter? To answer this question, it would seem to be enough to ask what was the subject matter of the suit? It was the alleged interest of the parties in this land; but as neither had any interest in it, there was nothing upon which the court had the power to adjudicate. From these premises it necessarily follows, that the decree of the territorial court in the Parrish suit is void, and neither binds nor affects anybody. The first exception must be allowed.

The second exception is taken to that part of the answer, pleaded as a second "count in equity." In it the Parrish suit and decree is again set up in bar of this suit, without the allegations relative to the town being a party in interest and having employed counsel.

It is difficult to understand the object of pleading the same decree twice in the same answer; but I believe the learned counsel for the defendant insists, that this decree, as pleaded in this so-called "count in equity," has become, in some occult way, an adjudication in rem, and binds all the world. If such is the effect of this decree by simply pleading it twice, it would be a curious question in legal alchemy what might be the result of pleading it twice. A judgment in rem is given in a proceeding in courts of admiralty and the court of exchequer; the suit is against the thing and therefore called in rem, as a ship claimed as prize or liable for seamen's wages or goods forfeited for being imported contrary to the revenue laws, and the judgment of the court is given directly against the thing, and determines the status, and all questions of ownership or property dependent thereon, from thenceforth. From the necessity of the case—for the convenience of commerce, to this judgment all the world are said to be parties, and therefore bound by it. During the pendency of the suit, any one may come into court, prefer a claim to the thing or an interest in it, and be heard and control the proceedings; and if any one having such a claim or interest omits to do so, he is properly deemed to acquiesce in what takes place. But in a criminal proceeding, at the suit of the king in the exchequer, against a person for an unlawful importation of goods, although the question of unlawful importation is passed upon, the judgment of the court is not in rem but in personam against the wrong-doer, and does not determine the ownership of the goods.

In no sense was this a decree in rem, it was pronounced in a suit in personam against the personal defendants, L., C. and C. This "count" is nothing but the first "count" repeated with the omissions mentioned. The exception to it is allowed. The third exception includes so much of the answer as is called therein the fourth "count in equity." Substantially it alleges, that in 1845, a number of persons occupied the present site of Portland, and laid out a town thereon for the purposes of trade and commerce; and that said persons and others, the inhabitants of Portland, have always used said levee as a public easement, except certain portions of the same wrongfully occupied by private persons. That the territory of Oregon was organized by act of congress of August 14, 1848, by virtue of which act, the act of congress of May 23, 1844, commonly called the "Town-Site Law," was extended over Oregon. That on January 23, 1851, the town of Portland was incorporated, and that in 1852, the United States surveys were extended over the place. That in 1858 the town of Portland, entered at the proper land office, the present site of Portland, under the town site law of 1844; and that in 1860, the town received a patent therefor from the United States for the purposes provided in the act of 1844. That complainant derives title to the premises from D. H. L., and that the title of the latter is founded upon his entry of March 11, 1852, under the donation act of September 27, 1850; but that said land was not subject to be taken as a donation under the act of 1850. That said D. H. L. acquired no title by said entry, but that said land was vested in the occupants thereof under the act of 1844, and that the premises in controversy are within said entry by the town.

Counsel for the complainant insists that the matters above stated are no bar to the relief sought, because the act of 1844 was not in force in Oregon at the time of the donation entry of D. H. L., and if it was in force, the town is seized only as trustee "for the benefit of the occupants thereof according to their respective interests," and that the complainant is the occupant of the lots in question, and that his interest under the town site law includes the estate in said lots, except the naked legal title held by the city as trustee for his benefit. For the defendant it is contended that by the provision of the act of August 14, 1848, which "declared the laws of the United States ex-

tended over" and "in force in said territory, so far as the same or any provision thereof, may be applicable," that the act of 1844 was extended to Oregon, and the decision of the general land office and the issuance of this patent, are relied on as authority for such construction of the act of 1848. That an occupant, under the town site act of 1844, in his right of selection as to the particular place he will occupy, is subordinate to, and must be governed by the law of the community constituted of the occupants of the town; and that such portions of the town site as this community may designate as streets or public grounds, for that reason become so, and are not open or subject to individual appropriation and occupation.

The limit of individual right of occupation under the town site act is difficult to determine. The difficulty lies principally in the meagreness and inadequacy of the act to the regulation of the subject. When a number of persons, coming together fortuitously, settle down upon a tract of public land and gradually build up a town, it is difficult to find any authority in the act of 1844 by which any number of said occupants can constrain any less number to occupy more or less of said land, or in this or that place. I suppose the act was originally passed as a special and temporary measure, to meet the case of some town already built up on the public lands, and it adopted the state of things as to the division into streets and lots then existing there. But it is not necessary to pass upon this question, because the answer denies the seizin and occupation of the complainant, and for the purposes of this exception that denial must be taken as true. Assuming, then, that the complainant is not an occupant of the premises, if the town site act was in force in Oregon, by virtue of the provision of the act of August 14, 1848, then the complainant would be without right or interest in the premises, and therefore not entitled to the relief sought.

This leads to the consideration of the question whether the town site act was in force in Oregon prior to the time it was specially extended here by act of July 17, 1854. Its operation since that time could not, I conceive, affect the rights of the parties to this suit, because it appears that D. H. L. entered the land in question under the donation act of 1850, as early as March 11, 1852. The question must, therefore, be determined in accordance with the law in force at and before the time of that entry. When congress, in organizing the territory of Oregon, by the act of 1848, declared that the laws of the United States should be in force in said territory, "so far as the same, or any provision thereof may be applicable," it did not mean that any particular one of such laws should be in force here, but only such as should be determined "to be applicable." Under this state of things, so far as the rights of person and property are concerned, authority is necessarily given to the courts, and it becomes their duty, whenever the question comes before them, to decide what laws were applicable and what not; and, consequently, what were in force and what not. Doubtless the administrative department of the government—the general land office, for instance—charged with the authority and duty of disposing of the public lands in this territory, may be called upon to decide the same question. But I respectfully submit that such decision does not conclude the courts in a proper case, where the parties are before the court claiming under conflicting or any laws of the United States, from deciding what laws were applicable to the territory at a particular time, and consequently in force, and what were not, independently of said decision, or even adversely to it. It is well known that at the time of the organization of the territory of Oregon, by the act of 1848, an anomalous state of things existed here. The country was extensively settled, and the people were living under an independent provisional government established by themselves. They were an autonomous community, in the full sense of the term, engaged in agriculture, trade, commerce, and the mechanical arts; they had built towns, opened and improved farms, established churches and schools, laid out highways, passed revenue laws, levied and collected taxes, made war and concluded peace by their own authority. From the necessity of their condition, and as the corner-stone of their government and social fabric, they had established a "Land Law," regulating the possession and occupation of the soil among themselves. That all this was known to congress, at the time of the organization of the territory, would be highly probable from its historic importance, and is certain to have been so from the language of sections 14 and 17 of the act of 1848.

The leading feature of the land law of the provisional government, was that which provided that every male inhabitant of the country, over a certain age, might occupy and possess 640 acres of land. The uses that the land might be put to by the occupant were immaterial. He might cultivate or pasture it, or if he possessed a good site, and had the necessary thrift and enterprise, he might lay off and build up a town upon it. In the disposition of the public lands by congress, this state of things called for peculiar legislation, differing altogether from that required for an unsettled country. Under these circumstances, can it be presumed that the town site act of 1844—an obscure, special, and insignificant provision of the then existing land system of the United States—was extended over this country, while the general system contained in the pre-emption act of 1841 was left behind? Nothing can be more unreasonable. It would tax the ingenuity of man to find a provision in the land system of the United States, as it stood in 1848, less applicable to

the condition of Oregon, or that would have worked greater hardship, confusion and injustice than the act of 1844. To the thrifty and enterprising settler it would have said: By your management and industry you have built up a town on your land claimed and thereby lost it. If you had been content to live upon it in a seven-by-nine cabin with tottering lean-to attached, and merely pastured it with a few Spanish cattle and cayuse ponies, it would have been yours. The acts organizing the territories of New Mexico, Kansas and Nebraska, extended the laws of the United States over them in the same language that the act of 1848 did over Oregon, and yet they were not deemed to have extended the act of 1844 over these territories. But congress, by special enactment of July 22, 1854, extended it over them. If their organic acts extended the act of 1844 over them, why this special legislation for that purpose? By act of September 9, 1850, California was admitted into the Union. Section 3 of the act declares "that all the laws of the United States not locally inapplicable, shall have the same force and effect within the state of California, as elsewhere in the United States." This provision was never supposed to have extended the act of 1844 or any portion of the land system of the United States, over that state; but on the contrary, congress, by special act of March 3, 1853, provided for the disposition of the unclaimed lands within that state, and extended the act of 1844, by name over the lands therein, not mineral, and "occupied by towns and villages." But I conceive that this question has been negatively determined by the supreme court in Lownsdale v. Parrish, supra. In that case the court says, that on July 29, 1850, when that suit was commenced, "congress had passed no law in anywise affecting the title to lands in Oregon," nor did not "till September 27, 1850," referring to the passage of the donation act. The general expression includes the particular; and in this case the court must have specially considered whether the particular act of 1844 was in force or not, for the parties litigant before them were occupants of lots in the town of Portland, claiming some kind of an interest in or right to them. Yet the court say, that no law had been passed by congress in anywise affecting the title to lands in Oregon, before September 27, 1850; thus by the plainest implication negativing the proposition that the act of 1844 was extended to Oregon by the act of 1848.

But the passage of the donation act itself is further evidence that congress did not deem the act of 1844 "applicable" to Oregon, and did not intend to extend it here. This act is a wide departure from the act of 1841, commonly called the "Pre-emption Act." It is a system complete in itself, and was admirably adapted to the condition of the people and the country as it found them. Substantially, it gave to every settler in the country his land claim as he held it, without any reservations or conditions as to lands fitted for the purposes of trade and commerce or town sites whatever. It assumes to be, as it really was, the first legislation by congress affecting the public lands in Oregon. It was a practical and just recognition of the land law of the provisional government. The donation act is in this respect incompatible with the act of 1844, and its passage puts the matter beyond cavil or doubt, that the act of 1844 was not in force here, until specially extended as above stated. In Marlin v. T'Vault, 1 Or. 77, this question is well considered and the conclusion reached that the act of 1844 was not extended to this country by the act of 1848. This exception must be allowed.

The fourth exception is taken to a portion of the answer called the fifth "count in equity." Said "count" alleges that in 1845 Pettigrove and Lovejoy selected the present site of Portland and caused a town to be laid out thereon; and that said P. and L. dedicated said levee to public use as far as was in their power. That the people of Portland accepted said dedication, and occupied said levee without let or hindrance up to the year 1849, when said P. and L. sold their claim to said town site to D. H. L. aforesaid; and that the said D. H. L. recognized said dedication, but when or how is not stated. That the people of Portland have always enjoyed the free use of said levee, except where private individuals have wrongfully occupied the same; and that D. H. L. did dedicate said levee to public use, and has never paid any taxes on the same. That D. H. L. claims to have acquired title to the premises since said dedication; and that complainant derived his title from D. H. L. long after said dedication. The exception goes to so much of this so-called "count" as concerns the acts and doings of P. and L., and extends to the figures "1849." It must be allowed. The question is too plain for argument. P. and L. had no interest in the soil, never acquired any, and had nothing to dedicate. They simply held the naked possession of the land under the laws of the provisional government, according to the custom of the country, and when they gave up and abandoned this possession to D. H. L. he took it as though the foot of man had never been upon it, except as to the extent of its boundaries, or any liability he might take upon himself by special agreement with said P. and L. in relation to their past acts concerning it.

The remainder of this so-called "count" is also excepted to. It alleges a dedication upon the part of D. H. L., directly, and also by recognizing the one said to have been made by P. and L. Now if D. H. L. made a dedication of the premises to public use, or recognized and confirmed one made by others, it is binding upon him, and also upon the complainant, his grantee, by reason of the priority of estate between them. What

amounts to a dedication, and what does not, and whether any dedication made by D. H. L., before the passage of the donation act, will bind the after acquired estate, are questions that will properly arise and be determined on the final hearing. This exception is disallowed.

The sixth exception is taken to so much of the answer as is denominated the sixth count in equity. This "count" alleges that on August 14, 1850, L., C. and C. aforesaid, released to the public certain lots in said levee, including the one in controversy; that the release was made upon certain conditions, one of which was, that the suit of Lownsdale v. Parrish, aforesaid, should be dismissed; and that the conditions upon which said release was made have been fulfilled, and the release accepted by the people. That the town has power by its charter, to remove obstructions from the levee, and that complainant derived his title from D. H. L. long after the making and acceptance of said release. In support of this exception it is urged by the complainant that said release appears to have been made before the passage of the donation act—September 27, 1850—when D. H. L., nor any other, had no estate or interest in the land, and that being without covenants, it does not bind an after acquired estate in the premises; and that, if this were otherwise, the release never took effect, because the answer shows that the condition upon which it was given was never fulfilled—namely, the dismissal of the Parrish suit. Upon examination of the authorities, I find the cases upon the point, without exception, concurring in the rule, that a conveyance by deed of bargain and sale or release without covenant, does not bind an after acquired estate in the same land which as to the grantor, was then contingent. Where such after acquired estate is obtained by the grantor from any other source than the title which he assumes to bargain, sell or release, he is not estopped from claiming the premises, even against his own grantee. This release was made when D. H. L., had no interest in the soil. It passed nothing, supposing that it took effect, beyond the mere naked possession which he held under the laws of the provisional government. If he afterwards acquired the title to the premises from the United States under the donation act, it did not inure to the benefit of the public on account of said release. It may be, that where a party has the equitable estate or interest in lands and conveys the same by deed of bargain and sale or quit claim and release, without warranty, and afterwards acquires the legal estate, that while he is not estopped by such deed from asserting said legal estate, equity will compel him to convey it to his grantee of the equitable estate.

Where there is a dedication to public uses, under similar circumstances, without deed, but by acts and declarations of the party having the equitable estate, the rule seems to be that the after acquired legal estate attaches to the dedication as soon as acquired by operation of law. But there can be no question upon authority that this release does not estop or bar the complainant from asserting his legal title to the premises, and upon the showing of the answer, it would be against equity and good conscience that it should. For while it is true that this portion of the answer avers that the conditions upon which the release was made were fulfilled, elsewhere the answer shows that this averment is not true. At the time the release was executed, it appears that the Parrish suit was pending. It involved the right of Parrish and the public to an easement in the strip of land since called the levee as against the alleged exclusive right of possession of L., C. and C. The terms of a compromise were agreed upon, by which the defendants in that suit were to release a portion of the levee to the public—the latter at the same time relinquishing all claim to the remainder and to procure the dismissal of the pending suit. Yet it appears that the suit was not dismissed, but prosecuted to final decree in the territorial court against the defendants, which decree is now set up in the answer herein as an estoppel. Under the circumstances, to allow the defendants to claim anything under this release, would be in effect to sanction a fraud upon the releasors. This exception must be allowed. The complainant has taken an exception to the separate answer of the recorder, Orville Risley, and also to the like answer of the marshal, James H. Lappeus. Neither of these exceptions is well taken. The matter excepted to may be impertinent, but being in response to his amended bill, the complainant cannot object to it on that ground. Decree, that the first, second, third, fourth and sixth exceptions be allowed and that the remainder be disallowed.

[The case was subsequently heard upon bill, answer, and proofs, upon which a decree for complainant was entered. Case No. 8,579.]

Case No. 8,579.

LOWNSDALE v. PORTLAND et al.

[1 Deady, 39; [1] 1 Or. 397.]

District Court, D. Oregon. Dec. 6, 1861.

REAL PROPERTY—PUBLIC LANDS—TITLE BY OCCUPANCY — DEDICATION BY OCCUPANT TO PUBLIC USES—PUBLICATION OF MAP — PAROL DECLARATIONS—ACCEPTANCE OF DEDICATION—AFTER-ACQUIRED ESTATE.

1. A dedication of land in Oregon to public use by an occupant thereof, prior to September 27, 1850, does not bind or estop a subsequent occupant of the same lands.

[Cited in Myers v. Reed, 17 Fed. 405.]

[1] [Reported by Hon. Matthew P. Deady, District Judge, and here reprinted by permission.]

2. The exhibition or publication of a map or plan of a town by the proprietor thereof, upon which certain spaces are marked as streets and public squares, is evidence of a dedication of such spaces to public use as streets and squares.

3. When a dedication of ground to public uses is attempted to be established by proof of casual conversations and remarks by the owner, susceptible of various meanings and constructions, such proof should be closely scrutinized, and unless in harmony with the established circumstances of the case, but little heeded.

4. As against the general owner, a dedication of land to public use is not to be presumed, but must be proved; and when the evidence consists of the parol acts and declarations of such owner, they ought to be of such public and deliberate character as to be generally known and not of doubtful import.

5. The adoption, by the common council of Portland, of a map upon which Front street is represented as being bounded by two parallel lines, so as not to include a strip of land lying between it and the Wallamet river on the east, is a solemn admission by the corporation of Portland that said strip of land is not a part of Front street.

6. A release without covenants by a party in possession does not affect an after-acquired estate in the same lands by the releasor.

[Cited in Myers v. Reed, 17 Fed. 405.]

[This was a suit by J. P. O. Lownsdale against the city of Portland, George C. Robbins, Jacob Davidson, A. D. Shelby, Jacob Stitzel, William S. Higgins, J. C. Ainsworth, M. M. Lucas, Erasmus D. Shattuck, Absalom B. Hallock, Orville Risley, and James H. Lappeus, seeking to enjoin the defendants from trespass upon and to quiet title to certain lots. For a former hearing upon exceptions to the bill, see Case No. 8,578.]

George H. Williams, W. W. Page, and A. C. Gibbs, for complainant.

George Cartter and John H. Mitchel, for defendant.

DEADY, District Judge. This suit was commenced November 9, 1860, to enjoin the defendants from trespassing upon lots 1, 2 and 3 in block 74 of the town of Portland, and to quiet the title of complainant thereto. On June 8, it was heard upon exceptions for impertinence to the amended answer. On December 5, it was finally heard upon the amended bill, answer thereto and proofs, and submitted on written arguments afterwards filed, and taken under advisement. By his amended bill the complainant alleges that he is a citizen of Indiana; that he is the legal owner and entitled to the exclusive possession of lots 1, 2 and 3 in block 74 in the town of Portland, and has been seized in fee of the same and had the possession thereof since about January 1, 1853; that in pursuance of a long-contemplated purpose, about July 1, 1859, he caused piles to be driven and the framework for wharves to be erected on said lots, and that said improvements are of the value of about $1,000; that said improvements were made without objection or hindrance on the part of the defendants, but that the defendants have since threatened to remove, tear down and destroy the same, and have arrested the agents and employés of complainant engaged on said improvements, and now hold them in custody without authority of law; that the defendants falsely and wrongfully allege that the town of Portland has some right or title in and to said lots adverse to the complainant, and by reason thereof defendants make said threats and will execute them unless restrained, but that said town has no right or interest in such lots either at law or in equity; that said lots are worth about $12,000, but if the defendants be permitted to execute said threats, they will be valueless to complainant, and the complainant will suffer great and irreparable damage; and that by reason of the false and wrongful representations aforesaid, many persons suspect that complainant's title is invalid, with a prayer for a perpetual injunction.

The separate amended answer of the town of Portland denies the material allegations of the amended bill, and then pleads by way of answer that in the year 1845, the present site of Portland was laid off in blocks, lots, streets, squares, and a levee, by Francis W. Pettigrove and Abbot L. Lovejoy, and that said streets, squares and levee, were dedicated to the use of the public by said P. and L. forever; that the people of Portland accepted such dedication, and occupied and possessed the same up to the year 1849, when the said P. and L. transferred all their right to the land claim upon which the town was laid out to Daniel H. Lownsdale, and that said D. H. L. recognized and affirmed said dedication, and did particularly represent and state that the strip of land now called the levee and then Water street, was public property, and by reason of such representations did sell lots adjoining thereto at enhanced prices; and that the people of Portland have always had the use of the same except where wrongfully deprived of it by private claimants, and that D. H. L. has never paid any taxes on said lots; that the premises in controversy are within said dedication, and D. H. L. claims to have acquired title to the same since such dedication, and that the complainant claims through said D. H. L., and is therefore barred from asserting any interest in the premises as against this defendant. And for further answer, that the town is authorized by its charter to prevent and remove nuisances and obstructions from the streets and the Wallamet river within its limits, and that the common council thereof on August 2, 1860, passed an ordinance to prevent and remove obstructions from the Wallamet river and the levee thereon, between Washington and Main streets.

The defendant, Orville Risley, by his separate answer says that by virtue of his office of recorder, and the ordinance of August 2, 1860, he issued a warrant for the arrest of the agents and employés of the complainant

engaged in erecting improvements on the lots in question.

The defendant, James H. Lappeus, by his separate answer says that by virtue of his office of marshal and the warrant aforesaid he arrested the agents and employés aforesaid.

From the pleadings and proofs certain facts appear to be established in this case, which it will be well to state in their chronological order, before proceeding to investigate those that are controverted and about which doubts may exist. Sometime in 1845 Pettigrove and Lovejoy took up the land claim of 640 acres upon which the town of Portland is now built and occupied it until September 22, 1848, under the land law of the provisional government, the title thereto being in the United States, during which time they laid out some portion of it in blocks, lots and streets, and that on said September 22 they abandoned or transferred their possession to Daniel H. Lownsdale, and that sometime in the year 1849, Stephen Coffin and W. W. Chapman became joint occupants and interested in the possession of the land claim with D. H. L. That afterwards said D. H. L., under the donation act of September 27, 1850 (9 Stat. 497), became a settler upon one third of such land claim, including the premises in controversy, and by virtue of the required four years residence and cultivation, as evidenced by the donation certificate [Ex. A, p. 1, Ev.] [2] became the legal owner thereof, and on September 20, 1851 [Ex. B. & C., p. 1 and 2, Ev.],[2] by deed duly executed, conveyed said lot 3, and on January 1, 1853, said lots 1 and 2, to complainant; that on April 29, 1852, the common council of Portland, by resolution, adopted the plat of the town "drawn by John Brady as the city plot" [Ex. F, p. 9, Ev.],[2] and that said council, by ordinance, passed August 2, 1860, asserted the strip of land east of Front street to be a public levee, and provided for removing all obstructions therefrom, which ordinance was by said council repealed on June 14, 1861, and on August 6, 1861, said council passed an ordinance declaring said strip of land to be private property, and permitted the holders thereof to build wharves, wharf-houses and docks thereon; [Ex. E., p. 9, Ev.] [3] that in the years 1854 and 1858 the town of Portland assessed the premises for the purpose of taxation, and that said taxes were paid to the town by D. H. L. for complainant; and that D. H. L., on April 20, 1851, and for six successive weeks thereafter, published a notice in the weekly Oregonian, a paper of general circulation in the town of Portland, that he claimed the land east of Front street, including the premises in controversy, and warned all persons from trespassing thereon.

Both parties admit the title of D. H. L. The complainant claims under him by a paper title which has been satisfactorily proved. He is also shown to have been in the actual possession of the premises at the commencement of this suit and as far back as July of the same year. Whether the premises were actually occupied by him before that time does not distinctly appear; but the title draws to it the possession and he would be presumed to have it, if material to his rights, unless the contrary were shown. The defendant also claims under D. H. L. by dedication to public use. The defendant alleges that this dedication was originally made by P. and L., but this allegation is not supported by any evidence whatever. On the contrary the evidence tends to show that P. and L. held and occupied the property now called the levee as private property. They had upon it a private wharf and slaughterhouse, and used them as such. [See Ev. Robinson, p. 8; Ev. of King, p. 11.] [3] But if the fact were otherwise, and it appeared beyond doubt that P. and L. did make such dedication, it would be immaterial. They had nothing in the land to dedicate. They were mere occupants of the public land; had only the naked possession, which terminated with such occupancy, and could not by any act of theirs charge the lands in the hands of any subsequent occupant with any easement or encumbrance whatever. This question was fully considered and discussed when this case was before the court on exceptions for impertinence. Lownsdale v. Portland [Case No. 8,578].

It is also alleged that D. H. L., after he came into the possession of the land claim, ratified and confirmed such dedication by general representations to the public, as well as particular ones made to persons to whom he sold lots lying contiguous to said levee. Neither is this allegation supported by any evidence whatever. And from the fact that no such general or special representations have been proven, although if made the fact must be known to many persons now living here, I conclude that the allegation is absolutely untrue as well as unproved.

This disposes of the question of dedication so far as it distinctly appears upon the pleadings; but on the trial evidence was offered to show a special and original dedication by D. H. L., jointly with Coffin and Chapman after they had been admitted into the possession of the land claim with him. In considering this evidence, it is well to bear in mind that D. H. L. was the owner of this property, and that the burden of proof is upon the town to show such dedication. It should be clear and cogent, and when it consists of casual and disjointed conversations and remarks, often indifferent in themselves and susceptible of various interpretations and colorings, owing to the prepossessions and prejudices of the witnesses who detail them, it should be closely scrutinized, and unless in harmony

[2] [From 1 Or. 402.]

[3] [From 1 Or. 403.]

[3] [From 1 Or. 403.]

with the established circumstances of the case, but little heeded. Security and certainty of title to real property are among the most important objects of the law in any civilized community. Any act intended and permitted to affect the ownership or use of such property the law requires to be done or suffered with certain solemnities and formalities, so that the fact may be read and known of all men. What is shown to have once belonged to a person he is not presumed to have parted with; but the fact, if claimed, must be satisfactorily proved. And, although from the nature of the case, a dedication of streets and public grounds in towns may be shown by acts and declarations in parol, they ought to be of such a public and deliberate character as would make them generally known, and not of doubtful import. Of this character are the exhibition or publishing of a map of a town, with certain spaces marked thereon as streets or public squares. But it is too apparent to admit of doubt that the introduction of this evidence was an indirect attempt on the part of defendant to avail itself of the release which was held to be invalid and insufficient for this purpose on the exceptions to the amended answer for impertinence. The only witnesses who speak of this alleged dedication, are W. W. Chapman and Shubrick Norris, and they both state that it occurred in the summer of 1850, and that it was the controversy which resulted in this release. Now, the nature of that transaction seems to have been this: From the time of his occupation of the claim to July, 1850, D. H. L. appears to have been in the undisputed possession of the strip of land now called the levee, east of Water, now called Front, street, as much so at least as of any other undisposed part if it. Up to this time no one has been found who ever heard even of any dedication of this land to the public by any one, let alone D. H. L. In the fall of 1848 he is shown to have kept a private wharf upon it, for hire. The person who attended the wharf testifies to the fact. The wharf was afterwards accidentally carried off by the river. In April, 1850, D. H. L. had the town surveyed by R. V. Short, who then laid off this strip of land into fractional blocks and lots, which were openly sold to the public. By this survey, Front street, instead of extending to the Wallamet river, was bounded on the east by a line parallel with the west side of it, making a street of the usual width of other streets in the town, and continuing the streets that crossed it at right angles to the water. After all this, in July, 1850, while a building was going up in one of these fractional blocks east of Front street, Parrish, the occupant of a lot on the opposite side of the street, commenced a suit to enjoin the erection of the building. At this time D. H. L. was in San Francisco. He came home soon after, and, on hearing of the matter, said to Chapman, who had acted as his agent in his absence, that he had not intended to have that piece of ground built upon, but intended it for wharves. Apart from the written release, this is the only word of D. H. L.'s, one way or the other, that the defendant has shown upon the subject of this alleged dedication.

Does it amount to a dedication, or imply that one had been made? Certainly not, even when considered apart from the strong qualifying circumstances; but when taken in connection with his continued and open acts of ownership and occupation before or since, it would be preposterous to draw any such inference from this single expression. The declaration is one which might very naturally and properly be made by a town proprietor, upon finding that his agent, in his absence, had authorized or permitted an ordinary building to be erected on a block which he had reserved or set apart to build a wharf upon. The words plainly imply a private ownership on the part of D. H. L. inconsistent with an existing public use, and a purpose to have used it in the future as a private wharf-ground for his own benefit. However, in the language of witness Chapman, for the purpose of "buying peace" and getting rid of the suit which would disparage and prevent the settlement and growth of the new town—then struggling for recognition as a place of promise and future importance—a compromise was arranged by which L. C. and C. agreed to release to the public that portion of said strip of land lying between Main and Washington streets, which includes block 74, on condition that said suit should be dismissed. This condition was never performed, and the release never took effect. Doubtless, from thence until the fall term of the court in which the suit was pending and to be dismissed, the understanding of all parties was that according to and in pursuance of the terms of this compromise, the above mentioned portion of said strip of land was to be left open to public use as a levee or landing. This period was about one month. But the suit was not dismissed. It was kept hanging over the town and retarding its growth to the special injury of the releasors. Whatever the cause for this failure to perform the condition in the release, it was no fault of the releasor, D. H. L., and the public took nothing by the transaction.

I have been induced to state the particulars of this transaction, which is here sought to be distorted into an absolute dedication, by keeping out of sight the release itself, while showing the general impression of the public and the casual conduct of the releasors after it was executed and before it was known that its conditions would not be complied with, more for the purpose of showing that the claim of the defendant is without any merit, than for the purpose of determining its legal effect.

Upon the exceptions for impertinence in this case the court held that if the release

had been unconditional, being a mere quit-claim without covenant from a mere occupant having no title, it would not bar the releasor from asserting the after acquired title from the United States. Lownsdale v. Portland [Case No. 8,578]. The rule of law upon this question is established beyond doubt. The authorities go in one unbroken current to the effect stated. But not only has the defendant failed to prove a dedication to public use, but upon the whole evidence, it satisfactorily appears, that there never was any such dedication or intention to make it, apart from the proceedings connected with the giving of the release. The map drawn by John Brady from the survey of Short, is in evidence. The latter recognizes it and testifies that it was made from his survey. The map is without date, but it is proven that the Short survey was made in the spring of 1850, and Short also testifies that he saw the Brady map in Portland in the fall of that year. From the inspection of that map it plainly appears that Front street is bounded by two parallel lines, and that the strip of land between the east line of said street and the Wallamet river is laid off in blocks and lots varying in depth with the meanderings of the river. Nothing appearing to the contrary, this fact alone is sufficient to decide the question against the defendant. Nor is this all; the defendant, on April 29, 1852, by a resolution of its common council, deliberately recognized and adopted this map as a correct representation of the plat of the streets and blocks and lots delineated thereon. In the year 1854 the corporate authorities assessed the premises in controversy as private property and collected the tax in 1855. The same thing was done in 1858. D. H. L. always claimed this so-called levee as private property and constantly asserted his right to it, by notice to the public, by sales of portions of it, by actual occupation from time to time, and by payment of taxes levied thereon by defendant. Even since the commencement of this suit the defendant has, by two different ordinances passed by its common council, deliberately admitted that the levee was private property. Ordinances of June 14 and August 6, 1861. The complainant is shown to be the legal owner of the premises, and it does not appear that they were ever dedicated to public use by the grantor of the complainant, or any one else. The defendant did, and was threatening and proceeding to continue to commit the trespasses complained under a claim of right or use in the premises.

Decree, that the town of Portland, and the corporate authorities thereof, of whatever name or nature, be perpetually enjoined from asserting any right, title, or interest in said premises, or in any way trespassing upon or molesting the complainant in the occupation and use thereof by reason of the supposed dedication in its answer alleged and set up, and for costs.

LOWREY (WHARTON v.). See Case No. 17,481.

LOWRY (BLYDENBURGH v.). See Case No. 1,582.

Case No. 8,580.

LOWRY v. CANAL BOAT.

[See Case No. 8,582.]

Case No. 8,581.

LOWRY v. COMMERCIAL & FARMERS' BANK et al.

[Taney, 310; [1] 3 Am. Law J. (N. S.) 111; Brunner, Col. Cas. 331; 6 West. Law J. 121.]

Circuit Court, D. Maryland. April Term, 1848.

EXECUTOR—BEQUEST OF BANK-STOCK—PLEDGE FOR INDIVIDUAL DEBT—NOTICE—TRANSFER OF STOCK—LIABILITY OF BANK FOR IMPROPER TRANSFER—LIABILITY FOR TESTATOR'S DEBTS.

1. Bank-stock was bequeathed to the testator's executors, and the survivor of them, to pay the dividends to one for life, with remainder over; and the executors were, by a decree in chancery, directed to hold the same in trust to pay the dividends to the devisee for life, and after her death, to divide the stock between those in remainder. The testator died rich; and several years after his death, and after all his debts were paid, one of the executors pledged the stock, which was still standing in the testator's name, to another bank to secure his individual debt; the debt being afterwards paid, the stock was transferred to T. J. & Co., one of the executors being the sole member of that firm, and was by him re-transferred into the names of himself and his co-executor, as executors. Afterwards he, signing his name as acting executor, again pledged the stock to the said bank, to secure other debts of the firm of T. J. & Co.; and a note, for which said stock was held in pledge, not being paid, in consequence of the failure and entire insolvency of the firm of T. J. & Co., the stock was sold, and the proceeds applied to its payment, leaving a balance in the hands of the bank. The last dividend on the stock, before it was sold, was received and retained by the bank; but the other dividends, which accrued whilst the stock was in pledge, were received by the said executor; those first received were paid over by him to the legatee for life, but the others were not. On a bill filed by the legatee for life, who was an alien residing in Ireland, to recover the dividends due to her, *held*: That as the bank, to whom the stock was pledged, paid a valuable consideration for it, and had no notice, actual or constructive, of any violation of trust, upon which the transfer could be impeached in equity, it had a right to sell the stock for the payment of the note for which it was pledged, and to make the purchasers a valid title.

2. Purchasers of stock are not bound to look beyond the certificate, or to examine the books of the corporation, to ascertain the validity of the transfer.

[Cited in Pratt v. Taunton Copper Co., 123 Mass. 112.]

3. But the corporation whose stock is transferred, is made the custodian of the shares, and is clothed with power to protect the rights of every one from unauthorized transfers. It is a trust placed in its hands for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper dili-

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

gence and care; and is responsible for any injury sustained by its negligence or misconduct.

[Cited in Thurber v. Cecil Nat. Bank, 52 Fed. 514.]

[Cited in Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 500.]

4. As the corporation appoints the officers before whom the transfers of stock must be made, it is responsible for their acts, and must answer for their negligence or default, whenever the rights of a third person are concerned.

5. By the law of England, and it would seem, of Maryland, also, before the act of 1843, c. 304 (which does not apply to this case), an executor may sell or raise money on the property of the deceased, in the regular execution of his duty, and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money.

[Cited in Loring v. Salisbury Mills, 125 Mass. 151.]

6. But if a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured.

[Cited in Duncan v. Jaudon, 15 Wall. (82 U. S.) 175.]

[Cited in Carter v. Manufacturers' Nat. Bank, 71 Me. 453.]

7. In this case, the rights of stockholders and persons interested in its stock were placed by law under the guardianship and protection of the bank, so far as concerned the transfer on their books.

8. If these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction.

[Cited in Jaudon v. National City Bank, Case No. 7,230.]

9. The transfer having been made by one of the executors, his character of executor, of itself, was notice that there was a will open to inspection upon the public records; the bank, therefore, when the transfer was proposed to be made, was bound to take notice of the will, and is chargeable to the same extent as if it had actually read it.

10. This stock, although specifically bequeathed, was liable to be sold to pay the testator's debts; and if the bank did not know, or had no reasonable ground for supposing, that the executor was misapplying the assets, it would not be responsible, notwithstanding its implied knowledge of the will.

11. The bank is equally chargeable for the neglect or omission of duty of the officer to whom it had committed the superintendence of the transfers of stock, as for the neglect or omission of its president; and such officer is also equally chargeable with implied notice of the will, and equally bound to refuse the transfer, when he saw that the executor was using this stock in violation of his trust as executor.

12. In the case of Allender v. Riston, 2 Gill & J. 86, the opinion of the court would seem to have been that, notwithstanding the act of 1798, § 3, an assignment by the executor, for his own debt, would be valid against the creditors of the estate, unless there were collusion with the executor; but the case was not decided on that point, nor does the opinion of the court apply to an assignment of property specifically bequeathed.

13. The proposition of one of two executors (the other executor not uniting in the transfer) to transfer this stock, so long after the death of a wealthy testator, without first obtaining an order from the court to justify him, must have satisfied any man of common experience in business, that he was grossly abusing his trust.

14. A bank or other corporation is bound by the same obligations, moral and legal (when the rights of third parties are concerned), that apply to the case of an individual, unless explicitly exempted by law; and if an individual, who confederates with an executor and assists him in defrauding his cestui que trust, is liable to the party injured, there can be no reason why a bank, which knowingly enables an executor to convert the property of the cestui que trust to his own private use, should not be equally responsible.

15. Under the act of 1798, § 3, an order of the orphans' court, for the sale of the stock, would protect the bank from all responsibility.

16. Another bank being induced, relying on the certificate of stock, to loan its money upon it, without knowledge that the stock had ever belonged to the testator, or been transferred by his executor, the stock cannot be followed in its hands, or in the hands of those to whom it afterwards sold it, and be charged with the trusts created by the will.

17. The complainant's claim being merely for dividends on the stock, and not for the stock itself, and this court's jurisdiction over the case being based on the alienage of the complainant; it cannot do what the facts would otherwise warrant, and decree in favor of those of the defendants who are entitled to the stock after the complainant's death; although the court would be authorized to do so, if the complainant's interests required it.

This bill was filed on the 10th of February, 1847, by Maria Lowry, an alien and subject of the queen of the United Kingdom of Great Britain and Ireland, stating that Talbot Jones, deceased, of Baltimore, who was her brother, gave and bequeathed by his will, with other things, two hundred and eighty-two shares of stock in the Commercial and Farmers' Bank of Baltimore, to his sons Samuel Jones, Jr., and Andrew D. Jones, and the survivor of them, in trust, among other things, to pay over the dividends thereof to the complainant for the term of her natural life, and after her death to her daughter Mary (since deceased) for her life. That the testator appointed his said sons his executors, to whom letters testamentary were granted some time in the year 1834, after which, some time in the year 1840 or 1841, a bill was filed in the chancery court of Maryland by Michael S. Norman, the guardian of Wm. B. Norman, a minor, and by said Wm. B. Norman, against the said trustees and others, and on the 6th of November, 1841, by a decree passed therein, it was, amongst other things, decreed that the said trustees should hold the two hundred and eighty-two shares of stock aforesaid, in trust to pay the dividends thereof to the present complainant, Maria Lowry, for her life, and after her death, to hold ninety-four shares thereof, in trust for Emily J. Albert (the wife of Wm. J. Albert), according to the will of the testator, and transfer the remaining quantity of one hundred and eighty-eight shares to Josiah Jones, of Frederick county, and to the

said Wm. B. Norman, in equal moieties. That the said two hundred and eighty-two shares of stock continued in the name of the testator upon the books of the Commercial and Farmers' Bank, from the testator's death, in the year 1834, up to the month of May in the year 1842; on the 4th day of which month, they were transferred upon said books to the Merchants' Bank of Baltimore by the said Samuel Jones, Jr., professedly as executor aforesaid, but actually in violation of his duty as such. That on the 17th of June next following, the said Merchants' Bank transferred two hundred and eighty-two shares of the same bank stock, upon the books of the Commercial and Farmers' Bank into the name of Talbot Jones & Co., which was, at that time, the commercial style and name of the said Samuel Jones, Jr. That said Talbot Jones & Co., on the 20th day of the same month, transferred two hundred and eighty-two shares of the stock of said Commercial and Farmers' Bank, upon the books of said bank, into the names of Samuel Jones, Jr., and Andrew D. Jones, executors of Talbot Jones, deceased; and that said Samuel Jones, Jr., on the 17th of August next ensuing, describing himself as the acting executor of Talbot Jones, deceased, and professing to act for both executors of said deceased, transferred, by his sole act, to the Merchants' Bank aforesaid, the said two hundred and eighty-two shares of Commercial and Farmers' Bank stock, which it has held ever since, receiving from time to time the dividends thereon, when declared and paid by said Commercial and Farmers' Bank. That the shares of stock so as aforesaid transferred to the said Merchants' Bank, were by it received from the said Samuel Jones, Jr., and that it dealt alone with him in both transactions, and took his individual title only to said shares of stock, and that the complainant knew of no consideration given by the said Merchants' Bank, for either of said transfers, to the said Samuel Jones, Jr., and therefore charged that there was none, or if there were any, she charged that there were other securities lodged with it by said Jones, abundantly sufficient to make it safe without resorting to said shares of stock; and that she gave notice of her claim upon said shares of stock, and of the real title thereto, to the said Merchants' Bank of Baltimore, and charged that Daniel Sprigg, the cashier of the said bank, was aware, at the time of both of said transfers, of the said decree in chancery, and of the identity of the stock there mentioned with that transferred to the said Merchants' Bank; and that at the time of said transfers, the president and one or more of the directors and officers of the Commercial and Farmers' Bank knew the contents of the will of the said Talbot Jones, and the existence of the decree aforesaid; and that said Talbot Jones had been dead many years, and that any debts he might have left behind him had been settled long before the year 1842; and that the co-executor and co-trustee of said Samuel Jones, Jr., was a resident of Baltimore and doing business therein. That the dividend declared by the said Commercial and Farmers' Bank, payable in November, 1845, upon said two hundred and eighty-two shares, was $197 40, and that payable in the year following was $394 80, no part of which had been received by the complainant; that she first heard of the transfer of said shares in October, 1846; that Andrew P. Jones died in August, 1846; that Samuel Jones, Jr., was insolvent; and that William B. Norman was under age, and Daniel Sprigg was his guardian. That the said transfers of the 4th of May and 17th of August, 1842, were made by the president and directors of the Commercial and Farmers' Bank in violation of a by-law of said bank upon the subject of transfers by executors and others holding stock in a fiduciary character, and with notice of said shares being held only in a fiduciary character by said Samuel Jones, Jr., and Andrew D. Jones, and of their being used for his own benefit by said Samuel. That both said transfers were made and allowed without any authority in law on the part of said Samuel, and that they were void, and transferred no title to said shares as against the complainant; but that neither the Commercial and Farmers' Bank, nor the Merchants' Bank, would admit the invalidity of said transfers, nor the complainant's right to said shares, and to the dividends thereon.

The bill propounded certain interrogatories to the defendants, and prayed that it might be decreed that said transfers were null and void; that the shares transferred were still the property of the said Samuel Jones, Jr., as surviving trustee under the decree therein mentioned, and under the will of said Talbot Jones, deceased, and that it should be so entered upon the books of the Commercial and Farmers' Bank; and that there should be paid to the complainant the dividends declared on said shares in the month of November, 1845, and in the year 1846.

The answer of Daniel Sprigg, cashier of the Merchants' Bank, admitted that he had heard that Talbot Jones died in 1834, and left a will of which Samuel Jones, Jr., and Andrew D. Jones were executors, and that he was told by William J. Albert, at a meeting of the creditors of Talbot Jones & Co. in the autumn of 1846, that two hundred and eighty-two shares of stock of the Commercial and Farmers' Bank were left by said Jones as a part of his estate; and that he was subsequently, and after the 4th of December, 1846, informed by said Albert of the decree which he supposed was the decree mentioned in the bill; but that he had never heard previously to said conversations with said Albert, either of said trusts, or of said decree. That he was the cashier of the Merchants' Bank on the 4th of May and 17th of

August, 1842, and still was, but that he was not, at either of said periods, aware of the existence or of the contents of the decree referred to in said bill; that the first information he ever obtained of said decree, so far as he recollected, as already stated, was some time after the 4th of December, 1846, when he was informed by Mr. Wm. J. Albert of the existence of a decree, and of its contents, which decree he supposed was the one referred to in said bill. That Andrew D. Jones was a partner in the firm of Jones, Burneston & Co., and did business in Baltimore to the time of his death, in 1846; that Samuel Jones, Jr., was insolvent, and that respondent was the guardian of William B. Norman.

The answer of the Merchants' Bank stated that Daniel Sprigg was its cashier on the 4th of May and 17th of August, 1842, and still was; that the respondent had no knowledge or information whether or not, on or before either of said days, said Sprigg was or was not aware of the existence or contents of the decree referred to in the bill, except what it had derived from said Sprigg himself since the bill was filed; that it maintained that it was not to be, in any manner, concluded or affected by any knowledge or information which said Sprigg might have acquired in his private capacity, but nevertheless stated that said Sprigg had told respondent that he had no knowledge whatever of said decree, on or before either of said days, and that the first information he ever obtained of said decree was some time after the 4th of December, 1846, when he was informed by Mr. Wm. J. Albert, that a decree existed which the said Sprigg supposed to be the one referred to in the bill. That on the 4th of May, 1842, the respondent discounted for Talbot Jones & Co. two notes for $2500, which became due, respectively, on the 6th and 16th of June, 1842; to secure which loan, Messrs. Talbot Jones & Co. deposited with the respondent a certificate of two hundred and eighty-two shares of stock of the Commercial and Farmers' Bank, made out in the name of the respondent, and brought to it by Samuel Jones, Jr., one of said firm, as the security for said loan; and the respondent supposed that on the said 4th of May, the transfer to it was made on the books of the Commercial and Farmers' Bank, but had never examined said books, and had no agency whatever in making said transfer, and no knowledge of it except what was contained on the face of the certificate, and did not know in whose name the stock stood previously to the transfer, or by whom the transfer was made, or that it was claimed by or belonged to any person except the said Talbot Jones & Co. That it was the usual course, in lending upon the security of stock, for the borrower to deposit with the lender the certificate of the stock to be hypothecated, made out in the name of the lender, and previously transferred to him, and that it was entirely unusual, in such cases, and in all cases of the transfer of stock, for the transferrees to examine into the transfers thereof, or to inquire in whose name the stock stood previously to the transfer, or by whom the transfers were made, but that a certificate of stock, regularly made out in the name of the transferree, as aforesaid, was considered as conveying a good title, behind which it was not the custom, nor was it considered necessary to look. That on the payment of said notes, the respondent, by the usual power of attorney, authorized the re-transfer of said shares of stock, and supposed that the same was transferred into the name of Talbot Jones & Co. That on the 16th of August, 1842, the respondent made a loan to Talbot Jones & Co., upon a hypothecation of two hundred and eighty-two shares of the stock of the Commercial and Farmers' Bank, transferred to it on the 17th of the same month; that the money so loaned was duly paid, but the respondent continued to retain the said shares of stock standing in its name, and from time to time, made loans to said firm of Talbot Jones & Co., upon the faith and security of said stock, until February, 1845, when a note of the said firm for $5000 was discounted by the respondent, on the security of said stock, and at the same time, an agreement was made between them (filed with the answer) by which the respondent, on default being made in the payment of said note, or any of its renewals, was authorized to sell the said stock, and apply the proceeds to its payment; that said note was subsequently renewed from time to time, and on the first of August, 1846, the note was given by way of renewal, which the respondent exhibited as part of its answer, which note fell due and was protested on the 4th of December, 1846; that the note so exhibited was likewise discounted by the respondent for said Talbot Jones & Co., and with their consent, and upon the security of said two hundred and eighty-two shares of stock, transferred as aforesaid on the 17th of August, 1842, and held by it at the time of said discount. That when said first notes were discounted, there were no endorsers to them, and no security of any kind was given therefor, except the said stock, until the 17th of September, 1844, when the note then given by Talbot Jones & Co. was endorsed by Jones, Burneston & Co., who continued to endorse the renewals, from that time, until the note above mentioned was given; but that the respondent looked mainly to said shares of stock as security for said loan and its renewals. That Andrew D. Jones was a member of the firm of Jones, Burneston & Co., and Samuel Jones, Jr., was sole member of the firm of Talbot Jones & Co. That the first notice which the respondent received of the claim set up by the complainant to said stock, was a letter dated the 3d of December, 1846, from William J. Albert, claiming to act as attorney for the complainant, to which the respondent replied by a letter dated about the 4th of December.

That the respondent had every reason to suppose that said stock belonged to Talbot Jones & Co., and no one else, until the autumn of 1846, when, at a meeting of the creditors of Talbot Jones & Co., said Albert made an undefined claim to said stock. That said Samuel Jones, Jr., for a great number of years, was largely engaged in business by the name of Talbot Jones & Co. That said firm until long after the year 1842, enjoyed a very high degree of credit, and said Samuel Jones, Jr., during said period, and until his failure, possessed the entire confidence of the community as a man of integrity and honor. That the note above mentioned, not having been paid at maturity, the respondent placed said stock for sale in the hands of Wm. Woodville, a broker in the city of Baltimore, and the same was sold, and the balance of the proceeds, after paying said debt, amounted to $470 52, which had been carried to the credit of the suspense account of the respondent, in ignorance of what other disposition to make of it; that whilst said stock was pledged to respondent, the dividends were drawn by or paid over to the firm of Talbot Jones & Co., except a balance of $157 92, which had been added to the said suspense account, making the amount of said account $628 44. And that the respondent was a creditor of the firm of Talbot Jones & Co. for other loans, to a much larger amount than the said sum of $628 44.

The answer of the president and directors of the Commercial and Farmers' Bank stated, that the said Talbot Jones, deceased, was, at the time of his death, as appeared by the books of the said bank, the owner of two hundred and eighty-two shares of the stock of said bank; that they did not know anything of the last will and testament of said Talbot, further than they had heard; and they believed that he left a will, and that his sons Samuel Jones, Jr., and Andrew D. Jones, the latter of whom had lately departed this life, were the executors thereof; but the respondents had no knowledge, at the time, that said Talbot bequeathed said shares of stock to the complainant, or for her use, nor did they then know of said fact, further than by hearsay, and by the statement thereof in the bill. That they had no knowledge of the passing of the decree by the chancery court of Maryland, as stated by the complainant, and never heard thereof till after the failure of Samuel Jones, Jr., in July or August, 1846; neither did they know of any apportionment of said stock, or any part thereof under said decree, further than the same was disclosed by the bill aforesaid; they admitted that said shares of stock continued to stand on the books of the Commercial and Farmers' Bank, in the name of said Talbot Jones, until the said 4th day of May, 1842, when a transfer of the same was made to the Merchants' Bank of Baltimore; and for the several transfers of said shares, at various times since, and by whom made, until the 11th day of December, 1846, inclusive, they referred to copies from the transfer book of said bank, and a list of the names of the persons to whom they were finally transferred by William Woodville. That they did not know that, at the time of the death of said Talbot Jones, the then president, and one or more of the directors of the Commercial and Farmers' Bank, knew the contents of the will of said Talbot, or that they knew of the existence of the decree aforesaid, but they thought it probable, from the connection existing between the then president, and the family of said Talbot, that at the time of the transfers to the Merchants' Bank of said stock, the contents of the will of the said Talbot were known to the then president of the Commercial and Farmers' Bank; but that said president was altogether ignorant of the making of said transfers, and did not in any manner or way sanction the same; that the transfers of said stock, made on the 4th of May and 17th of August, 1842, were not, at the time, known to the then president of the bank, or to the respondents; they denied that said transfers were made with the sanction of the respondents, or of their then president, who would certainly have objected to the making thereof, in the manner in which they were made, had they known, at the time, of the intention of Samuel Jones, Jr., so to make them. They admitted that Andrew D. Jones, deceased, was a resident of the city of Baltimore, and they also stated that the dividends mentioned in said bill, amounting to $592 20, were paid to the Merchants' Bank of Baltimore. They also admitted the insolvency of Samuel Jones, Jr.; that William B. Norman was an infant, and Daniel Sprigg was his guardian. That at the time of the transfer of said stock, on the 4th of May, 1842, there was in existence a by-law of their corporation on the subject of transfers by executors, and other legal representatives, a copy of which they filed, which was still unrepealed, and that until very lately, no evidence of the authority of executors or guardians to make transfers was required, other than a certificate of their appointment; that they believed and charged that the debt for which the said stock was hypothecated to the Merchants' Bank, on the 17th of August, 1842, was fully paid by Talbot Jones & Co., and that it became and was the duty of the Merchants' Bank immediately on the payment of said debt, to re-transfer said stock to the said executors of Talbot Jones, and had it been so transferred, it would have placed it in the power of the respondents to prevent any further transfer of said stock; but that, instead of doing so, said Merchants' Bank, without having any lien thereon, or any proper authority so to do, retained said stock as its own, and afterwards, from time to time, discounted the notes of said Talbot Jones & Co., for differ-

ent amounts, and at different times of payment; by which, as they alleged and charged, the Merchants' Bank made itself responsible for the value of said stock to the respondents, or to any one else having a just claim thereto, and more especially to those for whose use it was bequeathed in trust by said Talbot Jones, if there were any liability for the same to the said parties.

And the respondents, in answer to the interrogatories appended to the bill, said, to the first interrogatory, that they admitted the death of Talbot Jones in the year 1834, and that at the time of his death, he held two hundred and eighty-two shares of the stock of the respondent's bank, standing in his name on the books of said bank; and that the present officers of said bank did not know anything of the will of said Talbot Jones, further than by hearsay. To the second interrogatory, that at the time of the death of said Talbot Jones, it was not known to the officers of the bank, or to the bank, that said two hundred and eighty-two shares of stock were devised in trust, as stated in the bill, neither was it known that said officers or the bank knew of the decree of the high court of chancery, at the time of the passing thereof, or of the terms thereof, nor was it in any manner made known to the officers of the bank, till after the failure of Samuel Jones, Jr., in July or August, 1846. To the fourth interrogatory, that on the 4th of May and 17th of August in the year 1842, Jacob Albert was president of said bank, and Joseph (not Robert) Taylor was a director, and it was known that Talbot Jones died several years before, and was believed to have died rich; but they did not know anything of the debts for which his estate was liable, nor when, nor in what manner they were paid, nor whether they were paid; and that it was not known that Jacob Albert and Joseph Taylor were acquainted with the contents of said will. To the fifth interrogatory, that until the 4th of May, 1842, said two hundred and eighty-two shares of stock stood in the name of the said Talbot Jones, but the transfer thereof by Samuel Jones, Jr., on that day, and not the 17th of August following, was not made with the sanction or knowledge of Jacob Albert, the then president of the respondent's bank, who did not know thereof, until a considerable time after they had been a second time transferred to the Merchants' Bank; and they said, that had their then president known of the intention of said Samuel or Andrew Jones to make said transfers, he would have objected and not consented thereto. To the sixth interrogatory, that at the times of said transfers, there was in existence a by-law of their corporation on the subject inquired of, which was still in force, of which they annexed a copy, and they did not know whether any authority was filed or deposited at the time said transfers were made. To the eighth interrogatory, that Andrew D. Jones died in August or September, 1856, and at the time of his death, was a resident of Baltimore city, and in business there as a merchant; that Samuel Jones, Jr., was insolvent, and that Daniel Sprigg, they believed, was the guardian of William B. Norman, a minor.

The by-law referred to in the answer was in these words: "Sec. 10. The stock of the company shall be transferable on the books, only by the person in whose name it appears, or by his duly authorized attorney or representative. In all cases of transfer by attorney, the original letter of attorney, duly proved, shall be deposited and remain with the bank. And in case of transfer by executors, administrators or guardians, or other legal representatives, duly authenticated evidences of their authority shall be deposited and remain in the bank. No transfer shall be made, until the certificate granted to the transferrer shall be produced at the bank."

The answer of William J. Albert and Emily his wife, and Josiah Jones, Jr., admitted the statements of the bill so far as they were within their knowledge, and denied the validity of said transfers as against their residuary interests therein.

The answer of Samuel Jones, Jr., admitted the death of Talbot Jones in March, 1834, the bequest of said stock, the passage of the decree in chancery, the transfers of said stock, the death of Andrew D. Jones, who at the time of his death was a resident of, and doing business in, Baltimore, his own insolvency, the infancy of William B. Norman, and the appointment of Daniel Sprigg as his guardian.

A good deal of testimony was taken, the effect of which is sufficiently stated in the opinion of the court.

J. Mason Campbell, for complainant.
Brown & Brune, for Merchants' Bank.
R. Johnson and Sam'l J. Donaldson, for Commercial and Farmers' Bank.

TANEY, Circuit Justice. In order to understand the points which arise in this case, it is necessary to state the facts somewhat in detail. Talbot Jones, of the city of Baltimore, died in the year 1834, having first duly made his last will and testament, and appointed his sons, Samuel Jones and Andrew D. Jones, his executors, to whom letters testamentary were granted in the same year. The testator died possessed of a large amount of property of different kinds, and owned, at the time of his death, two hundred and eighty-two shares of stock in the Commercial and Farmers' Bank of Baltimore, standing in his name on the books of the bank. The dividends upon this stock is the matter of dispute.

The testator, by his will, bequeathed it, in trust for the complainant, during her life, in the following words: "I order and direct that my executors hereinafter named, or the survivor or acting one of them, shall receive

the dividends, from time to time declared and made payable on my stock in the Commercial and Farmers' Bank of Baltimore, in trust, that the said dividends shall be paid over or remitted by my executors, or the survivor or acting one of them, to my sister, Maria Lowry, now or lately of Dublin, in Ireland, during her natural life, and after her decease, to her daughter Mary Lowry, should she survive her mother, during the lifetime of the said Mary."

And in the succeeding clause of the will, this stock, together with other property, and also the general residue of his estate, is bequeathed to Samuel Jones and Andrew D. Jones and the survivor of them, and the "heirs, executors and administrators of such survivor, in trust for sundry persons named in the will, in certain proportions therein mentioned," subject to the devise of the dividends (on the stock) to his sister and daughter as aforesaid.

In 1839, upon a bill filed in the chancery court of the state by some of the parties interested, for the partition of the property bequeathed in the last-mentioned clause of the will, a decree was passed directing, among other things, that Samuel Jones and Andrew D. Jones should hold these two hundred and eighty-two shares of stock, in trust to pay the dividends to Maria Lowry, during her life, and after her death to be divided as mentioned in the decree: Mary Lowry, the daughter, died before the devise was made.

In this proceeding, Maria Lowry, the complainant, was made a defendant, and the bill taken pro confesso against her, upon publication in the usual form; but process was never served upon her; nor did she appear or answer; nor had she any interest whatever in the suit. By the decree, William B. Norman, Josiah Jones, and Emily J. Albert, are entitled to this stock upon the death of Mrs. Lowry; and on that account, it has been supposed to be advisable to make them parties in the case before the court.

After the death of Talbot Jones, Samuel Jones carried on business, on his individual account, in the name of Talbot Jones & Co.; and the transactions in the name of Talbot Jones & Co., mentioned in these proceedings, are the transactions of Samuel Jones, on his own individual account.

The stock in question continued to stand on books of the Commercial and Farmers' Bank in the name of Talbot Jones, until 4th May, 1842, when it was transferred to the Merchants' Bank by Samuel Jones; the other executor not joining in the transfer. This transfer, it appears, was made as security for a loan obtained by Samuel Jones from the Merchants' Bank, on his own private account, under his mercantile style and name of Talbot Jones & Co., and the money being afterwards paid, the stock was transferred to him by the bank, under the same name and style, on the 17th June in the same year; and on the 20th of the same month, transferred by him as Talbot Jones & Co. to himself and Andrew D. Jones, as executors of Talbot Jones. On the 20th of August following, Samuel Jones, signing his name as acting executor, again transferred this stock to the Merchants' Bank, which continued to hold it as a pledge for sundry loans of money made, from time to time, to Talbot Jones & Co., until the 11th of December, 1846, when it was transferred to a broker, and sold to pay a note which fell due on the 4th of that month, and had been protested for non-payment.

Talbot Jones & Co., that is to say, Samuel Jones, stopped payment in September, 1846, and in January, 1847, petitioned for the benefit of the insolvent laws of this state; it is admitted on all hands, that he is utterly insolvent, and unable to pay any part of the dividends due to the complainant. After the last transfer to the Merchants' Bank, the dividends were either paid to its orders in favor of Talbot Jones & Co., or were drawn by the bank and paid over to him, with the exception of the last dividend, which fell due before the stock was sold. This is yet in the hands of the bank, except the sum of thirty-nine dollars and forty-eight cents which has been paid out of it for taxes on the stock. Notwithstanding the transfer of the stock in 1842, the amount of the dividends were regularly paid over to the complainant by the executors, until November, 1845; but the dividend declared at that time has not been paid to her, nor any of those subsequently. She had no notice of the transfer of the stock until October, 1846, after the last of the loans above mentioned had been made by the Merchants' Bank; and on the 3d of December following (the day before the note became due), she gave the bank notice of her claim.

When the stock was first transferred by Samuel Jones to the Merchants' Bank, a certificate was issued by the Commercial and Farmers' Bank, in the following words:

"Commercial and Farmers' Bank of Baltimore.

"No. 707. May 4, 1842.

"This is to certify that the Merchants' Bank of Baltimore is entitled to two hundred and eighty-two shares in the capital stock of the Commercial and Farmers' Bank of Baltimore, on each of which thirty dollars have been paid, but which have since been reduced by the act of assembly to twenty dollars a share. Transferable at the bank only, personally or by attorney.

"Trueman Cross, Cashier.

"282 shares."

This certificate was delivered by Samuel Jones to the Merchants' Bank, when he obtained the first loan, and was re-delivered to him when the money was paid and the stock transferred to Talbot Jones & Co.; a similar certificate was again issued by the Commercial and Farmers' Bank, when the second

transfer was made to the Merchants' Bank, and was retained by it, until the stock was transferred to the broker to be sold, as hereinbefore mentioned.

This is a summary statement of the facts, so far as they are material to the decision of the case. It is very clear, that the money due to the complainant has been grossly misapplied; and the question is, whether she is entitled to relief against the banks, or either of them. Samuel Jones is undoubtedly liable; but as he is admitted to be insolvent, she can obtain no redress from him.

As concerns the Merchants' Bank, we see no ground upon which it can be liable beyond the amount of dividends remaining in its hands. It does not appear that the bank, when it accepted the pledge of this stock, or when it made its loans, had any reason to suppose that the stock had ever been held by Talbot Jones, or that it was transferred to the bank by Samuel Jones, as one of his executors. In order to obtain the loan upon the pledge of this stock, Samuel Jones did nothing more than produce the certificate of the Commercial and Farmers' Bank, showing that the two hundred and eighty-two shares of stock had been transferred to the Merchants' Bank; but the certificate did not shown by whom it had been transferred, nor to whom it had previously belonged; and according to the usual course of business, the presumption was that it belonged to Samuel Jones himself. The Merchants' Bank appears to have acted under this impression; for when the first loan was paid, and the lien of the bank thereby released, it transferred the stock to him individually, by the name of Talbot Jones & Co., and not to the executors of Talbot Jones.

It is very true, that the instrument of transfer upon the books of the Commercial and Farmers' Bank showed it to have been made by Samuel Jones, in his character of executor; and in general, a party must be presumed to have notice of everything that appears upon the face of the instrument under which he claims title. But a transfer of stock cannot, in this respect, be likened to an ordinary conveyance of real or personal property. The instrument transferring the title is not delivered to the party; the law requires it to be written on the books of the bank in which the stock is held; the party to whom it is transferred rarely, if ever, sees the entry, and relies altogether upon the certificate of the proper officer of the bank, stating that he is entitled to so many shares, that is to say, so many shares have been transferred to him by one who had a lawful right to make the transfer.

The case of Davis v. Bank of England, 2 Bing. 393, is a strong one on this head. The three per cent. consolidated annuities created by the English government, were made payable at the Bank of England, and transferable at the bank, in the manner pointed out by law; a large amount of these annuities, which belonged to the plaintiff in that case, and stood in his name, were transferred under a forged power of attorney; the property did not pass by this transfer. Yet the court held, that subsequent bona fide purchasers from the fraudulent transferree, whose name had been registered in the books of the bank as the owner, were entitled to recover from the bank the amount of dividends falling due on these annuities, although the bank was also liable to the true owner of the stock, whose name had been forged.

In this case, indeed, the executor had a legal capacity to make the transfer, and the legal title to the stock passed to the Merchants' Bank; and as it paid a valuable consideration, and had no notice, actual or constructive, of any violation of trust, upon which the transfer could be impeached in equity, it had a right to sell the stock for the payment of the note for which it was pledged, and to make the purchasers a valid title. A different rule would render the right of every purchaser of stock in a bank insecure or liable to doubt, and greatly impair its value, and would, moreover, seriously disturb the usages of trade and the established order of business in relation to this subject, in a manner highly injurious to the community; for purchasers always rely on the certificate of the bank in which it is held, as conclusive evidence of the ownership. Most commonly, the purchase is made through a broker, and the buyer does not know who is the seller or who makes the transfer; the certificate of the bank tells him that he is entitled to so many shares, and he pays his money upon receiving the certificate, without further inquiry. It would be unjust and inequitable, to charge the stock in his hands with any equitable incumbrance or trust, however created, which was not known to him at the time he paid his money.

As respects the Commercial and Farmers' Bank, the claim of the complainant rests upon different grounds. By the charter of the bank (like that of every other bank incorporated by a law of this state) the stock is transferable at the bank only, and according to such rules as shall be established by the president and directors. It cannot, therefore, be transferred without the supervision of the officer designated for that purpose by the bank. The corporation is thus made the custodian of the shares of stock, and clothed with power sufficient to protect the rights of every one interested, from unauthorized transfers; it is a trust placed in the hands of the corporation for the protection of individual interests, and like every other trustee, it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its negligence or misconduct. Upon this principle, the bank was held liable for an improper transfer of its stock, in the case of Farmers' & Mechanics' Bank v. Wayman, decided in the court

of appeals of this state, at December term, 1847 [5 Gill, 336]; and the case of Davis v. Bank of England, hereinbefore referred to, where government stocks were made transferable on the books of the bank, was decided upon the same ground. As the corporation appoints the officers before whom the transfers must be made, it is responsible for their acts, and must answer for their negligence or defaults, whenever the rights of a third person are concerned. Hodges v. Planters' Bank of Prince George's Co., 7 Gill & J. 306, 310.

Undoubtedly, the mere act of permitting this stock to be transferred by one of the executors, furnishes no ground for complaint against the bank, although it turns out that this executor was, by the act of transfer, converting the property to his own use; for an executor may sell or raise money on the property of the deceased, in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. Such is the doctrine of the English courts, and would seem to have been the law of this state, prior to the act of assembly of December session, 1843 (chapter 304); and the transaction now before us took place before that act went into operation. But it is equally clear, that if a party dealing with an executor, has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured. The cases upon this subject are numerous, and it would be tedious to refer to them particularly; they are for the most part collected and commented on in the cases of McLeod v. Drummond, 17 Ves. 152, and of Field v. Schieffelin, 7 Johns. Ch. 150.

It is very true, that in the case before us, the pledge of stock was not made to the Commercial and Farmers' Bank, nor did it loan the money to the executor. But a party is not made liable because he pays or advances money for property of the deceased; but because, by doing so, when he has reasonable ground for believing that the executor means to misapply it, he knowingly assists him in committing a breach of his trust. In this case, the rights of stockholders, and of persons interested in its stock, were placed by law under the guardianship and protection of the bank, so far as concerned the transfers on their books; the stock could not be transferred, could not become the legal property of another person, without the permission of the proper officers of the corporation. Union Bank v. Laird, 2 Wheat. [15 U. S.] 393. And if these officers, at the time of the transfer, had reason to believe that the executor, by the act of transfer, was converting this stock to his own use, in violation of his duty, then the bank, by permitting the transfer knowingly, enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction. The object of the executor could not have been accomplished without the co-operation of the bank in permitting the transfer to be made on its books.

The question then is, had the bank at the time of the transfer, actual or constructive notice that the executor was abusing his trust, and applying this stock to his own use? The bank, by its answer, denies that it knew anything of the contents of Talbot Jones's will, or of the bequest to the complainant; and there is no proof of actual notice; but it did know that this stock was the property of Talbot Jones at the time of his death, for it so stood upon its own books; and as the transfer was made by Samuel Jones, as his executor, the bank must, of course, have known that Talbot Jones left a will. Although it may not have had actual notice of the contents of the will, yet as it was dealing with an executor in his character as such, the law implies notice; this is the doctrine in the English court of chancery. 4 Madd. 190. And the rule appears to stand upon still firmer ground in this state; for now it is settled, that every person has constructive notice of a deed for real or personal property, where it is duly registered according to law; in England, the weight of authority is perhaps to the contrary. Now, in Maryland, every will of real or personal property is required to be recorded; and if third persons are bound, at their peril, to take notice of a registered deed, when there is nothing to lead them to inquiry, the obligation must be still stronger upon one who is dealing with an executor concerning the assets of the deceased; for his character of executor, of itself, gives actual notice that there is a will open to inspection upon the public records.

The bank, therefore, was bound to take notice of the will when this transfer was proposed to be made by one of the executors; and is chargeable to the same extent as if it had actually read it. It was negligence in the bank not to examine it; and if it was ignorant of the contents of the will and of the specific bequest of this stock, it was its own fault. It must be dealt with in this case, as if it had possessed actual knowledge that the stock in question was specifically bequeathed by the testator, and was not by the will to be transferred, or in any manner disposed of, by the executors, during the lifetime of the complainant; and that it was the duty of the bank, during that time, to pay the dividends to them in trust for the complainant.

Undoubtedly, this stock, although thus specifically bequeathed, was yet liable to be sold, if necessary, for the payment of the debts of the testator; and if the bank did not know, or had no reasonable ground for

supposing, that the executor was misapplying the assets, it would not be responsible, notwithstanding its implied knowledge of the will. But when the second transfer (under which the stock was finally sold) was made to the Merchants' Bank, the circumstances then within the knowledge of the Commercial and Farmers' Bank, were abundantly sufficient to satisfy any reasonable mind, that Samuel Jones was using this stock for his private purposes. This transfer took place on the 20th of August, 1842; the bank at that time knew that Talbot Jones had been dead eight years; that he died rich; and that the time had long before elapsed within which the law of Maryland requires an estate to be settled up by an executor or administrator. It appeared by their own transfer books that, on the 4th of May preceding, the same stock had been transferred by Samuel Jones to the same bank (the other executor, although he resided in town, not being a party to the transfer); that on the 17th of June, in the same year, it was re-transferred by the Merchants' Bank to Samuel Jones in his individual right, under the name of Talbot Jones & Co., and by him restored to the estate of the testator, a few days afterwards, by a transfer to himself and the other executor. And when, after these transactions, all appearing on the books of the bank, he came again, without his co-executor, to transfer it a second time to the Merchants' Bank, could the officers of the Commercial and Farmers' Bank doubt the purposes for which this second transfer was made? Familiar as they must have been with the usual course of business in the banks, and the usage of loaning money upon hypothecation of stock, could they have failed to see that Samuel Jones was misapplying the assets of the testator, and pledging this stock for his own individual benefit?

Indeed, the bank, in its answer, does not deny it, but on the contrary, impliedly admits it; for the answer states that, if the president had known that the transfer was about to be made by Samuel Jones, he would have prevented it. Now, the bank is equally chargeable for the neglect or omission of duty by the officer to whom it had committed the superintendence of the transfers of stock, as it is for the neglect or omissions of its president; and such officer was also equally chargeable with implied notice of the will of Talbot Jones, and equally bound to refuse the transfer when he saw that Samuel Jones was using this stock in violation of his trust as executor. And if the circumstances above mentioned were not sufficient to satisfy the bank officer, beyond all reasonable doubt, that he was so using them, yet they were certainly sufficient to create strong presumptions against him, and to make it the duty of the officer to inquire before he allowed the transfer to be made. If he neglected to make the inquiry, when the fact could have been so easily ascertained, and either from negligence or design, without inquiry, enabled the executor to convert the stock to his own use, the bank is responsible for this negligence.

There is another circumstance also, which ought, of itself, to have created strong doubts in the mind of the transfer officer of the bank. By the act of assembly of Maryland of 1798 (section 3) it is in the power of the executor to procure an order of sale from the orphans' court, whenever a sale shall be necessary. It is true, that in the case of Allender v. Riston, 2 Gill & J. 86, the opinion of the court would seem to have been that, notwithstanding this act of assembly, an assignment by an executor, for his own debt, would be valid against the creditors of the estate, unless there was collusion with the executor. But the case was not decided on that point; nor does the opinion of the court apply to an assignment of property specifically bequeathed; nor was that point in the case, or raised in the argument. However that question shall be ultimately decided, it may, we think, be safely asserted that, in practice, under this law, there has been no instance in Maryland, since its passage, in which an executor, acting fairly and bona fide, has undertaken to sell or pledge personal property, specifically bequeathed, without a previous order from the orphans' court. And the proposition of Samuel Jones, one of two executors (the other executor not uniting in the transfer), to transfer this stock, so long after the death of a wealthy testator, without first obtaining an order from the court to justify him, must have satisfied any man of common experience in business that he was grossly abusing his trust. In South Carolina, under a law very similar in its provisions, it has been decided that the sale of such property by an executor is void, unless made by the authority of the court. 4 Desaus. Eq. 522. And we think there are strong reasons to support this decision.

The cases referred to in relation to transfers of government stocks by the Bank of England do not apply to this case. They are collected in 1 Daniell, Ch. Prac. 139, and they all turn upon the meaning and policy of the acts of parliament by which the management of the public stocks and annuities was given to the Bank of England. It is with reference to the duties imposed by these acts of parliament, that the court say, that the Bank of England is not bound to take notice of a trust affecting public stock standing on its books, and must look only to the legal estate. But this opinion cannot influence the decision of this case; because the privileges and obligations of the bank must be determined by its own charter, differing widely in its terms and its object from the English acts of parliament. Certainly, none of the English acts convey the idea that, upon general principles of law, a bank is not bound to notice a trust of its own

stock, and must look only to the legal estate; for a bank or any other corporation is bound by the same obligations, moral and legal (when the rights of third parties are concerned), that apply to the case of an individual, unless it is explicitly exempted by law. If an individual who confederates with an executor, and assists him in defrauding his cestui que trust, is liable to the party injured, there can be no reason why a bank which knowingly enables an executor to convert the property of the cestui que trust to his own private use, should not be equally responsible. The difficulties to which the Bank of England would be subjected, if bound to take notice of the trusts in the government stocks, and which are strongly stated by the chancellor in the case of Hartga v. Bank of England, 3 Ves. 58, are altogether inapplicable here; for, putting aside the immense difference in amount and character between the government stocks of England and the stock of this bank, a chancery suit can never be necessary in this state for the protection of the bank, where stock bequeathed in trust is required to be sold for the payment of debts; because, under the act of 1798, an order for the sale, by the orphans' court, which could at any time be obtained in a summary way, without delay and without expense, would protect the bank from all responsibility, and occasion no delay or embarrassment in the payment of debts.

The case then is this: The will of the testator, in effect, directed that this stock should not be sold or transferred during the lifetime of the complainant, and the dividends, during that time, should be received by his executors and paid over to the complainant. One of these executors proposes to transfer this stock, in order to raise money on it for his private purposes; and the officers of the bank, knowing the purpose for which it was transferred, or with circumstances before them sufficient to create a strong presumption that such was the intention of the executor, and therefore, sufficient to put them on inquiry, permit the transfer and certify that the transferree is entitled to the stock. Relying on this certificate, the Merchants' Bank was induced to loan its money upon it, and having no knowledge that it ever belonged to Talbot Jones, or had been transferred by his executor, the stock cannot be followed in its hands, or the hands of those to whom it afterwards sold it, and charged with the trust created by the will. The executor is insolvent, and there is, therefore, no effectual remedy against him. Ought the loss to be borne by the complainant, who has committed no fault and been guilty of no negligence, or by the Commercial and Farmers' Bank?

The established principles of equity seem to require that the loss should be borne by the party by whose negligence or misconduct it was occasioned. The bank not only enabled the executor to perpetrate the wrong by permitting the transfer, but co-operated in it, by certifying that the title of transferree was good; justice, therefore, requires that it should bear the loss.

The only remaining question is, the nature of the relief to be administered by the court. In order to do substantial justice, it is evident, that the decree must be directly against the bank, as Samuel Jones is admitted to be utterly insolvent.

The complainant's claim is for dividends only; she has no property in the stock, which belongs to the defendants, William B. Norman, Josiah Jones and Emily J. Albert, in certain proportions, who will be entitled to the dividends after the death of the complainant. Yet, if there were no difficulty on the score of jurisdiction, the court would, according to the practice of courts of chancery, proceed to dispose of the whole matter in dispute, and decree as to the stock, and the balance in hand in the Merchants' Bank, as well as the dividends. But the jurisdiction of this court is founded upon the fact that the complainant is an alien; it has no jurisdiction in the controversies between the defendants, as they all reside in Maryland. Undoubtedly, if the case of the complainant could not be disposed of, and relief administered to her, without deciding upon the rights of all the parties before the court, we should necessarily dispose of the whole matter, and decree as to the stock, as well as the dividends. But the rights of the complainant may be adjusted, without interfering with the right of the claimants of the stock, or with the balance arising from its sale, which yet remains in the hands of the Merchants' Bank; for it is immaterial to the complainant, whether the stock be replaced or not. All that she has a right to demand is, that the amount of dividends on two hundred and eighty-two shares of stock, which she has lost by the negligence or the misconduct of the officers of the bank, shall be paid to her, as if the stock had never been transferred. The jurisdiction, therefore, to decree in the controversy as to the stock, cannot, we think, be maintained.

We have said nothing of the decree of the chancery court of Maryland, which has been filed in the case; neither of the banks were parties to the proceedings in that case, nor do they appear to have had notice of it; neither was the complainant a necessary party; she had no interest in the property to be divided; it was not proposed to change or modify, in any respect, the trust in her favor; and the decree passed by the court leaves her interests precisely where they stood before.

In regard to the stock itself, the decree for partition has, in a material respect, changed the character of the trust; for the two executors, instead of holding it, in undivided portions, for the cestuis que trust named in the will, hold under the decree, as trustees for those to whom it has been specially as-

signed in severalty. And it may be doubted, whether this circumstance does not form an additional objection to the jurisdiction of this court in regard to the stock; and whether Samuel Jones and Andrew D. Jones ought not to be considered as trustees, appointed in that respect by the court of chancery, to hold this stock in trust for cestuis que trust named in the decree, and therefore, responsible for their conduct to that court, rather than to a court of the United States. It is, however, not necessary to examine this question, because it does not affect the dividends bequeathed to the complainant, and certainly, can form no objection to the jurisdiction in her case.

It appears from the evidence, that the stock sold for more than enough to pay the note for which it was hypothecated; and that, besides the surplus arising from this sale, one of the semi-annual dividends upon these two hundred and eighty-two shares remains in the hands of the Merchants' Bank, deducting therefrom the amount paid by the bank for taxes on this stock; the amount of the dividend remaining in the hands of the Merchants' Bank, subject to the deduction aforesaid, belongs in equity to the complainant, and for that amount she is entitled to a decree against the Merchants' Bank. For the residue of the dividends due to her, and remaining unpaid, the Commercial and Farmers' Bank must answer.

The case must be referred to a master, to state an account according to this opinion, preparatory to a final decree.

Case No. 8,582.

LOWRY v. The E. BENJAMIN.

[4 Pa. Law J. Rep. 25; 6 Pa. Law J. 277.]

District Court, E. D. Pennsylvania. 1847.

COURTS—ADMIRALTY JURISDICTION—AFFREIGHTMENT.

The district court has admiralty jurisdiction to enforce a contract of affreightment by a proceeding in rem.

[See The A. M. Bliss, Case No. 274.]

In admiralty.

Mr. Griscom, for libellant.

Blythe & Harris, for claimant.

KANE, District Judge. The facts, as admitted, are these: The E. Benjamin, a licensed boat or vessel, of eighty-six tons burden, having a mast and sails, is customarily employed in navigation from Pottsville, on the Schuylkill river, many miles above tidewater, via the canal and locks of the Schuylkill Navigation Company, to tidewater at Philadelphia, and thence by the tidewater of the Delaware & Raritan Canal, through it, and from its eastern débouché by the tidewaters of New York Bay to the city of New York. On the 15th of last month, she received, at Bound Brook, on the Raritan river, a cargo of hay, to be transported to Philadelphia, under a contract made between the libellant, as shipper, and Gibbons, who appeared as master. The hay having been injured during the voyage, this proceeding in rem was instituted by the libellant to recover his damages.

The questions presented by the record, and argued by the proctors of the parties, are two in number: 1. Has the district court of the United States, sitting as a court of admiralty, jurisdiction in cases of maritime affreightment? 2. Was the contract in this case one of that character? I have no doubt on either point.

1. The act of congress of 24th September, 1789 [1 Stat. 73], gives original cognizance to the district court of "all civil causes of admiralty and maritime jurisdiction;" and I cannot so understand this expression as to exclude from its import any case in which redress is sought by proceeding in rem on a contract "relating to the navigation, business or commerce of the sea." In saying this I do not mean to enter upon the question, which, in Delovio v. Boit [Case No. 3,776], and in Ramsey v. Allegre, 12 Wheat. [25 U. S.] 611, divided two of the most eminent jurists of this country, because I do not see in the report of Judge Johnston's opinion (12 Wheat. 611, et supra) that he doubted the jurisdiction of this court, in a case of maritime contract, where the proceeding against the person was only accidental, and the real redress sought was against the vessel. At a fitting time I shall not refuse to enter upon a discussion of the general subject; but for the present it is enough to decide that the contract of maritime affreightment may be enforced in this court by proceedings in rem.

2. Was this a contract of maritime affreightment? It has all the characteristics of such a contract. It was entered into at a place within the admiralty jurisdiction, the Raritan, at the point indicated, being within the ebb and flow of the tide; it was to be executed in part on the tidewaters of two considerable rivers, the Raritan and the Delaware, and the terminus was the port of Philadelphia. It regarded the transportation of merchandise on board a vessel navigating from one revenue district of the United States to another. It was, in a word, the contract of affreightment, which, by the maritime law, as universally understood, operates as a hypothecation of the vessel in favor of the shipper of the goods, and gives him a preference for the amount of damages his goods may sustain over a general creditor of the owner. The Rebecca [Case No. 11,619]. I do not distinguish this case in any respect from that of Howe v. The Lexington [Id. 6,767a], in the Eastern district of New York, nor from that of Knox v. The Ninetta [Id. 7,912], decided by my immediate predecessor in this court in 1843. They cover the entire case, and I will not weaken the argument in them by repeating it.

I may add, as the point was alluded to in

the argument, though not pressed, that the ordinary occupation of the vessel cannot affect her liabilities for the particular voyage. The canal-boat, like the steamer, does not become a subject of maritime regulation by merely descending from a canal or a river to its outlet upon the tide. But though such has been her general voyage, when she passed out upon the high seas, she becomes by the very act amenable at once to the jurisdiction of the admiralty. The exception to the jurisdiction of this court is overruled; and the party intervening has liberty to answer upon the merits before the 24th day of the present month; otherwise the decree of condemnation to be entered pro confesso.

Vide The Mary Washington [Case No. 9,229]; The Huntress [Id. 6,914]; The Eddy, 5 Wall. [72 U. S.] 481.

[On appeal to the circuit court the libel was dismissed for want of jurisdiction. Case unreported. The case was again before the court on a question of costs. Case No. 8,565.]

LOWRY (PAUL v.). See Case No. 10,844.

Case No. 8,583.

LOWRY v. The PORTLAND.

[1 Law Rep. 313; 1 Hunt, Mer. Mag. 255.]

District Court, D. Massachusetts. Jan. 22, 1839.

COLLISION—KEEPING TO RIGHT—DEPARTURE FROM COURSE—SPECIAL EMERGENCIES.

1. Upon collision between the steamboat Portland and the schooner Cygnet, with damage to the Cygnet, in the passage between Thatcher's Island and the Londoner, on an evening in November, the Portland *held* not to have been in fault, having taken a course in conformity to common usage, keeping to the right, and the Cygnet having departed from such usage, unnecessarily and improperly, having been previously in a course, which she had a right to keep and ought to have kept.

[Cited in The Leopard, Case No. 8,264; The Cynosure, Id. 3,528; The New Jersey, Id. 10,161; Wheeler v. The Eastern State, Id. 17,494.]

2. Special emergencies or positions of vessels may allow and even require a deviation from the general rule or usage, but the Portland not held to be blamable for not making or attempting such deviation, under the circumstances appearing in evidence.

[Cited in Poole v. The Washington, Case No. 11,271.]

3. Nautical questions proposed to experienced navigators, in reference to the case, and their answers.

[Cited in The Cynosure, Case No. 3,528.]

[In this case, the libellant [Benjamin Lowry, Jr.] claimed to recover about $600, for damages sustained by the schooner Cygnet, of 83 tons burden, in consequence of a collision with the steamer [Portland], on the night of November 17th, 1838, when passing through the passage between Thatcher's Island and the Londoner; the schooner being bound from Bangor, (Maine,) to Medford, (Mass.,) with a cargo of lumber, and the steamer being on her way to Portland from Boston.] [1]

G. S. Hillard, for libellant.

E. Haskett Derby, for respondents.

DAVIS, District Judge. The libellant alleges, that the schooner Cygnet, of which he was and is master and part owner, was, on her passage from Bangor, in the state of Maine, on the evening of the 17th of November last, about half a mile south of the light-house on Thatcher's Island, near Cape Ann, forcibly struck by the steamer Portland (R. S. Boyd, commander), sailing in an opposite direction, caused by an improper change of course, as is alleged, of said steamboat, by means of which the schooner Cygnet was damaged; that the knight heads and the timbers on the star-board side of the bow were broken, the corresponding timbers, on the port side, started and rendered useless, and the deck started and ripped off as far as the windlass. It is further alleged, that the wind was light, the Cygnet moving slowly, the steamboat rapidly, and that there was room enough for the steamboat to steer clear, and pass by the schooner, without any damage whatever, and that the collision was wholly the fault of the persons navigating the steamboat Portland.

Damages are demanded to the amount of 650 dollars, viz.:

For estimated expense of the repair of the schooner, and men's clothing injured by the water	$500
Schooner Tamerlane, for towing the Cygnet into Boston harbor	50
Transportation of cargo of lumber from Boston to Medford, where it was to be delivered	100
	$650

The Steamboat Navigation Company, owners and claimants of the Portland, in their answer, admit the collision, though not in the place specified in the libel, but deny all blame on the part of the Portland in that occurrence, alleging that the collision and incident damage to the Cygnet were occasioned by the gross carelessness, inefficiency, and mismanagement of the persons then in charge of that vessel. They aver that the schooner Cygnet was an old vessel, of inconsiderable value, and insufficiently navigated; that the steamboat Portland, strong and staunch, was, at the time stated in the libel, proceeding from Boston for Portland, in her regular employment, as a packet between those places, with many passengers, about one hundred and thirty in number, on board; that she pursued her usual course, through Broad Sound, with a four knot breeze from N. N. W., at her accustomed speed of twelve knots an hour, passing to leeward, according to invariable usage, all the numerous coasters, stated to have been more than thirty, which were met

[1] [From 1 Hunt, Mer. Mag. 255.]

bound to Boston, having luffed or kept to windward, averred to have been the established usage of the coast; that, about ten minutes before 5 o'clock p. m., the Portland, pursuing her direct course, was within two miles distance from Thatcher's Island lights, in a narrow channel, between Thatcher's Island and the Londoner, near which it is averred is a dangerous reef; that on entering that channel, in the usual route of the Portland for her destination, she kept well to the leeward, to give a wide berth to coasters coming from the eastward, all of which luffed and passed clear to the windward; that when the Cygnet was first discovered from the Portland, she was running a south south westerly course, through the passage, which would have carried her clear of the Portland, and to the windward; that when within half a mile, the Cygnet appeared to change her course and bear away towards the Portland, rendering it doubtful to those on board the Portland, whether it was intended to cross her bow, or pass to windward; that as soon as this deviation was noticed, five minutes, at least, before the collision, steam was shut off, pursuant to a signal given by the pilot, and the Cygnet was immediately hailed to luff; that this hail was not noticed, and was repeated four or five times, by the captain of the steamboat, with a trumpet; that, upon this, the Cygnet began to luff, and that, while hailing, the captain of the Portland, gave the signal to stop the engine entirely, and back water; that this was accordingly done, and that, as soon as the schooner began to luff, orders were given by the captain of the Portland, to the man at the wheel, to hard up the helm; that the schooner, having begun to luff, would have gone clear, although very near to the steamboat, when the captain of the Cygnet was heard, on board the steamer, to cry out, apparently in great agitation, "Hard up your helm and call all hands"; that the helm of the Cygnet was then put hard up, notwithstanding repeated and earnest calls from the steamboat to luff; that the Cygnet, being thus made to fall off, ran her starboard bow against the stem of the Portland; that when the vessels came in contact, the Portland had lost all head way, and was going, at least a knot an hour, astern; that when the collision took place, the Portland was close into the southwest end of the Londoner; that the vessels immediately separated, with no damage to the Portland, and that so moderate was the motion of the Cygnet, at the time of the collision, the injury received should be attributed, mainly, to the age and weakness of that vessel; that all due assistance was given to the Cygnet and those on board, after the occurrence; that the Portland, at the time of the collision, could not have gone further to the leeward without imminent risk of striking a dangerous reef, nor further to windward without incurring great danger of being run into by the Cygnet, thereby endangering the lives of all on board, and property of great value. It is denied that the collision was in any way ascribable to the fault of the Portland; they aver, that her master, pilot and crew, on that occasion, used the greatest care and skill in her management, took every possible precaution to prevent the occurrence, and were, in every respect, competent to perform the duties devolving on them; and, finally, that the collision was occasioned by the recklessness, want of skill and experience of the officers and crew of the schooner Cygnet, and that the owners of the Portland are not liable for the damages sustained, stated to be greatly overrated.

The character of this case, as indicated by the libel and answer, induced a suggestion, from the court to the counsel, that it would be a relief, and obviously promotive of a correct decision, if the court could be assisted, by experienced navigators, to hear the testimony, and give their opinions on the nautical questions that might occur. The suggestion had reference to the aid occasionally given by masters of the Trinity House on trials in the high court of admiralty in England, frequently acknowledged in the reports. The intimation met with ready acceptance from the learned counsel, on both sides. Three gentlemen, selected by their agreement, and approved by the court, obligingly consented to attend the hearing, for the purposes that have been expressed; a duty somewhat irksome in a protracted examination, but which they have faithfully performed. The evidence given, at a hearing of long continuance, was contained in depositions, or derived from examination of numerous witnesses, officers, mariners or passengers in the respective vessels, and of persons, called to testify relative to usages at sea in such instances, especially on the eastern coast, and as to the amount of damage sustained. A statement of facts, of material bearing in the case, is contained in the report of the referees. After the evidence and arguments, five questions were proposed to the referees, by the court, one by the libellant's counsel, and several by the counsel for the respondent. The referees were requested to give their opinions on these questions in writing, and to express an opinion, also, on any points which might occur to them, in consideration of the evidence, which might not be comprehended in any of those questions.

The questions proposed by the court were these: (1) What are the nautical rules or usages applicable to this case, from the time when said vessels came in sight of each other until the collision which ensued? (2) If there be a general rule or usage which should govern sailing vessels under the circumstances evidenced in this case, would such rule be inapplicable to the case, from the circumstance that one of the vessels was a steamboat? (3) Was there a deviation from such rule or usage by either of these vessels; if so, was there any justifiable or reasonable

cause for such deviation? (4) If there was such deviation, by either of said vessels, on that occasion, was it induced, and rendered expedient or proper, from any reasonable ground, to infer that the other vessel had or probably would take a course, requiring or authorizing such deviation? (5) Was there any, and if any, what, blamable act or omission, at any stage of the occurrence, to which it would appear, from the evidence, that the collision is to be imputed?

On a subsequent day those gentlemen made the following report: "The undersigned have duly considered the questions submitted to them by the court, in the case of the schooner Cygnet versus the steamer Portland, and respectfully submit the following answers: To the first question they answer: That the course to be taken by vessels when approaching each other from opposite directions is not so clearly and universally understood and settled as to establish an absolute rule; but the general practice, both upon our coast and elsewhere, is that when two vessels approach each other, both having a free or fair wind, the one with her starboard tacks aboard keeps on her course, or, if any change is made, she luffs so as to pass to the windward of the other, or, in other words, each vessel passes to the right. To the second question they answer: That a steamer is always considered as sailing with a fair wind, and therefore bound to do whatever a sailing vessel, going free, (or with a fair wind,) would be required to do, under similar circumstances, in relation to any vessel she may meet. To the third question they answer: That they think there was a deviation from the common usage by those on board the schooner Cygnet, in keeping her off, when she ought to have been kept on her course, or luffed, and they are unable to discover sufficient cause for such deviation. There is some discrepancy in the testimony in this case, but not more than might be expected when the excitement of the occasion, the different position of the witnesses on board the two vessels, and other circumstances that occurred, are taken into consideration. The testimony, taken together, establishes the following facts in the case: On the evening of the 17th November last, as the schooner Cygnet was passing through the strait between Thatcher's Island, and the Londoner, steering S. S. W., with a moderate breeze from N. N. W., those on board of her discovered the steamer Portland about one point off her weather bow three or four miles distant. The schooner was then kept off about one point, and, shortly after, another point to the southward. The steamer was then steering a little to the eastward of N. N. E., thus bringing the schooner nearly ahead; and she was discovered by those on board of the steamer about three-fourths of a mile in that direction. Soon after discovering the schooner, the course of the steamer was changed to the eastward, the necessary measures taken to diminish her speed, and, when the danger of collision became imminent, the machinery was reversed, so as nearly to stop her way before the two vessels came in contact. Had the schooner been kept on her original course, S. S. W., it is evident the collision would not have taken place, and she would have passed to windward of the steamer, as she ought to have done, especially after it was discovered that the steamer had kept off to the eastward, with the apparent design of passing to the leeward. To the fourth question they answer: That the course taken by the steamer was in conformity to what may be considered the usage in such cases, and they do not perceive that those on board the schooner had 'reasonable ground' to expect that a different course would be taken. To the fifth question they answer: That the collision was the consequence of the change of the course of the schooner, which ought not to have been made in that direction. The error, however, was unintentional, and the undersigned are fully satisfied that both parties did that which appeared to them, at the moment, likely to avoid the accident. The question put by the libellant cannot be answered unless the courses and distance of the two vessels are given; and a reply to those put by the respondents is embraced in the answers here given to the court. Benj. Rich. Wm. Sturgis. Francis Dewson."

In considering this report of the referees, I have been led to compare their results with the cases cited at the hearing, and they appear to me to correspond or to be in no conflict with those authorities. The case of The Woodrop Sims, 2 Dod. 83, was pertinently referred to by the counsel for the respondents. The brig Industry, being on a course which she had a right to keep, according to the marine usage, was run down by the Woodrop Sims, and sunk. It was holden by the court, assisted by Trinity House masters, that the Woodrop Sims was to blame; that she had the wind free, and ought to have got out of the way. So the Cygnet, though not close hauled to the wind, as the Industry was, yet, before her deviation, was in a southwesterly course, which she had a right to keep, being on the starboard tack. A steamer is properly viewed, as always having a fair wind. The Portland changed her course to the right, which would have avoided the Cygnet steering south south west, if she had continued that course. The Portland did in this case what the Woodrop Sims was considered as culpable for not doing.

The cases cited for the libellant do not appear to me to sustain the allegation that the Portland was in fault. The cases are Handaysyde v. Wilson, 3 Car. & P. 538, and The Shannon, 2 Hagg. Adm. 173. In the first mentioned case, which was before Chief Justice Best at nisi prius, there is a recognition of the principle or rule of the sea, that when a vessel is going close hauled to the wind,

and another is approaching, in an opposite direction, going free, the latter is to go to leeward; and although such vessel may go either to leeward or windward, as best she can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. This case, considered in reference to the principle on which it proceeds, would bind the Portland, had she met the Cygnet on her original course, to pass her either to windward or leeward, i. e. to luff or bear away, as best she could. But it sustains the course taken by the Portland, under the circumstances, as having a right to presume that the Cygnet would keep her original course. The other cases cited for the libellant was on a demand for damage done by the steamboat Shannon to a vessel called the British Union. The Shannon was coming down the English Channel, on the starboard tack. The Union was sailing up the channel. The counsel for the Shannon relied, in her defence, on the rule of navigation, upon ships meeting, and there being a doubt of their going clear, that the one on the starboard tack is to persevere in her course, the other to bear away. But the court sustained the argument of the opposite counsel, that the rule of navigation should be applied according to the character of the two vessels, and concurred in the opinion given by the Trinity House masters. Steamboats, it was holden, from their greater power, ought always to give away, and that the Shannon was farther bound to do so, as she had seen the Union four or five miles off, and was fully enabled to go clear. In the present case it was the Cygnet that bore away, after the Portland was seen by her. The change of course eastwardly, by the Portland, was taken with a discreet regard to any vessels that might be coming in an opposite direction. From that mutual diversion of course the collision ensued, and no blame can be imputed to the Portland, unless it were practicable for her to avoid that occurrence by any management, after the Cygnet was seen approaching, in a direction, that would bring the vessels in contact.

In the answer to the first question proposed to the referees, it is cautiously observed, that the rule which they mention is not absolute. There are not many rules completely absolute, and subject to no exceptions. Instances may be stated in which the general rule to be observed, by vessels approaching each other, should be disregarded; the object in view, a passage without collision, being attainable, more certainly or readily by a breach of the rule than by its observance.

There is much good sense, and, it may be presumed, a conformity to good seamanship, in the remarks made by the counsel and the court in the case before Chief Justice Best. "I apprehend," said Serjeant Jones, "the rule of the sea to be this: that the ship, which has the wind, is so to use it as to avoid the other, and is to take that course, which, under the circumstances, is the most prudent and safest course. There is no law, either of the sea or the road, by which a person is justified in adhering to a particular course, when it will be productive of mischief." "I agree," said Chief Justice Best, "with one observation, made by my Brother Jones, that although there may be a rule of the sea, yet a man who has the management of one ship is not allowed to follow that rule, to the injury of the vessel of another, when he could avoid the injury by pursuing a different course. But if the matter comes into any doubt, for instance, in the case of a dark night, then we ought to look to the practice, as that which is to regulate the parties." All this appears perfectly reasonable, and cases may occur in which the general rule that a vessel on the starboard tack should keep on her course, and steamboats keep to the right, should not be observed. Such deviations, however, from general rules or usages, obviously imply the necessity for a full and satisfactory view of all particulars, rendering such deviation urgent or eligible. At the time when those vessels entered the narrow passage, between Thatcher's Island and the Londoner, in opposite directions, the general rule should have been observed. It was observed by the Portland, bearing away to the right. The Cygnet should have kept on her course, or if any change were to be made, should have been luffed, and in either way she would have gone clear.

The views of the case taken by the referees clearly place the Cygnet in fault, for the imminent danger of collision, into which the vessels were brought, when the Cygnet was seen in near approach to the Portland; but, admitting the Cygnet to have been in fault in this particuler, it would remain to be determined, whether it was in the power of the Portland, by any variation of course, to have avoided the threatened collision. It appears, from the evidence, that the Portland could not safely bear away further to the eastward, on account of the dangerous reefs on that side of the passage near the Londoner; but it remained to ascertain, whether a course might not have been taken to the left, with a fair prospect of passing in safety. That the attention of the referees might be specially directed to this point in the case, and their views obtained, the following additional questions were proposed to them: (1) Whether, in the opinion of the referees, the steamer Portland, at any time after the discovery of the Cygnet, on the evening of the 17th November last, and knowledge of her course, could have avoided collision, by being put on a course not conformable to the general rules or usages of the sea, specified in the answers to former questions on the subject? (2) Whether it was reasonable, prudent or expedient for the conductors of the Portland to have adopted, or attempted such a course? Or (3) whether what was done on board the steamer on that occasion

was the only or the best practical mode of proceeding, under the circumstances?

These questions received the following reply: "We have no doubt that a course might have been taken by the Portland after the discovery of the Cygnet that would have prevented collision; but we think the course actually taken was, under the circumstances, the proper one; and it might have reasonably been expected that the error committed on board the Cygnet, by taking an improper course, would be corrected, up to a period so near the collision, as to render it impossible to change the course of the Portland in time to avoid it; and we do not think it would have been 'reasonable, prudent, or expedient' for the conductors of the Portland to have adopted a different course at an earlier time, for, had it been attempted, and a collision ensued, we think they would have been liable for the consequences. In view of the whole case, it seems to us that the conductors of the Portland did all they ought to have done to avoid collision. In our answers to former questions, we have stated the rule or usage to be that when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack shall give way, and thus each pass to the right. This rule should govern vessels, too, sailing on the wind, and approaching each other, when it is doubtful which is to windward; but if the vessel on the larboard tack is so far to windward that if both persist in their course the other will strike her on the leeward side, abaft the beam, or near the stern, in such case the vessel on the starboard tack must give way, as she can do so with greater facility, and less loss of time and distance than the other. These rules are particularly intended to govern vessels approaching each other under circumstances that prevent their course and movements being readily ascertained with accuracy—for instance, in a dark night, or dense fog. At other times, circumstances may render it expedient and proper to depart from them; for we consider them all subordinate to the rule prescribed by common sense, and applicable to all cases, under any circumstances, which is that every vessel shall keep clear of every other vessel when she has the power to do so, notwithstanding such other may have taken a course not conformable to established usage. We can scarcely imagine a case in which it would be justifiable to persist in a course, after it had become evident that a collision would ensue, if by changing such a course the collision could be avoided."

The explanations in reference to the points suggested are satisfactory, and I concur in the views expressed by the referees in this instance, as well as in the answers to preceding questions. It is a relief to receive their valuable aid in the questions occurring in the case, of ready disposal, probably, to them, from their known intelligence and experience in nautical tactics, but of a perplexing character to the court without the assistance which they have afforded. They have my thanks for the care and attention which they have bestowed in executing the duties of their appointment. They may reflect, with satisfaction, that they have not only given correct opinions for the disposal of this case, but have contributed information that may tend to prevent similar mishaps, and be a valuable auxiliary in the settlement of analogous cases, which may occur. Incidents of this description are always alarming, frequently disastrous; especially may this be apprehended when the impetus of a steam-vessel is to be encountered, from their size and velocity. By a careful observance, however, of a few rules and principles, and by vigilant attention, such occurrences may be in a great degree avoided, and steamships may proceed, with their giant power, without dismay or danger to the humblest sail vessels, that may be plodding their "weary way," in their habitual occupations.[2]

In the present instance, upon full and solicitous investigation, there appears no fault on the part of the steamer. Whatever of error or mistake there was in the occurrence, was on the other side. The libel must be dismissed, but from the favorable impression, expressed by the referees, in reference to the libellant's views and motives, and from a consideration of their circumstances, permitted to have an influence, the suit will be dismissed, without costs for the respondents, excepting that the compensation for referees is to be equally borne by the parties.

LOWRY (UNITED STATES v.). See Case No. 15,636.

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[2] One of the schedules annexed to an interesting report recently made to congress by the secretary of the treasury is a list of material accidents and loss of life and property, by explosions and other disasters, which have occurred to steamboats in the United States. The whole number is 215, commencing with the Washington, on the Ohio river, in 1816. Of the above number of casualties only six were by collision. The number of lives lost by disasters in steamboats had been computed to have been 2,000, or more. "I have been able," says the secretary, "to ascertain only 1,676 killed, and 443 wounded in steamboats; and 37 killed and 98 wounded by accidents to locomotives and standing engines." The full and valuable information, given in that report, with its accompanying documents, may be expected to lead to the adoption and observance of efficient regulations, by which the danger to life and property, in the application of steam power, may be materially diminished.

Case No. 8,584.

LOWRY v. WEAVER et al.

[4 McLean, 82.] [1]

Circuit Court, D. Indiana. May Term, 1846.

INDIANS — RESPONSIBILITY TO STATE LAW — RESERVED LANDS—SALE UNDER STATE LAW FOR DEBT.

1. Indians living within a state, and doing business as merchants, are responsible by the laws of the state, for the payment of their debts. This presupposes that they are not considered under the laws of the United States.

2. Lands reserved to them under a treaty, which vests in them the title, but which restricts them from conveying it, except with the consent of the president of the United States, descend under the laws of the state, and may be made responsible for the payment of debts.

[Cited in Love v. Pamplin, 21 Fed. 761.]

[Followed in Blue-Jacket v. Commissioners of Johnson Co., 3 Kan. 355, 364. Cited in brief in Pickering v. Lomax, 120 Ill. 290, 11 N. E. 175.]

3. The reservation as to the conveyance is personal, but such lands are subject to the operation of the state law.

[Distinguished in Wau-ke-man-qua v. Aldrich, 28 Fed. 497.]

[Cited in Taylor v. Vandegrift, 126 Ind. 328, 25 N. E. 549; Board of Commissioners of Allen Co. v. Simons, 129 Ind. 199, 28 N. E. 420.]

4. The law, thus substituting an agency, conveys the title without the sanction of the president.

5. This court will recognize the procedure of a court of probate, through which Indian lands have been thus sold, where the court had jurisdiction, and the proceedings upon their face appear to have been regular.

In equity.

Mr. Smith, for complainant.

OPINION OF THE COURT. This is a bill in chancery. Previous to the 17th of August, 1817, John W. Burnet and the complainant were partners in merchandizing, and on that day they settled their accounts, and a balance was found due by Burnet of two thousand four hundred seventy-nine dollars and ninety-four cents, for which he gave his note to the complainant. By the treaty of St. Mary's, in 1818, two sections of land on Flint river, near the Wabash, in Tippecanoe county, were granted to Burnet. As usual in Indian treaties, there was a provision that this grant to Burnet and his heirs, should never be conveyed without the consent of the president of the United States. In the year 1826 Burnet died, not having paid [Fielding] Lowry any part of his debt, or conveyed any part of his land. He left certain brothers as his heirs, but at the time of filing this bill the only surviving heirs were, William Davis and Richard Davis, the latter a minor, citizens of Indiana, and Mary Burnet and Francis F. Palms, citizens of Michigan, who are not made parties to this suit. Administration of the estate of John W. Burnet was granted in the year 1831, by the probate court of Tippecanoe county, to Peter Weaver, who gave bonds and entered upon the trust. On the 7th of January, 1832, Lowry filed the note of Burnet in the probate court, with the assent of [Peter] Weaver, the administrator, there being no presumption of payment, and there being no personal assets to pay the note. The administrator filed his petition to the court, for an order to sell seven hundred and sixty-eight acres of the land granted to Burnet and his heirs by the treaty, it being one entire section, and the remainder of the other section, after a sale made by Tipton, after the death of Burnet, as agent of one of his heirs, to the said Peter Weaver, to satisfy the debts of the estate, including the debt due to the complainant.

Upon the filing of the petition, the probate court made an order of publication against the non-resident heirs, and the resident heirs appeared by their guardian ad litem, and at the next term, proof of publication being duly made agreeably to law, the note of the complainant, though not objected to and admitted by the administrator, was proved as to the confessions of one of the heirs, a regular default was taken as to the non-resident heirs, and an order was made that the land named in the petition and described in the bill, should be sold by the administrator, and the sale was made by the administrator in due form to Lowry, the complainant, for one thousand three hundred eighty-eight dollars and eighty cents, being the full value thereof; and the probate court, on a return of the sale, confirmed it, and ordered the conveyance to be made to Lowry, which was done, and a credit was entered on the note, for the sum for which the land was sold. After the purchase and receipt of the deed, Lowry applied to the president of the United States to obtain his approval of the conveyance, which was refused, because a partition of the estate of Burnet had been previously made, and the land in question had been set apart to Rebecca Burnet, one of the heirs, who had sold it in trust to Francis Palms, who claimed title; the department submitting it to the courts to say, in whom was vested the legal title, and to whom a patent should issue. On the 30th of July, 1832, Lowry sold to Peter Weaver, the administrator, the one hundred and twenty-eight acres, a part of the second section, for the sum of six hundred and forty dollars, and gave a bond for a title on or before the 1st of January, 1834, provided the deed to Lowry should be approved by the president, or so soon as the purchase money should be paid. Weaver paid one hundred seventy-one dollars and seventy-six cents of the purchase money, entered into the possession of the land, and has ever since occupied it. Long since, Lowry tendered to Weaver a general warranty deed for the land, and demanded pay-

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

ment of the balance of the purchase money; which being refused, he offered to rescind the contract, and pay back the purchase money which he had received, but Weaver refused. And the bill avers that the balance of six hundred and forty dollars, with the interest, deducting the sum paid, is still due. The residue of the section of which Burnet died seised, is held by Weaver, who has refused to act as administrator, in subjecting it to sale, for the residue of the complainant's demand, alleging that he claims it by purchase.

The object of the bill is: (1) To compel the administration of the residue of the land of which John W. Burnet died seised, which was not administered by Weaver, and which he claims as a purchaser. (2) To compel Weaver to receive the deed tendered for the one hundred and twenty-eight acres, and to pay the residue of the purchase money. (3) To compel Weaver to discover the assets of the estate. Weaver has answered, substantially admitting the facts stated, and one of the defendants, William Davis, who has come of age since the filing of the bill, and who had answered by his guardian, has filed a plea of the statute of limitations; the other infant defendant has answered by guardian ad litem.

The great question in the case is, whether the real estate in question was liable for the payment of the debts of Burnet; and was subject to be made assets, by the administrator, under the laws of Indiana. It has been the policy of the government in making grants to Indians, sometimes called reserves, specially to provide in the treaty, as in the case before us, that the conveyance by the Indian should be made only by the sanction of the president. This was intended to protect the Indian right, he being, from his untutored condition, incapable of guarding his interests against the impositions and frauds of his white neighbors. This was a wise policy, but, it is believed, that it has fallen short of that protection which it was intended to afford. Such are the devices of dishonest men, that the utmost vigilance cannot detect and redress, all the mischievous tendencies of their acts. And this is especially the case when they are brought in contact with the uncivilized Indians. But the deed in question does not come within the provisions of the treaty. The grantee, and, perhaps his heirs, may not be able to make a valid conveyance of the land without the approval of the president. That may be considered a condition within the original grant, and is limited to the personal acts of the grantee and his heirs. But the conveyance under consideration is by operation of law. The land is not withdrawn from the sovereign action of the state. Like other lands, it may be taxed by the state, and is subject by the local law to the payment of debts. This belongs peculiarly to state power. It regulates the transmission of real estate by deed or by operation of law, and subjects it, in the mode prescribed, to the payment of debts. Except by compact, or the voluntary legislative action of the state, lands within its limits can not be withdrawn from its ordinary action.

For the payment of debts, the law provides a mode by which the lands of infants, who are incompetent to make a contract, may be sold. And no reason is perceived why the same rule should not apply in the case under consideration. It is a general principle, that the property, both real and personal, of persons capable of contracting debts, may be made liable for the payment of debts. The property gives them credit, and in sound policy and justice, it should be held responsible for their debts. The grantee of the government in this case was capable of making contracts, and was legally responsible under them. And although by the restrictions of the grant he could not alien, yet, there would seem to be no inconsistency in saying, that the state law may substitute an agency through which the land may be reached by creditors. The genuineness of the claim against the estate of Burnet, seems to be well established. Is the claim barred by the statute of limitations? The counsel for the complainant in answer to this says, that the statute does not operate on promissory notes. Rev. St. 1831, p. 686, 711; [Rice v. Minnesota & N. W. R. Co.] 1 Black, [66 U. S.] 378.

The sanction given to the note by the probate court, where notice had been given to the parties interested, as the law requires, and also by the administrator, is satisfactory evidence not only to the hand-writing of the promisor, but to the justice of the consideration. The allegations of the plea are unsupported by an answer, and the facts and circumstances of the case rebut the presumption of payment. No irregularity is pointed out by the counsel, in the probate court. 8 Cowen, 350; 3 John. Ch. Rep. 384. And as that court had jurisdiction of the subject matter before it, the court must treat the proceeding, until reversed or set aside, as valid. If there were a defect of title, Weaver could not maintain the possession of the land purchased by him, and refuse to pay the consideration. He is bound to rescind the contract, receive the money back he has paid, and give up the land, or pay for it and receive the deed. Believing that the title is valid, the court will decree a specific execution of the contract. On the tender of a general warranty deed by the complainant, the defendant shall pay the balance of the consideration, and interest thereon. And as to the land purchased by Weaver, it must be considered as subject to the payment of the debts of the ancestor, Weaver having notice of all the facts.

The court will decree that the heirs before the court, who have a claim to the land purchased by Weaver, shall pay their respec-

tive proportions of the balance of the debt due to the complainant in —— months; and in default thereof the interest in the lands of the heirs who are defendants, shall be sold, etc., and that the defendants shall pay the costs, etc.

LOYD (UNITED STATES v.). See Case No. 15,637.

LOYHED (PHELPS v.). See Case No. 11,077.

L. P. DAYTON, The. See Case No. 7,192.

L. P. SMITH, The. See Case No. 13,191.

Case No. 8,585.

The L. T. KNIGHTS.

[1 Lowell, 396.] [1]

District Court, D. Massachusetts. Dec., 1869.

SALVAGE—DERELICT—PLUNDERING THE VESSEL.

1. A coal-laden schooner was found derelict at sea about fifty miles from Long Island, and brought into Newport by the mate and two men from the coasting schooner Fanny Blake. The salvage service occupied thirty hours, and required a good deal of labor and some risk, as the derelict had holes bored in her hull, which were not discovered for many hours. On a value of $6400, the salvage awarded was $2500.

2. Neither the owners of the Fanny Blake, nor her master, nor her steward, made any demand for salvage, and there was evidence that the two latter, and perhaps some others, had been guilty of embezzling furniture and stores from the derelict. The libellants not concerned in the fraud were awarded the same shares that they would have had in the absence of any embezzlement.

3. A boy who was an actual salvor, and who had refused to join in plundering the vessel, but had taken two articles of very trifling value "as keepsakes," which he had offered to return to the claimant, was awarded a less share than he would otherwise have had.

Libel for salvage, promoted by the first mate and two of the crew of the schooner Fanny Blake. The L. T. Knights was observed early in the morning of Sunday, August 29, 1869, by the libellants and others on board their vessel, at sea, about fifty miles from Long Island, in apparent distress. On boarding her she was found to be coal-laden and derelict, with about three feet of water in her hold. Snow, the mate of the Fanny Blake, and two men, one of whom was the libellant Folio, undertook to bring her to Newport, and succeeded in doing so in about thirty hours. They were kept much of the time at the pumps until late Sunday night, when they discovered and partially stopped the leak, which was occasioned by holes bored in the hull of the schooner, though when and by whom was not discovered. The actual salvors incurred some risk, and both vessels were short-handed after the salving crew had been sent on board the schooner. While the vessel was lying at Newport in charge of the salvors, some of them embezzled furniture and stores, and carried them on board the Fanny Blake. The evidence tended to implicate the master and steward of that vessel in this misconduct. No demand for salvage was made by these men nor by the owners of the Fanny Blake.

C. T. Bonney, for libellants.

R. D. Smith, for claimants.

LOWELL, District Judge. The rule in such cases is, that the forfeiture of salvage does not attach to those who have had no part either in the fraud or its concealment. I speak of cases where the evidence is clear and decisive; for it may well be, that the burden of discrimination may lie upon the salvors generally, when embezzlement is shown. The evidence here does not implicate Snow nor Legg, and they should have the same allowance, and no more, as if the distribution were made to all the salvors; for the forfeiture enures to the benefit of the owners of the property, and not to that of the co-salvors. The Rising Sun [Case No. 11,858].

The question concerning Folio's conduct is not so free of doubt. He is a boy of eighteen years, whose service was meritorious, and whose statements both in and out of court appear to have been frank and consistent. His story is, that he took no part in the spoliation, but remonstrated with Ward against it, and was silenced by the asserted authority of the master. That seeing Ward packing articles in a box, he asked him to put in a log-glass for him as a keepsake. That he told Captain M'Intire, the claimant and owner of the L. T. Knights, of this, and offered to pay for the glass, but was told that it was of no consequence. It would seem, too, that he had a small earthen dish; the total value of both articles being less than half a dollar. It is of no consequence that a salvor has made nothing by a fraud, if he is a party to it; but in this instance there is room for a charitable doubt, considering all the facts and circumstances, whether this libellant's acts really amounted to embezzlement, in intent; though, perhaps, technically so in law. I am satisfied that he was no party to the main theft, but opposed it; and taking his whole conduct and declarations together, I feel authorized, though with some hesitation, to say that his conduct may be regarded as heedless rather than dishonest, and as a warning against even heedless conduct in this matter, to diminish, but not wholly forfeit his salvage.

The question of amounts remains. A meritorious case of saving a coal-laden derelict, likely to have foundered at sea, is one for a proportionally large compensation. The total value saved was $6,400. I consider the total salvage reward should be about $2,500. Of this I assign to Peter Y. Snow (the mate who conducted the enterprise), $400; to George V. Folio (an actual salvor), $200; to George B.

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

Legg (who remained on board the Fanny Blake), $150. The libellants are to have costs. The remaining salvage is forfeited to the claimants.

Case No. 8,586.

LUBKER v. The A. H. QUINBY.

[7 Wkly. Notes Cas. 509; 8 Reporter, 806.[1]]

Circuit Court, D. Delaware. 1879.

SALVAGE—EFFECT OF TENDER AND PAYMENT INTO COURT—RIGHT TO DEPENDS ON THE WHOLE SUM INVOLVED — APPEAL TRIED DE NOVO — COSTS—SOUND DISCRETION OF COURT.

1. Costs in admiralty are given or refused according to the sound discretion of the court, which is to be exercised in accordance with settled practice, for the furtherance of justice, and with reference to the facts of the case.

2. Though the question of costs is perhaps not per se the proper subject of an appeal, yet it is reviewable when a case is properly in the appellate court.

3. On appeal in a case of salvage, the whole case—as well the adjudication of the amount of salvage as incidently the costs—is before the appellate court for review; and that tribunal is not bound by the decree of the court below, but can decree more, or less, or nothing.

4. In cases of salvage, when a libellant has refused a tender, and subsequently recovers only the same amount as was tendered him, he is always chargeable with his own costs which have accrued since the tender was made; and generally with the owner's costs also, unless there are some special circumstances to modify the rule.

5. A tender in a respondent's answer of a certain sum as compensation for salvage services, and payment into court in pursuance thereof, is in no sense an admission of the libellant's right to such sum; and if the tender be refused, and a decree subsequently made against the respondent for the same sum as was tendered, he still has the right of appeal, and the amount decreed against him is to be considered in deciding whether there is a sufficient sum involved to give the right of appeal.

Appeal by the owner and claimant from a decree of the district court for the district of Delaware.

Libel for salvage. The facts of this case were as follows. On May 1, 1877, early in the morning the libellant discovered the schooner respondent about a mile outside of the Delaware breakwater, and about four miles from the Delaware shore, damaged by a collision with a bark. She had lost both her masts and stanchions, and rail on port side; her windlass was broken, much of her rigging overboard and fouled with the bark, and there were forty-five fathoms of her anchor-chain out, attached to her port anchor. The schooner was laden with lumber, so that her deck was only about a foot from the water. The sea at the time was rough, and the wind high, but it was not a gale. The libellant put off from Lewes in a surf-boat, accompanied by four men and went to the schooner's relief. Arrived at the schooner, he and the captain executed a paper, by which it was agreed that, if the libellant brought the schooner safely to the shore he should be paid "what the board of underwriters say is just and true," or, "if not particularly agreed on the compensation shall be such as is just in the premises." The libellant then went to work, and in about three hours had the schooner safe behind the Breakwater. They afterwards brought her to Wilmington. The respondent declining to appear before the board of underwriters, and no other umpire being agreed upon, on May 16, 1877, libellant filed his libel against the schooner, tackle, etc. On May 26, 1877, respondents tendered him the sum of $400 for compensation, and $63 for costs incurred to date, which was refused. On June 1, 1877, respondents filed their answer renewing the above offer, and paid the sum into the registry of the district court.

Upon the hearing, the court (Bradford, District Judge) decreed the libellant the sum of $400 as ample compensation for services rendered, and, on the question of costs, decreed against the respondent, saying: "On the question of costs, on some reflection, I have decided that the respondent pay all the costs of this suit. It is true the libellant has not recovered more than the amount tendered, but he has recovered a claim originally refused; and if he pursued it in good faith under an honest impression that he was entitled to more, which appears to have been the case, I am not prepared to put him into his own costs because he did not get a larger sum awarded in a decree." From this decree the claimant appealed to the circuit court.

The court (McKennan, Circuit Judge) denied the motion, saying: "Ordinarily, the amount of the decree, in an admiralty suit, is determinal of the 'matter in dispute,' and of the consequent right of appeal by the party against whom it is rendered. In this case the decree was in favor of the libellant for the sum of $400; but the respondent's right of appeal is contested on the ground that she offered to pay that amount to the libellant as a compensation for the salvage service described in the libel, together with the accrued costs, and paid the said sum and costs into the registry of the court. This was not, however, an unqualified admission of a sum due to the libellant, but a conditional offer to pay it in full settlement and compromise of his claim and upon a discontinuance of the suit. By the libellant's refusal of this offer, his whole claim was open to contention. He was not relieved from the burden of establishing the allegations of his libel by appropriate independent proofs. Nor was the respondent precluded from showing the actual value of his services. All the proofs, on both sides, the court must consider, and its decree must necessarily be taken as a judicial measure of the pecuniary merit of the libellant's services, determined by the import and weight of all the evidence in the case. In-

[1] [8 Reporter, 806, contains only a partial report.]

asmuch as the case could only be adjudged according to its merits, unaffected by the rejected offer, the libellant's claim, whether more or less, was the matter in dispute, and the amount at which this was fixed by the decree of the court determines the right of appeal. The motion to dismiss the appeal is denied."

(The argument on the motion to dismiss the appeal has been combined with the argument on the appeal.)

E. G. Bradford, Jr., for libellant.

The amount of salvage awarded, resting largely in the discretion of the court, will not on appeal be altered upon slight grounds, or for inconsiderable differences of opinion. The Sybil, 4 Wheat. [17 U. S.] 98. The Dos Hermanos, 10 Wheat. [23 U. S.] 306, 310; Hobart v. Drogan, 10 Pet. [35 U. S.] 108, 119; Tyson v. Prior [Case No. 14,319]; The Emulous [Id. 4,480]; The Boston [Id. 1,673]; Cushman v. Ryan [Id. 3,515]; The Narragansett [Id. 10,017]. Costs in admiralty rest in the discretion of the court, and are not per se appealable. Barnett v. Luther [Id. 1,025]; Shaw v. Thompson [Id. 12,726]; The Moslem [Id. 9,876]; The Martha [Id. 9,144]; Canter v. American & O. Ins. Co., 3 Pet. [28 U. S.] 307, 319; U. S. v. The Malek Adhel, 2 How. [43 U. S.] 210, 237. It being improper to reverse the decree as to the amount awarded as salvage, it should be affirmed as to costs. The tender and payment of the money into court, while it might influence, could not defeat, the exercise of discretion as to costs; nor would the court have the power, by allowing such payment into court, to debar itself from the exercise of that discretion. The doctrine of tender at law has no application to claims for uncertain damages. 2 Saund. Pl. & Ev. *834. The doctrine of tender, in admiralty, as applied to salvage cases, is altogether different, and rests upon the ground of discouraging the prosecution of unconscionable demands of salvors, after an offer of manifestly ample compensation has been made by the claimant. But where a salvor has acted in good faith, as in the present case, it should clearly appear that his demand is greater than could have been made by a man of ordinary intelligence, in the exercise of an honest opinion as to the merit of his services, before the court should disallow his costs, upon the ground of refusal to accept a sum less than that claimed by him. This is particularly the case where, as in the present instance, the claimant has been guilty of unfair and oppressive conduct toward the salvor. If, however, a claimant in a salvage case can, as to costs, claim the benefit of a tender according to its rigid effect at law, the libellant in the same case should derive whatever benefit would have accrued to him from that tender and the payment of money into court, if made in a court of law. In that event the $400 paid into court was not a matter in dispute, and the circuit court has no jurisdiction, for its jurisdiction only attaches when the amount in dispute exceeds $50, exclusive of costs. Desty, Fed. Proc. 56.

The sum of the matter in dispute, as to a respondent, depends upon the disputed amount of libellant's demand, so far as that disputed amount is embraced in the decree of the district court. Shirley v. Situs [Case No. 12,796]; Olney v. S. S. Falcon, 17 How. [58 U. S.] 19; 2 Abb. Pr. (N. S.) 234, 235. The amount in dispute here, so far as the claimant is concerned, did not exceed $50, exclusive of costs, because the $400 was admitted by the answer to be a just compensation, and the payment of it into court was a conclusive admission of record to that effect, and was equivalent to a payment pro tanto. Hubbard v. Knous, 7 Cush. 556; Spalding v. Vandercook, 2 Wend. 431; Johnston v. Columbian Ins. Co., 7 Johns. 315; Murray v. Bethune, 1 Wend. 191; Malcolm v. Fullarton, 2 Durn. & E. [Term R.] 645; Vaughan v. Barnes, 2 Bos. & P. 392; 1 Tidd, Prac. *622, *624, *626. The only matter, then, in dispute, was the libellant's demand over and above that sum, and as to this the decree was in claimant's favor.

Mr. Rumford, for respondent.

On an appeal the whole case, including the question of costs, comes before the appellate court de novo. The fact that a tender was made to prevent further litigation, which was rejected, and the offer renewed in the answer, and the amount tendered paid into the registry of the court, in no way limits or controls the sound discretion of the court in awarding salvage compensation. Such payment is merely a part of the formal requisites of a tender in admiralty. If, from the facts of the case, the court, in the exercise of its sound discretion, should determine that the libellant was not entitled to so large a sum as had been tendered, a less sum would be decreed. The Jonge Bastiaan, 5 C. Rob. Adm. 323; The General Palmer, 2 Hagg. Adm. 180; The Frederick, 1 Hagg. Adm. 211; Abb. Shipp. marg. 573; 2 Conk. Adm. 443; 2 Pars. Mar. Law, 732.

The rule appears to be that if a party does not accept what is tendered to prevent litigation, but proceeds with the suit, and recovers no more than the sum tendered, such party shall be liable for his own costs; and if it appear that the proceedings have been vexatiously pursued, he shall also be liable for the costs of the other party. Abb. Shipp. marg. p. 573, § 7; 2 Pars. Mar. Law, 732, 733; 2 Conk. Adm. 441–443; The Paris, 1 Spinks, 289, 291; The Clifton, 3 Hagg. Adm. 118; The Eleanora Charlotta, 1 Hagg. Adm. 156; The John & Thomas, Id. 157, note 1; The Frederick, Id. 211; The Black Boy, 3 Hagg. Adm. 386, note 3; The Emu, 1 W. Rob. Adm. 16; Hessian v. The Edward Howard [Case No. 6,436]; The Batavier, 1 Spinks, 169;

Shaw v. Thompson [Case No. 12,726]; The H. B. Foster [Id. 6,290]. A tender to prevent litigation is no admission of the justice of the demand, but merely an offer to escape the inconvenience of litigation. The Frederick, 1 Hagg. Adm. 218.

STRONG, Circuit Justice. After a careful review of the evidence, I am of opinion that, while the sum awarded is "ample compensation," it is not excessive. It is true the services rendered were of the lowest grade; the risk incurred and the skill and appliances required not great; and the time devoted to the service very short; but there was considerable expenditure in bringing the schooner to Wilmington, and the salvage allowed bears no undue proportion to the value of the property saved. I shall therefore affirm the decree of the district court so far as it awarded $400 to the libellant. But I cannot concur with that court in condemning the respondent to pay all the costs of the suit. Costs in admiralty are undoubtedly given or refused at the discretion of the court; but that discretion is to be exercised in accordance with settled practice, for the furtherance of justice, and with reference to the facts of the case. Here the libel was filed on the 16th of May, 1877, about two weeks after the salvage services rendered. Ten days thereafter, May 26, the claimant, the owner of this schooner tendered to the libellant the sum of $400, as compensation for the services rendered, and also $63 the full amount of costs incurred to that day. The tender was refused. On the 1st June, 1877, the respondent filed her answer, in which she renewed the offer of $463, and concurrently she paid that sum into the registry of the court. The sufficiency of the tender is not controverted, and it is therefore to be considered what its effect is. I think, as the libellant recovers no more than $400, no more than he might have had on the 26th day of May, 1877, he is justly chargeable with the costs that have accrued since that date, because they have been needlessly made by him. Such I understand to be the general rule in salvage cases in courts of admiralty. It is certainly the English rule, and, so far as the decided cases show, it is the rule in this country. It is sufficient to refer to a few decisions, most of which were called to my attention during the argument. Thus, in the case of The Vrouw Margaretha, 4 C. Rob. Adm. 103, Sir Wm. Scott said: "If a tender be pronounced sufficient, the court will make the party who refuses such an offer liable not only to his own costs but also to those of the other party, if it shall appear that proceedings have been vexatiously pursued." The John & Thomas, 1 Hagg. Adm. 157, note 1. In The Emu, 1 W. Rob. Adm. 15, where the tender was held sufficient, no costs were given (against the salvors), but the court said that in future where a tender was pronounced for, costs would always be given. In The Batavier, 1 Spinks, 169, a tender was held sufficient, and costs were adjudged against the salvors. The Albion, 2 Hagg. Adm. 180, note 2; The Clifton, 3 Hagg. Adm. 124.

It is true the rule is not an unbending one. It may yield to circumstances in the particular case. It is, almost without exception, ruled that when the tender is held sufficient, the salvor is not entitled to subsequent costs. But whether he must pay the costs of an owner incurred after the refusal of a sufficient tender is not so well settled. In the case of The Queen, 1 Spinks, 175, note, Dr. Lushington said: "The rule I have endeavored to follow is not to bind myself in all salvage cases to give costs against salvors, unless I think the tender was so large that the salvors, in the exercise of a sound discretion, could not do otherwise than accept it. Here the tender is sufficient; but it is not so much as to lead me to blame the salvors for not accepting it. I therefore pronounce for the tender, but without costs." In a subsequent case (The Paris, 1 Spinks, 289) he said: "I consider it my duty to pronounce for the tender, and, I am sorry to say, to condemn the parties in the costs. That is a measure which I am reluctant to pursue, though, according to practice in other courts, when the tender is considered sufficient, they uniformly follow that course." Such, then is the general rule. I do not question that there may exist in some cases sufficient reason for departing from this rule. There may exist a reasonable doubt respecting the sufficiency of the tender or the conduct of the owners may have been such as to justify imposition of the costs or a part of the costs upon them. Public policy required that favor should be shown to the salvors when they have acted in good faith, without any disposition to oppress unfortunate owners. But I find no such reasons existing in the present case. The ingenious argument made on behalf of the libellant urges that the owner exhibited bad faith in not appearing before the Philadelphia board of underwriters, to submit to that board the question what sum was due to the libellant. To this I cannot assent. It is in evidence that when the libellant came on board the schooner, and before he began his salvage services, he obtained from the master of the schooner a contract that he should receive for his salvage services such sum of money as the board of underwriters of and in the city of Philadelphia should, within a reasonable time, award to him as being justly due for his salvage services; or, if the amount of said compensation should not be otherwise determined, that he should receive such compensation as should be just in the premises. It is proved that the owner did not appear before the board when notified by the libellant to appear; and this is charged as bad faith and a breach of the contract made by the master of the schooner. But the contract, admitting it to have been fairly made

and binding, did not obligate the owner to submit the determination of the amount due to the arbitrament of the board of underwriters. It was in the alternative. She was at liberty to submit the assessment to the board, or to tender or submit to such compensation as was just. She chose the latter, as she had the right to do. She made a sufficient tender within what appears to me to have been a reasonable time. There was, then, no breach of faith or of the contract on her part. On the contrary, I think the conduct of the libellant was harsh and oppressive. He never exhibited the contract to the owner or her agent until after the schooner was seized, and after the tender was made. He insisted on a determination by the underwriters, practically refusing to the owner her alternative right. He filed his libel before a reasonable time had elapsed, I think, for a settlement of the amount due; and when the tender was made, on the 26th day of May, 1877, after no unreasonable delay, he refused to accept it, saying "he would lose $100 more before he would take that." The impression made upon my mind by all this is that the conduct of the libellant was oppressive and arbitrary, dictated more by the consciousness that he had an advantage than by a desire to secure a just and reasonable settlement. Certainly, there is nothing in all these facts which can justify a departure from the rule respecting the imposition of costs. I feel constrained, therefore, to order that the libellant shall pay all the costs that have accrued since May 26, 1877, when the tender was made. While salvors are to be treated with favor, they are not to be encouraged in oppressing unfortunate owners.

It was urged in argument that the decision of the district court on the subject of costs is not reviewable on appeal. I think otherwise. It is true, it has been said that the matter of costs is not per se the proper subject of an appeal, and that notice can only be taken of it incidentally as connected with the principal decree, when the correctness of the latter is directly before the court. The Malek Adhel, 2 How. [43 U. S.] 210, 237. But here there is a general appeal of the whole case, including the ascertainment and determination of the amount due the libellant, and it has been contended that the sum awarded by the district court was excessive. The entire case is before me, as well the adjudication of the salvage as incidentally the costs. I am not bound by the amount of the unaccepted tender. I can decree either more or less, or nothing. What is in controversy now is the amount of salvage. Costs are only an incident, though it unfortunately happens in this case that the incident is greater than the principal, in consequence, as I think, of the unjustifiable course of the libellant.

I notice another position taken by the proctor of the salvor. It is that inasmuch as the respondent tendered $400, the amount in controversy in this appeal does not exceed $50, and therefore that the circuit court has no jurisdiction. This position cannot be maintained. The appeal brings the whole case before me. The appellant contends against the entire claim of the libellant. It is true she tendered $400, but the tender not having been accepted, and the libellant having chosen to keep the case open, she is not bound by the amount of her tender. I am at liberty to award a less sum if, in my judgment, a less sum would be sufficient compensation. If a tender be made in admiralty, the court will afterwards, for good cause, reduce the amount, and decree a less sum to the libellant. The General Palmer, 2 Hagg. Adm. 176.

I do not deem it necessary to say more. From what I have said my conclusion will be manifest. I shall decree against respondent the sum of $400, together with $63 costs, and I shall direct that the costs of this appeal and all costs made since May 26, 1877, be paid by the libellant. Decree accordingly.

LUCAS (DARBY v.). See Cases Nos. 3,572 and 3,573.

Case No. 8,587.

LUCAS et al. v. MORRIS et al.

[1 Paine, 396.] [1]

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

BANKRUPTCY — JURISDICTION OF CIRCUIT COURT — REMOVAL OF ASSIGNEES — BILL TO COMPEL ASSIGNEES TO ACCOUNT.

1. The circuit courts have jurisdiction of matters arising under the bankrupt law, as they have of any other subject, where the constitution and laws of the United States give them jurisdiction.

[Cited in Carr v. Gale, Case No. 2,435; Payson v. Dietz, Id. 10,861.]

2. The district courts have not, like the chancellor in England, exclusive jurisdiction over the entire execution of the bankrupt law. They cannot remove the assignees, nor compel them to account.

[Explained in Morris' Estate, Case No. 9,825.]

3. Plea to the jurisdiction by a bankrupt on a bill filed by his creditors to compel the assignees to account, overruled.

[This was a bill by John R. Lucas and others against Robert Morris and others.]

S. Jones and D. B. Ogden, for complainant.

P. C. Van Wyck and C. G. Haines, for defendant.

THOMPSON, Circuit Justice. Comfort Sands, a bankrupt, and one of the defendants in this cause, has interposed a plea in abatement to the jurisdiction of this court, alleging, that all the matters and causes of complaint in the plaintiff's bill of complaint contained, belong exclusively to the judge

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

of the district court of the Southern district of the state of New-York.

It is not necessary, for the purpose of disposing of the present question, that I should go into an examination of all the matters contained in the complainant's bill filed in this case, nor determine whether relief is to be given by this court to the extent asked for. If the bill embraces any matter of which this court has cognizance, the plea in abatement must be overruled, for it claims for the district judge the sole and exclusive jurisdiction of all matters comprised in the bill. Nor is it necessary for me to go into a particular examination of the extent of the authority of the district judge, under the act in relation to bankruptcies [2 Stat. 19]. I cannot, however, discover from any part of this act exclusive jurisdiction given to the district judges over the entire execution of this law. It is not claimed for them that these powers grow out of and belong to their judicial functions. But that by the act they are constituted the organs for its administration, as a system per se, and entirely independent of the ordinary powers of courts of justice. This authority is claimed to be derived principally by implication; and by analogy to like powers exercised by the chancellor of England, under the bankrupt system of that country. Without entering into an examination of the origin and progress of the powers exercised by the chancellor in England in these matters, the analogy between the powers granted to the chancellors in England under their system, and those conferred upon the district judges under our act, fails in an essential particular; and that too, in a part claimed by the former as the principal ground upon which the jurisdiction has been assumed, viz.: The authority as to the appointment and removal of the assignees. The right of compelling the assignees to account was considered as a necessary incident to the power of removal. But no such authority is vested in the district judge under our act. The assignees are to be appointed by the creditors of the bankrupt, and by them alone are they removable. Where then rests the authority of the district judge to make them account? It is not expressly given by the act. Nor is there any power over them given, to which this can be considered as incident. Where then does the authority rest to call the assignees to account? To say they are irresponsible, is a proposition not to be endured. And this must follow, unless the courts of justice in the ordinary exercise of their authority have jurisdiction in the case. Can there be a doubt but that the court of chancery of this state would entertain a suit against the assignees, should a bill be filed in that court, in a matter properly cognizable in a court of equity? And if a state court has jurisdiction, it would seem to follow as a necessary consequence, that the courts of the United States must also have jurisdiction, whenever the case is brought within the constitution and laws of the United States. And the only inquiry would therefore seem to be, whether this is such a case. By the constitution of the United States (article 3, § 2), the judicial power, among other things, extends to all cases in law and equity, arising under the constitution and laws of the United States, when the controversy is between a citizen of the United States and a foreign citizen or subject. And by the 11th section of the judiciary act of 1789 [1 Stat. 78] it is enacted, that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds the sum or value of 500 dollars, and an alien is a party.

The bill of complaint filed in this case describes the complainants as British subjects, and of course aliens, and possessing the character which entitles them to come into this court. The subject matter of the suit is properly cognizable in a court of equity. The general scope and object of the bill is to call upon the defendants as trustees to account, and to compel them to carry into execution the trust, which they have assumed as assignees of Comfort Sands, a bankrupt. The bill does not call upon this court to take cognizance of and exercise any of the powers expressly delegated to the district judge. It is, in substance only, the common and ordinary case of the exercise of the authority of a court of chancery to enforce the execution of a trust, by compelling the defendants to account for the monies, property, and effects belonging to the bankrupt's estate, which have come to their hands, and to proceed to make a dividend, and distribution thereof among the creditors of the bankrupt; as by law they are required to do. If this does not fall within the ordinary powers of the court of equity, where is relief to be had? From the opinion of the district judge, upon the petition of Comfort Sands, the bankrupt, and upon which the proceedings referred to in the plea took place, I understand the district judge to disclaim having authority to compel the assignees to make a dividend of the bankrupt's estate. The bill in this case charges the assignees with having in their hands a large sum of money to which the creditors of the bankrupt are entitled, and prays that they may be compelled to make a dividend thereof. This, then, is thus far the precise case of which the district judge disclaims having jurisdiction. There are many parts of the bankrupt law, the execution of which the powers of the district judge are inadequate to enforce, and which would remain a dead letter without the aid of other tribunals. Thus by the 8th section the creditors may remove the assignees and appoint others in their place. And the assignees so removed are required to hand

over to the new assignees all the estate and effects of the bankrupt in their possession; and on refusal they forfeit a sum not exceeding five thousand dollars for the use of the creditors, and are also liable for the property detained. In what court is a suit for the property to be sustained? It will not, I presume, be contended, that the district judge can give relief in this case. But recourse must be had to other tribunals.

The doctrine attempted to be established by the defendants' counsel, that the entire execution of the bankrupt law is committed to the district judge, is manifestly untenable. Upon the argument of the present question, no objection can be taken to the form or to the equity of the bill. If any such objections exist, they must come up in another shape. The only inquiry now is, whether this court has jurisdiction of any matter arising under the bankrupt law when the subject matter is proper for a court of equity, and the parties such as the constitution and laws of the United States require. Because the plea claims exclusive jurisdiction in the district judge, and believing as I do that this doctrine cannot be sustained, the plea in abatement must be overruled.

Case No. 8,588.

LUCAS et al. v. The THOMAS SWANN.

[6 McLean, 282;[1] 1 Newb. 158; 3 Am. Law Reg. 659.]

District Court, D. Ohio. Oct. Term, 1854.

COLLISION — LIBELLANT BLAMELESS — INEVITABLE ACCIDENT—MUTUAL FAULT—INSCRUTABLE FAULT.

1. A libellant claiming damages on the ground of a collision with another boat, must make it appear that there was no want of ordinary care and skill, in the management of his boat, and that the injury for which he claims compensation, resulted from the sole fault of the other boat. But the faulty management of one boat, will not excuse the want of proper care and skill in the other.

[See The Bayard v. The Coal Valley, Case No. 1,128.]

2. A case of damage resulting from inevitable accident, is defined to be, "that which a party charged with the offense could not possibly prevent, by the exercise of ordinary care, caution and skill."

[Cited in The Johannes, Case No. 7,332.]

3. There is no ground for the conclusion in this case, that the injury was unavoidable; but on the contrary, it is a case of mixed or mutual fault.

4. To constitute a proper basis for a decree apportioning the damages equally to each boat, as in a case of mixed or mutual fault, the evidence must enable the court to find the specific faults of each, from which the injury resulted.

[Cited in The Hudson, 15 Fed. 167.]

5. If the court is satisfied that both boats were in fault, and yet, from the conflict in the evidence, cannot find, with reasonable certainty, the specific faults of each, it constitutes a case of inscrutable fault; and, in such case, in accordance with the law as settled in the United States, a decree for the equal apportionment of the damages resulting from the injury may be entered. The present is adjudged to be such a case, and a decree is entered in accordance with the principle stated.

[Cited in The Atlas, Case No. 633; The Comet, Id. 3,050; The Mary Patten, Id. 9,223; The J. W. Everman, Id. 7,591; Vanderbilt v. Reynolds, Id. 16,839; Ebert v. The Reuben Doud, 3 Fed. 522.]

[This was a libel by M. E. Lucas and others against the steamboat Thomas Swann (T. Sweeny and others, owners) to recover for damages sustained by collision.]

Walker, Kebler & Force, for libellants.

T. D. Lincoln, for respondents.

LEAVITT, District Judge. This is a case in admiralty, brought by the libellants, as owners of the steamboat Fanny Fern, to obtain compensation for an injury to that boat, by a collision with the steamboat Thomas Swann, of which the respondents are the owners. This collision occurred a little after 4 o'clock in the morning of 28th February, 1854, on the Ohio river, some ten or twelve miles below Wheeling, in the channel between Little Grave Creek bar and the Ohio shore, near the head of the bar, and at the distance of something upwards of one hundred yards from that shore. The Fern was a stern-wheel boat of about 450 tons burthen; the Swann is a side-wheel boat, of the largest class of Ohio packet boats, and was, at the time of the collision, one of the boats of the Union Line, from Louisville to Wheeling.

The libellants allege, that as the result of the collision, their boat immediately sunk in fourteen feet of water; and they claim damages for the full value of the boat, as being a total loss. They also allege, that the injury to the Fern was caused solely by the fault and misconduct of those having charge of the respondents' boat; and set forth as the foundation of their claim for indemnity, that the Fern was descending the river, in the proper and usual place of a descending boat, a short distance above the head of the Grave Creek bar, and that her pilot, noticing the lights of a boat coming up near the Ohio shore, and having no signal from her, when the boats were within from a quarter to less than a half a mile of each other, he gave two taps of the large bell of the Fern, thereby indicating his wish to take the left-hand side of the channel. The ascending boat proved to be the Swann; and the libellants aver, that she made no response to the Fern's bell, and that the Fern continued her course down, in her proper place, when her pilot, seeing the Swann veering across the channel, towards the Virginia side, promptly gave the order for stopping and backing; that the boat was stopped and backed, and every precaution used to prevent a collision; but that the Swann, wrongfully pursuing her course across the channel, struck the Fern nearly at

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

right angles, on the starboard side, near the foot of the stairs, about fifteen feet from the bow of the boat, cutting her about two-thirds through, and causing her to go down in less than one minute.

The respondents, on the other hand, deny that there was any fault or misconduct on the part of those having charge of their boat; and insist that the Fern, before entering the channel between the bar and the shore, was not in the proper place of a descending boat, being not more than thirty yards from the Ohio shore, and so near thereto, that in the line of vision from the pilot-house of the Swann, the lights of the Fern were so blended with the lights on shore at that point, that they could not be distinguished; and that from this cause the pilot of the Swann did not know, and had no reason to suppose, that a boat was coming down, till the bell of the Fern was heard, at which time the boats were not more than 200 or 250 yards apart; and that instantly, on being apprised that a boat was coming down, the pilot of the Swann gave one tap of the large bell, to indicate that he could not take the Ohio side of the channel, and almost simultaneously rang the bells for stopping and backing. The respondents also insist that, when the Fern's bell was heard, the Swann was in the proper place of an ascending boat of her size, at that stage of water, following the channel, and slightly quartering towards the Virginia shore; and that the Fern, being close to the Ohio shore, and with every facility for passing the Swann on that side, had no right to signal for the Virginia side; and that the Fern improperly attempted to cross the channel, and was nearly at right angles with it, when the boats came together. And they insist also, that having made the attempt to cross, she was wrong in stopping and backing; and that the collision was the result of this improper navigation, and not of any faulty conduct on the part of the Swann. It may be noticed here, as one of the facts about which there is no contradiction in the evidence, that the Swann struck the Fern at an angle of about 72° with her stern; and that she sunk near the head of the bar, about one hundred yards from the Ohio shore: her stern being in deep water, and very near the line of navigation usually followed by both ascending and descending boats at that point. This brief outline presents the nature of the controversy between these parties. Their theories and assumptions, both in the pleadings and by the evidence, are in direct conflict; and it may be added, both cannot be sustained. The libellants claim that their boat was without fault and therefore that the respondents are answerable for the whole damage she has suffered from the collision; while the respondents claim that the injury to the Fern was not occasioned by any fault on their part, but is chargeable solely to her mismanagement. The evidence affords no ground for any unfavorable presumption against either of the parties for any failure to comply with the requirements of the act of congress of 1852 [10 Stat. 61]. Whatever of contradiction there may be in the proofs in other respects, it satisfactorily appears that each of the boats was provided with the requisite signal lights, and that they were in good order at the time of the collision; and also that each was manned with the usual and necessary number of men and officers. And it is specially worthy of notice here, that the proof is ample, on both sides, to show that the pilot of each boat on duty at the time of the collision was, in all respects, trustworthy, and well qualified for the duties of his station.

With a view to some proper basis for a decree in this case, I have carefully read and reflected on the great mass of evidence presented on the hearing, partly oral, but mostly in the form of depositions. In this effort, I have encountered great difficulties, arising from the discrepant and contradictory character of the evidence, for and against the opposite claims of the parties. It is impossible, by any mental process, or upon any known principle of estimating the preponderance of evidence, to decide with even reasonable certainty, in what direction the scale should incline. With equally favorable opportunities of witnessing the occurrences to which they testify, and with the presumption that the witnesses on either side are equally intelligent, truthful and credible, it would seem to be an arbitrary exercise of the discretion of a judge, to reject the testimony given by one party and accredit that given by the other. To show the difficulty, if not the utter impossibility, of sustaining the hypothesis of either of these parties, it is only necessary to state some of the essential features or aspects of the case, in regard to which the evidence is in direct and irreconcilable conflict. And first, it is a conceded fact in the case, that the signal bell of the Fern, the descending boat, was first sounded; but as to the relative position of the boats, when the bell was tapped, and when the pilot of the Swann was apprised that a boat was approaching, the testimony of the parties is essentially variant. The witnesses for the libellants testify that the Fern, at that point, was in the proper place of a down-going boat, some one hundred and thirty yards out from the Ohio shore, and nearly on a line with the inner side of the bar. On the other hand, the respondents' witnesses testify, that when the bell of the Fern was first tapped, she was so near to the Ohio shore, that her lights were blended with, and could not be distinguished from, lights along the shore; thus rendering it impossible for the pilot of the Swann to know that a boat was coming down, until her bell was heard; and also, excluding the descending boat from the right of choosing the outer or Virginia side of the channel, and making it altogether wrong in

her to cross the channel, for the purpose of getting on that side. And the evidence is not less conflicting, in reference to the position of the Swann, the ascending boat, at the point where she was first seen by the pilot of the Fern. On one side, the proof is, the Swann was coming up the Ohio shore; on the other, that she was out in the channel, quartering to the Virginia side. And as to the distance between the boats when the Fern was first seen by the pilot of the other boat, a point of vital importance in the decision of the case, the evidence is very discrepant. The pilot of the Fern swears the distance was near a half a mile, and other witnesses for the libellants state it as upwards of a quarter of a mile; while for the respondents it is proved it did not exceed two hundred and fifty yards, and in the opinion of one witness, was not more than one hundred and fifty yards. There is also a direct contradiction between the testimony of the parties as to the course of the two boats, and their position at the time they came together. The libellants' witnesses swear the Fern was running straight down the river, up to the time when the pilot tapped her bell, and was then turned slightly across towards the Virginia side; whereas the respondents' witnesses say she was running nearly square across the river, and was struck by the Swann almost at right angles. And there is the same conflict in reference to the position of the latter boat. The witnesses for the libellants prove that the Swann turned out from the Ohio shore and was pointed across the channel, towards the Virginia shore, when the collision took place. The witnesses on the other side say her course was not changed from the time the Fern was seen, and was but slightly inclined towards the Virginia shore. And again, while the witnesses on one side state positively that the Swann ran into the Fern, those on the other are equally clear that it was the Fern that struck the Swann. These are some of the points in reference to which the evidence is conflicting, to an extent that makes it difficult to come to a conclusion for or against either of the parties. The libellants, as the result of this unfortunate collision, are the sole sufferers, no injury having been sustained by the other boat; and, as already stated, they claim indemnity for the whole amount of the injury they have sustained. They are entitled to a decree for this, only on making proof that the injury resulted from the fault of those having charge of the respondents' boat, and that there was no want of ordinary care or skill on the part of the libellants, to prevent the collision. On the other hand, it is a well settled principle of maritime law, that the fault of one boat or vessel will not excuse any want of care, diligence or skill in another. Now, if the court was at liberty to regard the evidence for the libellants, to the exclusion of that offered by the other party, there could be no hesitation in decreeing indemnity for the full amount of the injury. That evidence proves the respondents' boat to have been in fault, without any blame imputable to the libellants. But, if the evidence of the respondents is received and accredited without regard to that adduced by the libellants, the fault would rest upon the boat of the latter; and, the result would be, a decree dismissing the libel, at the costs of the libellants. But for the reasons stated, I am unable satisfactorily to come to either of these conclusions, or enter a decree upon either of the grounds indicated.

Without thinking it necessary, in the view I take of this case, to enter minutely into the examination of the evidence presented on both sides, I am prepared to state, as the conclusion of my mind, that the collision in controversy was not the result of inevitable or unavoidable accident. This is defined to be, "that which a party charged with an offense could not possibly prevent, by the exercise of ordinary care, caution and maritime skill." 2 Dod. 83; 2 Wm. Rob. Adm. 205; Fland. Mar. Law, 298. It is not a reasonable supposition, that the injury sustained by the libellants' boat could have been inflicted, without some fault, and as the mere result of unavoidable necessity. There was, at the time of this occurrence, not less than twelve feet of water in the channel of the river, and it was then rising. At the place where the Fern sunk, near the outer edge of the upper part of Grave Creek bar, there was a depth of fourteen feet. There was deep water the whole width of the channel between the edge of the bar and the Ohio shore, which, at that stage of water, was from one hundred to one hundred and twenty yards wide; and even upon the bar itself there was six feet water. There was then ample verge for these boats to have passed, without coming in contact. And moreover, there is no disagreement in the statements of the witnesses, that the night was calm, and, although somewhat cloudy, not so dark as to render navigation difficult or dangerous. With these facts in view, there would seem to be no difficulty in reaching the conclusion, that there was a censurable want of care, caution, or skill, in the management of these boats; and that the injury cannot be fairly placed to the account of inevitable accident.

It follows from this conclusion, that if this is a case warranting a decree of indemnity, it must be regarded either as one of mixed or mutual fault, or of inscrutable fault. If it be a case belonging to the first of these classes, by the well settled principles of the maritime law—differing in this respect from the common law—the decree must be for an equal apportionment of the injury sustained, between the two boats, with such order in respect to costs, as the court may deem equitable. While I do not affirm that such a decree might not be justined in this case, there would seem to be an objection to such a dis-

position of it. As I understand the maritime law, the court not only must find, as a basis of such decree, that the blame is imputable to both parties, but must find specifically the faulty acts of each, to which the injury is to be charged. As already intimated, it may be well doubted, whether the most searching analysis of the evidence would result in a satisfactory conclusion as to the precise acts which were the direct cause of the collision. The contradictory character of the evidence involves the facts of this case in great doubt, and renders it extremely difficult to attain such a result with reasonable certainty. Nearly every fact stated by the witnesses, imputing censure in the management of either of the boats, is so far impugned by opposing evidence, as to create doubt and uncertainty. In this state of the case, the court would scarcely be justified in assuming a theory, which could only be maintained by arbitrarily repudiating the evidence on one side, and accrediting that offered by the other. For the reasons which will be stated hereafter, there is no necessity for a resort to this desperate expedient, to attain the ends of justice in this case. It is true, there is one exception to the remark just made, that nearly every material fact implicating either boat is contradicted by opposing testimony. It has not escaped the attention of the court, that the evidence shows conclusively, that the Swann, as the ascending boat, failed to give the first tap of the bell, as required under certain circumstances, by the rules of the board of supervising inspectors, adopted pursuant to the steamboat law of 1852. This act of congress confers on this board ample authority to adopt such rules; and they are obligatory in cases to which they fairly apply. And a violation of any of these rules, resulting in disaster, raises a presumption of culpability, which can only be removed by proof that the collision is attributable to some other cause. The rule referred to requires the pilot of an ascending boat, "so soon as the other boat shall be in sight and hearing, to sound his bell," etc. But if, with ordinary diligence, the descending boat is not seen or heard in time to enable the pilot to comply with the rule, no censure can attach for not doing so. It would seem from the evidence of the respondents, that the Fern, from the fact that she was too near the Ohio shore, and from the impossibility of distinguishing her lights from those on the shore, was not seen and known to be a steamboat, until her bell was heard by the pilot of the Swann. This fact would excuse the pilot for not complying with the rule referred to. In reference to some other requirements contained in these rules, which have been noticed in the argument, I have only to say, that I doubt their application to the then state of the river, and the circumstances in which these boats were placed, immediately preceding the collision. There was not only a wide channel between the Ohio shore and the bar, but, in point of fact, there was water enough on the bar itself, for either of the boats to have passed over it. Without further remarks on this point, I have only to say, in reference to the rules referred to, that they must be construed in subordination to the paramount rule of navigation, that a collision must always be avoided if possible; and an injury inflicted will not be justified, unless inevitable, on the ground that the injured boat had violated a prescribed rule. But I do not propose to enter into an elaborate inquiry, whether this is a case of mixed or mutual fault, justifying a decree on that basis. In my judgment, there are, as before intimated, obstacles in the way of entering such a decree in this case. And as it may be disposed of on another principle, according, as I think, with strict justice and the doctrines of the maritime law, I prefer to place it on that ground. In its results, so far as the interests of these parties are concerned, the decree which I propose to enter, for an equal apportionment of the loss sustained by the collision, is the same as if based on the finding of mixed fault.

As already intimated, I cannot upon the evidence before me, with any reliable certainty, adopt the conclusion, that the injury suffered by the libellants arose from the sole fault of those in charge of the respondents' boat; nor can I find the reverse of this proposition to be satisfactorily established, and thus hold, that the respondents are absolved from all liability for the injury sustained. It is equally clear, for reasons before adverted to, that this injury cannot be fairly charged to inevitable accident. It is a fair deduction from the facts before the court, that the cause of this collision is to be found in the faulty management of one or both of these boats. And I have no hesitation in concluding, that in the excitement produced by the occasion, the pilots of both were in fault. This is a reasonable implication from all the circumstances involved in the transaction. And yet, from the conflict in the evidence, as before remarked, it is difficult, if not impossible, to determine to what direct and specific acts the collision is to be attributed. And this, as I understand the maritime law, makes it a case of damage or loss, arising from a cause that is inscrutable. It is not, of course, to be inferred from this, that any doubt exists that the immediate cause of the injury to the Fern, was the collision between the boats; but it implies that the causes which led to this result are involved in obscurity and doubt.

In this view it only remains to inquire what decree shall be made in this case. This is the only occasion on which this point has been before this court, and I confess, that from my limited experience in the administration of maritime law, I enter upon its consideration with some hesitancy, and with great reason to distrust the conclusions to which I might be led, unaided by the light which others have thrown upon the subject.

It is insisted by the counsel for the respondents, that the maritime law gives no redress for an injury resulting from the collision of boats or vessels, unless the court can find from the evidence that it was the result of the sole fault of one; or that it was mixed or mutual fault. This ground supposes that there can be no decree for an apportionment of the loss, if, for any reason, the cause of the injury is inscrutable, or left in such doubt that there can be no satisfactory finding of specific facts. The English admiralty decisions referred to by counsel would seem to sustain this position. They certainly show, that where the cause of the injury is inscrutable, and the proof does not implicate either of the parties as in fault, there can be no decree for an apportionment of the loss. I do not think they establish it as the law in England, that where there is reason to conclude one or both parties were in fault, but the evidence leaves it uncertain which, that no decree can be rendered for a contribution by moieties. I do not, however, propose a critical examination of these cases, as I consider the question referred to as satisfactorily settled in this country. In his commentaries on Bailments (sections 609, 610), Judge Story discusses this question, and maintains the right and expediency of dividing the loss, as between colliding vessels, where the fault is inscrutable. His language is: "Another case has been put by a learned commentator on commercial law. It is, where there has been some fault or neglect, but on which side the blame lies is inscrutable, or is left by the evidence in a state of uncertainty. In such a case, many of the maritime states of continental Europe have adopted the rule to apportion the loss between the vessels." The writer referred to by Judge Story is Mr. Bell, whose commentaries on the laws of Scotland have given him a distinguished reputation as a jurist. And in reference to the doctrine asserted by this author, Judge Story remarks, that "if the question be still open for controversy, there is great cogency in the reasoning of Mr. Bell, in favor of adopting the rule of apportioning the loss between the parties. Many learned jurists have supported the justice and equity of such a rule; and it especially has the strong aid of Pothier, and Valin, and Emerigon." In a note appended to the section before cited, Judge Story has inserted the argument of Mr. Bell in the maintenance of his views, the force and clearness of which certainly entitle it to the highest consideration. I am not informed whether the doctrine, thus approvingly referred to by Judge Story, has been distinctly asserted by him in any case calling for its judicial recognition. But another learned American judge, eminent for his profound research in the doctrines of the maritime law, and his able and judicious administration of that law, holds the rule for the apportionment of damages, in cases of an injury by collision, where the fault is uncertain or inscrutable, as indisputable, in the United States. In the case of The Scioto [Case No. 12,508], Judge Ware, the learned judge of the United States for the district of Maine, says: "This rule in admiralty—a contribution by moieties—seems to prevail in three cases: First, where there has been no fault on either side; second, where there may have been fault but it is uncertain on which side it lies; and third, where there has been fault on both sides." In the syllabus of this case, the point is stated thus:—"But if it—the collision—happens without fault in either party, or if there was fault, and it cannot be ascertained which vessel was in fault, or if both were in fault, then the damage and loss are divided between them, in equal shares." I may be permitted to remark, though I have not seen the reported cases, that I am informed that since the decision in the case of The Scioto, before referred to, Judge Ware has asserted the same principle in other cases. To what extent other American judges have affirmed it, I have not the means of information. But having the high sanction of Story and Ware—both known as able exponents of the maritime law—and sustained, too, by the most distinguished jurists of continental Europe, I have no hesitancy in applying it to the case before the court. A late elementary writer on maritime law in this country, of high reputation for accuracy and learning, affirms, that "without question, the doctrine above stated is the American law on this subject." This writer says: "Where the collision is evidently the result of error, neglect, or want of precaution, which error, neglect, or want of precaution is not directly traceable to either party, but is inscrutable, or left by the evidence in a state of uncertainty, there the rule of the maritime law is, that the loss must be apportioned between the parties, in equal moieties." Bland. Mar. Law, 296. This writer admits that a different rule prevails in England, but very justly remarks "that the rule adopted in England does not necessarily determine the law for us, in the United States. And accordingly, we find that the courts of admiralty in this country adhere to the rule of the ancient maritime law." Id. 298.

Adopting this view of the law, and satisfied that the application of the principle adverted to meets the real equity of the case, I shall decree an equal apportionment of the loss between the parties. As already stated, the contradictory and irreconcilable character of the evidence leaves the mind in doubt and uncertainty, as to some of the important facts in the case; but there is a satisfactory ground for the conclusion that both the colliding boats were in fault, and therefore that each shall contribute to the loss. And I may remark here, that in my judgment, the enforcement of the principle here sanctioned, is not only vindicated as in itself just and equitable, but in its application to the navi-

gation of the western waters, as altogether expedient. Heretofore, in cases of collision, the great object of each party has been to prove his adversary exclusively in the wrong, and thereby avoid all pecuniary liability. And it is almost proverbially true, that in collision cases, each party has but little difficulty in sustaining, by the proofs, any state of facts which may be insisted on. In most cases, the witnesses on either side, from a misapprehension of the facts, or a dishonest purpose of representing them falsely, involve the transaction in such doubt and uncertainty as to render it impossible to reach a satisfactory conclusion. If, under such circumstances, a reasonable ground is furnished for the conclusion that there is fault on both sides, and that each party should share in the loss sustained, there would be greater caution and vigilance in navigation, and less effort and less temptation, by corrupt or unfair means, to misrepresent or distort facts. It appears satisfactorily, that the injury resulting from the collision fell almost exclusively on the Fern. The injury to the Swann is so slight that the respondents have set up no claim to remuneration. The result, therefore, of the decree will be, that one-half of the actual loss or injury sustained by the Fern, must be paid by the respondents. The value of the Fern is variously estimated by the witnesses who have testified on that subject, at sums ranging from $12,000 to $20,000. For the purposes of this decree, the court fix her value at $15,500. There is proof in the case that the Fern has been raised, but no evidence was offered of her value, including her engine and machinery, after the collision. This value, whatever it may be, will be deducted from the sum of $15,500, and the respondents are decreed to pay the libellants one-half of the balance. It will be necessary to appoint a commissioner to inquire into and report the value of the Fern after the injury. This will be provided for in the decree to be entered. In reference to the costs, under the circumstances of the case, no discrimination will be made between the parties, and they will therefore be paid equally.

Case No. 8,588a.

LUCASEY v. UNITED STATES.

[2 Hayw. & H. 86.] [1]

Circuit Court, District of Columbia. Dec. 18, 1852.

INDICTMENT FOR RECEIVING STOLEN GOODS.

In an indictment for receiving stolen goods, statements made by the prisoner to a witness, admitting that he had received the goods, and disclosing where they could be found, and that he had better tell the truth in the matter. *Held*, to be voluntary and permissible in evidence.

The jurors of the United States, for the county aforesaid, on their oath, present that Anthony Lucasey, late of the county aforesaid, laborer, on the 6th day of July, 1852, with force and arms at the county aforesaid, one watch of the value of $14 and one watch of the value of $150, of the watches, goods and chattels of one Charles Lesiaidi, before then feloniously stolen, taken and carried away, falsely, wickedly and unlawfully did receive and have (he the said Anthony Lucasey, then and there well knowing the said watches, goods and chattels to have been feloniously stolen, taken and carried away) against the form of the statute in such case made and provided, and against the peace and government of the United States. The jury found the prisoner guilty as charged, and the court sentenced him to suffer imprisonment at labor in the penitentiary of the District of Columbia for the period of three years.

The United States to support the issue on their part, joined offered evidence tending to prove the commission of the larceny as charged in the indictment. They further offered one Gustare Heisler, a competent witness who gave evidence to prove that the larceny was committed on the night of 17th of June, 1852, by one Burt Pettit and other persons, of which the prisoner was not one. The United States then offered James B. Lokey, a competent witness, who gave evidence tending to prove that after the prisoner had stated he found the watches under some coal or lumber near the canal, and after it was represented to him that this story was improbable, and after he had been taken to the watch-house, he sent for the said James B. Lokey, who went to see him at the watch-house, and then told him that it would be better for him to tell the truth; that he persisted in saying that he had found the watches; that said Lokey asked him where the watches were, to which the prisoner answered that he did not know; that said Lokey replied it was no use for him to say so, as Lesiaidi had seen him with them, as he had sold one, and had offered to sell the other; that the prisoner knew where the gold watch was, and ought to tell said Lokey where it was; that the prisoner then told said Lokey that the gold watch was in a wood-yard between 13th and 14th streets, on the south side of New York Ave., and described the particular place where it was concealed; that said Lokey, accompanied a constable, went to the place described by the prisoner, and there found the gold watch.

The prisoner by his counsel objected to the said Lokey being permitted to state any of the foregoing conversation between him and the prisoner, which took place after said Lokey had told him that it would be better for him to tell the truth, but the court overruled the objection and permitted the whole of the subsequent conversation as aforesaid to be related by said Lokey to the jury. To which ruling of the court, and to the admission of which said subsequent con-

[1] [Reported by John A. Haywood, Esq., and George C. Hazelton, Esq.]

versation, the prisoner by his counsel excepts and prays, &c. Judgment of the criminal court affirmed.

Philip R. Fendall, U. S. Atty.

LUCE, Ex parte. See Case No. 1,099.

Case No. 8,589.

LUCE v. SPRINGFIELD FIRE & MARINE INS. CO.

[1 Flip. 281;[1] 2 Ins. Law J. 443; 5 Chi. Leg. News, 303; 19 Myers' Fed. Dec. 636.]

Circuit Court, W. D. Michigan. March, 1873.

INSURANCE POLICY—COMPROMISE—VALUED POLICY.

1. A compromise agreement to constitute a good defense to a suit upon any insurance policy, must be binding upon both parties, and of such a character as to operate as a satisfaction of the contract of insurance.

[Cited in Fisher v. Crescent Ins. Co., 33 Fed. 552.]

2. A policy enumerating certain articles with figures indicating dollars placed opposite to each, does not constitute a valued policy.

[Action by Benjamin Luce against the Springfield Fire & Marine Insurance Company.]

O. E. Corbitt and L. D. Norris, for plaintiff.
Hughes, O'Brien & Smiley, for defendant.

WITHEY, District Judge. Luce brings this action as the assignee of a policy of insurance, issued by the defendant to James H. Roberts, dated February 28, 1871, insuring Roberts "against loss or damage by fire to the amount of $2,500, for one year, on his oil paintings, consisting of landscapes and portraits, as per schedule, $7,500 other insurance." In the printed portion of this policy is this clause: "Said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same may happen."

The schedule referred to in the policy was made up and furnished by the insured to defendant's agents some two or three days after the application for insurance, and subsequent to the date of the policy, enumerating one hundred and five paintings; opposite each is extended in figures what purports to be Roberts' estimate of value. I say Roberts' estimate, because it is in proof that the figures indicate his valuation. The schedule reads:

"President Taylor and Cabinet, $1,000; President Harrison and Cabinet, $1,000; one full-length portrait of Washington, $1,000; General Taylor and the Battle of Buena Vista, $3,000," etc., comprising one hundred and five paintings, the aggregate of the sums extended amounting to $45,900. Three questions are presented: 1st—Was there a compromise between Roberts, plaintiff's assignee, and defendant and the other companies that issued policies insuring the property? 2d—Was the policy issued by defendant a valued policy? 3d—What is the measure of damages?

Four companies issued policies covering the property in question, three of them insuring $2,500 each, and one $2,400, making $9,900 insurance. Defendant's policy was for $2,500; the Phoenix, of Hartford, $2,500; the Home, of New York, $2,500, and the Queen, of Liverpool and London, $2,400. Mr. Ireton, the general agent and adjuster of the Phoenix, visited Grand Rapids, and under claim that he represented, for purposes of settlement, all the companies, obtained an understanding with the insured that the companies would pay pro rata, and the insured would accept $3,000 in full satisfaction of the four policies. All the paintings, save two, having been destroyed by fire, Roberts claimed $9,900 full insurance. Ireton claimed the paintings were worthless as works of art, and of trifling value. The evidence shows that Ireton had no authority to bind all the companies, consequently his promise that any company for which he was not authorized to act would give Roberts a draft for its proportion, was not binding on such company. From which it follows that as to all the policies there was no binding compromise.

By the terms of the arrangement, Roberts was to receive drafts from the companies as soon as they could arrive from Detroit, where defendant and the Queen were represented by general agent and adjuster. The two drafts from Detroit were received within two or three days by the local agents at Grand Rapids, who offered them to Roberts if he would receipt and surrender the policies of those companies. A few days after this Roberts transferred to plaintiff, Luce, all the policies remaining in his hands, and his rights in the surrendered Phoenix policy. No draft in behalf of the Home Company was received by the local agents, nor was one drawn or tendered to Roberts in behalf of the Home until the trial of this cause.

Mr. Ireton, at the time of the arrangement of compromise, gave Roberts a draft for $757.58 on the Phoenix Company, being its proportion of the $3,000 to be paid in compromise, and took up the policy of that company. The tender by defendant and the Queen was conditioned that Roberts surrender and receipt the policies. It would seem that such incomplete tender by two companies, and no seasonable tender by the Home, would present another good reason why the compromise was not effected, if a tender and readiness to perform were necessary. But standing as a mere agreement of compromise, it must have been one which would operate as a satisfaction of the contracts of insurance before such agreement can be offered as a defense to an action on the policies. A compromise agreement like accord and satisfaction, in order to take away the

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

right of action on the original contract, must be an agreement which is substituted for the pre-existing obligation. It must bind both parties so that suit may be maintained by either, to enforce the same. I think neither party was bound by the compromise arrangement, except so far as it was executed, as it undoubtedly was, with the Phoenix Company.

The question of valued policy is not so free from difficulty. This policy runs very close to the dividing line between an open and a valued policy, but after much consideration it is my opinion that this is not a valued policy. Such a policy determines beforehand, the amount for which the insurer is liable in case of loss, and is inserted in the policy as a fixed sum, to be paid if loss occurs. It does more than merely value the property insured, it values the loss. To do this the policy must amount to a contract, either to pay, in case of loss, a stipulated sum; or that the property shall be estimated at a stipulated sum in case of loss. Such seems fairly stated, to be the rule of the books. Fland. Ins. 45; Phillips, Ins. § 1178, 1180, 1213; Harris v. Eagle Fire Ins. Co., 5 Johns. 368; Laurent v. Chatham Fire Ins. Co., 1 Hall, 52, 53; Wallace v. Insurance Co., 1 Benn. Fire Ins. Cas. 412.

An agreement between the insurer and insured that the property shall be estimated at a certain sum, would make a valued policy, and the question is, was that done in this case? It has been held, when the policy describes the property, and contains a clause "valued at," or "agreed value," or "worth," followed by a specific sum, that such words indicate a valued policy, because amounting to an agreement that in case of loss, the property shall be estimated of the value stated.

If the policy, after describing the property, had added only "value $10,000" or other sum, this might probably, by analogy with decided cases, be held a valued policy; and yet, it would then seem not to be within the idea of a valued policy as defined in the books, but to value the property, not the loss; between valuing the property and valuing the loss, the books have attempted to make distinction, and yet it verges upon a distinction without a difference, when we consider the cases cited to illustrate and support the rule; and yet, in principle, there is a clear distinction, though not always exemplified by the adjudicated cases. The tendency of the cases is to hold that valuing the property values the loss, and is in the right direction.

But does this policy indicate such an agreement between the parties? I read this policy as if, instead of the words "as per schedule." it ran thus: "Do insure James H. Roberts against loss or damage by fire. to the amount of $2,500, for one year, on his oil paintings, consisting of landscapes and portraits, viz: President Taylor and Cabinet, $1,000; President Harrison and Cabinet, $1,000; one full length portrait of Washington, $1,000; General Taylor and the Battle of Buena Vista, $3,000," and so on, with the entire list of 105 paintings.

Now unless the court interpolates into this contract some word or words, not there, before the sign of dollars, in each instance, indicating that the figures represent agreed values, as "worth," "valued at," "value," or "agreed value," it is not clearly seen how the policy can be held, according to adjudicated cases, or upon principle, to be an agreement that in case of loss, such amounts shall be the estimated value of the paintings named. Especially is it difficult to so read the contract, when further on, in the printed portion of the policy, is the express stipulation that "the loss or damage is to be estimated according to the true and actual cash value of the property at the time the same may happen."

If the written part of the policy is inconsistent with the printed portion, the latter must give way to the former. This is a well established rule in reference to policies of insurance, but I am unable to say that there is any inconsistency, and certainly the rule is as well settled that the different classes must be made to harmonize if possible. They are not inconsistent, but in harmony, when read together. Without further discussion, I hold, for the reasons stated, that this is not a valued policy.

The only question remaining is, as to the rule of damage. The plaintiff's only testimony on this subject is that given by Roberts, the insured, who says in his judgment, the paintings were worth forty-five thousand dollars. Roberts is an old man, and has for thirty years been engaged in painting; but when his testimony is weighed in the light of the evidence produced by the defendant, no one can justly conclude otherwise than that Roberts' judgment is not a safe criterion of the value of these paintings. The basis of his judgment was not stated, and I have little doubt no just basis for his extravagant valuation exists.

On the part of the defendant there were four persons testified, all of whom speak from knowledge of works of art, including paintings. One, for thirty years has been a successful portrait painter; two have been and are extensive dealers in paintings and works of art, importing from Europe, and evincing a discriminating judgment of art works. They all testify that as works of art, these paintings had no value. Their judgment was based upon, and they testified in reference to, the two paintings which were not destroyed. Portraits of "John Wesley," and "Governor Bouck," which were by Roberts, the insured declared to be of average merit with the paintings destroyed, as I have the testimony, though it is claimed he qualified this statement as to "Wesley." But take "Governor Bouck" as a standard. The witnesses say these two paintings, which were produced in court, are worthless as works of art. Both paintings were thus characterized; that of "Wesley"

utterly worthless, and that of "Governor Bouck" as very inferior; it has "hardness of color or surface texture, wanting in drawing, wholly defective in composition, coloring and everything. They do not come under the head of art."

It is said by these witnesses, that landscape paintings of like inferior quality, would be worth more than portraits, because they would sell better at auction to persons without taste, or ignorant of art or of the value of paintings. They say landscapes of like want of merit might bring twenty-five to fifty dollars at auction. Portraits of "Governor Bouck" might bring twenty-five to thirty dollars, for the sake of having a copy of Elliott's original painting, but such portraits as "John Wesley," would be utterly worthless. Paintings find their market value mainly from their quality and the name of the artist. There are in this list of paintings eighty-eight portraits, four groups of portraits, five battle pieces, four historical pieces, and four landscapes. Under the evidence, it is somewhat doubtful what the value of the destroyed paintings may be, but the proofs will justify me in finding about $3,000 as the value, particularly if aided by the fact that the defendant, with the "Home" and "Queen" come into court and tender at this rate; while in my opinion $3,000 is the full value of the paintings in any and every aspect of the case; and I am not disposed, in view of all the facts, to fix the amount less.

Defendant is liable for $757.58 of this value, and $44.20 for nine months' interest. Judgment for plaintiff $801.78, and costs.

LUCERNE. The (CHAPMAN v.). See Case No. 2,605.

Case No. 8,590.

The LUCIA B. IVES.

[10 Ben. 660.] [1]

District Court, S. D. New York. Dec., 1879.

LIEN—DOMESTIC VESSEL—ADVANCES—NECESSARIES—CHARTER—COSTS.

1. F. filed a libel against a vessel owned in the state of New York, to enforce a lien claimed to exist under the law of the state of New York, passed April 24, 1862. It appeared that F., as a broker, had negotiated a charter of the vessel for her owners, who resided at Sag Harbor, for a term of six months; that the charterer, who acted as master of her, applied to F. to know where he should get stores for the vessel and F. obtained from C. an order on L. for the stores, which were furnished to the master on that order. In appeared further that F. also procured $215 of C. on a pledge of bills of lading and paid it to the master to disburse the vessel. The voyage was broken up so that the security failed and F. claimed that he owed C. the money. It appeared, also, that he advanced to the master $20 for labor in getting the vessel moved from Jersey Flats to Brooklyn, and $49 paid on request of the owners for wages of seamen on a previous voyage, and $25 for obtaining a bond for the vessel when under arrest, which bond was not accepted, and $25 for fees paid at the custom house. And he claimed $41 for commissions in negotiating the charter: *Held*, that it did not appear that the libellant furnished the stores or advanced the money necessary to procure them.

2. It was not sufficiently proved that the $215 was advanced for the purpose of "procuring necessaries" for the vessel, and, besides, it was advanced, not by the libellant, but by C.

3. There was no lien on the vessel under the statute for the amount advanced for custom house fees, or for the sum paid to procure a bond, or for the commissions, they not being included in the term "necessaries."

4. For the amount paid for moving the vessel the libellant had a lien, and also for the sum advanced to pay off the seamen, although by the terms of the charter, the charterer had agreed to pay all expenses of the vessel.

5. As the principal part of the claim was disallowed, the libellant should not have costs. The case of The John Farron [Case No. 7,341], distinguished.

In admiralty.

L. S. Gove, for libellant.

W. W. Goodrich, for claimants.

CHOATE, District Judge. This is a libel filed by A. G. Fisher to enforce an alleged lien for supplies furnished and money advanced in this port for procuring necessaries for the schooner Lucia B. Ives of Sag Harbor. The lien is claimed under the statute of New York, passed April 24, 1862. The claim consists of three parts: (1), for ship chandler's stores sent on board by one John H. Lewis, but in fact supplied, as is alleged, by the libellant; (2), for money advanced to the master to be expended by him in necessaries, $215; (3), for money at different times advanced by the libellant to the master for specific necessaries, about $150. The statute referred to provides that "whenever a debt amounting to $50 or upwards, as to a sea-going or ocean-bound vessel, or amounting to $15 or upwards as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them within this state for either of the following purposes, * * * 2d, for such provisions and stores furnished within this state as may be fit and proper for the use of such vessel at the time when the same were furnished, * * * 4th, on account of loading or unloading, or for advances made for the purposes of procuring necessaries for such ship or vessel, or for the insurance thereof; * * * such debt shall be a lien upon such vessel, * * * and shall be preferred to all other liens thereon except mariners' wages."

1. As to the stores furnished by Lewis, the libellant's testimony is that he was the broker who negotiated a charter of the vessel for the owners, who reside at Sag Harbor to one John Burns for the term of six months; that after the charter was effected, and while the vessel was in the possession of the charterer, who also acted as master, the libellant acted as agent for him, and the master made up a list

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

of the stores needed for the vessel, and asked the libellant where he should get them; that the libellant procured from one Crowell, his father-in-law, an order for the master upon Lewis to furnish these stores; that they were furnished on this order. Thus it appears that Lewis furnished the stores to the master, either partly or solely on the personal credit of Crowell. Crowell, though in court upon the trial, was not called as a witness. I do not think it can be fairly claimed that the libellant either furnished the stores or advanced the money for the purpose of procuring them. Whether Lewis or Crowell may have a lien under the statute is not now in question, but either of them, it seems, would, upon the evidence, have a better claim to be the party within the benefit of the statute than this libellant. The libellant says, indeed, that he owes Crowell the amount. This may be and yet he may not be within the statute; moreover, it appears that the libellant made no charge to the vessel or any person for these goods.

2. The $215 was procured of Crowell by the libellant upon the pledge of the freight bills or bills of lading for cargo shipped on the vessel for New Orleans. The libellant testifies that he paid it to the master to disburse the ship. This is all the proof there is that it was advanced, if advanced by him at all, for the purpose of "procuring necessaries." I think this evidence is wholly insufficient to prove this fact. Many things might be included in "disbursing the ship" which could not be considered "the procuring of necessaries," upon the most liberal interpretation of those words. Aside from this difficulty, I think it is entirely clear from the testimony that it was Crowell and not the libellant who advanced the money. The security taken has failed by the breaking up of the voyage, and the libellant claims that he owes Cromwell the amount as money borrowed, but the evidence, especially considering the fact that Crowell is not called as a witness, shows a direct advance by Crowell to the master on the pledge of the freight.

3. The claim for $150 advanced consists of several parts, $20 for labor in getting the vessel moved from Jersey Flats to Brooklyn, $49 paid by order of the owners for wages upon a previous voyage, $25 for obtaining bondsmen to release the vessel when under arrest, the bond, however, not being accepted, $25 for fees paid at the custom house, but what these fees were was not shown, and the remainder, about $41 for the libellant's commission as broker and agent in negotiating the charter, procuring freight, etc. It is conceded that the first item of $20 is properly to be treated as necessaries within the statute. The amounts paid to a person for procuring bondsmen to release the vessel, which bond he did procure but which was not accepted, and also the amount paid for custom house fees, seem not to be within the meaning of the term "necessaries" as here used. The word, taken in connection with the other parts of the statute, seems to refer to something supplied to the ship, as materials, labor, provisions, stores, use of a place to lie in, etc. These are the things for which those furnishing them have a lien, and I see no reason for believing that the legislature intended to give a larger lien to one advancing money than to one directly dealing with the vessel. That all possible expenses of the owners for and on account of the vessel were not intended to be included in this provision for a lien for advances, seems to follow from the circumstance that the statute adds "or for the insurance thereof." It is noticeable that the statute gives no lien for wages, probably upon the theory that they are already satisfactorily provided for by the maritime law. The circumstances under which the $49 was advanced were that the former crew of the vessel refused to leave her until they were paid, and they threatened to libel her, and thereupon the libellant, at the written request of the owners, paid the master this money and with it he paid off the crew. On the whole, it seems to me that money advanced for wages is to be considered advanced for "necessaries" within the meaning of this act. That labor furnished in various forms has the benefit of the lien, is evident. The reason for omitting this particular form of labor and in not giving a lien for wages to the seamen themselves, is also evident. The omission of such provision is therefore no strong argument against including wages in the word "necessaries" in the provision in favor of the party advancing money. The item for commissions clearly was not advanced at all. As to the two items of $20 and $49, which are to be regarded as necessaries, I think it appears that the libellant advanced them. It is admitted, indeed, that he procured the money from Crowell, but there is no sufficient evidence, as in case of the $215, that they were direct advances by Crowell to the master, although the libellant left the master's receipts with Crowell when he got the money.

It is objected, however, that the libellant had knowledge of the charter by the terms of which the charterer stipulated to pay all the expenses of the vessel during the period of the charter, and the case of The John Farron [Case No. 7,341], is relied on to support this objection. The point was not decided in that case, but the learned judge intimates his opinion that knowledge of the terms of the charter would have defeated that claim. The agreement in the charter in that case was that the repairs to be made should not be a lien on the boat. In the present case, the agreement was that the charterer would pay all the expenses in question except the $49 for wages above referred to, and required the charterer to give security for the fulfilment of this agreement; and such security was given. While the knowledge of this charter was a circumstance to be considered

on the question whether credit was given to the vessel or to the charterer, I think it did not preclude the libellant from acquiring a lien under the state statute. In the case of The John Farron [supra], it might have been a fraud upon the owner to aid the charterer to impose the lien at all, because he agreed not to do it; but it was not in itself a fraud in this case, because the creation of the lien is not inconsistent with an intention on the part of the charterer to clear off all such incumbrances, and this is all that he agreed to do and for which he gave the security. He did not agree to pay everything in cash. In the case of The City of New York [Case No. 2,758], Mr. Justice Nelson expressed the opinion that upon a charter similar to this a person supplying the vessel in a foreign port would have a maritime lien, although he knew of the charter. And I think the libellant's right, under the statute, is at least as great.

The owners were not proved, as claimed by the libellant, to have agreed, upon taking back the vessel, to pay all these bills, but only to discharge all valid liens. It was therefore open to them to deny that these were valid liens. The defence of collusion between the libellant and the charterer to defraud the owners is not sustained. As the principal part of the claim is disallowed, I think the libellant should not have costs. Decree for libellant for $69.

LUCIANI (MURATI v.). See Case No. 9,936.

Case No. 8,591.

The LUCINDA SNOW.

[Abb. Adm. 305;[1] 11 N. Y. Leg. Obs. 97.]

District Court, S. D. New York. July, 1848.

SHIPPING—MASTER—SALE OF WRECKED VESSEL—PERIL TO VESSEL—NECESSITY—PURCHASER.

1. It is well settled in this country, that the master, as such, has authority to sell a wrecked vessel, when he proceeds in good faith, exercising his best discretion for the benefit of all concerned; and this whether the sale is made in view of a peril then involving the vessel, or of one likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued.

2. The circumstance that the master who has sold a stranded vessel believed at the time that he could get her off, would be pertinent to show bad faith avoiding the sale; but proof that the purchaser believed himself able to rescue the vessel, can have no such effect.

3. The degree of necessity which justifies the sale of a wrecked vessel by the master,—defined.

4. The purchaser of a wrecked vessel from the master is not bound, in order to maintain his title, to furnish direct and positive evidence of the honesty of the master's conduct and of the necessity of the sale; but presumptive proof of those facts is sufficient.

This was a libel in rem, filed by Alfred Peabody against the schooner Lucinda Snow, to recover possession of that vessel. W. W. Rogers intervened by claim and answer, setting up a title to the vessel by purchase at auction, under the following circumstances: The schooner was purchased at Boston jointly by the libellant and one Dawson Lincoln, for a joint commercial adventure, the vessel to sail under the command of Lincoln as captain. The two purchasers loaded her with a cargo upon joint account; and in December, 1846, the schooner, thus loaded, was dispatched by Peabody and Dawson, under the command of Dawson, on a voyage to Galveston and a market. She reached Galveston and delivered her cargo, and was there loaded on freight for the Rio Grande; and having accomplished this voyage, she was chartered by the government of the United States for a further voyage,—in the prosecution of which she was cast away on the island of Sacrificios, near Vera Cruz, in the storm known as the great "norther" of May 2, 1846. The gale prevented any aid being rendered to the vessel until May 3d, when a survey was made under the direction of Captain Lincoln. The vessel was condemned to be sold; and on May 8th she was sold at auction by the government auctioneer, and was bought by the claimant for $1,750. The libellant claimed the vessel as sole owner.

A. F. Smith, for libellant.

(1) The onus of proving the validity of the sale rests on the claimant. The Sarah Ann [Case No. 12,342]; Id., 13 Pet. [38 U. S.] 387.

(2) The claimant must make out good faith in the master, and a case of extreme necessity. The master has no authority to sell unless in a case of extreme necessity. 3 Kent, Comm. (5th Ed.) 131. He may sell, provided it be done in good faith, and in a case of supreme necessity, which sweeps all ordinary rules before it. 3 Kent, Comm. 173. At all events, a sale can only be justified by extreme necessity and the most pure good faith. Abbott, Shipp. 26. All the circumstances must be submitted to the jury, and they must find both the necessity and good faith. Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604. It is not sufficient that the sale be one of good faith on the part of the master, and for the benefit of all concerned, unless there be an urgent necessity. The Tilton [Case No. 14,054]. For it is certain that he has no authority to sell unless in a case of extreme necessity, and when he acts with the most perfect good faith. Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 262. It is not sufficient that the master acted in good faith and in the exercise of his best discretion; the claimants must prove there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell. The Sarah Ann [Case No. 12,342]; Id., 13 Pet. [38 U. S.] 387. If the circumstances were such that an owner of reasonable prudence and discretion, acting upon the pressure of

[1] [Reported by Abbott Brothers.]

the occasion, would have directed a sale, from a firm opinion that the vessel could not be delivered from her peril, &c., the sale is said to be valid. The Sarah Ann [Case No. 12,342]; The Fanny and Elmira Hicks, Edw. Adm. 117; The Fortitude [Case No. 4,953]; Robinson v. Commonwealth Ins. Co. [Id. 11,949]; Same v. Royal Exchange Assur. Co., 8 Taunt. 755; 3 Brod. & B. 151; Abb. Shipp. 7-24, and cases cited.

(3) A more stringent rule is applied as between the purchaser from the master and the owner, than between the owner and underwriter. The Tilton [supra].

(4) Upon the question of necessity, it seems that the actual conduct of the master, in connection with the other circumstances, is to be taken into consideration. In other words, fraud, upon the part of the master, is evidence of a want of necessity. Robinson v. Commonwealth Ins. Co. [supra].

(5) The fact that the vessel was got off is certainly a strong circumstance against the necessity for the sale. The Sarah Ann [Case No. 12,342]; Abb. Shipp. 22, note. It is, however, by no means conclusive. We must weigh all the circumstances. 1. The position and exposure of the vessel. 2. The season of the year. 3. The danger from storms. 4. The expense. 5. The probable chances of success in getting her off. 6. The necessity for immediate action.

(6) Necessity is not to be inferred from the fact that the sale is in good faith. Patapsco Ins. Co. v. Southgate, 5 Pet. [30 U. S.] 604, 620, 621.

(7) A survey is not conclusive as to the state of the vessel, though, if regularly and honestly made, it is very strong evidence. Fontaine v. Phenix Ins. Co., 11 Johns. 293; Anth. 16, note a. If the surveyors acted fairly, and the master acted fairly, his acts in conformity with their opinions will be justified, unless it shall be made to appear that the facts on which they founded their opinion were untrue, or their inferences incorrect, and the burden lies on those who impeach the survey. The Sarah Ann [supra]. The report is presumed to be made in good faith, and fairly, unless the contrary appears. Gordon v. Massachusetts Fire & Marine Ins. Co., 2 Pick. 264; The Fortitude [supra].

(8) Admiralty surveys are inadmissible to prove the facts they recite. Abbott v. Sebor, 3 Johns. Cas. 46; Saltus v. Commercial Ins. Co., 10 Johns. 487. The facts must be proved like other facts. Cort v. Delaware Ins. Co. [Case No. 3,257]; U. S. v. Mitchell [Id. 15,-791]; Hall v. Franklin Ins. Co., 9 Pick. 466. The survey is not evidence of the facts, but only that a survey was made. Watson v. Insurance Co. of North America [Case No. 17,284].

E. C. Benedict, for respondent.

(1) This is a possessory action. Now it is clearly impossible to say what interest libellant may have in the vessel till the accounts are taken between him and Lincoln, who were partners in the joint adventure of the vessel, her cargo, and freight. That account cannot be taken in admiralty, and this possessory action must fail for that reason.

(2) Lincoln and the libellant, being partners in the vessel and cargo, and Lincoln being in charge of the property as master and managing owner, he was competent to give a good title for the whole vessel, (she being wrecked,) on being actually paid for her her full value, as he was by the claimant. 3 Kent, Comm. (3d Ed.) 154. And the co-owner cannot sustain a possessory libel without proving, affirmatively, such collusion or fraud or knowledge on the part of Rogers, as would destroy his character as a bona fide purchaser.

(3) Captain Lincoln was, at the time of the sale, owner of one half of the schooner—the papers of the vessel were in his name, and he was actually half owner. The transaction between him and the libellant was a mere mortgage, neither transferring the title nor the possession, and was not registered nor entered on the register. Lincoln was quite competent, then, to sell and convey one half of the vessel, and receive the purchase-money; and the claimant, Captain Rogers, therefore, in any view of the case, has a good title to one half the vessel, and the other owner having no greater share, cannot sustain a possessory libel for the whole.

(4) Under the foregoing circumstances, the sale to Captain Rogers was more than a sale of a stranded vessel by a mere master. It was a sale by a master having an unusual interest and control, and clothed with an unusual discretion as master, and being also an equal owner and partner, and authorized to advise and direct the master. A purchaser, under such circumstances, will not be held to such stringent rules as are applied to a sale by a mere master.

(5) But if this were a case of a sale by a mere master, the title of Captain Rogers would be good.

(6) The powers of a master of a vessel flow from the nature and necessities of his employment. He must have, in most matters, the rights of ultimate and absolute sovereignty. He unites the legislative, judicial, and executive functions in the police and management of his ship's company, and he has the right of eminent domain, so to speak, in all the property under his charge, cargo as well as ship, and whenever required by the perils to which he must be continually exposed, and which in detail can never be foreseen, he may subject it to taxation, (average contribution,) —he may destroy it, (jettison or cutting away,) —he may encumber it, (bottomry,)—he may also use it, (food and clothing,)—he may sell it to make repairs, &c.,—and he may abandon it;—and the power to sell the shattered relics of his vessel when stranded, that he may

bring home the proceeds to his owner, is as reasonable and necessary as any other of his powers. He has all these powers, subject only to the limitation that in his honest judgment, aided by that of those about him, actual injury and imminent peril makes it expedient, for the common good of those interested, that he should exercise the power. Lawrence v. New Bedford Ins. Co. [Case No. 8,140]; Hunter v. Parker, 7 Mees. & W. 342; Smith, Merc. Law, 173.

(7) The necessity which the law requires as the justification of the sale of a stranded vessel by the master, is only such necessity as makes it an urgent duty upon the master to sell for the preservation of the interest of all concerned. The necessity is to be determined in each case by the actual and impending peril to which the vessel is exposed, from which it is probable, in the opinion of persons competent to judge, that the vessel cannot be saved. Lawrence v. New Bedford Ins. Co. [supra]; [The Sarah Ann] 13 Pet. [38 U. S.] 401.

(8) This "necessity," "the actual and impending peril," must of course be "determined" on the spot, and at the time where and when they exist; because there only can they be seen, and there only can the sale take place, and there must the rights of the purchaser be fixed, or the sale would be nugatory or a fraud; and it must be determined by the master, the appointed agent and trustee of all parties, because he alone is there to determine it. To give strength and respectability to his determination, and to preclude injurious imputations, the law counsels him to protest publicly, before a proper public officer, to have a public survey by sworn surveyors, and suitable public notice and a public sale, but it does not require him or them to judge infallibly. The necessity of a sale cannot be denied when the peril, in the opinions of those capable of forming a judgment, makes a loss probable, though the vessel may in a short time be got off. The fact of her being got off raises no presumption of the master's incompetency, or that of his advisers. Nor does her strength or condition, or costs of repairs, as subsequently ascertained, raise a presumption against the necessity, because they are all subsequent to "the actual and impending perils." It is, therefore, not the real and inevitable peril and an absolute necessity which make the sale valid, but the apparent peril and necessity; the probable loss.

(9) The very existence of the necessity, or the duty or expediency of a sale, presupposes that there are other persons whose means and resources or wants are such that in their hands the actual and impending peril is not so formidable as in those of the master, and that they can make it profitable to buy, otherwise there could be no sale.

(10) The "actual and impending peril" is made up of many elements. The incompetency, want of means (no matter how produced) of the master,—the locality,—the proportion of vessels lost or saved on the same beach,—the general opinion of the hopelessness of a loss,—the absence of mechanics, and of tools and materials,—the liability to sudden and unwarned perils rendering it necessary for all other vessels to keep their own means under their own control,—the existence of a state of war,—and the lawlessness and absence of regular government,—all enter more or less into the peril.

(11) Nor can the necessity or propriety of a sale be at all affected by the mode in which the stranding was produced. If the absence of the captain or crew,—the loaning of her chains and anchors,—the neglect of the captain,—caused the vessel to go ashore, or deprived him of the means of getting her off, it would not affect the purchaser. It is the "actual and impending peril," no matter how produced, which justifies the sale.

BETTS, District Judge. The schooner Lucinda Snow was stranded on the island of Sacrificios, near Vera Cruz, about May 1, 1847, in a violent norther. She was driven up into the sand of the beach two or three hundred feet, and several hundred yards beyond a depth of water sufficient to float her. About twenty vessels were wrecked in that vicinity in the same gale.

The master, who was also half owner, called a survey. The particulars of the survey are not proved by any party who made it. Several witnesses, however, testify to the extreme peril of the vessel, and to the small probability that, in her condition, and with any means which could be procured at that place, that she could be saved.

The master decided to sell her. She was sold at public auction, and bought by the claimant for $1,750. He succeeded in getting her off at an expense of about $250, and she was found not injured so as to prevent her making the voyage to New Orleans; and, after some repairs there received, she was brought to this port. She was here arrested by the libellant, who asserts that the claimant acquired no legal title by the sale and purchase.

The law applicable to this subject is no longer open to doubt in this country. The cases of The Tilton [Case No. 14,054]; Robinson v. Commonwealth Ins. Co. [Id. 11,949]; The Henry [Id. 6,372], decided in this court in 1834; and The Sarah Ann, 13 Pet. [38 U. S.] 387; Id. [Case No. 12,342]—clearly establish the authority of the master, as such, to sell a wrecked vessel, when he proceeds in good faith, exercising his best discretion for the benefit of all concerned, and in view either of existing peril, or of perils likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued.

I do not now recapitulate the testimony, but it is strong and satisfactory to show that no reasonable hope could be entertained that

the vessel, in her then situation, could be saved by use of any means belonging to her, or which her master could procure at that place; for although there were numerous vessels of all sizes at anchor in the roadstead, at the time, yet the hazard to ships at that anchorage from the formation of the coast, and the suddenness and violence of northers, demands the constant command, for their own protection, of all the anchors and tackle they are usually supplied with.

Anchors, cables, and floats were the essentials requisite for the relief of vessels wrecked and buried in the sand there, and witnesses of long experience at that port testify that little or no chance exists for procuring them on hire in aid of a wreck. It is ordinarily, therefore, only by sale of wrecks to those making it a business or speculation to recover them, that any thing can be reasonably hoped to be saved for the owners, when vessels become disabled and unnavigable in that region of country.

In the cases cited, the courts consider and dispose of the suggestion that the master is bound to exert himself to save his vessel, when she is not so desperately circumstanced but that bystanders are prepared to purchase her, and are able to get her off; and although it is reurged here, nothing can be added to the force of argument by which it is repudiated by the circuit and supreme courts. The Sarah Ann [Case No. 12,342]; Id. 13 Pet. [38 U. S.] 401.

The answer of the claimant is relied upon as distinguishing this case in an important feature from those cited, as it admits that he would not have bid for her unless, in his opinion, there was a reasonable prospect of getting her off. But it is to be observed that this is the answer of the purchaser, and not of the master; proof that the master believed he could rescue his vessel with the means he had at command would be pertinent to show the sale was without good faith, and to prevent any title passing under it. But no such effect can be given to the motives and judgment of the buyer. Of course, he acts under the persuasion that he may be able to save the wreck.

Neither is it of any effect upon the validity of the sale that the loss of the schooner occurred through the culpable negligence of the master, in leaving her to encounter the gale without a sufficient crew on board, and for objects of private adventure and profit. The buyer is not bound to inquire further than to ascertain the danger of her position on shore, and the propriety of her sale, and he can be no way made chargeable for antecedent misconduct, or want of skill or prudence in the master.

Mal-conduct and bad faith in the master in the sale is charged upon the evidence of the first mate, that the master had purchased a wrecked vessel, which was anchored near the schooner, on board of which he had an anchor of his own of sufficient weight to have enabled him, with the force at his command, to haul the Lucinda Snow out of the sand in which she was imbedded. It is insisted he was bound to use the anchor for that purpose.

It may well be doubted, upon the whole proof, whether that single anchor would have been an adequate support to the force necessary to draw the schooner off the bank the distance she had been driven on shore; but the conclusive answer to the argument is, that the master was not bound to deprive his own vessel, which was held by that anchor, of her security, in order to attempt the relief of the schooner. Had it been proved he had in possession or control an anchor of that kind, not employed with or necessary to another vessel, it might be proper to consider upon the evidence whether it was a neglect of duty on his part to omit the use of that means to save the schooner, so palpable as to be notice to the purchaser that the sale was without authority; or whether the chances of success, with such light assistance, would not be so remote as to justify his resorting to a sale, notwithstanding the possession of such aid.

The earlier English authorities no doubt demanded the existence of a case of extreme necessity, an imperative, an overwhelming necessity to justify the master in selling. Abb. Shipp. 9, 12. Chancellor Kent evidently favors that doctrine, and seems inclined to exact the highest degree of necessity to uphold a sale made upon the sole authority of the master. 3 Kent, Comm. 173. These epithets are exceedingly indefinite and uninstructive; for, notwithstanding their intensity, it was never asserted that the situation of the vessel should be desperate to authorize a sale by the master. This would be to hold that she could only be sold either as fragments or after the loss was absolutely total.

The supreme court of the United States, in the case already cited, removes the ambiguity of the epithets "extreme," "supreme," &c., and gives precision to the rule, by placing this requisite of necessity as an element in the power of sale, on a footing both reasonable and practical.

To render a sale valid, in a case of stranding, to pure good faith in the master is to be united the necessity, "to be determined in each case by the actual and impending peril to which the vessel is exposed, from which it is probable, in the opinion of persons competent to judge, that she cannot be saved." The master must collect the best information his situation and the urgency of the case may admit, in respect to the actual condition and injury of his vessel,—the character of her exposure in that situation,—and the known and probable means he may command for her relief; and then, if his honest opinion concurs with that of competent judges, whom he may have opportunity to

consult, his power to sell is not only complete, but the necessity then becomes an urgent duty upon him to sell for the preservation of the interest of all concerned. The Sarah Ann, 13 Pet. [38 U. S.] 400.

Chancellor Kent concedes this to be the now settled doctrine on this subject. 3 Kent, Comm. (6th Ed.) 174, note; Smith, Merc. Law, 171, note. Judge Story states the rule in perhaps broader phraseology,—The Fortitude [Case No. 4,953],—but the principle is compressed and made definite in the decision of the full bench,—[The Sarah Ann] 13 Pet. [38 U. S.] 400; Lawrence v. New Bedford Ins. Co. [Case No. 8,140].

It is argued that the large sum bid for the vessel proves, that in the judgment of those attending the sale, she was not in imminent peril. There is, no doubt, force in the suggestion, but it is merely a speculative one—no witness testifying to a belief she was worth so much—and it is to be weighed in connection with other considerations notoriously acting at such sales. The spirit of competition and even bravado, are apt to mingle with and influence a course of public biddings, and whilst courts may, perhaps, properly indulge in the speculation that bystanders, awake to their own interest, will not permit vessels or property to be so acquired at wholly inadequate prices,—The Sarah Ann [Case No. 12,342],—even such conclusions would very slightly uphold the presumption that at a brisk auction the biddings might not largely exceed the fair value of the articles on sale.

In the present case it would certainly be more satisfactory to have evidence of efforts made by the master to obtain assistance, and the testimony of persons applied to or who knew his exertions in that behalf, than to be left to decide the case upon the opinions and judgments of witnesses, all of whom except two, (and those two standing in a good degree in direct conflict in their statements,) without personal knowledge of the acts or efforts of the master, or, as matter of fact, of the actual difficulties and impediments to his getting off the vessel, or obtaining the necessary aid to do it.

It is to be remarked, that Thompson the mate, whose evidence is relied upon as impeaching the conduct of the master, stands in material contradiction with himself in his sworn protest and the deposition given in this cause, and that the master died at Vera Cruz soon after the sale, so that the now claimant cannot have the advantage of his instructions to supply proofs of his motives and conduct; and I am not disposed to introduce into this case a rule more rigorous than any heretofore indicated by the courts, and to hold that a purchaser, to maintain a title under a master's sale, must furnish direct and positive evidence of the honesty of the master's conduct and the necessity of the sale. The implied and presumptive proof to that point, in my judgment, in this case, is sufficient and satisfactory. I shall accordingly hold that the claimant has made out a sufficient and valid title to the vessel, and that the libel must be dismissed.

Case No. 8,592.

In re LUCIUS HART MANUF'G CO.

[17 N. B. R. 459.] [1]

District Court, S. D. New York. April 25, 1878.

BANKRUPTCY—LEASE—POSSESSION BY ASSIGNEE—RENT—PLACE OF STORAGE.

The bankrupt corporation occupied a store in Fulton St., New York, under a lease for a term of years, at a yearly rental of $3,000. A petition was filed against the corporation in August, 1876, and an adjudication was subsequently had and an assignee appointed, who on the 7th of February, 1877, took possession of the goods and removed them from the store. He never had actual or constructive possession of the store, and no sales were made therein. The goods brought less than $3,000 upon the sale. The landlord claims for rent of the premises from the time of the filing of the petition to the time of removal by the assignee: *Held*, that the assignee never became assignee of the lease, and that the landlord can only claim as against the estate for the use and occupation of the premises as a place of storage or safe-keeping, and that forty dollars a month was a reasonable sum for such use and occupation under the circumstances.

[Cited in Re Ives, Case No. 7,116; Re Wheeler, Id. 17,490. Distinguished in Re Secor, 18 Fed. 320.]

In bankruptcy.

CHOATE, District Judge. Exceptions to report of the register, to whom it was referred to take proof of facts stated in the petition of Schermerhorn for payment of rent. The register has reported in favor of the petitioner for the sum of fifteen hundred dollars, for the use and occupation of the premises for six months. The bankrupt corporation occupied a store in Fulton St., New York, at the time of its failure in August, 1876, under a lease for five years, beginning in 1875. August 14, 1876, a petition was filed against the corporation to have it adjudged a bankrupt. An answer was interposed, and trial was had November 10, 1876, and an adjudication was ordered; but it was stayed on account of the instituting of proceedings for a composition, December 20, 1876. The adjudication was made, and the marshal took possession of the goods in the store, December 30, 1876. January 25, 1877, an assignee was appointed and on the 7th of February, 1877, he took possession of the goods and removed them to an auctioneer's store for sale. He never took possession of the store, and declined to take the key. Some part of the goods, however, had been previously removed by a party having a chattel mortgage on them. The goods removed and sold by the assignee brought less than three thousand dollars, gross proceeds. They consisted of plated goods and

[1] [Reprinted by permission.]

Britannia ware, and show cases and tables used for the exhibition and sale of such goods.

I cannot agree with the conclusion of the register in this case. The assignee never became assignee of the lease, and there is no ground on which, as against the estate, the landlord can claim, except on the ground that the use and occupation have been beneficial to the estate. The use made of the premises after the filing of the creditors' petition was merely as a place of storage and safe-keeping for the goods. The store was not used as a place of sale at all. Pending the adjudication, if the bankrupt is to be regarded as a trustee for the creditors, neither such trustee nor an assignee would have been justified in charging the estate with the expense of a costly store adapted for the sale of goods, when all that the estate required was a place of safe-keeping, and there was no sale of goods to be made. The value of the use and occupation to the estate is what it would have cost to have obtained a proper place for the storage of goods such as these were. It would be certainly very wasteful to hire a place at a rent of three thousand dollars a year to keep goods in, not themselves worth three thousand dollars. The landlord was not restrained by any order of the court from dispossessing the bankrupt tenant; and even if such injunction had been issued, it has been held that that does not entitle him to his rent as against the estate, but he should apply to the court for relief. He thought it for his interest to wait and take the chances of the bankrupt making a compromise with its creditors and going on in business, and thus being able to pay him his rent. The case cannot be distinguished in principle from the cases of In re Metz [Case No. 9,509]; In re Lynch [Id. 8,634]; and others cited. I think, upon the evidence, that for forty dollars a month a suitable place for the storage and safe-keeping of these goods could have been obtained, and that the use and occupation of the petitioner's premises have been of that value to the estate. An order will be entered setting aside the report of the register, and allowing the assignee to pay the petitioners for the use of the premises, from August 14, 1876, to February 7, 1877, at the rate of forty dollars per month.

Case No. 8,593.

LUCKETT v. WEST et al.

[4 Cranch, C. C. 101.] [1]

Circuit Court, District of Columbia. Nov. Term, 1830.

SHIPPING — SUPERCARGO — OSTENSIBLE OWNERS — RIGHT TO RETAIN BALANCE—SECRET OWNER.

1. A supercargo who receives his instructions from the ostensible owners of the whole cargo, has a right to retain, out of the whole proceeds of the cargo, the amount of a general balance due to him from such ostensible owners, although there may be another part-owner, whose interest was not disclosed to him until he had settled his account with such ostensible owners.

2. In such case, the secret part-owner cannot compel the supercargo to account with him.

Bill by a secret part-owner against a supercargo, to account for one eighth of the cargo of the brig Sea Horse.

CRANCH, Chief Judge (THRUSTON, Circuit Judge, absent). The plaintiff's intestate, Fielder Luckett, was owner of one eighth of the brig Sea Horse, of which vessel, J. & J. Harper owned the residue; and the said F. Luckett was, by agreement with the Harpers, owner also of one eighth of the cargo consigned by them to the defendant, John West, as supercargo, on a voyage to Rio Grande and a market. West was entirely ignorant of Luckett's interest in the vessel or cargo; all the documents, excepting the register of the brig, being in the name of the Harpers, or of "the owners," without naming them. West was the agent and factor of the Harpers only, and derived his authority from them alone. If he had a right to retain in his hands the proceeds of the cargo, on account of their debt to him, he had fully accounted with his principal before notice of the plaintiff's claim, except the sum of $410.01, which he has paid to the plaintiff, with the assent of the other parties. Having been of opinion, in the preceding case of Vowell v. West [Case No. 17,024], that West had a right to retain so much of the proceeds of the cargo as would cover the debt of the Harpers to him, it follows, that, as he has accounted to them for the residue, he has now nothing more in his hands, and the bill, as to him, must be dismissed. Bill dismissed as to the defendant West.

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

Case No. 8,594.

LUCO et al. v. UNITED STATES.

[1 Hoff. Land Cas. 345.] [1]

District Court, N. D. California. June Term, 1858.[2]

MEXICAN LAND GRANT—FRAUDULENT.

The claim rejected on the ground that the alleged grant is fraudulent and antedated.

Claim for [the Rancho Ulpines] a tract of land, quantity unknown, in Solano county, rejected by the board, and appealed by the claimants [Juan M. Luco and José Leandro Luco].

Calhoun Benham, for appellants.

P. Della Torre, U. S. Atty., for appellees.

HOFFMAN, District Judge. The claim in this case is for a tract of land of from thirty to fifty square leagues in extent, constituting a sobrante, or surplus, between various

[1] [Reported by Numa Hubert, Esq., and here reprinted by permission.]

[2] [Affirmed in 23 How. (64 U. S.) 515.]

ranchos mentioned in the title. It was rejected by the board as spurious. The testimony is very voluminous. I have considered it with the attention due to its importance. The claimants have offered in evidence a paper purporting to be the original petition of José de la Rosa to the governor, dated October 18th, 1845, with a marginal decree of the latter, dated November 8th, 1845. Also the original grant, signed by Pio Pico, José Ma. Covarrubias, secretary, dated December 4th, 1845, with a certificate of approval by the assembly, signed by the same persons, and dated December 18th, 1845. These papers are not produced from the archives of the former government, but were deposited in the surveyor general's office on the twenty-fifth of October, 1853, by the claimants. No claim was presented to the board within the time limited by the act of 1851. An application was therefore made to congress, and a special act was passed July 17th, 1854, authorizing the presentation of the claim. This application was based upon the affidavits of Pio Pico and José Maria Covarrubias, which will hereafter be noticed. It is contended, on the part of the United States, that all the papers in the case are spurious, and were fabricated long after the conquest of the country. In deciding upon the genuineness of any title alleged to have been derived from the former government, the most satisfactory evidence which can be offered to the court is that derived from the archives, and that afforded by a notorious occupation, and a claim of ownership recognized and acquiesced in, if not by the public authorities, at least by the neighbors and adjoining proprietors of the alleged grantee.

In the case at bar, the archives show no trace whatever of the existence of the grant. The petition and marginal decree are presented by the claimants from their own custody. No proofs are offered to explain why the claim was not sooner presented to the board, nor where or in whose custody the documents have been since their alleged delivery to the grantee. The affidavits on which the application to congress was founded were made in May and June, 1853. It is clear that neither to Pico nor Covarrubias was the original petition presented. In his deposition, taken before the board, Covarrubias states that all the documents presented to him, when he made his affidavit, are, he believes, referred to in the affidavit; and that as well as he can recollect, all the documents about which he was then testifying were presented to him. He is not very positive, however. He remembers that the expediente was shown to him. Had the witness before testifying adverted to the affidavit itself, he would have seen that he therein swears that, "he (De la Rosa) presented a written petition for said grant of land, but the affiant does not know where said petition now is. The practice with the office was to return the petition with the grant." It will hardly be contended that the petition was before Covarrubias when he made this affidavit. The affidavit of Pico refers exclusively to the "original document hereunto annexed, bearing date December 4th, 1845"—which was the grant. Mr. Haight, who was consulted by the claimants as counsel, testifies that he saw, in 1853, the original document, that is, the grant; but is not positive as to the others, and that "the claimants represented to him that there were other papers in Mexico, which they would endeavor to get." It is evident, therefore, that so late as the beginning of 1853 the petition had not been brought to light. It is also obvious, from the tenor of the affidavits of Pico and Covarrubias, that the certificate of approval by the assembly was not exhibited to them when their affidavits were taken. The affidavit of Covarrubias refers exclusively to the grant. Neither Mr. Haight nor Mr. Hawes pretend to have seen the certificate. It is produced for the first time in October, 1853, when it was deposited in the surveyor general's office. No explanation whatever of these circumstances is offered by the claimants, nor has any attempt been made to show how it happened that the petition and certificate became separated from the grant; how they, or at least the former, found its way to Mexico; in whose custody they were found, and when, and from whom and under what circumstances the person in possession of them procured them.

M. G. Vallejo, one of the principal witnesses relied on by the claimants, testifies that in the month of December, 1845, he received from the governor, by a courier, the grant, which he delivered to Rosa. It was in an envelope which the latter opened, and the witness saw and read it. In reply to the sixth cross-interrogatory, he states that the grant was the only paper received by him, and that he did not see the others. He also states that he never saw the certificate of approval, until he saw it in the surveyor general's office; that he saw the petition when Rosa drew it, but that he does not know that Rosa had the petition after he received the grant. To the twenty-second cross-interrogatory, he replies that he never saw the petition and approval attached together until he saw them in the surveyor general's office. José de la Rosa, the grantee, testifies that he drew the petition in 1845, and that in the latter part of that year he received it back again with the title. That the title was delivered to him by M. G. Vallejo in December, 1845, and that the certificate of approval was delivered to him by Vallejo subsequently, in the year 1846—in January or February of that year. The credibility of the testimony of either of these witnesses will be considered hereafter. It is sufficient at present to say that neither pretends to account for the papers after their alleged reception by Rosa in 1845 and 1846. No inquiry was made of the latter as to whether he retained them in his

custody; why he did not while the property remained his—that is, up to March 18th, 1853—present his claim to the board; whether at the time of the transfer he delivered the papers to the present claimants, or if not—whether as stated by them to their counsel, Mr. Haight, about the same time—they were then in Mexico, and if so in whose custody, and for what reason sent. In a case where the chief inquiry is whether the papers be genuine, information on these points ought not to be withheld. We have seen that José Maria Covarrubias, in his affidavit in 1853, states it to have been "the practice with the office to return the petition with the grant." This extraordinary statement is not only disproved by the notorious fact that the expedientes containing the petition, informes, orders and concession, were usually retained in the archives where they are now found—the grant or titulo being the only document delivered to the party—but it is contradicted by the evidence of M. G. Vallejo, and by the testimony of Covarrubias himself. In his answer to the sixty-second cross-interrogatory he says: "The petitions and the balance of the expedientes were archived in the archives of the government. This was the general practice before, while, and after I was secretary."

It is to be regretted that the sense of the necessity of accounting for the absence of the petition from the archives, which may have suggested the statement of Covarrubias in his affidavit, did not lead the claimants then or since to offer a more satisfactory explanation of the circumstance. The claimants can thus derive no aid to their documents from any presumptions of genuineness which might have arisen from their production from the proper custody. On the contrary, they are liable to the suspicions which their long delay in presenting them, and their entire failure to explain circumstances so clearly requiring and so easily admitting of explanation (if the papers are genuine) naturally excite. Evidence has been offered to show an occupation by Rosa of the land said to have been granted to him. The witnesses on this point are Alvarado, Victor Prudon, Mesa, Salvador, Vallejo, Carillo, Juarez and Ortega. Alvarado swears that in 1849, Rosa told him in San Francisco, that he was occupying a rancho near Sonoma. Victor Prudon testifies that in 1840 he knew Rosa to be in the occupation of a rancho called Julpines; that he had a house and corral on it, and that he remained there until 1846. The witness, on his cross-examination, admits that he never was on the rancho; that he knew of Rosa's occupation "from General Vallejo and common report," and from his sending goods to the place by Rosa's order, or that of his major domo. Mesa testifies that he knew Rosa to be living on and occupying a rancho in Solano county, long before the Americans came to the country; that he had an adobe house on the place, in which he lived with his family. He had a corral and horses, and some cultivation. That he visited Rosa at his house while he lived there. That he saw Rosa building the house, and that the cultivation was about one hundred varas square. Salvador Vallejo swears that he knows Rosa has occupied the place ever since he obtained the grant—that is, in 1845 or 1846. That he had a house and corral, horses and cattle there, and a portion of the land inclosed and cultivated. That Rosa lived there with his family, but at times during the period he has resided at Napa, Sonoma and Monterey. On cross-examination he states that he knows Rosa has continued to occupy the land, for it is on the road to Sacramento, and he, the witness, has frequently seen it in passing that way. José Ramon Carillo testifies that he has frequently stopped at Rosa's house on the Rancho of Ulpines; that Rosa was living there with his family; that he had horses and cattle on it, and had erected a corral. The house was an adobe. That Rosa was still on the place when he (witness) left Sonoma two or three years after the Bear Flag war—that is, 1848 or 1849. Cayetano Juarez testifies that he was in Rosa's house on the rancho in 1845; that it was built of poles, covered with board and tules; that it was near an estuary of the river; that it could not possibly have been seen from the road to Sacramento, it being eight or ten leagues distant; that there were eight or ten acres cultivated in wheat; that the house was situated about eight leagues from the road running from Sonoma to Sacramento; that on one occasion he lent him horses and carts to take his family to the rancho; that he had lent him horses on several occasions; that the cultivated land was not fenced, but appeared to have been plowed. Ortega swears that in 1838 he saw on the land a house, built of poles and plastered with mud; that it was situated on the right hand side of the road as you go from Sonoma to Sacramento, about seventy varas from the estero; that he stopped there on his way to Sacramento, and that he saw the house from the traveled path before he turned off to go to it. There was no wagon road to it, but numerous paths made by cattle and elk. José de la Rosa, the grantee, testifies that he occupied the land; that he kept his wild horses upon it during the year 1846; that they were three or four hundred in number, and marked with his brand, of which he gives a rough drawing. The tame horses, about fifty in number, he kept at Sonoma. That in 1845 and 1846, he frequently visited his ranch with his family; but "he always went with his own horses—he never had horses belonging to any one else." Salvador Vallejo testifies, in a second deposition, that he conveyed De la Rosa in his launch the first time he went to occupy Ulpines. That a house was built under his and witness' di-

rections, and was built of poles and mud, and roofed with boards. That a piece of land was inclosed and cultivated there, and that the cattle on the rancho were owned by Rosa, but branded with the mark of M. G. Vallejo. M. G. Vallejo states, in a general way, that he knows that De la Rosa occupied the rancho. He admits, however, that he never was on it after Rosa received his grant.

The foregoing comprises all the testimony adduced by the claimants to prove occupation by De la Rosa of the land. It is apparent that the witnesses contradict each other on several material points. As to the extent of the cultivation, as to whether or not it was fenced, as to the material of which the house was composed, as to the brand upon the cattle, and especially as to the situation of the house, whether it was near to and visible from the road, or eight or ten leagues distant. The statement of one of the witnesses that he frequently lent horses and carts to De la Rosa is inconsistent with the declaration of the latter that he always used his own horses in going to his rancho, while the frequent voyages in the launch, as described by Vallejo, seem wholly to have escaped the recollection of De la Rosa. It is unnecessary, however, to dwell on these contradictions, for the alleged occupation by Rosa of the land has been disproved by what I cannot but consider a clear preponderance of testimony. It is in evidence that up to 1853, the lands were treated by the United States as public lands, and surveyed as such. Felipe Peña, one of the original grantees of the adjoining rancho of Los Putos with Baca, states that Rosa never built a house upon or occupied the rancho; that he is acquainted with the rancheros in that region, and never knew Rosa to be the proprietor or owner of any land. Demetrio Peña makes the same statement. John Bidwell, the original grantee of "Elichama," and who was acquainted with all the rancheros in that part of the country, states that the premises claimed in this case were never occupied or cultivated by any one to his knowledge, and that had De la Rosa lived on the rancho he thinks he should have known it. José S. Berreyesa, who was alcalde of Sonoma in 1846, states that he was asked by Don Agustin Bernal if he would report favorably to his (Bernal's) petition for the land, whether it was vacant and could be granted; to which he replied that it was vacant and unoccupied, and that so far as he (Berreyesa) was concerned, there would be no obstacle to the grant. S. Cooper testifies that he was acquainted with all the rancheros in the neighborhood in 1846, and ever since; that he never heard of Rosa's having a grant; that there was no adobe house upon it. That he was assessor during the first two years California was a state; that all the ranchos were given in to be assessed except one—but this rancho was not given in by any one, and was not taxed. William Denton testifies that in 1852 and 1853, as county surveyor, he inquired of all the old rancheros in the neighborhood, and that from the information so obtained, he certified this land to be public land. That he has been conversant with the whole tract of country since 1852, and never saw any evidence of any old Spanish improvements on this land, or heard of any. E. F. Elliott testifies that in the spring of 1846, Rosa moved into the same house with himself, and purported to be a school teacher; that he had no property, and since the war he has followed the business of a tailor, and sometimes worked in General Vallejo's vineyard. The witness further states that he was personally acquainted with the whole neighborhood, and worked in every rodeo; that his business was killing cattle for their hides and tallow, and that Rosa did not have, during the years 1846, 1847, 1848 and 1849, cattle to the number of from three hundred to five hundred, the same number of horses, or any less number, nor could he have had them without the witness' knowledge. That he never saw the brand delineated by Rosa on any cattle; that he would have seen it had it been there. The witness gives from memory some sixteen brands which were upon cattle in the neighborhood. He further states that he has heard Rosa frequently complain of his poverty, but never heard him speak of having any property. Elmsley Elliott swears to nearly the same facts. He states that Rosa's family has often come to his father's house begging for something to eat; that he has traveled all over the country, and has never heard of Rosa's owning the stock described by him; that Rosa has told him more than twenty times, from 1845 to 1849, that he did not own any such. John Cameron, a witness for the claimants, who has resided in Sonoma from April, 1847, until March, 1854, stated that he never knew Rosa to be the owner of any number of horses and cattle. That he was acquainted with all the brands used from Sutter's to San Rafael, and he never had any pointed out to him as Rosa's brand; that he was generally supposed to be a very poor man.

It is unnecessary to recapitulate all the evidence on this point. A careful perusal of it has led me irresistibly to the conclusion that it is not proved that Rosa either occupied, built upon or cultivated this rancho. From the whole testimony in the case, as well on the part of the claimants as of the United States, it clearly appears that up to the latter part of 1844, Rosa's residence was in Monterey, where he was employed as printer. That in 1844, or the beginning of 1845, he came to Sonoma, where he resided with his family until after the conquest; that he was poor, and obtained his livelihood by mending clothes and watches, and

similar occupations. From 1846 to 1848, it is stated by one of the claimants' own witnesses, (J. P. Leese) that he lived with General Vallejo, to whose children he taught music, and that Vallejo, from charitable motives, gave him an opportunity to support himself. Since the organization of the board of commissioners, he is stated by one of the witnesses to have added to his ordinary business as a tailor, the more profitable profession of testifying in land cases. No one can read the depositions of the numerous witnesses who testify as to his continued residence in Sonoma, as to his circumstances and means of livelihood, and avoid the conviction that his statement as to the occupation of the rancho, his ownership of fifty tame and three or four hundred wild horses, etc., is incredible. To all this may be added the repeated declarations of Rosa, that he never owned a rancho, and had never applied for one. This last evidence, however, is met on the part of the claimants by that of George C. Yount and Narciso Botello. The first of these witnesses swears that sometime in 1846, Rosa told him he had a rancho, and to the best of his (witness') belief, stated that it lay between Baca and Bidwell's ranch, and was called Pulpones or Pulpines. Narciso Botello swears that he remembers that while a member of the assembly he heard some talk of an application by Rosa for a grant in Sonoma; that he does not know whether he ever obtained the grant, nor was he informed of the fact until he recently saw the papers exhibited by the claimants. The circumstance stated by Botello may perhaps explain the testimony of Mr. Yount. It may be that Rosa did endeavor to obtain a grant, or that "there was some talk about it," and he may have stated that fact to Mr. Yount. At all events, I do not feel at liberty to receive this testimony of an isolated declaration as outweighing the evidence of so many witnesses, who testify as to his residence, his mode of life, his means of livelihood, and his repeated declarations that he owned no rancho whatever. Having thus seen that no evidence of the authenticity of this grant is afforded by the archives of the former government, nor by the production of the documents from the proper custody, nor by proof of an occupation of the land, we proceed to consider the evidence as to the genuineness of the signatures.

A large number of witnesses testify, on the part of the claimants, that in their opinion the signatures of Pio Pico are genuine. On the part of the United States, several witnesses testify that they believe them to be forgeries; and one of them expresses the opinion that they were written by the person who wrote the body of the instrument—that is, by Covarrubias. It is admitted by all the witnesses for the claimants that the signatures of Pico in these documents are unlike his usual mode of writing his name; although it is stated by them that his mode of signing his name was not uniform. The deposition of Pico himself has been taken since the case was appealed, but a traced copy of the grant, and not the original, was submitted to him. The testimony of Pico is singularly guarded. He says he cannot now remember in regard to the original document, "but the signature as it appears in the traced copy appears to be my signature, and I believe my signature was placed to the document at the time it bears date." He repeats totidum verbis the same answer to three successive interrogatories. To the seventh interrogatory he answers: "I do not now remember of the grant of land mentioned in the interrogatory, except from the papers shown me, and therefore cannot state further in regard to it." In answer to the first cross-interrogatory he says: "My statement in regard to my signature is made from inspection of the papers now presented to me, and not from recollection of signing the originals. I believe, however, from my best recollection, that the original documents were signed by me at the time they bear date." To the second cross-interrogatory he says: "I speak of the papers as they are now shown me, and not from recollection of the events as they transpired." It is evident that the testimony of the witness merely amounts to a statement that the signature, a traced copy of which is shown him, appears to be his. But the fact of the application for, or issuance of the title, he is wholly unable to recollect. The depositions of John W. Shore and Joseph A. Hinchman have also been taken since the appeal. These witnesses testify in substance that there is now on file in the county clerk's office, at Los Angeles, a document purporting to be signed by Pio Pico, a traced copy of which is annexed to their deposition. One of them swears that he believes the signature to be genuine. The document is dated October, 1845, and the signature somewhat resembles, in the formation of the "P's" in Pio Pico's name, the signature in the case at bar. It differs from it, however, very perceptibly. It is this resemblance, such as it is, which alone gives importance to the testimony. But unfortunately it does not appear that this document is genuine. Shore testifies, April 24th, 1857, that it had been in its present custody, to his knowledge, about three years and a half. Whether it was then filed for the first time does not appear. A document filed at the end of the year 1853, with a signature resembling those now in question, cannot certainly aid the claimants. Shore, it is true, expresses his belief that the signature is genuine, but his testimony is of no greater force than if he had expressed the same belief with regard to the signatures in the papers in this case. It is but one more witness in addition to prove the genuineness of the signature. It is worthy of remark that Pio

Pico is not himself asked whether his signature to this document is genuine, although he resides in Los Angeles county, where the original is kept, and was, it is presumed, accessible.

Since the cause was submitted, the court being desirous of obtaining more full information from the archives, directed an examination of them by Mr. Hopkins, the clerk in charge. Mr. Hopkins was therefore examined by the court, with liberty to either side to cross-examine him. From Mr. Hopkins' testimony it appears that the signature of Pio Pico appears in various expedientes on file in the archives two hundred and ninety-eight times; that on the journal of the assembly it occurs one hundred and thirty-one times; and on various grants in 1845 and 1846, about one hundred times. The signatures in the expedientes, and on the journals, are remarkable for their uniformity. Those on the expedientes are exactly similar, without a single exception; those on the journals are also uniform, with the exception of a single sheet, signed "Pico." This appears to be a loose borrador, or blotter, and the signature is unlike any other that appears in the records. The one hundred signatures in the grants present the same uniformity, with some exceptions. The first is that in the case of Prudon and Vaca, hereafter alluded to. Mr. Hopkins expresses the opinion that it is a forgery. The next is a signature bearing a striking resemblance to that last mentioned. It is attached to the certificate of approval of the grant of Petaluma to M. G. Vallejo. The next is the decree of concession in case number six hundred and forty-eight, before the commission. It differs, says Mr. Hopkins, from all others that he has seen. The "P's" are made somewhat in the style of those in the present case. The remaining signatures are attached to various documents, dated from January to July, 1846. All these last differ from all others. They are all uniform and resemble each other. They differ from all others in the form of the "P's." A letter written by Pio Pico, as administrator of a mission in 1839, is also produced. The signature resembles that in the present case. No similar signature occurs later than 1839. At that time he appears to have used this last form of signature, and that previously described, indifferently. All these documents were produced in court, and submitted to inspection. From the foregoing it appears that from the beginning of his official career, up to the year 1846, throughout all the expedientes on the journals of the assembly, (with the exception of one sheet supposed to be a borrador) and in every grant, with three exceptions, Pio Pico's signature was marked by a uniform and striking peculiarity. That in grants made during 1846, he sometimes used another mode of signature; that this mode is also uniform and similar to that now used by him, as it appears on his affidavit, deposition, etc., in this case.

The three exceptions among the grants made previously to 1846, are first, that to Prudon and Vaca, which is supposed to be a forgery, and which is obviously intended to imitate his usual signature; second, another closely resembling it; and a third, differing from any other, and somewhat resembling that in this case. Of all of these numerous signatures, not one made since 1839 is found which in any respect resembles those in the grant in this case, except the solitary instance last mentioned which, as Mr. Hopkins states, differs from all others, though it somewhat resembles those in this case in the form of the "P's." It thus appears that of six hundred and twenty-eight signatures made previous to 1846, all except four are uniform. That of these four one is attached to a borrador or blotter; the second is pronounced a forgery; the third strikingly resembles the second; the last is unlike any of the others. No one except the last resembles in any respect those in this case. It is not enough, therefore, for the claimants to show that Pio Pico had various ways of signing his name. They should prove that the mode adopted in this case was one of the modes used by him. This they have sought to do by exhibiting documents made previously to 1839, but none since. Of six hundred and thirty-nine signatures made since that time, all are uniform except fourteen, and only one bears a resemblance to those in this case. On the very day which this grant purports to have been issued, his signature appears to other grants, exhibiting its marked and uniform characteristics. In the journals of the assembly it occurs one hundred and thirty times, uniform and peculiar. It was certainly a strange accident that in this one grant he did not adopt the mode of signing which he was then, and for a long time previous had been daily using in his official transactions, but recurred to a mode of signature not used by him since 1839. All proof of handwriting except the direct evidence of those who have witnessed the act of writing is but opinion, founded on a mental comparison of the writing in question with other writing of the same party which the witness had seen. But if, as in this case, more than four hundred specimens of a signature of a party are presented, no one of which is found, except those made previously to 1839, to resemble that in question, the opinions of witnesses who pronounce it genuine from its resemblance to other signatures become of little importance. It will be urged that he did use this signature in 1839, and therefore may have used it in this instance. It is undoubtedly possible that such may have been the case, but it is in a high degree improbable that amongst so great a number of signatures marked by a uniform and striking peculiarity, he should, in this instance, have adopted a mode of signature resembling that occasionally used by him six or seven years previously. The suspicion involuntarily suggests itself, that the grant

was not made at the time it bears date. But that Pio Pico himself, or some one who has forged his name, has by mistake adopted a signature different from that which at the date of the grant, or subsequently, he was in the habit of using.

On the part of the claimants, M. G. Vallejo, Alvarado, José Castro and Salvador Vallejo testify that they are acquainted with Pio Pico's signatures, and believe those on the documents in this case to be genuine. The last witness says that he has seen Pio Pico's name to grants, and that the "P's" in the signatures to the documents are made in his usual style; he also states that Pio Pico wrote his name with uniformity. The gross inaccuracy of both of these statements will not be disputed. M. G. Vallejo states that Pio Pico made his "P's" like those in this case in his common writing. He had seen such in his grants and approvals, and common writing which he knew to be his. He cannot recollect any particular grant in which the letter is so made. The testimony of Mr. Hopkins exposes the error of this statement. Upon a grant by Pio Pico being shown to the witness, he admitted that there was no resemblance between the signature to that document and those in the case at bar, and accounts for it by the observation, "that he may have had more room in that grant, or was perhaps in a different humor." Andreas Pico swears that the signatures appear to be the true and genuine signatures of Pio Pico. That he formed his opinion by comparing them with those he has seen. That he has seen a great many in the archives. Manuel Castro, De Zaldo and Benito Diaz all express the opinion that the signatures are genuine. To this testimony may be added that of Botello, who swears that in his opinion the signatures are genuine. On the other hand, Richardson, Wm. Carey Jones, James Wilson, a former member of the land commission, and Thomas O. Larkin, all testify that in their opinion the signatures are not genuine. Orlando McKnight testifies that he has been much accustomed to examine and compare handwritings and considers himself capable of judging whether a document is written in an assumed hand. On examining the documents in this case he expresses the opinion that the signatures of Pio Pico were signed by the person who wrote the body of the instruments, that is, by Covarrubias. On comparing these signatures with seventeen signatures of Pio Pico, found in the records of the departmental assembly for 1846, he says that the letters of the name of Pio Pico in the former, as also the rubric attached, have the stiffness and clumsiness difficult to avoid in an imitation, while the seventeen signatures appear natural, easy and without restraint. On making a very close examination of the seventeen signatures with dividers, he states that he never saw a more uniform signature. J. H. Purdy, also an expert, is inclined to believe that the signatures to the document are in the same handwriting as the body of the instrument, but is not positive. On comparing these signatures with those in the record of the assembly, he says that the differences between them consist in the form of the "P's," and in that of the rubrics, also in their general appearance; that the rubrics in the record, though more condensed in width, fall farther below the line of the writing of the signature than those in the documents in this case. It ought perhaps to be added, that neither of these witnesses professes to have any familiarity with Spanish documents, or practice in comparing handwritings in that language. Col. Jonathan D. Stevenson testifies that he has corresponded with Pio Pico, and seen many documents purporting to be signed by him; that in none of them did the signatures resemble those in this case. That these last are bolder and larger than Pio Pico's usual signature, and the form of the letters, particularly that of the "P's," is unlike his genuine signature. He also thinks, from inspection, that the body of the documents and the signatures were written by the same hand, and with the same pen and ink. When asked to explain why he does not believe these signatures genuine, he says, "To use a school-boy's phrase, I think these letters were 'painted,' after they were formed. The difference is more easily pointed out than explained." I have thus recapitulated, perhaps unnecessarily, all the evidence as to the genuineness of the signatures. It is certainly not overstating its force to say that it leaves it open to the gravest suspicions—suspicions which the inspection of the originals has not tended to weaken.

At the end of the grant produced by the claimants, is the memorandum signed by the secretary, Covarrubias, stating that a note of the title had been taken in the corresponding book. This Covarrubias, in his deposition, states to have been done. The "corresponding book" is found in the archives, but it contains no note of this grant. Covarrubias swears that the book in which he entered this grant was not the one now produced. That it was not bound, but composed of sheets of paper sewed together. That in it were entered various "tomas de razon," in the handwriting of himself and of his two clerks. That he was in the habit of placing his initials "J. M. C." at the bottom of each entry. The entries for 1845, in the book now produced, are in the handwriting of Francisco Lopez, one of his clerks at that time. This statement is corroborated by the testimony of Narciso Botello. This witness swears that the book found in the archives is not that used by the government for the registry of titles at Los Angeles. That the latter was a "cuaderno," with loose leaves without binding, and generally in the handwriting of Covarrubias. He states that the writing in the last part is that of Francisco Lopez, and that on page 7 to be the writing of Don Augustin Olvera, the governor's secretary. On the oth-

er hand, Thomas O. Larkin, a witness produced by the claimants, testifies that he was acquainted with the books in the office of the secretary during the years 1845 and 1846. That there was only one book, and he believes the book produced from the archives to be the one referred to by him. That he saw this book in the secretary's office in the time of Micheltorena, and also among the archives when they were delivered over to the Americans in August or September, 1846. No other book of "tomas de razon," for 1845, is found in the archives, and the testimony of Mr. Larkin would seem sufficiently to identify it as that in which the entries for that year were made. But even admitting the accuracy of Covarrubias' statement, it is evident that as the entries are in the handwriting of one of his clerks, and the book was delivered to the Americans in 1846, among the other public records, the entries must have been made nearly cotemporaneously with their dates. It is possible, however, that they were copied from some loose sheets or "borradors," such as those spoken of by Covarrubias and Botello, and the absence of any note of this grant is not, therefore, entirely conclusive as to its genuineness. On examining this book, however, it appears that with one exception, every grant in colonization, of which the expediente is found in the archives, or which has ever been presented to the board, made from March, 1845, to December of the same year, the dates at which the entries begin and terminate, is found duly noted, as of the day on which by the memorandum on the grant the note appears to have been taken. This grant purports to be in favor of Victor Prudon and Marcos Vaca, with an informe by José de la Rosa, and a provisional license to occupy signed by General Vallejo. The expediente in this case was not found in the archives, but was deposited by the plaintiff's counsel on the ninth of February, 1852. This grant was rejected by the board as spurious. Its date is on the twentieth of December, 1845. The last entry in the book is December 23d, 1845. Admitting that it is genuine, the absence of a note of it in the toma de razon is no impeachment of the accuracy of the book. But with this exception, the entries are complete. On the very day (December 4th) on which the grant in this case purports to have been made, two other grants were made and duly entered; on the day previous, one; and another seven days afterwards. Conceding, then, that the book now found in the archives was copied from loose sheets, containing the original cotemporaneous entries, how can we account for the fact that this grant alone, of all those made during the period over which the entries extend, (with the exception above noticed) has been omitted? It is a circumstance pregnant with suspicion. It is suggested that it is possible that entries in the book now produced may have been taken from the expedientes on file; and as the expediente in this case was not on file, but returned to the party, this grant was omitted. This hypothesis is ingenious but highly improbable. It is to be borne in mind that the book now produced was found among the archives. If it be a copy of that on which the original entries were made, it was made under the former government. The borradors or loose sheets spoken of by Covarrubias and Botello have disappeared. If, then, a clerk of the former government prepared this copy, he probably did so, not from the expedientes on file, but from the borradors, which, according to Covarrubias, existed so late as the spring of 1846, when he went out of office. The fact that these borradors have disappeared, and that the book now produced alone remains, favors the hypothesis that they may have been destroyed when the copy was taken. If this be so, it is as difficult to suppose that an entry of this grant was accidently omitted, in a copy otherwise so complete and accurate, as to suppose it to have been omitted on the book in which the entries were originally made. In either case the hypothesis, if not impossible, is in a high degree improbable.

The certificate of the approval of the departmental assembly is dated December 18th, 1845. The resolution of approval appears to have passed on the eleventh of the same month. The records of the proceedings of the assembly at the close of 1845 and beginning of 1846 are preserved. They show that on the eighth of October, 1845, "The sessions of the assembly were suspended for the rest of the year, in consequence of permission having been granted to the señores deputies who reside out of this capital, to retire to the places of their residence, in view of the injuries they must suffer in consequence of their salaries due them respectively as functionaries not being paid." A publication of the foregoing in all the pueblos of the department was ordered to be made October 11th, 1845. The next session of the assembly, as shown by its journals, was on the second of March, 1846. The journals state that the governor and certain deputies, who are named, had "assembled for the purpose of reopening the ordinary sessions, which, by a resolution of the body, had been suspended for the balance of last year. Whereupon the proceedings of the eighth day of October of the last year were read and approved," etc. It is evident that no ordinary session of the assembly was held on the eleventh of December, the day on which this grant is certified to have been approved. It is contended, however, that extraordinary sessions were held, of which no record was kept, and the testimony of several witnesses has been taken to establish the fact. Juan Bandini testifies that he was elected a member of the assembly in 1846, and took his seat in the beginning of that year; that he knows that an extraordinary session was held from the eighth of October until the end of the

year 1845; that the ordinary session was commenced in the month of February, 1846, and of this he was a member. The business transacted at the extraordinary sessions related to the mission of one José Maria Hijar, and the confirmation of land titles, and granting the same. Santiago Arguello makes the same statement in almost the same language. Both repeat several times that they took their seats in the ordinary session, held in February, 1846; according to Arguello, about the first of that month. Unfortunately for these witnesses, the record of the first ordinary session of 1846 is preserved, whereby it appears, as we have seen, that the assembly resumed its ordinary sessions on the second of March, and not on the first of February; that the proceedings of the last ordinary session, to wit, that of the eighth of October, 1845, were first read and approved, and that the next business transacted was the reception of the credentials of Don Juan Bandini and Don Santiago Arguello; that the usual proceedings were on motion dispensed with; that the newly elected members were received by a committee of the body; that after making oath, as prescribed by law, they took their seats, and were congratulated by the Hon. president, who expressed his pleasure at their incorporation into the body. It is singular that both of these witnesses should have fallen into the same error with reference to a fact of which they speak so positively. It justifies the suspicion that they may also be mistaken in their statement that extraordinary sessions were held from October eighth, until the end of the year. The journals of the assembly show that secret and extraordinary sessions were held on various days between March 4th, 1845, and October 8th, of the same year. They frequently took place on the same day with an ordinary session, and the journals of the latter mention that the assembly went into secret session on the motion, etc. These secret or extraordinary sessions appear to have been not unlike the executive sessions of the United States senate, except that in some instances the proceedings at a secret session were read and approved at the next ordinary session. But the extraordinary or called sessions which are supposed by the claimants to have taken place at the end of 1845, after the suspension of the ordinary sessions for the rest of the year, are of a different character. A document is found in the archives, however, which seems to favor the idea that such may have been held. A committee, to whom a motion that the assembly dissolve itself or adjourn was referred, reports that it had no such power, as it was always in session as the council of the government; and they recommend that, after dispatching some pressing business which would come up in October, the assembly suspend its ordinary sessions for the rest of the year, and that permission be given to the deputies residing at a distance to return home. The resolution of adjournment passed October 8th seems to have been in pursuance of this recommendation. The cause having been reopened since its first submission, the evidence of Narciso Botello was taken in court. This witness states that though he does not recollect the fact, he has no doubt that there were extraordinary sessions in 1845, for he has seen documents which show it. A document from the archives was shown to the witness, which he stated to be in the handwriting of Don A. Olvera, secretary to the governor. This document appears to be a "letra convocatoria," or summons, to the members of the assembly, to meet in extraordinary session. Whether or not the session took place the witness is unable to recollect, but he presumes, from the summons, that it did. If there were any such in December, the witness states that he must have attended them, unless prevented by illness.

From all the evidence that can be obtained, I think it not impossible that extraordinary sessions may have been held after the adjournment of the eighth of October. The cause of that adjournment, however, as declared in the resolution above cited, is somewhat inconsistent with the idea that the members immediately reassembled in extraordinary session. If they did so, the record of their proceedings has been lost by another of those unfortunate accidents which have attended this case at every step. But in addition, it is not a little remarkable that if a part of the business of this extraordinary session was the confirmation and granting of titles, no title whatever of all those granted previous to the second of March, 1846, appears to have been approved at any extraordinary session of the assembly, between its adjournment on the eighth of October, and the reopening on the second of March, with two exceptions—the grant in this case, and that of Victor Prudon, above noticed. Every other grant made subsequently to the eighth of October, and among them one dated December 4th, the very day on which this title purports to have been issued, was reserved until the ordinary session of March, and was at that session, as appears by the record, presented and approved. It is also worthy of observation, that Narciso Botello does not pretend to recollect that an extraordinary session was in fact held at the time at which it appears to have been convened—still less that at any such meeting this grant was approved. He left Los Angeles on the twenty-fifth of December. The resolution of approval was passed, if at all, on the eleventh. The grant was large, and in payment of public dues. Had he been present at any session at which it was discussed and approved, it would seem probable that he would have recollected it. His failure to do so, however, is by no means a strong circumstance against the genuineness of the certificate. It deserves, however to be noted and considered amongst the other

circumstances of the case. But the United States have produced direct testimony to prove the time and place at which these papers were fabricated. Rafael Guirado testifies that in the month of August, 1853, about nine o'clock, a. m., José de la Rosa, in company with the Messrs. Luco and Salvador Vallejo, came to the house of General Vallejo and inquired for the latter. After about two hours he came in, when they all entered his office, where they seated themselves at a table. The witness overheard their conversation, which related to "settling" the rancho of Ulpines. General Vallejo offering to put three hundred mares upon it, etc. The next day a similar interview took place, and after the rest were gone, General Vallejo said to the witness, "I am transacting some important business," and asked if he had overheard it. To which the witness replied that he had. The general, after some expressions of his confidence in the witness, proceeded to inform him of the "plan" they had arranged. "The title," he said, "we have made in the name of Rosa. It supposes a certain amount to be due him as printer at Monterey; that his brother Salvador had gone to Los Angeles and succeeded in obtaining the signature of Pio Pico to the title." The witness then said to Vallejo that the title was false, to which the general replied, "I know it. It is in this way we have planned; how can it be false, it has the signature of Pio Pico?" After some further conversation detailed by the witness, General Vallejo said in reply to an observation by the witness, that the title was void, and it would in time be discovered. "In that case it would be diamond cut diamond," and he explained this expression to mean that if there were six or seven persons to swear that the title is null (nulo) he would bring ten or twelve to swear to its genuineness. If this story be true, the character of this claim is placed beyond a doubt. Guirado has, however, been impeached by various witnesses on the part of the claimants, and sustained by perhaps an equal number on the part of the United States. It would be useless, perhaps impracticable, to attempt to decide upon a comparison of this testimony whether or not his character is such as to justify a belief in his statements. Whatever it was, whether infamous or respectable, one fact is clear, that General Vallejo, so late as March, 1855, corresponded with him on terms of friendship and intimacy. The relations which General Vallejo's letter of March 4th, 1855, shows to have existed between them, must either relieve Guirado from the imputations cast upon his character, or that of Vallejo himself must in some degree be compromised. If Guirado's testimony stood alone, and if in other respects this claim seemed fair and genuine, I should hesitate long before rejecting it on the faith of such a statement. I have alluded to it as an item of evidence entitled to consideration. It is urged that according to this story, the signatures are the genuine signatures of Pio Pico, though the document may be antedated, and it disproves the theory of the United States that they are forged. To this it may be replied, that General Vallejo may not have known, or may have been unwilling to disclose the name of the person who forged the signatures. The risk of punishment to him would be far greater than to those who merely expressed an opinion as to their genuineness, or Pio Pico may in fact have signed the document, but have forgotten to adopt the mode of signature used by him at its date.

Since the case was reopened, testimony has been taken with regard to the seals. It appears by the evidence of Wm. B. McMurtrie, that the impression or seal on the grant in this case is different, and evidently made by a stamp different from that used on the petition and the certificate of approval. The impressions on these latter are identical with those used on various expedientes and grants exhibited to the witness. Four of these were produced in court, dated at various times from April 21st, 1843, to May 2d, 1846. The impression on the grant in this case is entirely dissimilar, and the witness not only expresses the positive opinion, but demonstrates that it could not have been made with the same seal as that used on the other documents. Photographs have been taken of these impressions, and the difference is obvious on inspection. How then is this fact to be accounted for? Covarrubias swears that he recollects of only one seal being used in the office of the secretary. How happens it that the petition and certificate bear the impression of the genuine seal, while the grant has an impression of one which, if not proven not to be genuine, is not found on any other document in the archives? It is true that this fact is not specifically sworn to by any witness, but since the testimony of McMurtrie was taken, ample opportunity has been afforded to the claimants to examine the archives. If a seal similar to that on the grant could have been found, it would doubtless have been produced.

It is argued that this testimony establishes at least the genuineness of two of the seals on these papers, even though it casts a doubt on the third. But we have already seen that at the time the grant was exhibited to Covarrubias and Pio Pico to procure the affidavits on which the action of congress was founded, it was unaccompanied by either the petition or the certificate of approval. How these papers were separated from the grant, or how since reunited to it, does not appear. The difference, therefore, in the seals, tends to corroborate our suspicions that the petition and certificate may have been prepared subsequently to the grant, as they certainly did not appear in the cause until long after the production of the grant to Covarrubias and Pico. It does not appear where or in whose custody the seal of the former government now is; and if any one of the documents exhibited

bears a spurious seal, it throws a doubt upon the genuineness of them all, which is not dispelled by the fact that on two of them the seals appear to be genuine. Another circumstance is also worthy of observation. Eleven expedientes have been produced from the archives, with a view of exhibiting not only the signatures of Pio Pico, but his title or the description of his office, as contained in the headings of the grants. These expedientes are regularly numbered, and are dated at various times from November 22d, 1845, to December 19th, 1845. In all of them Pio Pico is described as "Vocal decano de la assamblea departmental y gobernador provisional de las Californias." In the grant produced in the case at bar, and in the certificate of approval, he is described as "Vocal decano de la exma assemblea del departmento de las Californias y encargado del gobierno del mismo por ministerio de la ley." It is singular, that if this grant be genuine, the governor should in this one instance have deviated from the form which he had been using almost daily in his official acts for a considerable time, and which he adopted in three grants undoubtedly genuine, made on the very day on which this grant purports to have been issued. It is another of those extraordinary accidents which it is difficult to suppose could all have occurred by a kind of fatality, in one unfortunate case.

From the foregoing review of the evidence in this case, it is, I think, apparent that at every point it is liable to the gravest suspicion. We find that papers constituting a complete title for one of the most valuable ranchos in California have been unaccountably withheld from the board appointed to ascertain their validity, until the time for presenting them has expired, although the lands are situated in one of the most fertile and inhabited districts of the state and although all the neighbors of the grantee, including his friends and patron, General Vallejo, duly presented their claims for confirmation. We find that when the grant was submitted to counsel for inspection, and to Pico and Covarrubias for their affidavits, if indeed it was the same paper as that now presented, it was certainly unaccompanied by the petition, and almost certainly unaccompanied by the certificate of approval. That these papers have since been produced attached to the grant, but when and by whom we know not. That the petition is found, not in the archives, which was the legal and usual place of custody, but in the possession of the party, though the secretary of the government has no recollection of ever having withdrawn any expediente from the archives, nor does he remember sending any document whatever to the grantee in this case. How, and why, and when, and by whom this petition was obtained from the archives, we are wholly uninformed, except by the statement of De la Rosa that it was delivered to him by Vallejo, which the latter denies. Why and how it became separated from the grant is likewise unexplained, as is also the singular fact that, having this petition in their possession, the claimants should have procured from Covarrubias the affidavit stating that he did not know where it was, and "that the practice was to return the petition with the grant." If it was not then in the claimants' possession, where was it? In whose custody? And how and whence has it been procured? We find also that the pretended occupation by De la Rosa of this land has been disproved by so great a preponderance of evidence as to suggest the most painful suspicions. We find the archives not only failing to exhibit any trace of the existence of the grant, but unless a series of extraordinary accidents be supposed, absolutely disproving its existence. We find that the signatures of the governor, though sworn to as genuine, are by many disinterested witnesses declared to be forgeries; while the governor himself testifies with caution and reserve, and is wholly unable to recollect a single circumstance connected with the grant. We find that in the opinion of many respectable persons, the characters of the principal witnesses for the claimants are such as to render them unworthy of belief. And finally, we find the suspicions of the fraudulent character of this claim, so vehemently excited by every circumstance attending it, are confirmed by the detailed and circumstantial disclosure by a witness who, whatever his character, was certainly in the confidence of General Vallejo, of the time and place and manner of its fabrication.

Such an array of proofs I confess myself unable to resist. But in addition: To hold this grant genuine we must suppose that by some unexplained accident, and contrary to custom, the petition was delivered to the party—that it remained with the grant in his possession, unseen by any one, and unsuspected by almost all of his neighbors and intimate associates. That the owner of so valuable an estate was content to remain a dependent upon the bounty of a wealthy friend, or to obtain a livelihood by mending clothes and similar employments, and never himself thought, or was reminded by his friend, of the necessity of presenting his title for confirmation. That he has frequently and without a motive declared that he never obtained any grant whatever. That the petition, the grant, and the certificate of approval, though together in the possession of the grantee, were by some unexplained accident separated when he transferred his title to the claimants. That the first and the last documents, after disappearing for a time, were in some unexplained way recovered, and reunited to the grant after the papers had been submitted to counsel and affidavits to be laid before congress had been procured. We must further suppose that the note of the grant was taken in a book which has disappeared. That in the book which remains, and is by one witness

identified as the book in which titles were noted, a note of this grant was by some strange accident omitted, although every other grant issued during the period over which the record extends is found duly noted. We must suppose that in this instance, almost solitary, the governor made an extensive grant without requiring a single report or informe, and has entirely forgotten the circumstance. We must further suppose, that the departmental assembly held an extraordinary session, of which their journals contain no trace, and this after a formal adjournment for the rest of the year, and after permission given to the members to return home. That the journal of their proceedings on reassembling alludes to the fact of their previous adjournment for the balance of the last year, and shows that the reading and approval of the proceedings of the last ordinary session was the first business transacted, while all mention of the supposed extraordinary sessions in the interval is omitted. We must further suppose, that all the grants issued in the interval between the adjournment on the eighth of October, and the reassembling on the second of March, were reserved by the governor until after the ordinary sessions had recommenced, with the exception of this grant and one other rejected by the board as spurious. We must suppose that the governor—although his name appears to public documents of various kinds, signed with singular uniformity several hundred times—in this instance adopted a mode of signing, either never on any other occasion made use of by him on official documents, or long disused. And this, notwithstanding that on the very day on which this grant was signed, as well as before and afterwards, his signature appears on various documents, exhibiting the same uniform and striking peculiarities visible throughout all the records of his official action. We must suppose that the seal used on this grant is genuine, though it was not only different from that used on the petition of the eighth of November, and from that on an expediente of the nineteenth of December, but different from any elsewhere found in the archives, and this without proof that there was more than one seal, and in the face of the declaration of the secretary that there was but one. And finally, that a wretch has been found with intelligence and depravity enough to invent and swear to a detailed and circumstantial account of the fabrication of these documents. Such a series of improbable hypotheses I have found it impossible to believe. I have given to this case an unusual degree of labor and attention, and have endeavored to arrive at a just and impartial conclusion. My conviction is that it ought not to be confirmed.

[Affirmed on appeal in 23 How. (64 U. S.) 515.]

Case No. 8,595.

LUCY v. SLADE.

[1 Cranch, C. C. 422.] [1]

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

SLAVERY—DEED—UNRECORDED—PROOF OF EXECUTION.

1. A deed conveying or transferring a slave in Maryland, not recorded, cannot be given in evidence without proof of its execution, although it has been acknowledged before a justice of the peace in Maryland.

2. The oath, required by the Virginia law of the 17th of December, 1792, § 4, is of no avail unless taken within sixty days after the removal of the party.

Trespass, for assault and battery and false imprisonment, to try the right of freedom.

E. J. Lee, for defendant [Charles Slade], offered a deed of gift of the plaintiff by Colonel William Lyles to Miss Ann Lowery, whom W. H. Lyles afterwards married, acknowledged before Mr. Bowie, a justice of the peace of Prince George's county, Maryland, and a certificate of the clerk of Prince George's county, that Mr. Bowie was on that day a qualified justice of the peace; and a certificate of J. M. Gantt, chief judge of the court of Prince George's, &c.

Mr. Jones, for plaintiff, objected that it is no act, nor record, nor a judicial proceeding. It is not recorded, and if it had been, yet as it is not required to be recorded, it would gain no authenticity by the recording. It is not necessary to be acknowledged. The taking of an acknowledgemnt is not a judicial act.

THE COURT (nem. con.) decided that it was not evidence, unless proved by witnesses. The acknowledgment of the deed, at all events, can amount to no more than an estoppel against the party himself, who has acknowledged, and does not prevent another person from denying the execution of the deed.

THE COURT also permitted the plaintiff to give evidence of an importation by Colonel William Lyles, under a general allegation in the statement of the case, prepared by counsel under the order of the court; whereupon the defendant gave in evidence a certificate of an oath taken by William H. Lyles; but THE COURT instructed the jury that the said oath was not in compliance with the Virginia act of assembly of Dec. 17, 1792, p. 86, § 4, unless taken within sixty days after the removal of W. H. Lyles.

LUCY A. BLOSSOM, The (FOX v.). See Case No. 5,013.

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

Case No. 8,596.

The LUCY ANNE.

[3 Ware, 253;[1] 23 Law Rep. 545.]

District Court, D. Maine. March, 1860.

BOUNTY — COD FISHERY — SEAMEN'S WAGES—ACCOUNT OF FISH TAKEN—CUSTOM—AGREEMENTS BETWEEN OWNERS AND SEAMEN.

1. A court of admiralty has jurisdiction to decree the bounty allowed to persons employed in the cod fishery, and a claim for this may be united with a claim for an account of the fish taken during the voyages.

[Cited in The Grace Darling, Case No. 5,651.]

2. A custom is obligatory on the parties only when the law does not provide for the case.

3. When a condition precedent is annexed to a gift, that cannot be repudiated and the gratuity received unconditionally.

4. The reasonableness and equity of an agreement between owners and seamen will always be examined by a court of admiralty.

This case originated in the following state of facts. The complainant, Philip Rines, a minor, had been engaged in the service of the schooner Lucy Anne, of Southport, district of Wiscasset, during the cod-fishing season of 1859. The season embraced two voyages, one in hand-line fishing, the other in a trolling voyage. After the completion of the second voyage, Rines left with the master's consent, who did not settle up his wages. The terms of service and compensation were embraced in the articles of agreement, usual in this district, the substance of which is given in the opinion of the court. After the sale of the fish, the master, being at Wiscasset (the residence of Rines), called him aside and exhibited an account made up of various items of charges for supplies, outfits, and deductions for absence, extra help, etc., absorbing, or nearly absorbing, all his earnings from his catch of fish. No allowance of his share of five-eighths of the bounty was reckoned into the proceeds of the voyage. The father thereupon founded a libel on the facts, which was filed, and process issued against the vessel, which was duly arrested, and in the course of the trial the rights of fishermen, in the premises, to a full and just account of the fish taken, and to the entire value of the same, and to each man's share of five-eighths of the allowance of bounty received by the owners of the vessel, came up for settlement and adjudication on the principles of law and equity, as administered in courts of admiralty and maritime jurisdiction.

Sewall & Willis, for libellant.
Shepley & Dana, for respondents.

WARE, District Judge. This libel is filed by Philip Rines, a minor, by his father, and next friend, against the fishing schooner Lucy Anne, of about thirty-one tons burthen, claiming his share of the bounty, and an account of the fish taken in two trips in the season of 1859. No question has been made as to his engagement, or the time of his service. The defence relied on is, first, that he has been fully paid, for which his owners have his receipt; and, secondly, misbehavior, negligence, and desertion, during the voyage. But a question, in its nature preliminary, is made, that a court of admiralty has no jurisdiction over the question of bounty, and that this can be recovered only in a suit at common law. The provision of the law is, that there shall be paid to every vessel of thirty tons burthen, and over, at the rate of four dollars a ton, that shall be engaged in the cod fishery during the season, three-eighths of which shall belong to the owner, "and the other five-eighths thereof shall be divided by him, or his agent, to and among the several fishermen who shall have been employed in such vessel during the season aforesaid, or part thereof, as the case may be, in such proportions as the fish they shall have respectively taken bears to the whole quantity of fish taken on board such vessel during such season." The consideration of this allowance is essentially and exclusively maritime. It is measured to the men in proportion to the fish they have taken, and must be considered like the double pay allowed to seamen when they are put on short allowance, and the three months' pay allowed when discharged in a foreign port, as additional wages. It is a gratuity offered to the men to engage in this laborious, and not usually lucrative service, forming a nursery and school for seamen, who are always ready to engage in the public service when they are wanted. The law does not, indeed, say that they may recover it in a libel as wages; but it treats them as seamen, giving the same remedies against them for enforcing their contract, and subjecting them to the same penalties. The allowance is paid to the owner, and he is bound to pay it over to the men. I can see no room for doubt that a claim for the bounty, and for an account of the fish taken in the voyage, may be united in the same libel. They relate to the same subject-matter, and if the bounty is to be considered an additional compensation, are both of admiralty jurisdiction.

The first objection to the libel, on its merits, is the settlement made in January, and the receipt in full of Philip of that date. This settlement was on the basis of the custom of Southport, and assumes the validity of that custom. Waiving the question of the reasonableness of that settlement,—and as it departed from the law, whether it was explained to the libellant, and fully understood by him; whether he gave up any of his legal rights without receiving a full consideration therefor, which as a fisherman having the rights of a seaman, a court of admiralty will always look into;—setting aside these questions, it is manifest that the case brings up the binding force of that custom. The settlement refers to this, and this has been the principal question which has been argued. It is, in fact, to settle this question that the suit is prosecuted, for the amount in controversy would

[1] [Reported by George F. Emery, Esq.]

be scarcely worth the expense of litigation unless this question lay at its bottom. But this is important, both as a legal question and in its practical consequences, and deserves a deliberate consideration. Custom certainly may have the force of law, and be equally binding, when it is not expressly referred to in the contract. In all civilized and uncivilized countries a large portion of the transactions between man and man is left to be regulated by usage. And this usage is binding on the parties because they make their engagements in reference to it, and it comes in and silently makes part of the contract. This is the case when no reference is made to the custom; and it is still more so when the parties themselves refer to it. But this is only also when the legislature has not expressed its will on the subject, or when, as is not uncommon, the general rule is established, that the parties are expressly allowed to derogate from the law by their particular contracts. But when a departure from the rule of law is not expressly or impliedly allowed, the law prevails; and this for the best reason, because every party is supposed to know the law and make this a part of his contract, unless he expressly provides otherwise. Seamen, however, have at all times, from their habitual carelessness and improvidence, from their own ignorance and the superior knowledge and the habits of business of those who deal with them, been held to be peculiarly entitled to the protection of courts of justice. They have been treated in some manner as minors, incapable of waiving their legal rights without these are fully explained at the time, and a full and adequate consideration is made for them. If the case rested here a duty might be imposed on this court to see that a full equivalent for the bounty was allowed by the custom of Southport.

But the question in this case is not merely whether custom can do away with an express provision of a statute, but whether a grant of the legislature, supported by a consideration can be abrogated by a custom. This grant of a bounty is made only to vessels qualified by law to carry on the cod fisheries. The United States alone can give that qualification, and this would be a sufficient consideration to uphold a contract in any case. The ship cannot receive the bounty without the requisite qualification. This, then, is a gratuity to the vessel, and it is given on the express condition that five-eighths shall go to the fishermen, and to this extent it is a gratuity to them, and it is given them on condition that they inure themselves to this hardy service. If they should choose to waive their rights, they could not do it without the consent of the United States. The donor may annex such conditions to his bounty as he pleases; nor at least when he has an interest in his liberality, can the beneficiary repudiate the conditions without the consent of the donor. He cannot take that as a free gift to which a condition precedent is annexed. Independent of the last clause of the contract, by which the parties reserve to themselves all the benefits to which they are entitled under the act for the government of persons employed in the fisheries, I can entertain no doubt that the custom is void. Besides, so long had the practice prevailed in this district of settling with the fishermen without paying to them any part of the bounty, that from the whole evidence it is evident that they were uncertain whether any part was due to them. The libellant would be entitled to relief on common principles, taking into view his occupation, on the ground of a surprise. There must be a decree for the bounty. Whether the custom of Southport is a beneficial one or not, is a question into which the court cannot examine. The United States have a perfect right to affix such conditions to their gratuities as they please.

The next question is, to what part of the bounty is Rines entitled? Five-eighths is to be distributed among the men, respectively, in the proportion which the number of fish taken by each bears to the whole taken on board the vessel. In the first trip there is no controversy. The fish were taken with lines, and the fish of each man were put into a kid by themselves, and faithfully counted out at night. The entry of them at each night was made on a slate in the presence of the whole crew, so that every man had an opportunity to see that his fish were rightly counted; and the week's work was on Saturday night transferred to a book in ink. This I think a sufficient entry. In this trip, according to the account, Rines took 1,337 fish. In the second trip the fish were taken by a troll. This is a new mode of fishing, with which all the men were equally inexperienced. A troll, as described by the witnesses, is a long rope extended on the water for many fathoms, with baited hooks attached to it, about three or four feet apart. This is sunk in the water and occasionally drawn up with the fish on the hooks. The whole crew is employed in the management of the troll, and the fish come up in a mass. Though the troll shows what the whole have taken, the share of each individual cannot appear in this mode of fishing. But the law requires the bounty to be distributed among the crew in proportion to the amount taken by each individual. When a part of the time is spent in troll fishing, and a part in taking with lines, I know of no more equitable way of dividing the troll than to allow to each man a proportion equal to that which he has taken with the line. This may be considered as indicating a fair average of the efficiency of each man. The whole number of fish taken on the first trip with lines was 7,958, of which, Rines took 1,337. That taken by troll fishing was 4,000. This would make Rines' share 670, and added to 1,337 will make 2,007. His share of the bounty will be $13.06.

The libellant also demands his share of the fish. I know of no reason for doubting the account of John Cameron of the proceeds of the sale of the fish, and that the proper deductions were made of salt, the expenses of cure, freight, and commissions. According to this account, the net proceeds of the sale of the fishermen's part were $464.35. Of this, Rines' share was $78.93, and to this add his share of the bounty, $13.06, and we have $91.99 as the balance due from the owners. Against this demand, the owners have filed their account of offsets of $70.33. This libel is brought by Philip, a minor, by his father and next friend, and there can be received in offset only what went to Philip, or what he authorized to be charged against him. What was for Moses Rines, the father, cannot be charged against Philip. It is true that the father might appropriate the earnings of his son to himself. He might also leave the earnings of the child to him, and the son's bringing the libel himself, with the authority of the father, must be considered as a sufficient proof of emancipation. We may strike out the charge in Lincoln's bill of $9.23. With respect to Lenox's, though I think that there is some doubt as to part of the charge, my opinion is that, as Philip gave his order for the payment, it ought to be allowed. There is a charge of six days' work on board the vessel in Rines' absence. According to the custom under which the contract was made, certain duties on board the vessel were to be performed by the men. But of such a charge as this there ought to be some better evidence than a simple charge in a pencil account, or the testimony of a witness. The absence of a seaman should be noted in the log-book at the time, both to show that there was a delinquency on the part of the seaman, and that it was such a one as in the opinion of the master or skipper ought to be noticed. Independent of this, Russel was from the same town, and was absent at the same time. and about the same number of days with Philip; he was charged with but one day's labor for his absence. As he was one of the crew, and had the same labors to perform, if I allow against Philip the same, I think enough will be allowed. Decree for $20.51, and costs.

Case No. 8,597.

The LUCY C. HOLMES.

[Blatchf. Pr. Cas. 196.] [1]

District Court, S. D. New York. July 28, 1862.

PRIZE—ENEMY PROPERTY.

Vessel and cargo condemned as enemy property.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured off the coast of North Carolina, May 22, 1862, by the United States steamer Santiago de Cuba, and were sent into this port as prize. The vessel and cargo were owned in South Carolina, and sailed from that port for Nassau, New Providence. No proof being furnished from the papers, or the examination in preparatorio, vindicating the honesty of the vessel and cargo, both of them are, upon the pleadings and proofs, condemned as enemy property, and decreed to be forfeited.

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

LUDDINGTON (BRIGHAM v.). See Case No. 1,874.

LUDELING (JACKSON v.). See Case No. 7,139.

Case No. 8,598.

LUDINGTON et al. v. The NUCLEUS.

[2 Am. Law J. (N. S.) 563.]

District Court, D. Wisconsin. Jan. Term, 1850.

MARITIME LIEN—MATERIALS FURNISHED — JURISDICTION OF ADMIRALTY OVER LAKES—ACT OF CONGRESS—DISTRICT COURT.

Contracts for materials furnished, at the home port, in the building of steamboats and other vessels, are not within the act of congress extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same, approved Feb. 26, 1845 [5 Stat. 726].

[Cited in People's Ferry Co. v. Beers, 20 How. (61 U. S.) 402; The Edith, Case No. 4,283.]

[This was a libel by Robert Ludington and Henry U. King against the schooner Nucleus (Alanson Sweet, claimant).]

MILLER, District Judge. The demand of these libellants is for materials furnished in the building of this vessel. It appears in evidence that the vessel was launched in the month of June, 1848; and that a very small portion of the materials were furnished after that date. The libellants furnished the materials, from their store in Milwaukee, to the builders of the vessel at the same place, at different times, from the month of Nov. 1847, to the month of Oct., 1848. The vessel was enrolled and licensed, in the month of October, 1848, and made her first voyage in the spring of 1849; and before the filing of this libel. The claimant, in his answer, denies that, at the time the cause of action accrued, this vessel was enrolled and licensed for the coasting trade, and was employed in business of commerce and navigation, as set forth in the libel. By the law of this state boats and vessels used in navigating the waters of the state, are liable for the materials used and labor bestowed, in their construction; and a party can file his claim and proceed, in the courts of the state, against the boat or vessel by name. Contracts for marine service, in building, repairing and supplying ships, are cognizable in courts of admiralty, as maritime and appertaining to commerce and navi-

gation; and when a lien is given by the local law, they may be enforced by admiralty process. The Gen. Smith, 4 Wheat. [17 U. S.] 438; The St. Jago de Cuba, 9 Wheat. [22 U. S.] 409; Peyroux v. Howard, 7 Pet. [32 U. S.] 324; The Orleans v. Phoebus, 11 Pet. [36 U. S.] 175; The Jerusalem [Case No. 7,294]; Adm. Rule 12. Demands for materials furnished and labor bestowed in the construction of vessels not launched, are decided to be within the admiralty jurisdiction, where the local law gives a lien; provided such vessels are intended or designed for maritime business upon the high seas, or tide waters. Read v. Hull of a New Brig [Case No. 11,609]; Davis v. A New Brig [Id. 3,643]; Harper v. The New Brig [Id. 6,090]; Stevens v. The Sandwich [Id. 13,409]. As the employment of these vessels was to be maritime, the contracts for labor and materials were for maritime purposes. The contracts were such as touched rights and duties appertaining to commerce and navigation; and were enforced by admiralty process against vessels, which from their location and construction were designed, or intended for the employment of commerce and navigation upon the high seas, or tide waters. From these authorities it appears, that this court might entertain jurisdiction of this cause, if jurisdiction co-extensive with the admiralty jurisdiction of the national courts, has been extended to the lakes.

The only act of congress, conferring upon this court jurisdiction, similar to the admiralty jurisdiction possessed by district courts, in pursuance of the constitutional provision, is "an act extending the jurisdiction of the district courts, to certain cases, upon the lakes, or navigable waters connecting the same;" approved Feb. 26, 1845. By this act. "the district courts of the United States shall have, possess and exercise, the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation, between ports and places in different states and territories, upon the lakes and navigable waters connecting the said lakes, as is now possessed and exercised by the said courts, in cases of the like steamboats and other vessels employed in navigation and commerce, upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts, in all such matters of contract, or tort, the remedies and the forms of process, and the modes of proceeding shall be the same as are, or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such courts in the same manner, and to the same extent, and with the same equities as it now does in cases of admiralty and maritime jurisdiction." "The object of this act appears to be, first, to bring these cases within the cognizance of the district courts, without regard to the citizenship of the parties, as cases arising under a law of the United States, (that is to say, under the act itself;) and, secondly, as far as it could constitutionally be done, to apply to them the same rules, both of procedure and of decision, as if they had pertained to ocean instead of inland navigation, and so been strictly of admiralty jurisdiction; or in other words, to subject them to the operation of the admiralty law of the United States." Conk. Adm. 6. In the construction of statutes generally, "everything which is within the intention of the makers of the act, is as much within the act, as if it were within the letter; Stowel v. Zouch, 1 Plow. 366. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason, or motive, upon which the legislature proceeded, from the end in view, or the purpose which was designed." U. S. v. Freeman, 3 How. [44 U. S.] 556. Upon these rules, it is plausibly argued, that this case falls within the act in spirit and intent. But this is an act to extend the jurisdiction of courts, not of inferior, but of limited jurisdiction, created by law. In the exposition of such a statute every part is to be considered, and the intention of the legislature extracted from the whole. Such intention must be apparent on the face of the statute. Wilkinson v. Leland, 2 Pet. [27 U. S.] 627; U. S. v. Fisher, 2 Cranch. [6 U. S.] 358.

The jurisdiction of courts, of limited jurisdiction, created by statute, should be made affirmatively to appear, for "the fair presumption is, that a case is without the jurisdiction until the contrary appears." And it is "necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed to set forth upon the record, the facts or circumstances which give jurisdiction, either expressly, or in such manner as to render them certain by legal intendment." Turner v. Bank of America, 4 Dall. [4 U. S.] 11, 1 Cond. R. 205. Courts, which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. These rules have been rigorously adhered to by the courts of the United States, at all times and under all circumstances. Kemp v. Kennedy, 5 Cranch [9 U. S.] 185; McCormick v. Sullivant, 10 Wheat. [23 U. S.] 192; Ex parte Bullman and Ex parte Swartwout, 4 Cranch [8 U. S.] 75, 96; Grignon v. Astor, 2 How. [43 U. S.] 319; and many other cases. It is well understood that the federal courts do only possess and exercise jurisdiction, conferred by the constitution and laws of the United States; and that such jurisdiction must be shown by facts, or circumstances properly pleaded. Before this court can possess, or exercise the quasi admiralty ju-

risdiction conferred by the act, it must be alleged in the libel that "steamboat, or other vessel, is of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time when the cause of action accrued, was employed in business of commerce and navigation between ports and places in different states and territories, upon the lakes and navigable waters connecting the said lakes." Upon that averment, or allegation in the libel, the court is authorized and empowered by the act to exercise the same jurisdiction as "in cases of the like steamboats, or other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States." This averment in a libel, is as essential to confer jurisdiction under the act, as that of citizenship, or alienage in a declaration or bill, under the act to establish the judicial courts of the United States, approved September 24, 1789 [1 Stat. 73].

It no where appears in this very cautiously drawn statute, that congress intended to confer upon the courts, full admiralty jurisdiction, which is limited by and depends primarily upon the nature of the contract, or tort. But, "on the contrary, congress seems to have had an eye, rather to those provisions of the constitution which confer upon the national legislature, power to "regulate commerce with foreign nations, among the several states, and with the Indian tribes"; and upon the judiciary jurisdiction of "all cases arising under the laws of the United States;" and to have intended merely, to subject the descriptions of cases, specified in the act, to the practical operation of this constitutional provision, and sub modo, to the admiralty forms of procedure." Conk. Adm. 4. From a critical examination of the act, it is reasonable to infer, that congress strictly pursued the following intimation of the supreme court in The Jefferson, 10 Wheat. [23 U. S.] 458, 6 Cond. R. 173: "Whether, under the power to regulate commerce between the states congress may not extend the remedy by the summary process of the admiralty, to cases of voyages on the western waters, it is unnecessary for us to consider. If the public inconvenience, from the want of a process of an analogous nature, shall be extensively felt, the attention of the legislature will doubtless be drawn to the subject." The increasing commercial intercourse between the different states, by means of lake navigation, required more than the ordinary legal remedies afforded by the state tribunals. The title of the act implies a limited or partial extension of jurisdiction to the courts. The certain cases alluded to in the title, are described in the act, to be "matters of contract and tort, arising in, upon, or concerning steamboats or other vessels of twenty tons burden or upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation, between ports and places in different states and territories, upon the lakes and navigable waters connecting said lakes." These are terms of description and of limitation, as well as of jurisdiction. The steamboat or other vessel must be of twenty tons burden or upwards, enrolled and licensed, and at the time the cause of action accrued, employed in business of commerce and navigation on the lakes, &c. The jurisdiction of the courts is not intended by the act, to be ascertained or determined, by the nature or character of the cause of action alone; but also, by the description and employment of the vessel. The vessel is required to be employed in business of commerce and navigation at the time the cause of action accrued; and not, as in the courts of admiralty, merely designed or intended for such employment. The words "at the time" seem to have been cautiously inserted in the act for the purpose of confining the jurisdiction conferred within the actual necessities of commerce upon the lakes. The actual necessities of commerce require that the summary jurisdiction of the admiralty should be exercised; in cases of contracts and torts strictly maritime, which no doubt was the inducement to the enactment of the statute under consideration; and may be a reason for its cautious and limited terms. It has been observed before, that upon contracts for supplies or materials furnished, or labor bestowed, in the construction of boats or vessels, it is only in virtue of state laws, that a lien is deemed to attach. Because, such lien is created by the state law, it is enforced in the admiralty, otherwise the parties would have to resort to the common law remedies. The lien created by the state law, is regarded as in its nature maritime, and is, therefore, recognized in courts of admiralty, and enforced by admiralty process. But the contract, being an ordinary transaction between persons on shore, and of the same place, the necessities of commerce do not require the creation of a lien by statute. The principal reason, or necessity for such a lien, is for the better security of the material man and shipwright. This is a subject of local legislation, induced by local policy; and not absolutely necessary to be brought to the consideration of the national courts, but properly cognizable in those of the state. To enforce this lien the state courts possess full and complete power and authority. But as liens cannot be created by the laws of a state, in cases of damages by torts, and of contracts entered into, without its territorial limits, the exigencies of commerce required the summary process of the admiralty, in cases of contracts and torts of steamboats and other vessels afloat, or employed in business of commerce and navigation on the lakes. Parties are not required by the act to resort to the federal courts, in pursuit of the remedies thereby provided for, as to courts of general ad-

miralty jurisdiction. The act saves the "right of a concurrent remedy at the common law, when it is competent to give it; and any concurrent remedy, which may be given by the state laws, where such steamer, or other vessel, is employed in such business of commerce and navigation." This saving provision, probably, was not necessary, as parties can select their own tribunal; but it may tend to show, that the certain cases of contract and tort, made cognizable by the act, in the courts of the United States, are not to be deemed exclusively within the jurisdiction of those courts, as courts of admiralty. A similar inference may, probably, be drawn from the saving provision in the act, of the "right of trial by jury of all facts put in issue in such suits, when either party shall require it;" as the trial by jury is unknown to courts of admiralty, where the civil law mode of trial is alone followed.

I do not deem it necessary for the libellant, at the hearing, to prove that the steamboat or vessel was actually enrolled and licensed. The evidence of the enrolment or license is in the possession or within the knowledge, or perhaps under the control of the respondent. The presumption is, that a vessel would not be employed in business of commerce and navigation, without a license, and in violation of the revenue laws, at the risk of a forfeiture. A proper allegation, or averment in the libel of the facts or circumstances, required by the act to confer jurisdiction, is sufficient, unless denied by a plea to the jurisdiction of the court, and sustained by proof, as in cases at law or in chancery. Nor is the extent of the employment of a steamboat or vessel a material subject of inquiry. If a steamboat or vessel is afloat and ready for such employment as the act contemplates, she would, I think, be subject to the admiralty process of this court. For these reasons, I am of the opinion, that contracts for materials furnished at the home port, in the building of steamboats or other vessels, are not within the act of congress, extending the jurisdiction of the district courts to certain cases, upon the lakes and navigable waters connecting the same, approved Feb. 26, 1845; and this court must therefore, in such cases decline the exercise, of the quasi admiralty jurisdiction conferred by the act. The libel is ordered to be dismissed, for the want of jurisdiction.

Case No. 8,599.

In re LUDLOW.

[1 N. Y. Leg. Obs. 322.]

District Court, S. D. New York. 1843.

BANKRUPTCY—ALLOWANCE TO BANKRUPT—NECESSARIES—WEARING APPAREL—GIVEN TO WIFE—PERSONAL ORNAMENTS.

1. A fowling-piece, pistol, fishing tackle, paintings, &c. are not necessaries within the purview of the act, and cannot be set apart as such, nor can a watch and breast pin of the bankrupt be considered wearing apparel or necessaries.

2. The assignee cannot claim articles of jewelry of the bankrupt's wife, which were given to her prior to marriage, and which have continued in her use ever since, nor can he claim such gifts by the husband to his wife of personal ornaments or attire, as were compatible in value and character with his circumstances at the time they were made.

This case came before the court for decision on the report of Commissioner Campbell. The assignee had set apart to the use of the bankrupt [Edward H. Ludlow] various articles as necessaries, and also articles of jewelry belonging to the wife of the bankrupt, and some as part of his wearing apparel. Exceptions were taken to the allowance, and the decision of the assignee, with the exceptions, were referred to the commissioner for proof and a report thereon. Various articles were excluded by the commissioner from the list of necessaries, and it was submitted as a question for the court to dispose of whether the discretion of the court might not extend to reserving for a bankrupt articles valuable chiefly causa affectionis as heirlooms, family pictures, donations as tokens or memorials, &c., &c., although not coming within any fair interpretation of the term necessaries.

Peter Clark, for bankrupt.

W. C. H. Waddell, official assignee in person.

BETTS, District Judge. I affirm the decision of the commissioner that the fowling-piece, pistol, fishing tackle, and paintings, are not necessaries within the purview of the act, and cannot be set apart as such, and I also decide that the watch and breast pin of the bankrupt are not wearing apparel or necessaries which can be exempt from the operation of the statute [of 1867 (14 Stat. 517)]. Does the exception in the act admit of a construction leaving a discretion with an assignee to surrender to a bankrupt things which can be classed neither under wearing apparel, household furniture, or necessaries? The proviso is that there shall be excepted from the operations of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value in any case, the sum of $300, and also the wearing apparel, &c., &c., &c. The body of the section having transferred to the assignee all property and rights of property of a bankrupt of every name and description, it is supposed that the power to except is as broad as the vesting one, and that accordingly the assignee exercises in this respect an absolute discretion within the limits of $300, and subject.

only to appeal to the court. This appeal, if that construction of the act is correct, would effect only the amount and not the particular reserved. A decision of Judge Story, in the First circuit, upon this clause, strongly favors the claim that the assignee may assign ad libitum from the effects of the bankrupt within the limitation of $300. He says it is competent for the assignee under the proviso to allow $126 cash expended by the bankrupt for the board of his family (In re Grant [Case No. 5,693]), and clearly if money might be appropriated as falling within the description of other articles and necessaries, it must follow that congress have only intended by the proviso to deny the bankrupt a reservation exceeding $300, but have not restricted the denomination of property that he may enjoy within that value. It is not intended to trench upon the decision in the First circuit in respect to the power of the assignee to admit cash as within the articles and necessaries referred to by the act, that question not being now raised for decision; it only becomes important to determine whether articles of mere fancy or taste, or conveniency may be excepted from transfer to creditors. It seems to me that the statute contemplates in this privilege only that description of property which is palpably of immediate necessity to the bankrupt or his family. Those things named are emphatically of that character, and it would not comport with the cautious designation of furniture and wearing apparel as particulars to be reserved, to employ terms in connection with these which would embrace the same things and an unlimited range beyond them. The "other articles and necessaries" ought accordingly to be understood as having relation to things, not precisely furniture or wearing apparel, but manifestly useful to the individual or his family in a like sense. Provisions in the house, the common implements or tools of trade, by which a daily support is gained, may justly be ranked in that class; and I am inclined to hold that in this case the auction stand and flags, as things in daily use and necessary to the business of the bankrupt, fairly fall within the catalogue of articles that may be exempted. This, however, cannot with like justice be said of the clock, desks, &c., for they are in no way peculiar to this employment and at most can be claimed as mere conveniences.

I adhere to the opinion pronounced in Kasson's Case [Case No. 7,616], and founded upon our own laws and the bankrupt act, that the assignee cannot claim articles of jewelry given the wife previous to marriage and continuing in her use since. It is unnecessary to repeat here the reasons and authorities upon which that decision was based. So also I still maintain that gifts from the husband to the wife of personal ornaments or attire, compatible in value and character with his circumstances at the time, are the sole property of the wife, her paraphernalia under one law, which his creditors cannot dispossess her of, nor do they pass on his bankruptcy to his assignee. I am aware Judge Story questions this doctrine (Grant's Case [supra]), and it in no way devolves upon me to controvert the positions or conclusions he deduces from the general or local law upon the subject, for I am persuaded the decision of this court may be sustained without any conflict with the principles enforced by that surpassingly sagacious and learned judge. In the case referred to, it is said by the court with a just and impressive sensibility, that in regard to mourning rings given by third persons to the wife since her marriage, "they are, from their very nature and character, purely personal as for her sole and separate use as memorials of the dead, and also of the affection of the living. They are sacred and cannot be touched by the husband or his creditors." But the inquiry must spring out of that proposition with striking pertinency and significancy: upon what doctrine of the law a respect and sympathy for one species of token or relic may be exercised that does not equally authorize it with any other? Why is not a marriage ring, or birthday gift, also an object of affection, and a tender memorial between the living or toward the dead? And if the connection of the subject with sentiments of an elevated or touching character may secure such donations, a dedication discharged of the claims of a husband's creditors, what principle of the law regulates that exemption by considerations of value? And why will not the wife endowed by a loved parent or relative with jewelry or plate, or furniture or equipage be equally entitled to maintain a special and sole property in those memorials of affection? And if the generality of the doctrine is to be restricted to particulars of personal ornaments or attire, what consideration referred to can sanction the privilege as to one article, that does not also exempt the others? The doctrine of the common law would be unqualified that all the wife's personal property and effects in possession, vest absolutely in the husband (2 Kent, Comm. 143), and of course pass under an assignment in bankruptcy.

It is only under the administration of the common law rules, as modified and humanized by courts proceeding according to the course of the civil law, that the distinct interest of the wife becomes recognized and protected, aided in some instances by a more tolerant and heedful regard to her interests in acts of legislation. The commissioner reports that the jewelry of the wife, valued by the assignee at $136.74, consists of antenuptial gifts to her, and that a diamond ring and chain valued by the assignee at

$21, were presented by her husband since their marriage, and when his circumstances would warrant it. These two last articles I think she is also entitled to retain. The first fall within the principle before adjudicated and settled in this court. It has been supposed the qualification expressed in Kasson's Case [supra], that the presents should be suitable to the condition of the bankrupt at the time, and reasonable and appropriate in their character, was introducing a new distinction into the law of property, and affecting to give a consideration to one condition of life that would not be yielded to every other, and thus according privileges to individuals, because of former affluence which are not shared by others, when both are reduced to a common level of poverty. I do not assume the assertion of any novelty in this respect, or apply the discrimination upon any supposed inherent distinctions between one class and another in society in relation to rights or privileges; but I follow submissively, though cautiously, the direction of the act of congress, in this behalf, and the plain rule prescribed by our state legislation in kindred cases. The reservation in every respect is to be determined in the language of the act "having reference, in the amount, to the family, condition, and circumstances of the bankrupt" [5 Stat. 443]; "condition" being manifestly used in relation to his position, personal or relative, and "circumstances" necessarily expresses something antecedent, because the operative clause of this very section had taken every vestige of property from him, leaving him as destitute in existing circumstances as if he had never been other than one of the most impoverished of the human family.

The court, accordingly, in determining what may be reserved for, or delivered back to the bankrupt, is compelled to consider in what condition of life, and under what circumstances of estate, he had enjoyed that of which he is now deprived, and a portion of which he is permitted to receive back through the officers of the law. So the state statute declares where a man dies leaving a family and a widow, "the clothes of the widow and her ornaments, proper for her station," shall not be considered assets (2 Rev. St. p. 83, § 9), and cannot accordingly be appropriated to the payment of her husband's debts, whatever may be the condition of his estate as to solvency. These solemn acts of legislation denote that courts in awarding the reservation of ornaments to a wife or widow, even when the rights of creditors come in competition, must be governed by a regard to the condition, circumstances, and station in life of the husband at the time the reserved property was enjoyed. In this case the decision of the assignee and report of the commissioner are affirmed with the exception of the articles before pointed out.

Case No. 8,600.

LUDLOW v. CLINTON LINE R. CO. et al.

[1 Flip. 25;[1] 3 West. Law Month. 299.]

Circuit Court, N. D. Ohio. Jan. Term, 1861.

JUDGMENTS — CORPORATIONS — LIEN IN SEVERAL COUNTIES—RECORDING MORTGAGE—SALE—ROAD INDIVISIBLE — EXTENT OF LIEN OF FEDERAL JUDGMENT.

1. In Ohio, a judgment of a court of record creates a lien upon the real estate of a defendant within the county where it is rendered, or where the land is seized in execution; and this is superior to that of a prior unrecorded mortgage made by defendants. This lien is not superseded by the mortgage if subsequently recorded.

2. A judgment against a railroad corporation becomes a lien upon its road and realty, in the same manner as upon the real estate of a natural person.

3. Where the road passes through several counties, the same rule as to lien and sale applies as to an entire tract of land lying in several counties.

4. Where a mortgage by a railroad company of its road, which passes through several counties, is recorded in one of those counties before judgment recovered against the company by a stranger; but is not recorded in the other counties—it has a priority of lien over the judgment upon the part of the road lying in that particular county, but not upon such portions of the road as lie in the other counties.

5. A sale under execution, cannot however, be made separately of that part of the road not subject to the prior lien of the mortgage. For the purpose of sale, the entire road must be treated as indivisible. The whole must be appraised and sold together. The proceeds must be brought into court, and the same be distributed according to priority of liens and the portions of the road subject to such liens respectively.

6. A judgment of the circuit court of the United States has the same effect, as a lien upon lands throughout the district, that a judgment of the state court throughout the county has where it is rendered.

[This was a bill in equity by E. Ludlow, trustee, against the Clinton Line Railroad Company, and Patrick Lavin for the foreclosure of a mortgage.]

Ranney, Backus & Noble, for complainant.
Hitchcock, Mason & Estep, for Lavin.

WILLSON, District Judge. This case was referred to a master in chancery, to inquire and report, whether the defendant, Patrick Lavin, by his judgment rendered in this court, at the July term, for $24,640 and costs, against the Clinton Line Railroad Company, obtained a lien upon the lands of said company, and if so, to what extent. The master, on the 5th of January, 1861, filed his report, in which, without giving any reason for his conclusion, he says that the judgment of said Lavin is not a lien upon any part of the lands of said railroad company.

To this report the counsel for Lavin have filed exceptions, on the ground that the finding of the master is erroneous and contrary to law, in this: 1st—In finding and declaring said judgment not to be a lien on said company's land; and 2d—In his failing to find

[1] [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

and declare said judgment to be a lien, prior and superior to the complainant's mortgage upon all of said company's land, situate in the counties of Portage, Geauga and Trumbull.

It appears from the record in this case, that the cause of action upon which Lavin recovered his judgment against the company, was for work and labor in grading the road-bed; for constructing culverts and furnishing materials for the same, and generally, for labor and materials furnished in preparing the road of said company for its iron track.

The judgment was rendered in July, 1856, and execution issued on the 19th of April, 1859, and was levied upon lands belonging to the company, situate in the counties of Portage, Geauga and Trumbull. The complainant has brought this suit in equity to foreclose a mortgage given by said railroad company to him as trustee for the security of certain creditors, holders of the bonds of the company, which bonds are accurately described in the trust deed. This mortgage covers, in its terms, the road and real estate of the corporation. It was recorded in the county of Summit, on the 3d day of October, 1855. But it was not received for record, or recorded in the counties of Trumbull, Geauga and Portage, until 1857, and after the rendition of said judgment in favor of Lavin.

The Clinton Line Railroad Company is a corporation organized under the act of the general assembly of Ohio, passed May 1, 1852. Its terminii are fixed and established in the town of Hudson, in the county of Summit, and a point in the Ohio and Pennsylvania state line, in the county of Trumbull. The road has been surveyed and located on a route running through the counties of Summit, Portage, Geauga and Trumbull. Only a portion of the entire line of the road-bed has been graded; no iron rails have been placed upon it, and no equipments have been acquired by the company for operating the road. It seems to be admitted by all parties, that the corporation has abandoned the project of completing the road; that it is insolvent, and that its property must be sold to pay its debts.

This, then, is a contest between creditors for a priority in the distribution of the fund to arise from the sale of the property belonging to an insolvent railroad corporation, whose road cannot be finished and operated by a receiver. And the question is, does the judgment of Lavin operate as a lien upon the lands acquired by the company, for the construction and operation of its road, and upon the road itself?

In determining this question of lien, we are to be governed by the laws of the state of Ohio, and the construction given to those laws by the supreme court of the state. The four hundred and twenty-first section of the Ohio Code of Civil Procedure, provides, that "the lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term, at which judgment is rendered." Swan, St. 675.

The limits of a federal judicial district, (in the exercise of the jurisdiction of the U. S. circuit court,) is, as the limits of the county to the local courts. The principles of the state law are adopted, but the instruments which give effect to those principles are necessarily different, as they are made to operate throughout a more extended jurisdiction. In Sellers v. Corwin, 5 Ohio, 400, the supreme court of Ohio decided that the lien of a judgment in the circuit court of the United States, was co-extensive with the territorial jurisdiction of the circuit court. This effect and extended operation of judgment liens in the federal courts, is equally as well established in other states. Lombard v. Bayard [Case No. 8,469]; Koning v. Bayard [Id. 7,924]; Shrew v. Jones [Id. 12,818].

The lien, therefore, of a judgment rendered in this court, has the same effect and operates to the same extent upon the debtor's land throughout the Northern district of Ohio, as the lien of a like judgment, rendered in the state court, operates upon the debtor's land in a county. The language of the statute is clear and explicit, that the land and tenements of the judgment-debtor shall be bound for the satisfaction of the judgment.

Ordinarily such lien attaches only to lands in which the debtor has the legal title. But, by the judgment of the highest judicial tribunal of the state, a railroad and the lands necessary for its operation, (by whatever title such lands are held) together with the franchise of maintaining the road and demanding compensation for the transportation of passengers and property, constitutes real estate—possessing the unity and character of a tract of land, and as such, is subject to appraisement and the other incidents of a judicial sale of land. If this doctrine is correct, we do not see why the judgment-lien is not effectual on such property, and secures to the creditor a right equal to that of a mortgagee, whose security on such railroad property is obtained by the voluntary act of the debtor corporation.

It has, however, been urged by counsel, that insolvent railroad corporations furnish exceptional cases, not by reason of any general law of the state, or by virtue of any exemption in the law of their creation, but solely upon considerations of public policy. And the case of Coe v. Columbus, P. & I. R. Co. [10 Ohio St. 372], decided last April by the supreme court of Ohio, is cited by counsel as an authority for the doctrine.

When a statute of Ohio has been interpreted or construed by the supreme court of the state, such interpretation or construction is followed and adopted by this court, if not in conflict with the constitution and laws of

the United States. The case of Coe v. Columbus, P. & I. R. Co., involves the construction of the act of the Ohio legislature of February 11, 1848, in relation to the powers and liabilities of railroad corporations organized under its provisions.

The Clinton Line Railroad Company derives its powers from the act of May 1, 1852. The fifteenth section of this law provides that "such company may acquire by purchase or gift any lands in the vicinity of said road, or through which the same may pass, so far as may be deemed convenient or necessary by said company to secure the right of way, or such as may be granted to aid in the construction of such road, and the same to hold or convey in such manner as the directors may prescribe," etc. And the third section of said act, among other things, provides that said railroad company shall have power to contract and be contracted with, to sue and be sued, to acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation.

The first and fourteenth sections of the act of February 11, 1848, contain, substantially, the same provisions as are embraced in the third and fifteenth sections of the act of May 1, 1852. Hence, the construction which the supreme court of Ohio has given to the act of 1848, must be deemed the true and authoritative construction which should be given by this court to the act of 1852, in cases where that construction properly applies. But the case of Coe v. Columbus, P. & I. R. Co., is distinguishable from the case before us in many important particulars.

That was a proceeding in equity to foreclose a mortgage, given by the railroad company, upon its entire property to a trustee, for the benefit of bondholders. The company at the time of the commencement of the suit, had finished the construction and equipment of the road, and was operating the same in the transportation of freight and passengers. The relief asked for was a sale (under an order of court) of the entire road, including the real and personal property of the corporation with its franchises.

The court held, that under the general powers conferred by the act of February 11, 1848, the company had no authority to alienate the franchise "to be a corporation;" but that the railroad, with its fixtures, constituting an entire tract of real estate—(indivisible for the purpose of sale) together with certain franchises connected therewith, should be sold in like manner as an entire tract of land lying in two or more counties.

In that case there was no substantial question in relation to conflicting liens between judgment creditors and mortgagees. It is true, it appeared that one Hilliard had recovered a judgment against the company, for money advanced, and had levied execution upon a part of the railroad, rails, superstructure, etc. But the recovery by Hilliard of his judgment, and the levy of the execution, were transactions subsequent in time to the giving and recording of the mortgage, and after the commencement of the suit for foreclosure, and while the road and all the property of the corporation were in the hands of the receiver, appointed by the court. The property of the company was thus placed in the custody of the law, and when so held by its proper officer, it could not be the subject of a judgment-lien or levy of an execution.

Yet, it was urged that inasmuch as the consideration of the debt for which Hilliard obtained judgment, was for money advanced in the payment of interest and taxes, and for the right of way, he had an equitable claim as against the mortgagee, and the learned judge, who delivered the opinion of the court, said "those who advance money, or sell on credit to the directors of the company, are bound to take notice of the claim which will arise under the mortgages, which are required by law to be recorded in each of the counties through which the road passes. If they part with their money or property without taking security, we know of no principle upon which one can be created for their benefit. We are not inclined to exempt the company or the mortgagees from the application of any rule of law which could properly apply to the dealings between them, or to the property which is the subject of those dealings, and which would secure or protect the just claims of third persons."

What effect the court would have given to Hilliard's judgment had it been obtained previous to the execution and recording of the mortgages, we are left to conjecture from what is said in another part of the same opinion. The learned judge says: "It may be true that a railroad corporation holds its property in a certain sense, as a public trust, to answer the purpose of a public highway for the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involved obligations to individuals, and to meet those obligations the property of the corporation must in some form be liable. The question is, in what form? Shall it be in the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced, which may have the effect to delay creditors and operate as a shield to protect property from their just demands?"

Again, he says: "We are satisfied that it is not the policy of the state, nor just to individuals, that the power of a court should be invoked to enable an insolvent corporation to operate a railroad, by protecting its

property from the claims of creditors, of those who have performed for it labor, or have suffered loss or sustained injuries by the misconduct of its agents. We think the true policy of the state requires, that just demands should be met, and that the property of those, against whom they exist, should be applied for the purpose."

The supreme court of Ohio, in the case referred to, fully approve of the well established principle, that the mere grant to a body corporate, in the absence of any restriction, gives the right to acquire and dispose of real estate; and in such case a corporation may be regarded as occupying the position of an individual owner of land. There is the same voluntary alienation and a like liability to involuntary alienation. What a corporation can convey its creditor may subject.

We can see nothing in the railroad policy of the state, as interpreted by the supreme court, or in the act of May, 1852, which should exempt from judgment liens, the lands and road owned by the Clinton Line Railroad Company. Its power to pledge lands, by way of mortgage to pay creditors, implies the right of a creditor to subject such lands, by legal proceedings, to the payment of its debts. The law of its charter confers the power to acquire lands, and "the same to hold and convey in such manner as the directors may prescribe." The power to convey is without any restriction as to mode or purpose. In that respect the corporation has all the freedom of action which belongs to natural persons. Its power of alienation, therefore, whether voluntary or involuntary, should be subject to the incidents which attach to individuals.

With this view of the case, we are clearly of the opinion, that the lands and road of the Clinton Line Company are subject to the operation of the general law of the state, which law declares, that the lands and tenements of the judgment-debtor shall be bound for the satisfaction of the judgment.

The next question is, how may Lavin enforce his judgment lien? or, in other words, in what way can it be legally made available to him? It is against the declared policy of the state to disintegrate a line of railroad by a sale of a portion of the land over which it runs. The whole road, and the land necessary for its operation, together with the franchises of the corporation to maintain the railroad and demand compensation for the transportation of passengers and property, must be sold, and for the purposes of the sale, such property is to be considered as one tract of land, lying in different counties, and subject to appraisal and the forms of law usual in other cases of a judicial sale of lands. The proceeds of the sale will be brought into court for distribution according to priority of liens.

This course of procedure is the one established by the supreme court of the state in relation to the sale of railroads, and one which we do not feel at liberty to vary in this case. The complainant having caused his mortgage to be recorded in the county of Summit before Lavin obtained his judgment, the mortgage has priority over the judgment upon the road and lands of the company situate in that county. But, as the complainant failed to record his mortgage in the counties of Portage, Geauga and Trumbull, until after the rendition of the judgment, the judgment has priority over the mortgage upon the road and lands of the company in those counties.

There must be separate appraisals of the two portions thus designated, but the entire road and lands may be sold as one tract, at not less than two-thirds of the aggregate appraisal. The exceptions to the master's report are sustained.

LUDLOW (LANE v.). See Case No. 8,052.

LUDLOW (McSORLAY v.). See Case No. 8,927.

LUDLOW (WINTER v.). See Case No. 17,891.

Case No. 8,601.

In re LUDWIGSON.

[3 Woods, 13.] [1]

Circuit Court, D. Louisiana. Nov. Term, 1876.

BANKRUPTCY—DISCRETION OF COURT—ORDER FOR THE SALE OF REAL PROPERTY.

1. A bankrupt court should not make an order for the sale of real estate returned by the bankrupt, on the ground that the title is in dispute, when the liens upon the property exceed its value.

2. Where the title to one undivided half only of certain real estate returned by the bankrupt is in dispute, the bankrupt court is not authorized by section 5063 of the Revised Statutes to order a sale of the entire property.

3. It is doubtful whether the order, in a summary proceeding, of a bankrupt court directing the sale of real estate returned by the bankrupt, on the sole ground that the title thereto is in dispute, can be considered that due process of law to which the party who disputes the bankrupt's ownership is entitled.

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

The petition was filed by the children of the bankrupt, John H. Ludwigson, for the review of an order of the district court, made by virtue of section 5063 of Revised Statutes, directing a sale of certain real estate returned by the bankrupt on his schedule as a part of his estate. The section referred to provides that "whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of an assignee, or which is claimed by him, is in dispute, the

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

court may, upon petition of the assignee and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of, and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale." Ludwigson, the bankrupt, placed upon his schedule of property surrendered, certain real estate situated in the city of New Orleans. This property was acquired by him during his coverture with his wife, to whom he was married in August, 1850, and who died in 1867. The petitioners in review, the children of Ludwigson, claimed that the said real estate was community property, and that on the death of their mother, the wife of Ludwigson, one undivided half of it descended to them as her heirs. The assignee of Ludwigson on the 17th day of March, 1875, filed a petition in the district court praying for an order to sell said real estate, free of incumbrances. But it having been made to appear that the liens upon the property far exceeded its value, the court refused to make the order prayed for, and dismissed the petition. Afterwards, on April 5, 1876, the assignee filed his petition for the sale of said real estate, on the ground that the petitioners in review had set up a claim to an undivided half thereof, and prayed that the same might be sold as property which was claimed by the assignee and the title whereof was in dispute. The district court, upon this petition, ordered the entire property to be sold. The purpose of this petition is to review this order.

Joseph P. Hornor, for petitioner.
A. Micou, for assignee.

WOODS, Circuit Judge. The order of the district court is erroneous in that it orders a sale of property which is not in dispute. It appears from the petition filed in the district court that the heirs of Mrs. Ludwigson set up title only to the one undivided half of the property in question, and that the title to such undivided half only is in dispute. Yet the order is for the sale of the entire estate. As the order is based on the sole ground of disputed title, the order to sell should be limited to the property in dispute. But should any portion of the property have been ordered to be sold? The same reason which induced the district court to refuse an order to sell the property free of incumbrances, to wit, that the incumbrances largely exceeded the value of the property, and that the general creditors had no interest in having the property sold, ought to have prevailed in this case. The property appears from the evidence to be worth only $4,000, and the incumbrances are three or four times that sum. The general creditors have no interest in the property, and the assignee no concern in bringing it to sale. And the fact that the title to property is in dispute is a good reason why the court should be slow to order a sale, unless it be absolutely necessary to the proper administration of the bankrupt estate. The power to sell the estate of another simply on the ground that it is claimed by an assignee in bankruptcy, is a high-handed one. Whether a sale ordered by a bankrupt court in a summary proceeding, and solely on the ground that there is a dispute touching title of the property, can be called due process of law is, to my mind, very doubtful. Under this provision of law the claimant may be deprived of the realty of which he is in possession, asserting title simply because another person sets up title thereto. See Greene v. Briggs [Case No. 5,764]; Hoke v. Henderson, 4 Dev. 15; Taylor v. Porter, 4 Hill, 146; Vanzant v. Waddel, 2 Yerg. 259; Bank of the State v. Cooper, Id. 599; Jones' Heirs v. Perry, 10 Yerg. 59. At all events it seems clear that no court should exercise the power, except in cases of absolute necessity. As in this case there was no reason why the assignee should ask a sale, the general creditors of the estate having no interest in the property, I am of opinion that the order of sale was improvidently made, and ought to be set aside. Ordered accordingly.

LUKE (VOSS v.). See Case No. 17,014.

LUKINS (U. S. v.). See Cases Nos. 15,638 and 15,639.

Case No. 8,602.

The LULIE D.

[4 Biss. 249.] [1]

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

JUDGMENT—ASSIGNMENT—PAYMENT WITHOUT NOTICE—SILENCE OF ASSIGNEE.

1. Payment to original judgment creditor, made at any time before the judgment debtor has notice that the judgment is assigned, is valid.

2. When a judgment debtor pays to the judgment creditor a part of the amount of the judgment by agreement between them that such payment shall operate as a full satisfaction, such agreement is void, as wanting a sufficient consideration.

3. When a judgment creditor assigned his judgment to a third person, and the debtor, hearing a rumor that the judgment has been assigned, but not understanding to whom it was assigned, applied to the assignee for information on that point, and the assignee refused to tell him who was the assignee: *Held* that, under such circumstances, the debtor might safely pay to the original judgment creditor.

In admiralty.

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

McDONALD, District Judge. In a proceeding in admiralty in this court, Stephen Groves, on the 28th of February, 1868, recovered judgment for the sum of four hundred and fifty-nine dollars and twenty-nine cents. Pending this proceeding, divers other persons intervened for small claims against the steamboat Lulie D., and, on the same day, they recovered judgment for divers small sums respectively, amounting in the aggregate to two hundred and eight dollars and seventy-five cents.

The proceeding was originally in rem. Under it the vessel was seized. Afterwards, Anthony J. Cavender, the owner, under the provisions of the act of congress, filed a delivery bond with William Dunbridge and John M. Grace, as sureties thereto. Upon this, the steamer was redelivered to Cavender. On this condition of the case, the said judgments were, by virtue of the act of congress, rendered on the bond against Cavender, Dunbridge, and Grace. An execution has been issued on these judgments. On a petition filed on the 23rd of July, 1868, by Cavender, he now moves for the entry of satisfaction of these judgments, and for an order that the marshal return the execution. None of the judgment creditors, except Groves, make any opposition to this motion. Groves and one David D. Doughty appear by counsel and oppose it.

The evidence in support of the motion and in opposition to it is substantially as follows:

Cavender produces and proves the receipts of all the judgment creditors, except Henry Reno, acknowledging payment in full respectively of each judgment and costs, and directing the marshal to return the execution. He also produces the receipt of the clerk for all the costs taxed, and for thirty-three dollars and seventy-eight cents, the full amount of Henry Reno's judgment.

Doughty, who claims as assignee of the judgment in favor of Groves, produces and proves an assignment to him by Groves of this judgment, dated March 5, 1868. This assignment was not made of record and witnessed by the clerk, as required by the Indiana statute. 2 Gavin & H. 366.

It is proved that before Groves made said receipt to Cavender, which is dated June 26, 1828, Cavender heard a rumor that Groves had assigned said judgment to some person; but he did not hear to whom. Thereupon, Cavender applied to Doughty and to Doughty's attorney to learn to whom the assignment had been made. They both told him that the judgment had been assigned; but they refused to tell him the name of the assignee. Cavender never had notice that Doughty was the assignee till after he procured said receipt from Groves.

The assignment to Doughty was filed in the clerk's office among the papers of this case on the first of July, 1868. Doughty paid, in consideration of this assignment, only five dollars. Cavender paid to Groves, in consideration of the receipt acknowledging satisfaction of the judgment, only twenty dollars.

This is the substance of the whole proof; and the question is, what ought to be done under it?

As to those judgment creditors, who have respectively acknowledged satisfaction of their judgments, and who do not resist this motion, I have no hesitation in holding that satisfaction of their judgments ought to be entered. And the same may be said in regard to the judgment in favor of Henry Reno. But what shall be done in respect to the judgment in favor of Groves?

As to the assignment of this judgment to Doughty, I feel no difficulty. It was not made according to the provisions of the Indiana statute; consequently it has no effect other than what the common law gives to it. Cavender was not bound by it till he had notice of its existence. The rumor that came to his ears was no notice; it was not sufficient even to put a prudent man on inquiry, so as to make inquiry a duty. 4 Kent, Comm. 179; Flagg v. Mann [Case No. 4,847]; Foust v. Moorman, 2 Ind. 17. When Cavender applied to Doughty and his attorney for information on the subject of the assignment, they both refused to tell him to whom the judgment was assigned, though they then knew it was assigned to Doughty. This concealment on their part estops Doughty from insisting that Cavender had then notice of the assignment. It is like the case of the owner of property, aware of his rights, standing by and seeing it sold, and making no objections. Cavender had no notice of the assignment of the judgment till after his arrangement with Groves to satisfy it. The assignment, therefore, cannot affect the validity of that arrangement.

But was the arrangement itself valid as a full satisfaction of the judgment? The judgment was for four hundred and fifty-nine dollars and twenty-nine cents. Cavender paid on it twenty dollars, which was the only consideration on which Groves executed the receipt in which full satisfaction of the judgment is acknowledged.

It is undoubtedly the law that an agreement by a creditor to receive on a debt due him a less sum than the debt, though he actually accepts the less sum in full satisfaction of the whole debt, is a void agreement, as not being supported by a sufficient consideration. Such an agreement the present appears to be. Cavender could not, by paying twenty dollars on this judgment, satisfy it. This sum could go no further than its amount towards satisfying the judgment.

As to the motion to have the execution called in, I allow it. All the judgment creditors, except Henry Reno, whose judgment is fully paid, have under their hands ordered the marshal to return the execution. I think, therefore, that he ought to return it. And on the whole case, my decision is: That all

the judgments, except that in favor of Groves, be entered satisfied; that satisfaction to the amount of twenty dollars be entered as to the judgment in favor of Groves; that full satisfaction of all the costs that have been taxed be entered; and that the execution now in the hands of the marshal be forthwith returned to the clerk of this court. I further order and adjudge, that, as against each of the judgment creditors, Cavender recover the costs of this motion arising between him and them respectively; and that, as between Cavender and Groves, each pay his own costs.

Consult Cavender v. Grove [Case No. 2,530]; Booth v. Farmers' & Mechanics' Nat. Bank, 50 N. Y. 396; and Cumber v. Wane, 1 Smith, Lead. Cas. 646,—where the doctrine of satisfaction of judgments or other legal claims at less than their face is elaborately discussed and the authorities collated.

Case No. 8,603.

LULING v. RACINE.

[1 Biss. 314;[1] 8 Am. Law Reg. 603.]

District Court, D. Wisconsin. April, 1860.

LAW AUTHORIZING CITY TO ISSUE BONDS, NOT A GENERAL LAW—BONDS VALID THOUGH ACT PUBLISHED AS PRIVATE ACT—PAYMENT OF INTEREST, &C., AFFIRMANCE OF BONDS.

1. Where the constitution of a state requires that all general laws shall be published before going into effect, a legislative act authorizing a city to issue bonds for stock in a railroad company, is not a general law within the constitutional provision, and the bonds are valid, although the act was not published before they were issued, and then in the volume of private and local acts.

2. The city issuing such bonds in pursuance of the act cannot controvert the constitutional power of the legislature to declare, in the body of the act, that it shall take effect immediately after its passage.

3. Where the city authorities paid the interest on the bonds for several years, and the inhabitants of the city elected commissioners to represent the stock received for the bonds, while they were passing as promissory notes payable to bearer, such acts are in affirmance of the bonds in favor of a bona fide holder, and he was not bound to look further.

4. An act authorizing a city to issue bonds payable in twenty years, allows the city to make the bonds payable in twenty years from the act, and the bonds are valid, although not made payable twenty years from their date.

At the trial of this cause it was shown that the legislature of this state passed an act, entitled, "An act to authorize the city of Racine to aid in the construction of certain railroads," approved February 10, 1853, and authorizing the city council to borrow on the credit of the city, three hundred and fifty thousand dollars for twenty years, in such sums as they might deem proper, on interest not exceeding seven per cent., payable annually in the city of New York, for the purpose of investing three hundred thousand dollars of the same in the capital stock of a railroad company, authorized to construct a railroad from the city of Racine westerly towards the Mississippi river, and fifty thousand dollars to the capital stock of a company authorized to construct a railroad on the shore of Lake Michigan, or, in case the money should not be borrowed, to subscribe for so many shares of the capital stock of those companies in the proportion above named, and pay for the same in the bonds of the city, payable as above stated. The shares of the stock in the said railroad companies, and the dividends arising from them, were pledged for the payment of the principal and interest of the city bonds. The city council shall annually levy a tax upon the taxable property of the city, sufficient to pay the interest of such bonds, after deducting the dividends due the city on the shares of stock. The legal voters of the city, at each annual election, shall choose one railroad commissioner, who shall attend the annual meeting of the stockholders of said corporations, for the election of directors thereof, and shall be entitled to cast one vote for every share of stock which said city shall hold in said corporations, respectively. And this act shall take effect immediately. The act was first published in the month of October, 1853, in the volume of private and local acts, passed by the legislature of Wisconsin, in the year 1853. A resolution of the common council, authorizing the issue of bonds to the Racine and Mississippi Railroad Company, in pursuance of the act, was read. The bonds bear date March 15, 1853, and it was proven that they were all issued by the month of May following. The bonds are payable on the tenth day of February, 1873, to the Racine & Mississippi Railroad Company, or to the holder thereof, at their office in the city of New York, with interest thereon at the rate of seven per cent. per annum, payable annually on the tenth day of each February thereafter, for stock subscribed by the city in the said company. And the company agrees that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special indorsement, or by delivery, as if the same were a note of a hand payable to bearer. The mayor of the city annexed certificate to each bond that it was issued by the city, in pursuance of a special act of the legislature of the state of Wisconsin, entitled "An act to authorize the city of Racine to aid in the construction of certain railroads," approved February 10, 1853, and by an unanimous vote of the city council of said city, passed March 15, 1853. Appended to each of said bonds are coupons, signed by the mayor of the city, for seventy dollars each, for the payment of the annual interest. The coupons for the interest payable in the years 1854, 1855, 1856, 1857 and 1858, were detached from the bonds. This suit was to recover the contents of the coupons payable in February, 1859, on thirty of

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

the bonds. The bonds are not indorsed. It was conceded that the stock was issued and the railroad commissioners were elected to represent the city at the annual elections of the railroad company. It was contended at the trial that the bonds were illegal, and not binding on the city, as the act of the legislature had not been previously published, and because they are made payable before twenty years. The court, pro forma, overruled these points and directed the jury to find a verdict for [two thousand and one hundred dollars] [2] the amount of the face of the coupons. [With request to the counsel to move for a new trial, which was done. The motion having been argued is now to be disposed of.] [2] Motion for new trial.

Strong & Fuller, for plaintiff.
A. W. Farr, for defendant.

MILLER, District Judge. The constitution of this state directs that "the legislature shall provide by law for the speedy publication of all the statute laws, and of such judicial decisions made within the state as may be deemed expedient. And no general law shall be in force until published." The legislature did provide by law for the publication of all the statutes or acts, and in pursuance of the law, the act in question, with similar acts, was published. The act is particularly stated on the face of the bonds, by the certificate of the mayor, to be the authority under which they were issued by the city, and on the faith of the act in force immediately after its passage, the plaintiff purchased them.

Under the authority of the case of Board of Com'rs of County of Knox v. Aspinwall, 21 How. [62 U. S.] 539, the city is concluded by its representations on the face of the bonds, in regard to its authority for issuing them, and cannot go behind them, to show irregularities in the preliminary proceedings required by the act. In the opinion, the court says, "The act in pursuance of which the bonds were issued is a public statute of a state, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it, and as the board were acting under delegated authority, he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determining this question, and upon looking into it we see that full power is conferred upon the board to subscribe for the stock and issue the bonds." And it is there decided that the purchaser of the bonds was not bound to look further for evidence of a compliance with the conditions to the grant of the power. In the case of Royal British Bank v. Tarquand [6 El. & Bl. 327], cited in the opinion, the court says: "We may take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute, and the deed of settlement. But they are not bound to do more." I do not think that the supreme court intended, by the words "public statute," to convey the idea that the act under which the bonds were issued was a general law affecting the whole people of the state, but a statute publicly passed by the legislature, according to the constitution of the state.

It is the duty of courts to enforce statutes, as prescribed by the law-making power, and to put such construction upon them as will carry into effect their object. It must be a very clear and unequivocal case, to induce a court to pronounce an act of the legislature unconstitutional or invalid. It is by no means the duty of a court of justice so to construe a statute as to retard its operation, or to affect contracts made in pursuance of it. The universal practice of the state government has been to consider acts similar to the one under consideration of the character of special acts in force from and after their passage, and to publish them according to the law, for that purpose, in the volume of local or private acts. And the general opinion of jurists and citizens is, that legislative acts similar to this one are grants of power to municipal corporations for local or special objects, and are not general laws affecting the whole people of the state. But in my opinion the question attempted to be raised cannot be considered a legitimate matter of defense. The obligor in the bonds cannot contest, by plea or otherwise, the constitutional power of the legislature to declare in the body of the act, that it shall take effect immediately after its passage. The legislature passed the act, and the state authorities published it, as a private local act. The law-making power of the state has concluded the question.

The act carried on its face all the legislative forms and requirements of a valid and constitutional statute, in force from the day of its passage. The legislature passed the act as a private or local act, to take effect immediately, and not from its publication. As such private act, the people and authorities of Racine accepted it. As such, the city council unanimously authorized the bonds to be issued, in pursuance of its authority. And the mayor and city clerk issued them under the corporate seal. The plaintiff was not bound to look beyond the act.

Even if the act should be considered by the court to be a general law, in the sense of the constitution, affecting the whole people of the state, and which should have been published before going into effect, contrary to the legislative declaration and intention, yet the contract was entered into by the city with this plaintiff, under a law acknowledged by all parties to be valid at the time this plaintiff parted with his money. This plaintiff is before the court as a bona

[2] [From 8 Am. Law Reg. 603.]

fide holder of the bonds and coupons, for a valuable consideration, innocently paid on the faith of the validity of the act, and the court cannot, by a technical construction of the act, release the city from the payment of a just debt. Under the authority of the act, the city issued the bonds, and on the faith of it the plaintiff purchased them, and the court will not allow a supposed technicality to defeat the recovery of a debt thus honestly contracted. If the question here attempted to be raised were available, any tax-payer of the city, by a proper application to the circuit court of Racine county, might have restrained the city from issuing the bonds.

I disclaim any conflict in this opinion with decisions of the supreme court of the state, as contained in manuscript opinions of judges of that court. That court, in those cases, considered the matter then decided a legitimate defense, which this court does not. It is not unusual for the courts of the states and of the United States, to disagree in their rulings. The rules of practice and the principles controlling the action and decisions of the different courts are in many instances very dissimilar, and in no respect binding on each other. It is the approximate duty of the supreme court of the state to construe the constitution and statutes of the state, and it is the bounden duty of this court to adopt such construction, in cases involving or requiring it, but not where the construction, contended for on behalf of a party, is not recognized as a legitimate matter of defense.

The act was approved February, 10th, 1853, [which authorized the city of Racine to issue the bonds payable in twenty years. The bonds are payable February 10, 1873],[3] and the coupons are payable on the 10th of February in each year. The bonds bearing date March 15, 1853, did not allow twenty years, nor one full year, for the first year's interest to run. This is not a suit for the principal of the bonds, nor for the first year's interest, and consequently that objection to these bonds is not tenable.

The city authorities put their own construction upon the act, and carried it out by issuing bonds as they did, and approved their acts by paying the annual interest on the bonds for several years after the publication of the act, and receiving certificates of stock of the railroad company as consideration for the bonds.

And as the people of the city approved of all this by electing commissioners, under the act, to represent the stock thus received for the bonds, at the annual elections of the company, while the bonds were in circulation as promissory notes, payable to bearer; I think they should not be permitted to object to the validity of their own acts. The people of the city of Bridgeport confirmed similar bonds to these. City of Bridgeport v. Housatonic R. Co., 15 Conn. 475. The motion for a new trial will be overruled and judgment entered on the verdict.

NOTE. The rulings of the supreme court of Wisconsin will be found in the following cases: The charter of the city of Janesville, authorizing a vote to be taken on the question of issuing bonds to aid in the construction of a railroad, was published in the private acts, and the certificate of publication attached to the volume was dated October 4, 1853, *held*: by the supreme court of Wisconsin, that the charter was first published by authority at the date of the certificate, and that it did not authorize the common council to pass an ordinance, and the people to vote on the question in July, nor the council to issue the bonds in August previous to the authoritative publication. Every person taking these bonds is chargeable with a knowledge of this want of authority. Cole, J., dissenting. Clark v. City of Janesville, 10 Wis. 136. The charter is a general law, within the provision of article 7, § 21, of the constitution of Wisconsin, which requires that "no general law shall be in force until published." The words, "general law," as here used, have the same meaning as "public act," in the ordinary acceptation, and they are convertible terms. Id. Bonds issued by the officers of a town pursuant to a vote of the people thereof, before the law authorizing such vote and issue of bonds was published, are void. Town of Rochester v. Alfred Bank, 13 Wis. 432, affirmed in Berliner v. Town of Waterloo, 14 Wis. 378. For a full citation of authorities on the subject of municipal bonds, see Schenck v. Marshall Co. [Case No. 12,449], decided by Drummond, J., June term, 1866. In Marcy v. Ohio [Id. 9,457], decided in the Northern district of Illinois, in March, 1873, Drummond, J., holds, that a bona fide holder of coupons payable to bearer, issued by a town by virtue of a special act of the legislature, is not bound to prove that every prerequisite has been complied with, and that a mere irregularity in the form of an election does not constitute a good defense as against him. Consult also Mygatt v. Green Bay [Id. 9,998], and Goedgen v. Manitowoc County [Id. 5,501]. For an elaborate discussion of the bonds and contracts of municipal corporations, see Dill. Corp. §§ 370–426.

[See Case No. 1,213.]

LULL (BROWN v.). See Case No. 2,018.

LULL (KEMBLE v.). See Case No. 7,683.

Case No. 8,604.

The LULU.

[1 Abb. (U. S.) 191; Chase, 162; 1 Am. Law T. Rep. U. S. Cts. 103; 1 Balt. Law Trans. 52.] [1]

Circuit Court, D. Maryland. April Term, 1868.[2]

"FOREIGN PORT"—MARITIME LIEN FOR SUPPLIES.

1. A port in another state from that in which a vessel is enrolled and registered, is deemed, in the absence of special facts controlling the question, a "foreign" port, within the rule which confines the maritime lien for supplies to cases of supplies furnished in a foreign port.

2. To entitle a material-man to claim a maritime lien upon a vessel for supplies furnished to

[3] [From 8 Am. Law Reg. 603.]

[1] [Reported by Benjamin Vaughan Abbott, Esq., and by Bradley T. Johnson, Esq., and here compiled and reprinted by permission.]

[2] [Reversed in 10 Wall. (77 U. S.) 192.]

her in a foreign port, upon the order of the master, he must show that the supplies in question were necessary to the vessel, and also that some special exigency or necessity existed to require the master to obtain them upon the credit of the vessel. To show only that the supplies were needed, is not enough.

[See note at end of case.]

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

Hearing upon several libels for repairs and supplies. The principal suit was brought by the persons composing the firm of Skinner & Forsyth, for repairs made upon the steamer Lulu. It was heard with other suits for supplies.

CHASE, Circuit Justice. This is a suit in admiralty to enforce a lien claimed upon the steamer Lulu, for repairs made upon her by the libelants at the request of the master. It is consolidated with other suits, all brought by material-men for supplies or repairs to the vessel. The Lulu was a steamer owned in New York, which was her home port, but employed in the trade between Baltimore, in Maryland, and Charleston, in South Carolina. When the libel was filed she had been in the trade about eleven months—from April, 1866, to March, 1867. The repairs and supplies for which satisfaction is sought, were furnished in Baltimore, during and after July, 1866; but chiefly in November and afterwards. They were furnished at fair prices, and were proper and necessary.

In each suit the New York Guaranty & Indemnity Company has filed a claim and answer, asserting a prior right to satisfaction out of the proceeds of the steamer; which has been sold under an order of the court. The claim of this respondent is founded upon a bill of sale made to the company on August 24, 1866, by the former owners of the Lulu, in consideration of twelve thousand dollars. This bill of sale, though in form absolute, was intended as a mortgage to secure repayment of the advance, in six months from the date; but no part of it has been repaid.

The only question in this cause is, whether the material-men, under the circumstances of the case, had a lien for their repairs and supplies; for if they had, this lien is superior to that created by the bill of sale or mortgage, whether prior or posterior in time. It was insisted on the argument, that Baltimore was the real home port of the Lulu, and that there could be no lien for repairs and supplies furnished in the home port; and this might be a material circumstance in the decision of the case, if it appeared that the Lulu was chartered to citizens of Baltimore, for the Charleston trade. Such a charter might be considered as transferring her home port from New York to Baltimore; especially when taken in connection with the proved facts of the case, which show that Baltimore might very fairly be called the actual home of the Lulu, during the time of the transactions in controversy. But there is no evidence of such a charter; and it is clear that under the American decisions, Baltimore, being in another state than that in which the vessel was owned and enrolled, must be regarded as a foreign port; and that, in a proper case, material-men would be entitled to a lien for supplies there furnished.

The question then occurs: "Were the repairs and supplies in question furnished under such circumstances as would entitle the material-men to the liens which they claim?" The general rule applicable to this class of cases was first laid down in The General Smith, 4 Wheat. [17 U. S.] 443, as follows: "When repairs have been made or necessaries have been furnished to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in the admiralty to enforce his right." The same rule, in substance, was affirmed in Peyroux v. Howard, 7 Pet. [32 U. S.] 324; in The Nestor [Case No. 10,126]; and in several other cases. The nature and degree of necessity essential to the creation of a lien for repairs and supplies was much considered in the case of The Laura, or Thomas v. Osborn, 19 How. [60 U. S.] 28, 35. The court then said, in substance, that it is only in case of necessity that the master can hypothecate the vessel by a bottomry bond or other express obligation, or create a lien by obtaining repairs and supplies on her credit (page 30), and that, to constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them (page 31). If the master has funds which he ought to apply in payment, but does not, and the furnisher knows this fact, or has the means by due diligence to ascertain it, then no case of actual necessity to have a credit exists, and no maritime lien is created by furnishing repairs and supplies. The rule on this point was stated by Chief Justice Taney, who, with Justices McLean and Wayne, dissented from the judgment of the majority, somewhat less stringently, as follows: "That repairs and supplies in a foreign port, if necessary to enable a vessel to proceed, are presumed to have been furnished and made on the credit of the vessel, unless the contrary appears, as well as on that of the master and owners; and creates a lien which may be enforced in admiralty." Page 38. The difference between the court and the dissenting justices on this point was that the former held that, in order to the creation of the lien, there must be a necessity for the credit as well as a necessity for the supplies, while the latter seem to have thought that if the supplies were necessary the credit may be presumed.

The same subject was further considered

at the same term in the case of The Sultana, or Pratt v. Reed, 19 How. [60 U. S.] 359. That case was in its general features much like the cases now under consideration. It was a libel against the steamer Sultana for supplies of coal furnished from time to time, from June, 1852, to May, 1854, and the lien for supplies was contested by the answer, which set up a claim under a prior mortgage on the steamer, dated October 31, 1863. The court held that the material-man had no lien, and decreed the proceeds to the mortgagees. The court stated the rule thus: The proof of a necessity at the time of procuring a supply for a credit on the vessel * * * "is as essential as that of the necessity of the article itself." It is only under very special circumstances and in an unforeseen and unexpected emergency that an implied maritime hypothecation can be created.

The decision of the case was not put upon the ground that the supplies were unnecessary, but upon the ground that there was no sufficient proof of a necessity for the implied hypothecation of the vessel, or of any unexpected or unforeseen exigency that required it.

A distinction between the cases now to be adjudged and the cases thus decided was attempted in the argument; but I find myself unable to make any which has substance. That decision was by a unanimous court, and was on the very point which must govern these cases; namely, the necessity of the credit; and I am unable to discover any very special circumstances, any very unexpected and unforeseen emergency in these cases which will take them out of the application of the rule which the decision cited establishes. The repairs and supplies in all of the cases now presented were furnished in the ordinary course of trade, and under ordinary circumstances. There is no proof whatever of any unusual exigency. Except in the case of Coleman v. Bailey [Case No. 2,981a], there is no averment of the necessity of a credit to the steamer.

It was contended also that the rule goes beyond any that has heretofore been applied to material-men by the courts; and I must admit, that I have found no other case in which proof so stringent as that required by it has been held essential to a lien for repairs and supplies. But the rule established by the unanimous judgment of the supreme court is not on that account the less binding upon me.

I am constrained, therefore, to hold that the furnishing of the repairs and supplies set forth in the several libels did not create a maritime lien in favor of the libelants; and that the respondents are entitled to the proceeds in the registry after payment of costs.

Decree accordingly.

[NOTE. Dissatisfied with this decree reversing the sentence of the district court, the libelants appealed to the supreme court. Mr. Justice Clifford delivered the opinion of the court. As it was not shown that the master had funds, or that the owners had sufficient credit, or that there were any circumstances or reasons sufficient to put the repairers and furnishers upon their inquiry as to those facts, the court would presume a necessity for credit, since it appeared from the testimony that the repairs and supplies ordered by the master were necessary for the vessel. The decree of the circuit court was accordingly declared erroneous, and the cause remanded, with instructions to enter a decree affirming the decree of the district court. 10 Wall. (77 U. S.) 192.]

Case No. 8,605.

LUMA v. ATLANTIC MUT. INS. CO.

[13 Hunt, Mer. Mag. 557.]

Circuit Court, D. Massachusetts. Dec., 1845.

MARINE INSURANCE—RECOVERY—DISTINCT AND SEPARATE LOSS—ONE LOSS BEING CONSEQUENT UPON A PREVIOUS ONE—PROVINCE OF JURY.

[1. Distinct and separate losses on one voyage cannot be added together to make up an average of 5 per cent. under an insurance policy.]

[2. It is a question for the jury whether the losses to a vessel in two gales, ten days apart, in the first of which she lost part of her sails and bulwarks, and in the second the movables on deck, were distinct, or consequent one upon the other, so as to constitute a single loss, averaging 5 per cent., under the policy.]

This was an action of assumpsit, in which the plaintiff sought to recover of the defendants a partial loss on a policy, made by them, March 4, 1844, on the brig Columbia, on a voyage from Boston to Savannah. It appeared in evidence, that the brig sailed on this voyage about the 10th of March; that on the 17th of the same month, she experienced a gale and a heavy sea, which blew away the fore top-mast staysail, carried away a great part of the bulwarks, and monkey rail, stove in the cook's galley, and shipped several very heavy seas, which made her labor very hard; that after this she continued the voyage, lying to in two or three instances, but with generally moderate weather, carrying all sail, till the 27th of March, when she experienced another gale, and shipped a sea, burying the brig all up in a clear sheet of foam, and swept her decks of her jolly-boat, spars, roundhouse, and two water casks, the fore spencer being also carried away. There was no other loss on the voyage. There were several questions of law, raised by the defendants, growing out of other evidence, and the transactions for a settlement of the loss, a reference of the matter having been made by the plaintiff's agents in Boston, and a decision given by the arbitrator against his claim, by which he refused to abide. But the main question raised, was, whether these two losses could be added together to make an average of five per cent. under the policy; and upon this point there was considerable evidence.

HELD BY THE COURT (WOODBURY, Circuit Justice) that distinct and separate losses on the vessel, could not be added together to make up five per cent., and that the

assured could not recover, unless he proved a single loss to that amount; but that it was a question for the jury, whether the losses here were distinct or not; that where one loss was consequent upon another, however remote in time, it was to be taken as part of the antecedent loss, and if both amounted to five per cent., the assured would recover.

THE COURT left to the jury three questions, upon which they were to find specific answers. The only one of these material to the report of the case upon the foregoing facts, was, whether there was any loss consequent upon the cause, amounting to five per cent. Upon this, the jury found there was such a loss, and assessed the damages at $230, the amount claimed by the plaintiff being $394.

LUMBERMAN, The (WOOD v.). See Case No. 17,949.

Case No. 8,606.

In re LUMPKIN.

[2 Hughes, 175.] [1]

District Court, E. D. Virginia. May, 1874.

CLAIM FOR RENT—RIGHT OF HOMESTEAD—JUDGMENT FOR DEBT—SUPERIORITY—WAIVER OF LIEN FOR RENT.

Where a landlord, having a claim for rent, which is in Virginia superior to the right of homestead, solicits and obtains an office judgment by confession for the amount due him as "recovered for debt," the law of Virginia making the right of homestead superior to a judgment for debt: *Held*, that here was waiver of the specific lien for rent, and an acceptance of a judgment for debt in lieu of the rent, and that the homestead might be allowed as against the judgment.

[In the matter of John G. Lumpkin, a bankrupt.]

HUGHES, District Judge. In this case it must be conceded that the bankrupt has received very liberal allowances on the score of exemptions. But the only protest against these allowances is made by Sarah T. Sydnor, executrix of William B. Sydnor, deceased, who claims that a judgment in her favor rendered by the county court of Hanover county, on the 12th day of December, 1872, upon a confession of judgment by the said Lumpkin, for the sum of $250, is founded on rent due her from Lumpkin, and that the homestead exemption is not good against rent. The record of the county court of Hanover does not show that it was rendered for rent due. It was not rendered upon a distress for rent, it was rendered in the clerk's office upon "judgment confessed by the defendant for $250," and the execution recites that it was issued upon a "judgment recovered for debt" generally; one-half due 1st July, 1872; rest, 31st December, 1872. The adjudication in bankruptcy was on the 9th August, 1873. The 11th article of the state constitution, repeated by chapter 183 of the Code, pp. 1168, 1169, giving the homestead exemption of $2000, provided, amongst other things, that "such exemption shall not extend to any execution, order, or other process issued on any demand . . . for rent hereafter accruing;" and the 7th section of the 11th article of the state constitution provides that "the provisions of this article shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out."

The only question in the case presented now for decision is whether the execution above described issuing from the county court of Hanover can be regarded as an execution for rent. It was awarded upon a judgment for debt confessed in the office, and the record of that court supplies no information whatever as to the nature of the debt for which it was confessed. The exception in favor of rent in the homestead article of the constitution occurs in a category of exceptions of liabilities, all of which, more or less, operate as liens, such as unpaid purchase-money due for lands, taxes, levies, assessments, and the like. It is plain that the constitution in its exception of rent looked only to those executions upon distress process where the lessor held a lien upon the specific property of the lessee which was liable for rent, and did not intend to extend the lien for rent to all the personalty of the lessee. Being bound to construe the law of the state giving the homestead exemption "liberally," I must look to the record of the county court of Hanover as it is, and cannot, upon extraneous allegations, interpret it to be judgment for rent, when it appears to be a judgment for a debt generally; or extend the lien which the lessor had upon such specific personalty as might have been subject to the lien for rent, to all the personalty of the bankrupt. The lessor's execution has in fact waived her specific lien for rent by taking a general judgment. Against such a judgment the homestead exemption is good. Her petition is therefore dismissed.

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

LUMPKIN (UNITED STATES v.). See Case No. 15,640.

LUMSDEN (UNITED STATES v.). See Case No. 15,641.

LUND (LLOYD v.). See Case No. 8,433.

LUNT (SCOTT v.). See Case No. 12,540.

LUNT (UNITED STATES v.). See Cases Nos. 15,642 and 15,643.

LUNT, The J. B. See Case No. 7,246.

Case No. 8,607.

LUPTON v. JANNEY.

[5 Cranch, C. C. 474.] [1]

Circuit Court, District of Columbia. Oct. Term, 1838.[2]

EXECUTORS AND ADMINISTRATORS — SETTLEMENT OF ACCOUNT BY THE ORPHANS' COURT—CONCLUSIVENESS — JURISDICTION OF ORPHANS' COURT—JURISDICTION OF CIRCUIT COURT—SUIT AGAINST INSOLVENT DEBTOR OF ESTATE — OPENING ACCOUNT—BAR—LAPSE OF TIME—ACQUIESCENCE.

1. The settlement of an administration account by the orphans' court is conclusive upon this court as against distributees and residuary legatees, except by appeal; although not conclusive against creditors upon a question of devastavit or plene administravit. It is a part of the ordinary duty of the orphans' court to ascertain and distribute the surplus, or residuum of a deceased person, and, for that purpose, to settle the administration account. The jurisdiction of that court in that matter is original, peculiar, and exclusive. An original bill, in the circuit court, to compel an executor to account with a residuary legatee, and not necessarily connected with any other ground of equitable jurisdiction, is a bill asking that court to do what originally belongs exclusively to the orphans' court to do. The circuit court has not jurisdiction of such an original bill.

2. A court of equity will not lend its aid to enforce an unconscientious claim.

3. It is a matter within the discretion of an executor whether he will incur the expense of a suit against a known insolvent debtor of the estate.

4. Mere lapse of time is not alone a bar to the opening of an executor's account; but, long acquiescence in the settlement of an administration account may make it against conscience to seek to open it.

[See note at end of case.]

Bill in equity to open an executor's accounts after they had been settled more than twelve years in the orphans' court.

The plaintiff [Ann Lupton] was the widow and residuary legatee of David Lupton, junior, and the defendant [Phineas Janney] was his acting executor. The other executors were David Lupton, the father of the testator, and John McPherson, the father of the plaintiff. They all qualified, but as the defendant was the only one of the three residing in Alexandria, he took upon himself the whole burden of the administration. The bill states that the defendant rendered an inventory and sundry accounts to the orphans' court, by which it appeared that the estate was insolvent, and that the defendant was in advance for it. That the last account was rendered on the 5th of January, 1821. That the testator died in 1814. That if the accounts had been settled upon proper principles the estate would have been not only solvent, but a very handsome residuum would have remained to the plaintiff as residuary devisee. That the defendant should be charged with several debts due to the testator's estate which he might and ought to have collected; namely, $4,083.50, due by John McPherson & Son; $263.50 due by the same to Abijah Janney & Co., and assigned to the testator; $225, for plaster due by the same, and $140 due by the same to the testator upon open account; $223, due by Thomas Neil; and $4,959.43, which he charged as paid to Peter Saunders "without sufficient or legal evidence that the money was in fact due." That there might be many other debts due to the testator which have been lost by the defendant's negligence, as he had returned to the orphans' court no list of debts, either sperate or desperate. The bill then prays that the defendant may render a due list of debts due to the testator at the time of his death; that the administration accounts may be all opened, and that a new and full account may be ordered to be taken; and it also prays for general relief. The bill was filed at May term, 1833. The defendant, "saving to himself the benefit of exception to the jurisdiction of the court on the matter stated in the complainant's bill," and to the many errors, &c., answers, and among other things, admits that he returned the inventory and settled the accounts with the orphans' court, as stated in the bill; and that the plaintiff was not present at, nor summoned to attend at the said settlements; but avers that they were legally made before a court having full jurisdiction of the matter, in the due course and regular exercise of its jurisdiction; and he relies on the said settlements in bar of the jurisdiction of this court, as a court of original jurisdiction, in the case stated by the plaintiff, in the same manner as if the same were specially pleaded. The defendant not waiving this defence, further answered, among other things, that the said Peter Saunders was a fair and bona fide creditor of the testator to the full amount of all payments made to him by the defendant as executor, after deducting all proper credits. He admits that no security was taken on the sale of the flour to John McPherson & Son; but denies that he is chargeable with negligence on that account. He states that the firm of John McPherson & Son was composed of John McPherson, the plaintiff's father, who was one of the executors, and Daniel McPherson, her brother. That she had given the executors a written authority to sell the real and personal property either at public or private sale, as they might deem most advantageous, a copy of which is exhibited. That when the flour was sold to John McPherson & Son, they were in good credit, and engaged in extensive business in Alexandria. That the flour was in store at the death of the testator, in November, 1814. That the sale was made on the 17th of April, 1815, on a credit of six months. That in May, 1816, the defendant succeeded in obtaining the note of John McPherson & Son, for $1,000, on account of the sale, with

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

[2] [Affirmed in 13 Pet. (38 U. S.) 381.]

the said Peter Saunders as indorser; but they always refused to give their notes for any further amount, contending that the testator's estate was indebted to them in an amount equal, or nearly so, to the balance due for the flour. That in settlement with Saunders he was charged with the note of $1,000, and the testator's estate had credit for it. As to the note of John McPherson & Son for $263.50, and Thomas Neil's note for $223, he says they were taken by Peter Saunders, one of the firm of Abijah Janney & Co., (which firm was composed of Abijah Janney, the said Peter Saunders, and the testator, David Lupton, jr.,) for one-third of the debts due to that firm by the said John McPherson & Son, and the said Thomas Neil respectively, and were delivered by Saunders to the defendant, (but not until March, 1817,) as the testator's share of the said debts; and that the said John McPherson & Son, and the said Thomas Neil were insolvent when the said notes were taken, and the defendant did not think himself warranted in incurring the expense of suits against them. That the defendant has fully accounted for all the plaster belonging to the estate which came to his hands. That since his final account was rendered, the said John McPherson and Peter Saunders, have departed this life, by which the defendant is deprived of the benefit of their testimony. That the defendant did return to the orphans' court a list of debts due to the testator's estate, a copy of which is exhibited. That as to the debt of $140 by open account, supposed to be due from John McPherson & Son, they would only allow it as a discount to their claim against the testator's estate, and the defendant had no evidence but their qualified admission. And that Abijah Janney was also insolvent.

In March, 1837, the plaintiff filed a supplemental bill charging that the defendant had obtained letters testamentary also in Fairfax county, in Virginia, and sold property there to the amount of $8,000 or $9,000, of which he had rendered no account, &c. The answer of the defendant to this supplemental bill, avers that he had, long since, rendered his account of that administration to the county court of Fairfax which has been confirmed by that court and recorded; and also that his settlements of accounts with the orphans' court of Alexandria embrace the Virginia assets, and present a full statement of both administrations. He also relies upon the act of Virginia of the 8th of March, 1826, "for the limitation of actions against persons acting in a fiduciary character, and their sureties, and for other purposes." as a complete bar to any opening of that Virginia account. And he relies also on the lapse of time as to the whole matter of the accounts. He also states that since his answer to the original bill, circumstances have come to his knowledge which induce him to believe that John McPherson & Son were entitled to the credit which they claimed against their purchase of the flour, viz.: that he (this defendant,) had obtained the original note of the testator to John McPherson & Son for $1,000, dated 11 mo. 12, 1814, a few days before the testator's death, which note had upon its face their order to credit the proceeds to the account of the testator. That the note was discounted by the Bank of Potomac for the use of the testator, and the proceeds placed to his credit in that bank; and that it was taken up by the friend and nephew of John McPherson, and therefore was a proper set-off against the flour. By his will, the testator devised all the residue of his estate, after payment of his debts and those of the firm of Abijah Janney & Co., of which he was a partner, to his widow, the plaintiff. The will is dated 24th November, 1814, and was proved on the 2d of December, 1814. The accounts of the defendant settled in the orphans' court, and produced by the plaintiff, show that the defendant has accounted for all the assets which came to his hands.

A number of depositions were taken, by which it appeared that John McPherson & Son were in good credit and doing an extensive business at the time of their purchase of the flour, but that they stopped payment on the 7th of June, 1816. The evidence confirmed and corroborated the defendant's answer.

CRANCH, Chief Judge, after stating the substance of the bills, answers, and evidence, delivered the opinion of the court, as follows:

The first question which occurs in this case is, whether this court has original jurisdiction of a bill by a residuary legatee to surcharge and falsify accounts of an executor, stated, settled, and allowed in the orphans' court. Upon this question, I have had considerable doubt; but upon looking into the case of Beatty v. Maryland, 7 Cranch [11 U. S.] 231, I am inclined to the opinion that the settlement of the accounts by the orphans' court, is conclusive upon this court, as against distributees and residuary legatees; although not against creditors upon a question of devastavit, or plene administravit. Mr. Justice Duvall, in that case said, "the account was only binding upon the representatives of the estate, the distributees; and they might still open it in the general court. But the creditors are no parties to the settlement of the accounts, and cannot be bound by it." The question, in that case, arose upon the issue of devisavit vel non. The bill, in the present case, calls upon this court to do that which the orphans' court, upon a bill or petition, had the power to do, and which it was the proper business of that court to do, viz., to open the account so far as to permit the residuary legatee to surcharge and falsify. It is the proper function of that court to see that the residuum of the estate is properly distribu-

ted; and its original jurisdiction of that matter seems to be exclusive. By the act of congress of the 27th of February, 1801, § 12, (2 Stat. 103,) the judge of the orphans' court, in each county in this district, has all the powers, and is to perform all the duties then exercised and performed by the judges of the orphans' courts in Maryland; and an appeal is given to this court, "who shall therein have all the powers of the chancellor of that state."

By the Maryland law of 1798 (chapter 101, subc. 15, § 1), the orphans' court is established, "for the purpose of taking probate of wills, granting letters testamentary, and of administration; directing the conduct, and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relative to the affairs of deceased persons according to law." And by section 12, it is enacted, that "the orphans' court shall have full power, authority, and jurisdiction, to hear, examine, and decree upon all accounts, claims, and demands existing between wards and guardians; and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators; and may enforce obedience to, and execution of their decrees, in the same ample manner as the court of chancery may." This is a peculiar and exclusive original jurisdiction. An original bill, in this court, to compel an executor to account with a residuary legatee, and not necessarily connected with any other ground of equitable jurisdiction, is a bill asking this court to do that which originally belongs exclusively to the orphans' court to do. It is a part of its ordinary duty to ascertain and distribute the surplus, or residuum of the estate, and for that purpose to settle the administration account. When that account necessarily and incidentally comes before this court, either as a court of equity, or of law, in a suit, of which this court has original jurisdiction, the ex parte settlement by the orphans' court would probably be taken to be prima facie correct, but the opposing party would have a right to surcharge and falsify, and the court would open it for that purpose; but if the settlement had been made by the orphans' court, in a contested case between the same parties, it would probably be deemed by this court conclusive until it should be reversed upon appeal. But in an ex parte settlement without notice to the residuary legatee, he could not appeal; for an appeal can be taken only by a party to the contest, and if there be no contest, there can be no appeal. But he might call the executor before the orphans' court, by a bill or petition, charging errors in the accounts as settled, and praying that he may be permitted to surcharge and falsify the accounts, &c., and from the decree of the orphans' court, upon such a bill or petition, either party would have a right to appeal to this court. If, however, the executor's accounts should not have been settled by any definitive decree or order of the orphans' court, they would be entirely open, and the residuary legatee might file his bill or petition in that court for a settlement of the whole account; upon which proceeding the whole account would be open, and must be supported in toto by proper vouchers, in the due course of administration. This seems to me, from the best consideration which I have been able to give the subject, to be a correct view of the case; and I am, therefore, led to the conclusion that this court has not jurisdiction of an original bill to revise a settlement of an executor's account made by the orphans' court; or to call the executor before us, to render an original account. I do not mean, however, to say that if the accounts of an executor, settled ex parte in the orphans' court, without notice, should incidentally come before this court in a suit of which this court has original jurisdiction, and the correctness of that settlement should be questioned, this court would not permit the opposing party to surcharge and falsify. All I mean to say, is, that the settlement of an administration account is not an original ground of jurisdiction of this court, either as a court of equity, or of law.

The only ground of jurisdiction asserted in the present bill, is error in the settlement of the executor's account, by the orphans' court; and the alleged errors are in not charging the executor with legal laches in not pushing his legal rights to the utmost extent of the law. If the decree or order of the orphans' court be, for that cause, erroneous, we think that the plaintiff's remedy was either an appeal, or a bill or petition to open the settlement. But if we err in this opinion, and if we are bound to take cognizance of the cause, we think that, under the circumstances of this case, it is unconscientious in the plaintiff to assert what she supposes to be her legal right. And if she cannot, with a good conscience, assert her claim, a court of equity ought not to lend its aid to enforce it. The facts of the case, as we collect them from the evidence, are these. All the parties concerned in this suit were nearly connected by consanguinity or affinity; and had confidence in each other. The plaintiff was the daughter of John McPherson, and sister of Daniel McPherson, who constituted the mercantile firm of John McPherson & Son. Her husband, the testator, was the brother of the wife of his executor, the defendant, Phineas Janney. Abijah Janney, mentioned in these transactions, was the partner of the testator in the firm of Abijah Janney & Co., the other partner being Peter Saunders, also mentioned in the transactions. John McPherson, one of the executors, was the father-in-law, and the other executor, David Lupton, was the father of the testator. John McPherson, David Lupton,

and Phineas Janney, all qualified as executors; but as Phineas Janney was the only one of them who resided in this district, the other two seem to have left the whole management of the estate to him. The testator died in the last week in November, 1814. The greater part of his personal estate consisted of about 1200 barrels of flour, which, in consequence of the interruption of commerce by the war, was appraised at from $3 to $3.50 per barrel. In April, 1815, this flour was sold for a little more than $4,080, at six months' credit, by the acting executor, the defendant, Phineas Janney, to John McPherson and Son, who were merchants, dealing in flour, and then in good credit. This sale must, of course, have been known to the defendant's co-executor, John McPherson, the purchaser; and it can hardly be doubted that it was known also to the other executor, David Lupton, the father of the testator. In the defendant's letter to John McPherson, dated 12 mo. 21, 1816, principally upon another subject, a copy of which is annexed to the defendant's letter to David Lupton, dated 12 mo. 30, 1816, he mentions incidentally, and as a matter well known, "the amount of the flour sold John McPherson & Son, yet unpaid for," and says, "perhaps some arrangement might be made for a part of the money due for the flour, to be secured to the widow for what may be coming to her on settlement of the estate."

It may also be fairly inferred from the evidence, that the plaintiff, who is the residuary legatee, knew and approved the sale of the flour to her father and brother. The defendant, in his letter to her, dated 12 mo. 29, 1816, refers her to his letter to her father inclosing the letter to John McPherson, in which he speaks of the flour sold to John McPherson & Son, then remaining unpaid for, as a matter already well known, and says: "I wish thee most particularly to see the whole letter, in order that thee may know how the business stands." And again, he says: "In consequence of the will of D. Lupton not stating expressly whether the sale of his personal and real estate should be at public or private sale, I would thank thee to sign the inclosed certificate or memorandum, authorizing us to sell either at public or private, as the judge of the orphans' court says he would prefer having it for his authority." It is admitted that this certificate was antedated so as to cover the sale of the flour, and was signed by the plaintiff, (who was then living with her father, John McPherson, in Jefferson county, in Virginia,) and returned to the defendant. This authority, thus antedated and signed by her with a full knowledge of the sale, and that the money was yet unpaid, justifies an inference that the sale of the flour was originally made to her father and brother, with her knowledge and consent, or that she afterwards assented to it. In either case it is now unconscientious in her, after they have become insolvent, to attempt to throw the loss upon the defendant because he did not pursue her father and brother with the utmost rigor of the law. Whatever right the creditors might have had to charge the defendant at law with that loss, we think that the plaintiff, under the circumstances of the case, cannot so charge him in equity, with a good conscience.

But there are several other charges in the bill. The first is, that the defendant's commissions were increased thirty-five dollars and twenty-eight cents by unnecessary cross-entries in the accounts settled by the orphans' court. The bill does not explain this charge by reference to the particular cross-entries alluded to; but it is supposed that it refers to a cross-entry of sixty-four dollars credited to the estate for the testator's interest in a carriage sold to Peter Saunders, one half of which carriage he owned before, the value of which interest was allowed by Peter Saunders in the settlement of his claim against the estate of the testator. But it appeared that he (Saunders) had paid for repairs upon the carriage, which reduced the value of the testator's interest to fifty-two dollars; so that the error is in having charged commissions on sixty-four dollars instead of fifty-two dollars; the difference being ninety cents. The other cross-entry is in crediting the estate with four hundred and six dollars and fifty cents, being the amount of goods taken by the plaintiff at the inventory prices, and charging the estate with the same amount advanced to her on account of her residuary legacy. This charge against the estate ought not regularly to have been made in the account settled in the orphans' court; and the creditors might object to it at law, but this plaintiff, who has received the amount, cannot, in equity.

The next charge is, that the defendant paid money to Peter Saunders, without having sufficient evidence that the estate was indebted to him. If the debt was in fact due to him, it is immaterial whether the defendant had or had not sufficient evidence of it at the time of payment. If the bill is to be understood as charging the defendant with having paid money not due, the answer denies it positively, and avers that the said Peter Saunders was a fair and bona fide creditor of the estate to the amount of the payments made to him by the defendant, after deducting the fifty-two dollars for the carriage, and one thousand dollars for the note of John McPherson & Son indorsed by him, and all other credits. The answer, in this respect, being responsive to the bill, must be taken to be true, and removes the whole ground of this charge.

The next is, that the defendant neglected to collect the money due upon John McPherson & Son's note for $263.50. It appears by the evidence, that at the time this note was given or when it was delivered to the defendant, by Abijah Janney & Co., of which firm the testator was a partner, John McPherson & Son were insolvent; and the defendant, in

his answer, avers that he did not think himself warranted in incurring the expenses of a suit upon it. The same may be said of Thomas Neil's note for $223, and of the open and disputed account, against John McPherson & Son, for $140.

The next charge is for not accounting for eleven and a quarter tons of plaster. This item is founded upon a paper, in the handwriting of the defendant, produced in evidence by the plaintiff, purporting to be a statement of the funds to meet the judgment in favor of the Bank of Alexandria; one item of which statement is, "eleven and a quarter tons plaster, due from John McPherson & Son, at twenty dollars per ton, amount of appraisement, two hundred and twenty-five dollars." The paper shows that the plaster was not on hand, but was a debt due, by John McPherson & Son, in plaster. It rested, therefore, upon the same ground as the balance due upon the sale of the flour, and the open account; and John McPherson & Son denied that any thing was due, beyond the one thousand dollars for which they gave their note, with Peter Saunders's indorsement, and which was paid by him in the settlement of his claim against the estate. The fact of the insolvency of John McPherson & Son being proved, it was a matter within the discretion of the defendant, as executor, whether he should incur the expenses of a suit against them.

The next charge is, that the defendant had not accounted with the county court of Fairfax county, in Virginia, for the property received by him in that county. This charge is positively denied in the answer, and appears to have been abandoned in the argument.

The defendant, in his answer to the supplemental bill, relies upon the lapse of time as a bar to the opening of the accounts, at this time, his final account having been settled with the orphans' court in January, 1821, and the plaintiff's bill not having been filed until May, 1833, a period of more than twelve years, and more than eighteen after the sale of the flour. We are of opinion, however, that the mere lapse of time is not, alone, a bar to the opening of an executor's account. But the long acquiescence of the plaintiff in the settlement of the accounts, is material to the question, whether the plaintiff can, with a good conscience, now come into a court of equity to charge the defendant with the losses mentioned in the bill. This, with the other circumstances already noticed, does affect the conscience of the plaintiff, and renders it proper that this court, as a court of equity, should refuse her its aid. The bill must be dismissed with costs.

Affirmed by the supreme court of the United States (13 Pet. [38 U. S.] 381) upon the ground that the lapse of time was a bar to the relief sought.

LURTY (SLOCOMB v.). See Case No. 12,949.

Case No. 8,608.

LUSCOM v. OSGOOD.

[1 Spr. 82; 7 Law Rep. 132; 11 Hunt, Mer. Mag. 364.] [1]

District Court, D. Massachusetts. June, 1844.

PARENT AND CHILD — SERVICES OF MINOR CHILD — SEAMEN — DUTY OF CONSUL — AUTHORITY OF MASTER — LIABILITY OF OWNER FOR SEAMEN'S WAGES.

1. A minor, without the knowledge of his father, concealed himself on board a vessel bound on a whaling voyage, and was not discovered, until the vessel was at sea. The master soon afterwards put into Fayal, where he might have left the minor with the American consul. *Held* that the father was entitled to recover for the services of his son, from the time the vessel left Fayal.

[Cited in The Hattie Low, 14 Fed. 880.]

[Cited in Gabrielson v. Waydell, 135 N. Y. 7, 31 N. E. 970.]

2. The master might have left the minor with the consul, without paying the three months' extra wages. It would, in such case, have been the duty of the consul to provide for him, and send him to the United States.

3. The court allowed as compensation, such proportion of the lay given to those who shipped as boys, as the time after the ship left Fayal, bore to the time of the whole voyage.

4. The owners are liable for the wages of a seaman, employed by the master, notwithstanding he may have had a complement of men without him.

In admiralty.

J. H. Prince, for libellant.

J. H. Ward, for respondent.

SPRAGUE, District Judge. The libellant seeks to recover compensation for the services of his minor son, on board a whale ship, of which the respondent was owner. In July, 1840, the ship sailed from Salem, on a whaling voyage. On the morning of that day, the son was sent by his father to school, as usual; but, wishing to go on this voyage, he, without the knowledge of his father, or of the captain or owners, concealed himself on board the ship, and was not discovered by the captain, until some hours after she had discharged her pilot. The lad then confessed that he had run away, because his parents would not consent to his going to sea. The captain told him that he had done wrong, but it was then too late to return; and put him on duty as a seaman. The ship, after taking seventeen hundred and thirty-four barrels of sperm oil, returned to Salem in March, 1844, having been absent three years and eight months; during all which time the son performed the duty of a seaman, to the entire satisfaction of the captain, who, it ought to be added, seems to have treated this lad, thus thrown upon his hands, with much kindness and attention. In January, 1842, when eighteen months out, one of the crew died. The captain then shipped the lad as one of his crew, and

[1] [Reported by F. E. Parker, Esq., assisted by Charles Francis Adams, Jr., Esq., and here reprinted by permission. 11 Hunt. Mer. Mag. 364, contains only a condensed report.]

caused him to sign the articles. From that time, it is conceded that the libellant is entitled to compensation at the rate of 1/150 part of the proceeds; and the whole controversy relates to his prior services.

It is insisted by the father, that the captain ought to have sent the son home, by a schooner, bound to Boston, and spoken when only three days out. But I am not satisfied, from the evidence, that it was in his power. It is next urged, that the lad should have been left with the American consul at Fayal, to be sent home. It appears that the ship, in August, 1840, when a month out, touched at that place for refreshments, and remained there about thirty-six hours. The captain testifies that it was his purpose to send the lad home from Fayal, if there were any opportunity; that he made inquiry, but could find no vessel coming to the United States; and that he supposed that he could not leave him with the consul, without paying three months' wages. This was an error. It would not have been the case of a discharge of a seaman, within the third section of the statute of 1803 (2 Stat. 203, c. 9), any more than if he had been taken from a wreck, and put on duty for the time being. But having offered himself as a seaman, and being permitted by the captain to perform all the duties of one, he was a mariner, within the meaning of the fourth section of that act; and it would have been the duty of the consul to have afforded him subsistence, and sent him to the United States. And it cannot be doubted, that the gentleman, who holds that office at Fayal, would have performed that duty with all fidelity, and sent this lad to his father.

The posture of the case is this. The captain well knew that the father was entitled to the services of the son, who had escaped from his control, and was then rendering services on board this ship. He was in the port of Fayal, one of the Western Islands, whence the usual passage to the United States is not more than thirty days. If the lad had been left there, it would have been the legal duty of the American consul to provide for him, and send him home. The captain called on the consul for other purposes, but never requested him to take charge of this boy, or even mentioned that he was on board his vessel; but took him on a three years' whaling voyage, intending to have his services during the whole period. From that time, he must be deemed to have taken these services voluntarily, and the father is entitled to compensation.

It has been urged, that the ship having a full complement of seamen, the captain was not authorized to take more; and therefore the owners are not responsible. The master of a ship has authority to employ mariners. The person employed is not bound to inquire whether he has already a full crew.

It would be a doctrine as novel as it is unjust, to deprive a seaman of his remedy against the owners, on the ground that the master had hired more than were needed.

It has been further urged, in behalf of the respondent, that the practice of lads concealing themselves on board outward-bound vessels, is an evil which the court should endeavor to suppress, by withholding all compensation. But I apprehend, that would have little influence upon the thoughtlessness of early youth, impelled by a spirit of adventure and an excited imagination. And there is little danger that a parent, who would not consent that his son should go, under contract, for compensation, and properly provided under his own auspices, would connive at his furtively, and in a state of destitution, throwing himself, against their will, upon the officers of a ship, whose kindness and good will would be so important, not only to his comfort, but to his health and safety. On the other hand, if the services of strong and active lads, of nearly seventeen years of age, were to be had on these long voyages, without compensation, there would be a palpable temptation, on the part of the officers, to connive at, or encourage, the practice. And the danger would be increased when the master, as in the present case, is also an owner. To this we may add, that the evils are much greater to the one party than to the other. The owners are only called upon to pay for services of which they have, through their agent, availed themselves. But, on the other hand, the father would wholly lose those services; and, what in many cases would be vastly more important, he would lose the control and supervision of his son, during several years of the most critical period of his life, when his habits are to be formed, his education, perhaps, completed, and his occupation or profession determined. The most cherished purposes, and fondest hopes, of the parent might thus be destroyed.

I shall decree compensation from the time the ship sailed from Fayal; and, in ascertaining the amount, shall adopt the lay given those who shipped as boys, and for which this lad subsequently shipped, that is, 1/150; and, for the time, I shall adopt the rule prescribed in the shipping articles in case of death, and give such proportion of 1/150 of the whole products of the voyage, as the time after the ship left Fayal bears to the whole time occupied in performing the voyage.

As to remedy of parent against ship-owner, for abduction of his minor child, and the measure of damages, see Lovrein v. Thompson [Case No. 8,557]; Sherwood v. Hall [Id. 12,777]; Steele v. Thacher [Id. 13,348]; The Platina [Id. 11,210].

LUSE (BEAR v.). See Case No. 1,179.

LUSE (WOOD v.). See Case No. 17,950.

Case No. 8,609.

The LUTEKEN.

POST v. HUGHES.

[6 Ben. 565.] [1]

District Court, E. D. New York. June, 1873.

POSSESSION—CHARTER—EXCEPTED PERILS—RIGHT OF MASTER TO SELL CARGO—BREAKING UP VOYAGE—INJURY TO VESSEL AND CARGO.

1. A bark was chartered for a voyage from New York to Montevideo, by a charter which contained the clause, "dangers of the seas, fire and navigation mutually excepted." The charterer put on board a full cargo of lumber. On the day the loading was completed, a fire broke out on board, which made it necessary to fill the vessel with water. Both vessel and cargo were damaged, and the cargo had to be unloaded, but could have been carried forward in a damaged condition. In its damaged condition, it was worth in New York $4,947 26, and the freight due on performance of the voyage under the charter, was $5,105 29. The charterer offered to supply a new cargo, to be carried under the charter in lieu of the damaged one, but the master refused to give up the damaged cargo without payment of full freight. No offer was made to carry the cargo forward in any other ship. The ship was repaired at a cost exceeding her value when repaired; and the master, being without funds to pay for the repairs, which were liens on the vessel, advertised for a loan of $17,000, which was more than the value of the bark and cargo, upon the security of the vessel, her freight and cargo. Thereupon the charterer demanded his lumber, and, on a refusal to surrender it, except on payment of full freight, filed a libel against the cargo for possession; and, by means of the process issued thereon, took the cargo from the possession of the master, and it was afterwards delivered by the marshal to the charterer, on a stipulation for value taken in court, to return the cargo or pay whatever the court should decree the ship to be entitled to receive by reason of the removal of the cargo. The master also filed a libel against the charterer to recover the full freight and the average charges: *Held*, that the charterer was entitled to have substituted a sound cargo in place of the damaged cargo; and that the refusal of the master to accept the substituted cargo thus tendered, entitled the charterer to treat the charter as broken by the ship, and to demand the damaged cargo without payment of freight.

2. The act of the master in advertising for such a loan on the credit of the cargo, as well as of the ship and freight, was without authority, and authorized the charterer to treat the voyage as broken up by the fault of the ship; and it entitled him to demand the cargo without payment of freight.

3. The charterer, therefore, was entitled to a decree declaring him entitled to the possession of the lumber with costs; and the master's libel must be dismissed, with costs.

[These were suits in admiralty on the cargo of the bark Luteken and by Lucas E. Post against William H. J. Hughes.]

Scudder & Carter, for charterer.

Goodrich & Wheeler, for master.

BENEDICT, District Judge. On the 3d day of April, the libellant in the first of the above-named actions, at the port of New York, chartered the German bark Luteken for a voyage from New York to Montevideo, and agreed to provide her with a full cargo of lawful merchandise for the aforesaid voyage, to be transported to Montevideo at rates agreed on. The charter party contained the clause "dangers of the seas, fires and navigation mutually excepted." In accordance with this charter party, the charterer provided a full cargo of lumber, the lading of which was completed on the 17th day of April, 1873. On the same day a fire broke out in the bark, to extinguish which it was necessary to fill the vessel with water, and by reason of the fire, the vessel was so damaged as to require extensive repairs before being able to perform the voyage.

In order to repair the vessel, it was necessary to unload the cargo, and it was unladen by the master of the vessel. Some of the cargo was also greatly injured by the fire, but the largest part of it was only wet with salt water, and could have been carried to Montevideo in a damaged condition, but without rotting or bleaching. The original cost of the cargo was $8,518 73. In its damaged condition it was worth in New York, $4,947 26. The freight on the lumber, payable on performance of the voyage, according to the charter party, was $5,105 29, gold. The charterer offered, in place of the damaged cargo, to supply a new cargo of lumber, to be transported under the charter in lieu of the damaged cargo, but the master refused to give up the damaged cargo without payment of full freight. No offer was made to carry the cargo in any other ship, or to furnish any other ship, but a survey of the bark was had, and an estimate obtained of the probable cost of repairs, and the bark was thereafter repaired.

The value of the bark, in her damaged condition prior to the repairs, was $4,500. The total amount of the bills incurred in repairing the vessel, was $13,314 38; her value, when repaired, as disclosed by a subsequent sale, was $10,000. Without the payment of the bills for the repairs, and which constituted liens upon the vessel, it was impossible for her to proceed upon the voyage provided in the charter, and the master was wholly without funds, the owners having refused to provide any money wherewith to pay for the repairs. The master, therefore, determined to borrow about $17,000 upon bottomry and respondentia, and on the 12th of June actually advertised for a loan of that amount upon the security of the vessel, her freight and cargo, for the voyage in the charter provided. Whereupon the charterer demanded his lumber, and, upon a refusal to surrender it, except on payment of full freight, he brought his action for possession, which is the first of the actions above named, and by means of the process in this court, took the cargo from the possession of the master. Subsequently, the cargo was delivered by the marshal to the charterer, upon a stipulation for value taken in court, to return the same or to pay whatever sum the court should declare the ship

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

entitled to receive by reason of the removal of the cargo under the circumstances.

Thereafter the master also filed his libel against the charterer demanding a decree for the full freight and the average charges, by reason of the premises, which is the second action above mentioned. The two causes have been tried together upon a written statement of facts in which the facts above set forth are contained.

In disposing of the questions of law which have been discussed as arising in these cases, I feel authorized to consider the cases in any aspect presented by the written statement of facts which has been filed, whether such aspect be presented by the pleadings or not. If necessary, the pleadings can be made to conform to the evidence, and they may be so amended.

Upon the facts presented, I am of the opinion that the charterer was justified in demanding his cargo, without payment of any freight, upon two grounds. One ground is, that in view of the damaged condition of the cargo and its depreciation by the fire, to a value less than the freight, it having been unladen and being in the port of shipment, the shipper was entitled to ship in place of it a similar sound cargo, to be transported under the charter party in lieu of the damaged cargo. The ship would sustain no loss by such a change, and by such new shipment the charter party would, in my opinion, have been performed on the part of the charterer. The refusal to accept the substituted cargo which was thus tendered, therefore, entitled the charterer to treat the charter as broken by the ship, and to demand the damaged cargo without payment of freight.

The charterer also became entitled to have his cargo without payment of freight, by reason of what subsequently occurred, after the repairs of the ship were completed. It is to be noticed that no question was raised as to the right of the vessel to repair and to earn the freight stipulated in the charter. That right was conceded by the offer to provide a sound cargo, to be transported in lieu of the damaged cargo. It could not be disputed that the ship had the right to repair and earn the freight, notwithstanding the fact that the cargo had become of less value than the freight. Damage to the cargo, without fault of the ship, by an excepted peril, could not deprive the ship of the right to earn the freight she had agreed for.

The subsequent act of the master which caused the shipper to retake his cargo, was the announcement of the master that he was about to raise about $17,000 upon bottomry and respondentia, and that without thus pledging the cargo, he could not proceed upon the voyage. No specific statement by the master that he could not proceed without thus resorting to the cargo, is shown, but the facts admitted fully warranted that inference, and the subsequent sale of the vessel on legal proceedings instituted by the material men, which the statement of facts narrates, shows that the inference was correct. The case, therefore, presents the further question, whether this action of the master in respect to the cargo, under the known circumstances of the ship, did not justify the shipper in treating the voyage as broken up by the fault of the ship, and retaking his cargo without payment of any freight. It is not to be disputed that the master of a ship has power, under some circumstances, to raise money upon the security of the cargo. But when the foundation of this authority is examined, it proves decisive against the right of the master to exercise it in a case like this. The sole foundation for any authority of the master to sell a part or hypothecate the whole of a cargo shipped on board his vessel, is the prospect of benefit to the owner of the cargo. Therefore, it has been considered that while under proper circumstances the master might sell a part of his cargo, he could not sell the whole, for the reason that it could be of no possible benefit to the owner of the cargo that the ship proceed empty. What is in all such cases to be sought for as the basis of the master's authority to hypothecate the cargo, is a reasonable expectation of benefit to the owner of the cargo by the completion of the voyage, which is thus accomplished by the use of his property. If this be the limit of the master's authority, then, in the present case, the master was wholly without authority to resort to the cargo, as he proposed, in order to raise money for the purpose of enabling him to complete the voyage, because the completion of the voyage could not possibly be of benefit to the shipper, for his cargo had already become of less value than the freight he would be liable to pay on the termination of the voyage. The proposal of the master to raise money upon the cargo, under the circumstances, was not to raise money for the benefit of the cargo, but, in substance and effect, was to devote the cargo to the payment of the ship's debts, in which the shipper of the cargo had no interest.

The ship was worth $10,000. The freight, when earned, would be $5,105 29, and the announcement of the master was that he intended to raise about $17,000, at marine interest, and to pledge the cargo therefor. Such an intention, if carried into effect, would necessarily have resulted in casting upon the cargo a large part of the expense of the repairs which belonged to the ship alone to pay. The announcement of such an intention was the announcement in the most authoritative way, that the ship was unable to perform the charter, and justified the shipper in treating the voyage as broken up by the fault of the ship, and it entitled him to demand his cargo without payment of freight.

As the liability for the proper share of average expenses is not disputed, and an average bond has been taken, I understand that no action of this court is required in re-

lation thereto, although those charges form part of the demand set forth in the libel of the master. The decree must be that in the first action the libellant be declared entitled to the possession of the lumber, and to a decree against the respondent for costs; and, in the second case, that the libel be dismissed, with costs.

LUTHER (BARNETT v.). See Case No. 1,025.

LUTHER (HEINRICH v.). See Case No. 6,327.

LUTHER (LEE v.). See Case No. 8,196.

Case No. 8,610.

LUTHER v. The MERRITT HUNT.

[1 Newb. 4.] [1]

District Court, D. Michigan. 1852.

EX PARTE DEPOSITION—WHEN NOT RECEIVED.

1. An ex parte deposition, taken under the act of congress [1 Stat. 73], de bene esse, will not be received unless all the provisions of the act be strictly followed.

2. When the officer taking the deposition ex parte, did not certify that the witness was "cautioned" as well as "carefully examined and sworn," as provided by law, the deposition will not be received.

[This was a libel by Job S. Luther, A. A. Smalley intervening, against the schooner Merritt Hunt.]

Barstow & Lockwood, for Smalley.

Hunt & Newberry, for respondent.

WILKINS, District Judge. When this case was called for hearing, the counsel for libelants, to sustain their case, offered to read certain ex parte depositions taken at Green Bay, Wisconsin. To this objection was raised, that the depositions were inadmissible, because the provisions of the act of congress [1 Stat. 73] were not complied with.

That part of the judiciary act providing for the taking of ex parte depositions, has ever been construed strictly. The act requires, that the witnesses "shall be carefully examined and cautioned and sworn," &c. The act requires that the witness shall be cautioned as well as sworn. It does not appear from the certificate of the officer before whom the deposition was taken, that this was done.

The objection is sustained, and the deposition rejected. The cause will be continued, to allow the libelant to retake the deposition.

LUTHER (TAYLOR v.). See Case No. 13,796.

LUTZ (UNITED STATES v.). See Case No. 15,644.

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

Case No. 8,611.

LUXOM v. OSGOOD.

[See Case No. 8,608.]

Case No. 8,612.

The L. W. EATON.

[9 Ben. 289.] [1]

District Court, S. D. New York. Jan. 26, 1878.

JURISDICTION—LOCUS IN QUO—CONSTRUCTION OF STATUTE.

1. In a suit in rem, in admiralty, in the district court of the United States for the Southern district of New York, against a vessel, she was attached by the marshal on the 1st of April, 1875, under process in the suit, while she was afloat in the navigable waters of the Hudson river, lying west of Manhattan Island and to the south of the mouth of the Spuyten Duyvil creek, and where the tide ebbed and flowed, she being fastened, by means of a line, to a dock at Jersey City, in the state of New Jersey, and outside low-water mark, said wharf projecting into the navigable waters of the Hudson river lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil creek: *Held*, that the place where the vessel was arrested was within waters subject to the jurisdiction of said court.

[Disapproved in Hall v. Devoe Manuf'g Co., 14 Fed. 184, 185. Cited in The Norma, 32 Fed. 411.]

2. The jurisdiction of said court over said locus in quo, in such a suit, existed prior to the agreement of September 16th, 1833, between New York and New Jersey, which is set forth in the act of June 28, 1834 (4 Stat. 708), and nothing in that agreement or in that act restricted that jurisdiction.

[Cited in Malony v. City of Milwaukee, 1 Fed. 613. Disapproved in Re Devoe Manuf'g Co., 108 U. S. 417, 2 Sup. Ct. 905; Hall v. Devoe Manuf'g Co., 14 Fed. 184, 185.]

3. Sections 541 and 542 of the Revised Statutes do not have the effect to alter such jurisdiction so that it does not extend to such locus in quo.

[Disapproved in Hall v. Devoe Manuf'g Co., 14 Fed. 184, 185.]

4. The effect of the Revised Statutes enacted June 22, 1874, considered, as to altering statutory provisions in force on the 1st day of December, 1873.

[Cited in Thommasen v. Whitwill, 12 Fed. 903.]

In admiralty.

W. W. Goodrich and J. N. Whiting, for libellants.

Benedict, Taft & Benedict, for claimants.

BLATCHFORD, District Judge. This is a libel in rem, in admiralty, against the schooner L. W. Eaton. A question has arisen, the claimant having answered, as to whether the vessel was arrested within waters subject to the jurisdiction of the district court of the United States for the Southern district of New York, under the process issued herein. The parties have stipulated as follows as to the facts: "The schooner L. W. Eaton was attached by the marshal, under

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

the process issued in this cause, on the 1st day of April, 1875, the said vessel being, at the time, afloat in the navigable waters of the Hudson river, lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil creek, and where the tide ebbed and flowed, she being fastened, by means of lines, to a dock at Jersey City, in the state of New Jersey, and outside low-water mark, said wharf projecting into the navigable waters of the Hudson river lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil creek. A motion was made on behalf of the claimant to discharge the said attachment, on affidavits on file, before appearance, on the ground that said vessel was not at the time within the jurisdiction of the court, which motion was denied, and thereupon the vessel was bonded and the answer filed."

Prior to the enactment of the Revised Statutes of the United States on the 22d of June, 1874, it had been the established law of this district, that the locus in quo in this case was within the jurisdiction of the Southern district of New York, in admiralty. The question arose in the case of U. S. v. The Julia Lawrence, in this court, and was decided by Judge Betts, in May, 1860, and jurisdiction was always asserted and exercised in accordance with that decision. See The Argo [Case No. 515]. The opinion of Judge Betts has never been published at length. A synopsis of its conclusions is to be found in the New York Daily Transcript for December 6, 1871, and in 6 Am. Law Rev. 383 [Case No. 15,502]. The full text of the opinion is as follows: "The libel of information charges, that, on the 28th of September, 1858, the collector of customs of this port, on waters navigable from the sea by vessels of ten or more tons burthen, within the Southern district of New York, and within the jurisdiction of this court, seized the ship Julia Lawrence as forfeited to the use of the United States, for certain offences charged in said libel of information to have been committed by said ship against the revenue laws of the United States. The claimant of the ship filed an answer negativing each averment in the libel, and the cause was brought to hearing on the pleadings singly, as if upon an issue by demurrer to the libel for want of jurisdiction in this court over the place of seizure, it being admitted, on both sides, that the ship, when seized, was attached to a pier or dock on the New Jersey side of the river, and upon waters of the bay. It not being made to appear by the claimant, that the waters where she lay were not navigable for vessels of ten tons burthen, the averment in the libel of that fact must be deemed admitted by the pleading; and, accordingly, the locus in quo of the seizure will be within the cognizance of this court, irrespective of the territorial boundary of the state of New York, if the surface of the waters on which she was seized was within the jurisdiction of the Southern district of New York. It may be observed, that there appears to be no restriction to the discretion of congress in respect to the territorial limits within which they may appoint the jurisdiction of the inferior courts erected by them, to be exercised. 3 Story, Const. Law, § 1591. Those courts are usually so arranged as to have their powers restricted to the particular state to which the court is assigned; but this is not invariably so, either as to the parties or subject matters of their jurisdiction. Act Feb. 28, 1839, § 1 (5 Stat. 321); Act March 3, 1849, § 5 (9 Stat. 400). Two questions are debated on this issue in law. The first regards the actual boundary line of the Southern district of New York. This was coterminous with that of the state of New York at the time the district was erected and defined (Act Sept. 24, 1789, § 2; 1 Stat. 73), when the western boundaries of the counties on the south of the state were adopted as fixing the boundary of the United States judicial district. There is, however, more distinctness of discrimination in the restatement of that boundary line in the act of April 9, 1814 (3 Stat. 120, § 1). It is not necessary to moot the question whether any variation of that line, made by assent of New York, subsequent to the establishment of the United States judicial or collection districts, would affect the dimensions and authorities of those districts, without the full concurrence of the United States government in such change, because, in my opinion, the arrangement entered into between the states of New York and New Jersey respecting their mutual boundary line, no way impairs or conflicts with any jurisdiction or power possessed by the United States under its laws preceding that adjustment, or passed in approval or confirmation of it. On the contrary, congress, in assenting to the agreement entered into between the states of New York and New Jersey, relative to the limits of those respective states, which becomes a territorial boundary upon one side of this judicial district, provides, in express terms, that 'nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.' Act June 28, 1834 (4 Stat. 711, § 1). Although, therefore, the territorial ownership or authority of New York may not now, as on the passage of the judiciary act of 1789 (1 Stat. 77, § 9; 1 Rev. St. N. Y. pt. 1, c. 1, tit. 1, § 1), embrace the whole breadth of soil to the New Jersey shore, yet the United States retain the same jurisdiction over the waters of the bay it originally possessed on the organization of its courts. The language of the judiciary act is, that the district courts shall 'have exclusive original cognizance of all civil causes of admiralty and maritime juris-

diction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts.' Act Sept. 24, 1789, § 9 (1 Stat. 77). By the subsequent act of March 2, 1799 (1 Stat. 695, § 89), the trial of any fact in issue upon such seizures is directed to be within the judicial district in which the penalty may have accrued. The observations already made sufficiently indicate the judgment of the court, that the libel of information avers facts which constitute full jurisdiction in the court over the case as described in the statute, that is, the offence was committed, and the arrest was made, on waters of the bay below low water mark on the Jersey shore of Hudson's river. An amendment of that act, by the act approved Feb. 28, 1839 (5 Stat. 322, § 3), by which it is enacted, that 'all pecuniary penalties and forfeitures accruing under the laws of the United States may be sued for and recovered in any court of competent jurisdiction in the state or district where such penalties or forfeitures have accrued, or in which the offender or offenders may be found,' renders still more plain the purpose of congress not to restrict the jurisdiction of the court, in cases of penalties and forfeitures, to points of rigorous locality. Upon this state of the pleadings and admissions of fact, judgment must be rendered for the United States, and against the exception by the claimant to the jurisdiction of the court."

The present case is not that of a seizure for an offence against the revenue laws of the United States, as was the case of The Julia Lawrence. But the decision in that case holds that there was nothing in the agreement or compact of September 16th, 1833, entered into between the states of New York and New Jersey, respecting the territorial limits and jurisdiction of those states, and which agreement is set forth at length in the act of June 28, 1834 (4 Stat. 708), and nothing in the last named act, which limits or restricts the jurisdiction of this court over the locus in quo which is in question in this case, as such jurisdiction existed prior to the making of such agreement and to the passage of the last named act; and that, at the time of and prior to the making of such agreement, this court had the same jurisdiction over the waters of New York Bay which was conferred on the district court for the district of New York, when that court was organized in 1789, and which included jurisdiction over the waters of that bay below low-water mark on the New Jersey shore of the Hudson river and over the locus in quo in question in this case. The correctness of such decision in the particulars just named is not impugned by the claimant in the present case, but it is insisted on his behalf, that the territorial jurisdiction of this court is altered by the Revised Statutes of the United States enacted June 22, 1874, so as not to extend to the locus in quo in this case.

By the act of September 24, 1789 (1 Stat. 73, 77, §§ 2, 3, 9), the state of New York was made one judicial district, to be called the New York district, and a court called a district court was created in that district, and exclusive original cognizance was given to such district court, of all civil causes of admiralty and maritime jurisdiction, within that district. The territorial limits of the state of New York were thereby made the territorial limits of the New York district.

By the act of April 9, 1814 (3 Stat. 120, § 1), it was enacted, that the state of New York "shall be and the same is hereby divided into two districts, in manner following, to wit: the counties of Rensselaer, Albany, Schenectady, Schoharie and Delaware, together with all that part of the said state lying south of the said above-mentioned counties, shall compose one district, to be called the Southern district of New York, and all the remaining part of the said state shall compose another district, to be called the Northern district of New York." By virtue of this act, all that part of the state of New York which was bounded on the line between New York and New Jersey fell within the Southern district of New York. By the Revised Statutes of New York (1 Rev. St. 62, pt. 1, c. 1, tit. 1, § 1), which took effect January 1, 1830, it was declared, that the boundary of the state of New York, as its jurisdiction was then asserted, ran from a point on the west side of Hudson's river, in the latitude of 41 degrees north, "southerly along the west shore, at low-water mark, of Hudson's river, of the Kill Von Kull, of the Sound between Staten Island and New Jersey, and of Raritan Bay, to Sandy Hook," "in such manner as to include * * * all the islands and waters in the Bay of New York, and within the bounds above described." Clearly, the locus in quo in this case was, by such description, within the state of New York, and it was, therefore, within the Southern district of New York. By section 3 of the act of April 3, 1818 (3 Stat. 414), the counties of Albany, Rensselaer, Schenectady, Schoharie and Delaware were transferred from the Southern district of New York to the Northern district of New York, but the boundaries of the Southern district were otherwise not altered.

The agreement or compact between the states of New York and New Jersey respecting the territorial limits and jurisdiction of said states, was entered into on the 16th of September, 1833. It was confirmed by the legislatures of the two states, and afterwards, by the act of congress of June 28, 1834 (4 Stat. 708), which sets forth the agreement at length, the consent of congress was given to the agreement. Article 1 of the agreement is as follows: "The boundary line

between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and New Jersey, and of Raritan Bay to the main sea, except as hereinafter otherwise particularly mentioned." Article 3 provides as follows: "The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the Bay of New York, and of and over all the waters of Hudson river lying west of Manhattan Island, and to the south of the mouth of Spuyten Duyvel creek, and of and over the lands covered by the said waters, to the low-water mark on the westerly or New Jersey side thereof, subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say: * * * 2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements made and to be made on the shore of the said state, and of and over all vessels aground on said shore, or fastened to any such wharf or dock." The act of June 28, 1834, provides, that nothing contained in said agreement "shall be construed to impair, or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement."

It is apparent, that the jurisdiction of the district court for this district, in admiralty, was not affected by anything in said agreement or in the act of June 28, 1834. On the 25th of February, 1865, an act was passed (13 Stat. 438), creating the Eastern judicial district. That act provides (section 1) that "the counties of Kings, Queens, Suffolk and Richmond, in the state of New York, with the waters thereof, are hereby constituted a separate judicial district of the United States, to be styled the Eastern district of New York." It also provides (section 2) that "the district court for the said Eastern district shall have concurrent jurisdiction with the district court for the Southern district of New York, over the waters within the counties of New York, Kings, Queens and Suffolk, in the state of New York, and over all seizures and matters made or done in such waters; and all writs or other process or orders issued out of either of said courts, or by any judge thereof, shall run and be executed in any part of said waters." It is not necessary or proper to discuss in this case the question whether, under that act of 1865, the district court for the Eastern district of New York was clothed with jurisdiction over the locus in quo in the present case, or whether, in view of the provisions of the agreement between New York and New Jersey, the jurisdiction of the district court for the Eastern district of New York was so restricted by the act of 1865, as not to extend to such locus in quo. But that act, did not take away from the district court for the Southern district the jurisdiction which it then had over such locus in quo, whether it did or did not confer such jurisdiction concurrently on the district court for the Eastern district.

On the 22d of June, 1874, the Revised Statutes of the United States were enacted. Section 530 provides as follows: "The United States shall be divided into judicial districts as follows." Section 541 provides as follows: "The state of New York is divided into three districts, which shall be called the Northern, Eastern and Southern districts of New York. The Northern district includes the counties of Rensselaer, Albany, Schoharie and Delaware, with all the counties north and west of them. The Eastern district includes the counties of Richmond, Kings, Queens and Suffolk, with the waters thereof. The Southern district includes the residue of said state, with the waters thereof." Section 542 provides as follows: "The district courts of the Southern and Eastern districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens and Suffolk, and over all seizures made and all matters done in such waters; and all processes or orders issued out of either of said courts, or by any judge thereof, shall run and be executed in any part of the said waters." It is contended for the claimant, that sections 541 and 542 of the Revised Statutes are to be considered as new enactments, made in 1874, with reference to the boundaries and jurisdiction of the states of New York and New Jersey as between themselves, as existing in 1874, and with reference to the agreement of 1833; and that by such new enactments there was not conferred on this court any jurisdiction over the locus in quo in this case, because, under the agreement of 1833, it is provided that the state of New Jersey shall have exclusive jurisdiction over vessels fastened to a dock on the shore of New Jersey in the place where the vessel in this case was arrested.

The revision of the statutes of the United States was initiated by the act of June 27, 1866 (14 Stat. 74), which provided that three commissioners should be appointed "to revise, simplify, arrange and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings"; "that, in performing this duty, the commissioners shall bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text, and they shall arrange the same under titles, chapters and sections, or other suitable

divisions and subdivisions, with head-notes briefly expressive of the matter contained in such divisions, also with side-notes, so drawn as to point to the contents of the text, and with reference to the original text from which each section is compiled, and to the decisions of the federal courts explaining or expounding the same"; "that, when the commissioners have completed the revision and consolidation of the statutes, as aforesaid, they shall cause a copy of the same, in print, to be submitted to congress, that the statutes so revised and consolidated may be re-enacted if congress shall so determine, and at the same time they shall also suggest to congress such contradictions, omissions and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied and amended the same, and they may also designate such statutes and parts of statutes as, in their judgment, ought to be repealed, with their reasons for such repeal." This act of 1866 was revived by the act of May 4, 1870 (16 Stat. 96), which provided that three commissioners should be appointed "to prosecute and complete the work prescribed" by the act of 1866. The commissioners were appointed, and reported to congress a "revision of the statutes," which was afterwards embodied in a bill and presented to congress. Act March 3, 1873 (17 Stat. 579). This bill became a law on the 22d of June, 1874, and is known as "Revised Statutes of the United States," and is "the revision of the statutes of a general and permanent nature." Act June 20, 1874 (18 Stat. 113, § 3). It has "marginal notes referring to the statutes from which each section was compiled and repealed by said revision." Act June 20, 1874 (18 Stat. 113), § 2. The Revised Statutes themselves are entitled, "An act to revise and consolidate the statutes of the United States in force on the first day of December, anno domini one thousand eight hundred and seventy-three." Section 5595 of the Revised Statutes, provides that the seventy-three titles which precede that section "embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of congress." Section 5596 provides, that "all acts of congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be in force in lieu thereof, all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general and permanent in their nature; provided, that * * * all acts of congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

Section 541, has, as "marginal notes referring to the statutes from which it was compiled and repealed by said revision," references to section 1 of the said act of April 9, 1814, § 3 of the said act of April 3, 1818, and section 1 of the said act of Feb. 25, 1865. Section 542, has, as such marginal note, a reference to section 2 of the said act of Feb. 25, 1865.

The statutory provisions in regard to the boundaries of the Southern district of New York, and the jurisdiction of the district court for that district, which were in force on the 1st of December, 1873, were provisions general and permanent in their nature. It is clear, that it was the intention of congress to do nothing more than arrange and consolidate those provisions; that no alteration of those provisions, as a change of substance and meaning, was intended; that the provisions of sections 541 and 542 were intended to be merely compilations from the original provisions referred to in the marginal notes to those sections, and to be re-enactments of those provisions; that the provisions referred in the marginal notes to those sections, as repealed by the revision, are regarded as repealed only because they were in force on the 1st of December, 1873, and because they are embraced in those sections; and that, inasmuch as the provisions referred to in the marginal notes to those sections were general and permanent in their nature, and were in force on the 1st of December, 1873, it must be presumed that sections 541 and 542, re-enact them, with the meaning and interpretation which they had received prior to that day, and which were understood on that day to appertain to them. Undoubtedly, where the language of any section of the Revised Statutes, is so clearly different from the language of any prior provision referred to in the marginal note to such section, as to make it impossible to give to the new language the same meaning and interpretation which were given to the former language, the new language must receive a different meaning and interpretation. But the presumption is against any intention that new language should have a different meaning and interpretation. The presumption is that the new language is the result merely of revision, simplification, rearrangement and consolidation, with a view to the re-enactment of the same substance and meaning. Moreover, in the present case, the act of June 28, 1834, is still in force, unaffected by the Revised Statutes. It was not a "general" act, in the sense of that word, as used in section 5596, no part of it is embraced in any section of the revision, no section of the revision is in force in lieu of any part of it, and, therefore, the provisions of that act are not affected or changed by the enactment of the Revised Statutes. The material provision of that act is, that the agreement between New York and New Jersey shall not be construed to impair or in any

manner affect any right of jurisdiction, then existing, of the United States, in and over the waters which form the subject of the said agreement. The act of 1834, must be read in connection with sections 541 and 542 of the Revised Statutes, and all must be so construed that all may stand. Thus construing those sections, the limits of the "state" of New York, and of the "counties" thereof, and of "the waters thereof," must, so far as the jurisdiction of the district court for the Southern district of New York, in admiralty, is concerned, be construed to be the limits recognized prior to the making of said agreement between New York and New Jersey, and not any limits created by said agreement.

The views above announced are sanctioned by the opinion of the supreme court, in Murdock v. City of Memphis, 20 Wall. [87 U. S.] 590, 617, where it is said, that the revision of the statutes of the United States, passed in 1874, is "based upon the idea that no change in the existing law should be made," and also by its opinion in Smythe v. Fiske, 23 Wall. [90 U. S.] 374, where it is said that "it was the declared purpose of congress to collate all the statutes as they were" on the 1st of December, 1873, "and not to make any change in their provisions." The same views were applied by this court in its opinion in the case of U. S. v. Claflin [Case No. 14,799], and those views were concurred in by the circuit judge, in his opinion in the same case in the circuit court, on writ of error (ut supra).

It results, that the vessel in this case was arrested within waters subject to the jurisdiction of this court, under the process issued herein.

LYALL (MATTHEWS v.). See Case No. 9,285.

Case No. 8,613.

LYALL v. MILLER et al.

[6 McLean, 482.] [1]

Circuit Court, D. Michigan. June Term, 1855.

DEED OF TRUST—VESTED RIGHTS OF TRUSTEE—GRANTOR'S RIGHTS DIVESTED—ASSIGNEE IN BANKRUPTCY—EJECTMENT.

1. A deed of trust, having been, bona fide, given to pay a debt of twenty thousand dollars—surplus on sale by the trustee to be paid over—divests the grantor of the title, so that his assignee in bankruptcy cannot maintain an ejectment, nor can the purchasers under him bring an ejectment.

2. The claim of the bankrupt was limited to the surplus, if any, and this is all that the purchaser under the bankrupt's assignee can claim.

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

[Suit by Lyall against Miller & Little, administrators of Little.]

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

Mr. Holbrook, for plaintiff.

Mr. Jay, for defendants.

OPINION OF THE COURT. This is an action of ejectment. On the trial of the case a verdict was found for the defendant, and a motion for a new trial was made, on the ground that the district judge charged the jury that the following instrument conveyed the estate of Mackie to Eleanor Wood. Mackie took the benefit of the bankrupt law in New York, and the land in question was sold and conveyed by his assignee in bankruptcy. Under this deed the action of ejectment was brought. "This indenture, this 10th of April, 1841, between John F. Mackie of the first part, and Eleanor Wood of the second part, witnesseth—Whereas, the said party of the first part is indebted unto the said party of the second part in the sum of twenty thousand dollars, which bond conditioned to pay the same. Now, therefore, this indenture witnesseth that in order to pay the said sum of twenty thousand dollars, and in consideration of one dollar to the said party of the first part in hand paid by the party of the second part, at and before &c., the said party of the first part, hath granted, bargained, sold and assigned and made over, and by these presents doth grant, bargain, sell, assign, transfer, and make over unto the said party of the second part, her heirs and assigns forever, all and singular, the lands, hereditaments and real estate of him, the said party of the first part, in which he is interested either in law or in equity, situate and being at Saginaw or elsewhere, in the state of Michigan, and all the right, title and interest of said party of the first part. In trust, nevertheless, that the said party of the second part shall proceed and sell and dispose of the herein granted and assigned premises, at such time or times, in such manner and on such terms, and for such prices, as in her discretion shall be most advantageous for the parties interested therein, and out of the proceeds pay and discharge the expenses of this trust and the aforesaid indebtment of twenty thousand dollars, or such and so much thereof as shall then remain due, and refund the balance or surplus of such proceeds to the said party of the first part, his heirs or assigns. And the said party of the first part hereby constitutes and appoints the said party of the second part his true and lawful attorney irrevocably in the premises, and authorizes and empowers her to sell and dispose of at public or private sale the above granted premises, and every part and parcel thereof and to execute and deliver good and sufficient and valid deeds and conveyances to the purchaser or purchasers," &c.

The district judge, on the trial, held that the above instrument was a deed of trust, the fee being vested in the trustee for the purposes specified, and, consequently, that

the plaintiff claiming under the sale of the assignee in bankruptcy, was not vested with the legal title. And we think the instruction to the jury was correct. The assignee, on the supposition that there was no fraud in the deed of trust, could take under the assignment only the interest of the bankrupt, which was any surplus which might remain, after the above debt was paid. If the deed of trust were a mortgage, the suit of plaintiff could not be sustained, as on failure to pay by the mortgagee he could not recover the possession against the mortgagor. But the deed is not strictly a mortgage, but a deed of trust with power to sell, which is not affected by the bankruptcy of the grantor. The motion for a new trial was properly refused. Judgment, &c.

LYCOMING FIRE INS. CO. (LEONARD v.). See Case No. 8,258.

LYCOMING FIRE INS. CO. (WEEKS v.). See Case No. 17,353.

LYCOMING INS. CO. (JAMES v.). See Case No. 7,182.

Case No. 8,614.

The LYDIA.

[4 Ben. 523.] [1]

District Court, S. D. New York. Feb., 1871.[2]

COLLISION IN NEW YORK HARBOR—FOG—VESSEL AT ANCHOR AND FERRY-BOAT—MUTUAL FAULT—ARTICLE 20.

1. A sloop lying at anchor in the Hudson river off 51st street, was run into, in a fog, just before daylight, by a ferry-boat coming from Weehawken, and trying to make the ferry slip at 42d street. The tide was ebb. The sloop was well inside of the usual track of the ferry-boat, she had no watch on deck, and gave no signal to the ferry-boat, as the latter approached, blowing her whistle: *Held*, that there was faulty navigation on the part of the ferry-boat, in being so far out of her course.

[Cited in The Drew, 35 Fed. 792.]

2. The absence of a watch on the sloop, was the neglect of a precaution required by article 20 of the rules for avoiding collisions.

[Cited in The Clara, Case No. 2,787, 102 U. S. 203; The Erastus Corning, 25 Fed. 574; Hadden v. The J. H. Rutter, 35 Fed. 366.]

3. Both vessels were, therefore, in fault.

In admiralty.

D. McMahon, for libelant.

W. R. Beebe and J. A. Balestier, for claimant.

BLATCHFORD, District Judge. On the morning of the 10th of December, 1869, just before daylight, the sloop N. Cobb, belonging to the libellant, while lying at anchor in the Hudson river off the foot of 51st street, with her bow up the river, was struck on her port side and sunk by the steam ferry-boat Lydia, a side-wheel boat plying on the ferry between Weehawken, in New Jersey, and a slip at the foot of 42d street, on the Hudson river, in New York, and then on a trip from Weehawken to New York. There was a very dense fog at the time. There is considerable conflict of testimony as to the distance at which the sloop was anchored from the shore. But, whatever that distance was, she was anchored at a point considerably inside of the range up and down the river of the pier at the foot of 47th street, outside of which was the usual course of the ferry-boat on her way to her slip at the foot of 42d street. The ferry-boat was, therefore, very far out of her usual course, when she struck the sloop. She was out of such course because she was blindly pursuing her way in the fog. If she had not struck the sloop, she would, according to the testimony, have run herself on the shore, near the foot of 51st street. From the time she left Weehawken, she had had no guide whatever, by sight or sound, to indicate to her where her slip was, or where the New York shore was. There was a strong ebb tide running, and she was moving with it. I cannot resist the conclusion, that there was bad management on the part of the ferry-boat, in holding on too long upon a course towards the New York shore, with the tide and her own speed such as they were, so that she was carried a considerable distance to the northward and eastward of the west end of the 47th street pier, when her proper course was to the southward and westward of it. But the sloop was also in fault. Waiving the question as to whether she had a light burning in her rigging at the time of the collision, which is very doubtful, and the question as to whether she was anchored in a roadstead or a fairway, within the meaning of article 7 of the regulations, so as to require her to exhibit a white light, and the question as to whether she was within the requirement of subdivision three of article 10, as to the use of a bell by a vessel not under way during a fog, there can be no doubt that she was anchored in such a position as to have made it a proper precaution for her to have had some person on her deck, in so dense a fog, to indicate, by making a noise by means of a bell, or a horn, or shouting, or otherwise, her position in the water, on the approach of the ferry-boat. It is shown, that the ferry-boat blew her whistle constantly, and the sound of her paddle wheels was audible. It was well known to those on board of the sloop, that the ferry-boat was in the habit of running on that ferry in such a fog as then prevailed, and that the sloop was in a place where she could be struck by a moving vessel. Yet her crew were all below. Her neglect to have some one on deck to make a noise, which the ferry-boat on her approach could hear, must be regarded as being, within article 20 of the regulations, the neglect of a precaution required by the special circumstances of the

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

[2] [Affirmed in Case No. 8,615.]

case, and a neglect from the consequences of which, as it contributed to the collision, she is not exonerated. It results, that there must be a decree apportioning the damages equally between the two vessels.

[On appeal the circuit court affirmed this decision. See Case No. 8,615.]

Case No. 8,615.

The LYDIA.

[11 Blatchf. 415.] [1]

Circuit Court, S. D. New York. Dec. 15, 1873.[2]

NEGLIGENCE—FERRY-BOAT—FOG—VIGILANCE—RINGING OF BELL.

1. Important as it is that ferry-boats should be run, and although they are not necessarily bound to stop by reason of a fog, they are bound, when so running, to use vigilance, caution, and skill in some degree proportioned to the increased danger of accident.

2. The court will not now say that the ringing of a bell, or the giving of other audible signal, at the termini of the ferries, as a guide to crossing boats, is required by law; but, it is quite obvious, that it is a useful precaution, and observation suggests that it is not uncommon.

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

[In admiralty.]

Dennis McMahon, for libellant.

Charles Donohue, for claimant.

WOODRUFF, Circuit Judge. I am of opinion that the conclusion of the court below [Case No. 8,614], in regard to the fault of the ferry-boat, was correct. She was out of her course, and within the line of the piers, when she came into collision with the sloop. The preponderance of the evidence is to that effect. It is not shown, and I think it is not true, that, by reasonable and proper skill and care, she could not, in a dense fog, be so steered from Weehawken towards 42d street, as not to be found between the piers and within the exterior line of their ends, opposite 51st street, nearly one-half mile above the slip to which she was bound. Important as it is that ferry-boats should be run, and although they are not necessarily bound to stop by reason of a fog, they are bound, when so running, to use vigilance, caution, and skill in some degree proportioned to the increased danger of accident. The court will not now say that the ringing of a bell, or the giving of other audible signal, at the termini of the ferries, as a guide to crossing boats, is required by law; but, it is quite obvious, that it is a useful precaution, and observation suggests that it is not uncommon.

The question of fault in the sloop is not raised in this court, otherwise than as it is sought thereby to protect the ferry-boat. Her duty to contribute is, therefore, not in question. The libellant should have a decree in this court for the amount found due, as the contribution of the ferry-boat to the damages sustained by the two vessels, with costs of the appeal.

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

[2] [Affirming Case No. 8,614.]

Case No. 8,616.

LYELL v. GOODWIN.

[4 McLean, 29.] [1]

Circuit Court, D. Michigan. June Term, 1845.

ARREST—PERSON PRIVILEGED—REDRESS—SERVICE OF SUMMONS.

1. The mode of redress for a person privileged from arrest, when arrested, is by motion to the court from which the process was issued.

[Cited in Larned v. Griffin, 12 Fed. 591.]

2. A judge, privileged from arrest, when about to set out on his circuit, is not liable to be served with process of summons.

[Cited in Re Kimball, Case No. 7,767; Atchison v. Morris, 11 Fed. 583; Larned v. Griffin, 12 Fed. 592; Nichols v. Horton, 14 Fed. 329; Wilson Sewing-Machine Co. v. Wilson, 22 Fed. 804. Cited in brief in Holyoke & South Hadley Falls Ice Co. v. Ambden, 55 Fed. 594.]

[Cited in brief in McIntire v. McIntire, 5 D. C. 349. Cited in Andrews v. Lembeck, 46 Ohio, 41, 18 N. E. 483; Christian v. Williams, 111 Mo. 441, 20 S. W. 98; Cameron v. Roberts (Wis.) 58 N. W. 377.]

[This was an action by James L. Lyell against Daniel Goodwin for trespass on the case. The defendant moved to set aside the writ of summons.]

Mr. McReynolds, for plaintiff.

Mr. Fraser, for defendant.

WILKINS, District Judge. A writ of summons having been issued out of this court, and served upon the defendant, the present motion is made by the defendant "That the writ, and the service thereof, and all proceedings thereon, be set aside, quashed and vacated." The defendant sets forth in his affidavit upon which this motion is founded, the following facts, which are not contested: "That he is now, and for some time has been, one of the justices of the supreme court of this state. That a regular term of said court was, under the provisions of the laws of the state, commenced and held at the city of Detroit, on the first Tuesday of January last past, and which term did not expire until the 27th of March ensuing. That he, the defendant, as one of the justices of the said court, was in attendance upon the said court during and throughout the said term. That the court was in actual session on the 7th of March last, and was adjourned from that day until the 11th of the same month. That on the 20th day of the same month, the deputy marshal of the

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

United States for this district, came into the room assigned by the state authorities to the justices of the supreme court, and where the sessions of the said court are held; and while the defendant and two other justices of said court were actually engaged in the performance of judicial duties, and served upon the defendant, a writ from this court, commanding the marshal of the district to summon the defendant to appear before this court on the first Monday of April ensuing, (which was the 7th day of April,) to answer unto the plaintiff in this cause, in a plea of trespass on the case, etc., etc. On the day the said writ bears date, viz: the 8th day of March, the defendant was employed in the discharge of his official duties." By the provision of the state law prescribing the duties of the justices of the supreme court of the state of Michigan, the defendant is the presiding judge of the first judicial circuit of said state. The said circuit comprises the counties of Wayne, Monroe, Macomb, St. Clair, Mackinac and Chippewa; in which counties (excepting the counties of Mackinac and Chippewa,) circuit courts are required to be held twice a year by the said presiding judge; the spring term of the Macomb circuit required by law to be held at Mt. Clemens on the first Tuesday of April (which this year was the first day of April) and for the county of Monroe, at the city of Monroe, on the 2d Tuesday of April ensuing, which was the 8th day of April, the day subsequent to the return day of the writ. The city of Monroe is forty miles from Detroit, the present residence of the defendant; and the defendant states in his affidavit, which was made on the 26th of March last, that it was his duty, and he would proceed to the city of Monroe on the 7th of April (the day when he was summoned to appear in this court) to commence and hold the Monroe circuit. It appears then, that the writ of summons in this cause was issued on the 8th of March last, served on the 10th, and made returnable on the first Monday, which was the 7th day of April. And it further appears that the supreme court of the state was in session from the first Tuesday of January until the 28th day of March; and that the Macomb circuit, as required by law, was commenced and held on the Tuesday following the adjournment of the court; and that the Monroe circuit, held at the city of Monroe, forty miles from the city of Detroit, the residence of the defendant, was commenced and held by him on the 8th of April, the day after the return day of the summons from this court, and continued till the commencement of the St. Clair term, on the fourth Tuesday of April. Such are the facts, unquestioned by the plaintiff, and such the provisions of the state laws, regulating the circuit courts of the state, which are courts of record, of general jurisdiction, civil and criminal, and conferring upon and demanding of the circuit judge the exercise of high judicial powers in vacation.

From these circumstances, two points necessarily arise in the case, the defendant having in his motion preferred the claim of privilege. 1st. The regularity of the writ of summons by the marshal, and 2d. To what extent the privilege exempts a justice of the supreme court of the state during its existence.

1st. It being conceded by the plaintiff that the defendant was, and is a justice of the supreme court of the state, and that this writ was served upon him while engaged in the discharge of his judicial duties, and during his actual attendance upon the court, the service must of course be set aside as irregular. The privilege protecting the defendant while engaged in judicial duty, as well from the service of a summons as from arrest, for, although by the service of a summons, the trouble of entering special bail is avoided, yet the summons as well as the capias obliges the defendant to attend the court from which it issues, and exposes the public service to inconvenience and interruption, to prevent which, the protection of privilege in all cases, whether that of parliament, or of jurors, witnesses or suitors, was created by the common law. The privilege is not the privilege of the individual, but of the public, and is granted to guard the legislation of the country and the administration of justice, and it is the duty of courts to give this privilege their constant protection.

But, 2ndly. The privilege to the presiding officer of a court, without whose attendance the court can not be held, is as extensive as to a suitor or witness or juror of the court; and if public policy, which is the reason of the rule, thus protects these officers and parties, with stronger reason should the rule be applied to those public functionaries composing the highest judicial tribunal of the state. This privilege of the court protects jurors, parties and witnesses from the service of civil process eundo, morando, et redeundo, and comprehends protection from arrest by capias, as well as the service of a summons. In other words, the privilege protects them from suit, while necessarily going to, staying at, or returning from the court; private right being suspended in favor of the public good during the period thus comprehended. Such was the well established principle of the common law of England upon this subject, before the statute of 12 & 13 Wm. III. c. 3. For, antecedent to this statute, members of parliament were not only privileged from arrest, but also from being served with any process out of the courts of law, not only during the sitting of the parliament, but also during the recess, within the time of privilege, which was ever liberally construed a reasonable time, eundo et redeundo. It was not within the design of this statute to abridge the common law privilege, which

was enjoyed during the sitting of parliament; but to authorize the commencement of suit, a certain time after the dissolution or prorogation of parliament. The statute directs the manner of bringing the action, viz: by summons or distress infinite to compel a common appearance, but not until after the rising of parliament; and provides—what may be a just construction of the rule in this country—"that the plaintiff is not to be barred by the statute of limitations" in the time consumed by the privilege, but is at liberty to proceed de novo after the cessation of privilege, which, being a public right, enjoyed for the benefit of the public, only so far interferes with private right as to secure the public good, on the termination of which the private right re-commences, unimpaired by the time of privilege, the statute of limitations ceasing to run when privilege commenced. By this statute, as well as by the common law, which it slightly modified, during the session of parliament a suit could not be instituted; and if it had been commenced before, it could not be prosecuted during the session. Under the provisions of the statute, the courts authorized an original to be filed against a member of parliament, in order to prevent him from taking advantage of the statute of limitations, but no process could be issued upon it; and before this statute, this could not have been done at any time after the rising of parliament, during the continuance of privilege. In Pitt's Case, 2 Strange, 987, which occurred during the reign of George II., and to which the statute of William applied, and who was arrested two days after the dissolution of the parliament of which he was a member, and before he had time to settle his private affairs in order to return home, it was held, upon the third point made in that case, that he should be discharged from the suit upon motion, the institution of the suit within the time of privilege being a breach of the privilege of parliament. All the judges were of opinion that he should be discharged on motion, except two—the chief baron at first intimating a doubt, but subsequently ordering the entry of common bail to be stricken out, and the party discharged. And the principal question was, whether he should be discharged on common bail, or discharged altogether? It being after the dissolution of parliament, the plaintiff had a right to commence a suit under the statute, and therefore there was a doubt whether he should not be discharged from the arrest, on common bail, and the proceedings against him continued. But the judges held that they would not countenance the infraction of the privilege, and therefore discharged him entirely. Mr. Justice Blackstone, who published his Commentaries in 1765, after this decision, observes, "neither can any member of either house be arrested, or taken into custody, or served with any process, without a breach of the privilege of parliament." So that the law, as it stood in England before St. Wm. III., or since, extended the privilege to an exemption from arrest, or the service of civil process, during the time covered by the privilege.

In a recent case in the queen's bench—that of Cassidy v. Steuart [2 Scott, N. R. 432] 40 E. C. L. 464, which fully adopts the ruling in Pitt's Case [supra]—it was held, that a ca. sa. issued against a member of parliament, although with a direction to be returned non est inventus, and with the avowed object of continuing the proceedings of the original suit, and not to molest the defendant with an arrest, was irregular, and that the proceeding should be set aside. Bosanquet, J., observing: "Formerly (before St. 12 & 13 Wm. III. c. 3) the privilege was exemption from being sued. Exemption from arrest is recognized in various acts of parliament. The arrest, therefore, would be an illegal act. But if the thing ordered to be done be illegal, the order must also be illegal. But the writ commands the sheriff to do an act, which act, if done by the officer, in obedience to the writ, would be a violation of the privilege, and would throw upon the defendant the trouble and expense of obtaining that discharge to which his privilege entitles him." The same reasoning applies with equal force to a writ of summons issued during the existence of the privilege under the common law. For the latter writ commands an officer of the court to do an illegal act, namely, a breach of privilege, and where the privilege is exemption from the service of a summons as well as from an arrest, the order to infract it, is as irregular as the obedience of the order itself in the actual service. The doctrine of privilege is not peculiar to the common law of England, nor does it spring from the peculiar system of kings, lords and commons. It is as ancient as Edward the Confessor, and is consistent with, nay, necessary to the universal equality established in a republic. It is inseparably connected with the fundamental maxim in all free governments, that where the public exigency renders it necessary, for common preservation, private right shall yield to public good. It has been recognized and adopted in its fullest extent in the courts of the United States, and in several of the states of this Union.

In Hurst's Case [Case No. 6,924], decided in the circuit court of the United States for the district of Pennsylvania, Judges Washington and Peters both held, that the privilege protected a witness at his lodgings while under subpoena, and directed his discharge. The motion was made for his discharge from arrest under a ca. sa., the judgment having been rendered before he was subpoenaed as a witness. In Gyer v. Irwin, 4 Dall. [4 U. S.] 107, decided in 1790, the court held, that the privilege extended to arrest, summons, citation, or other civil process, during the necessary attendance to the public business. In Hayes v. Shields [2 Yeates, 222], a suitor was

privileged from being sued by summons while attending to his cause in court, and eundo et redeundo. In this case the cause had been tried, and a day had intervened after the delivery of the verdict, when he was served with process, and the court very properly held that they would not nicely scan the time of the return of witnesses, parties, etc., etc., and that the exemption from suit claimed by the party, was the privilege of the court, and not the privilege of the party. The plaintiff in this cause endeavored to establish a distinction between writs of summons and capias; which the court held not to be solid, observing that the party's attention to his own business in court, is distracted by other objects, and he is not to be subjected to that inconvenience which would be contrary to the wise indulgence of the law. The defendant was, on motion, discharged from the action. This case occurred in 1797, in Pennsylvania. The motion was made by Ross, whose legal eminence was co-extensive with the Union in his day; and the decision pronounced by Addison, J., as profound a lawyer and as honest a man as ever adorned the bench of this country or of England. Were it a modern Pennsylvania decision, I should probably hesitate to give that weight to it, to which its intrinsic merits entitle it, inasmuch as it is now the common parlance of the bar to treat with levity at least, the modern decisions of both New York and Pennsylvania. But it is not merely Pennsylvania law, but the common law of England, maintained, and enforced. In the argument of the counsel, and the opinion of the judge, we find cited Pitt's Case from Strange, and the common law from its ancient expounders. In Bolton v. Martin, 1 Dall. [1 U. S.] 296, the defendant, who was a member of the state convention in 1788, was served with a summons. Sargeant—so celebrated as a jurist and a statesman—moved to quash the process, upon his mere suggestion, as an officer of the court, that the defendant was acting in a public capacity, as a member of a legislative body, and was entitled to his privilege. The motion was sustained by Justice Shippen, and the defendant discharged from the action. In this case, the attorney general of the state appeared in support of the motion, the privilege being considered a public right; and the whole common law doctrine of privilege was fully sustained, the court reviewing the history of privilege, and placing it on the true ground, not of exclusive favor to an individual, but of public good. And in 1803, when the supreme court of that state was filled with eminent and profound jurists, it was held (in Miles v. McCullough, 1 Bin. 77) that a suitor attending an appeal from the court of another county, was privileged from a summons, and discharged from the suit, on motion. And still more recently, in 1822, in the case of U. S. v. Edme, where a witness attending before a magistrate to give his deposition under a rule of court, was arrested on a capias on his return home from the magistrate's office, under a writ from the district court of the United States, in a suit for the recovery of the penalties of an official bond, the supreme court of Pennsylvania discharged him from the arrest, after he had given bail to the marshal, and where the application was made to the court not by the party himself, who was absent, but by his bail, the court holding that the privilege protected the witness from suit, while attending under subpoena, and for a reasonable time in returning home; and he was discharged without the entry of common bail. This case is to be found in 9 Serg. & R. 150, and is valuable, not only for the point decided, but for the eloquent exposition, by Mr. Justice Duncan, of the right of privilege, and the constitutional boundaries of the federal and state jurisdiction. And but a few years ago, in 1836, the district court in Philadelphia, in the case of Wetherill v. Seitzinger, discharged the defendant from a summons, (which is tantamount to the dismissal of the suit), he being a suitor in another county, and having come into Philadelphia to attend to the taking of a deposition in the pending suit, although the taking of the deposition had been adjourned, and he was about to return. 1 Miles, 237. Although this decision goes greater length than any prior English or American case, yet it exhibits the spirit, that courts will not be deterred from a liberal construction of the privilege of the public, by the allegation of private loss or inconvenience. Nor is the extension of the privilege, in this case, more an invasion of private right, than that in the case of Cole v. Hawkins (in the court of king's bench) And. 275, where merely serving process upon a party attending to his cause in court and while he was upon the steps leading into the court, was held a great contempt of court, punishable by attachment, and the court compelling the attorney, who purged himself of the contempt by declaring that he had served the writ through mere inadvertence, to pay the costs—and discharging the defendant. If the Philadelphia decision in 1836 is calculated to alarm, in its extension of privilege, how much more this adjudication of the court of king's bench, in England, in 1738—a century previous. Both cases deem the infraction of the privilege a public wrong, and as such, punishable by the court against whose jurisdiction the wrong was committed, and whose process was abused.

The courts of New Jersey and Connecticut have followed in the Pennsylvania path, or rather, fearlessly proclaimed the common law doctrine upon the subject of privilege, recognizing no distinction between a capias and a summons, and considering the privilege as the privilege of the court, protecting the administration of justice from interruption and delay. Such is Halsey v. Stewart, 4 N. J. Law, 366, where the decision is pronounced by Justice Southard, of the supreme court of the state,

recognizing and adopting the Pennsylvania decisions in Dallas; and Cole v. Hawkins, in And. 275. Such is Harris v. Grantham, 1 Coxe [1 N. J. Law] 142; and King v. Coit, 4 Day, 129—where it was held by the supreme court of Connecticut, in 1810, that the party entitled to the privilege might avail himself of it, by a plea abating the writ, which is all the present motion under consideration calls for. Though this decision is based upon a local statute, and so referred to by Judge Smith, who gave the opinion of the court, yet the language of the statute is recited in the opinion, and but repeats the common law provision, "that the party is not to be molested by suit during the sessions of, or going to, or returning from, the general court." The court had no doubt but that the writ of error served upon the defendant, was an invasion of his privilege, as a member of the court, and that he had chosen the proper method to take advantage of his privilege, and ordered that the writ abate. Such, also, has been the character of the decisions of the supreme court of the late territory of Michigan, in Woodbridge v. Cook [unreported], decided in 1833, where the defendant was served with a summons while preparing to leave home to attend to his duties as a judge of the supreme court on a distant circuit. The judgment recovered against him in a suit thus irregularly commenced, was reversed on error—and this court has repeatedly recognized the same principle in relation to members of the state legislature, allowing the privilege when plead, and sustaining the demurrer in a suit commenced by Narr, where the privilege was set forth. In Massachusetts the same principle has been recognized, and to the same extent. In the Case of McNeil, 6 Mass. 245, 246, it was decided by the supreme court of the state, that a suitor to an action pending in court, and during the discussion of a mere question of law by his counsel, could not be arrested on a ca. sa. issued on a judgment previously obtained against him in another cause; the court holding that his privilege protected him while "his action was discussing," and ordered him to be discharged. In all the states of the Union, where the question has arisen, the doctrine of the common law has been fully maintained, unless altered and modified by local statute. In New York, a cursory examination of their reports would lead to a contrary impression: but I find that the principle is fully recognized.

In the Case of Livingston, in 8 Johns. 270, the supreme court declined interference with an inferior tribunal by mandamus, commanding the court of common pleas of a county to proceed in a case against the judge of the court, intimating that a judge is not liable to be proceeded against, except by bill in his own court. In the case of Secor v. Bell, 18 Johns. 52, the question arose in a collateral action of debt brought against the sheriff for an escape of an attorney of the court, who had been taken in an execution at the suit of the plaintiffs; and had produced to the sheriff a writ of privilege, upon which the sheriff discharged him from custody, and returned the execution accordingly. Chief Justice Spencer decided that the sheriff had no authority to discharge the attorney, because it was not his province, as a ministerial officer of the court, to take notice of the privilege of an attorney, and that the proper mode to apply the protection of the privilege, was by motion in court to discharge him on an affidavit of the facts. And as, by the Revised Statutes of that state, counsellors, attorneys and solicitors are made liable to arrest on mesne process, and to be held to bail as other persons, the intimation of the judge, that the motion must be to discharge on common bail, depended upon the local statute of the state; Judge Spencer recognizing the common law rule by his citation of authority, and consequently the principle in Col. Pitt's Case, which exempted jurors, and witnesses, and parties from arrest, and other civil process and defined the proper mode to be a motion to discharge altogether, and not the writ of privilege.

It is needless to cull from the numerous authorities, other cases; sufficient have already been referred to, to establish these propositions as the common law of England, and the law in the various states of the Union.

1. The privilege extends to suitors, witnesses, jurors and officers, and consequently to the presiding officers of the courts of justice; and protects them, while in attendance upon their public duties from arrest, summons, or any other civil process.

2. When the privilege is invaded, the proper mode of redress is by motion in the court from which the process issued, to set aside the service, and discharge the party, where privilege has been invaded; or, in other words, to abate the writ.

Apply these principles to the case under consideration. By provision of the state law, known to the counsel of the plaintiff, who took out the writ, the supreme court, of which he was an attorney, met on the first Tuesday of January last. It did not rise until Friday, the 28th of March. By another provision of the state law, the justices of the supreme court are the presiding judges of certain designated circuits; the defendant, Judge Goodwin, being the presiding judge of the 1st circuit, and required by law to commence the Macomb circuit on the first Tuesday in April; affording him this year but two legal days from the close of the supreme court, to prepare for and go to that circuit, and by law also required to attend in succession the Monroe and St. Clair circuits, commencing at Monroe on the second Tuesday of April. The writ of summons commanded the marshal to summon the defendant, Judge Goodwin, to be and appear in this court on the first Monday of

April, to answer the plaintiff; and the law of the state commanded his presence, forty miles from this city, on the day after. He must necessarily obey the law of the state; and his judicial privilege—the same as that which would protect the humblest suitor in the court—protected him from obedience to the summons. The writ was taken out by an officer of this court, who was also a practitioner in the supreme court while that court was in session, and made returnable on a day when the defendant was necessarily engaged in going to a court some forty miles distant from his residence. It was served upon the defendant on the 10th of March, while actually engaged in his official duties, and returned on the same day. Now, at what period of time from the commencement of the supreme court, in January, to the adjournment of the St. Clair circuit, two weeks after the return day of the writ, did the privilege of the judge cease to protect him from process? Certainly not the 29th and 31st of March, both of which days, according to the reasonable time allowed in Col. Pitt's Case, and the case in Yeates, was little enough for preparation to go, and actual going to the Macomb circuit. And from that time onward, to the close of the St. Clair term, in the beginning of May, there was not a day in which his privilege did not clearly and fully protect him from the service of the writ; and, therefore, the service was illegal, and consequently it was an abuse of the process of this court, to take out a writ commanding the marshal to do an illegal act; an act, which from the known provisions of the state law, must be illegal within the time in which it was commanded to be done, and therefore, this writ must be quashed. This privilege is not exclusive, but general; and is not appropriately obnoxious to condemnation, as invasive of private right. It is an ample shield, covering alike the suitor and the witness, the juror and the judge, and protecting from impediment the administration of justice between man and man. More especially is it essential, that the judicial functionary should be thus defended. For the time being, while engaged in the public service, he is divested of self and of private concernment, and, as it were, dedicated in time and mind to the public service. Nor need there be private injury as a necessary consequence. There may be a time, when the privilege of these functionaries ceases,—when the special duty, that sets them apart to the public service has been performed, and their return to private life is clear and unquestioned, when the public interest no longer demands their protection, and the private right to their attention can commence, and they be held answerable as any other citizen.

3. In regard to the question of jurisdiction, it is unnecessary to pronounce an opinion, as that question will come up in other cases now pending, and this writ is quashed on the ground already considered. But, it may be well observed, that since the argument, I have directed an examination by the clerk of the cases instituted since the organization of this court, and the great majority of them state the citizenship of the parties in the original writ, and the few that omit this important allegation are of recent date. By this writ, we are not informed of the character of either plaintiff or defendant. By the affidavits on file, it appears that the defendant is a judge of the highest court in the state, and the plaintiff an inhabitant of the city of Detroit. Now, the judicial act of 1789 [1 Stat. 73] limits the jurisdiction of the courts of the United States to suits between a citizen of the state where the suit is brought, and a citizen of another state, and to cases where an alien is a party; and, to maintain a suit in the circuit court of the United States, "the jurisdiction must appear on the record." This does not appear on the record, as yet, in this cause, and the presumption is, that a cause is without the jurisdiction of the court, until the contrary appears; and, did the quashing of this writ depend solely upon this ground, I would enter more fully into the investigation of the question, notwithstanding the remark of Mr. Justice Taney, in [Bradstreet v. Thomas] 12 Pet. [37 U. S.] 64, "that the proper place for the averment in a writ of right is, the declaration." Was this court asked to discharge a defendant on a writ or a capias, where the writ did not disclose the jurisdiction, or the plaintiff's right to the process, it would not be insisted on, that the defendant must patiently await the plaintiff's pleasure to aver the jurisdiction of the court in his declaration. The court direct the writ of summons in the above cause, and the service thereof, and all proceedings thereon, to be set aside and vacated, and the defendant discharged.

[For further proceedings in this action, see Case No. 8,617.]

Case No. 8,617.

LYELL v. GOODWIN.

[4 McLean, 44.] [1]

Circuit Court, D. Michigan. June Term, 1851.

SERVICE OF SUMMONS—PERSON PRIVILEGED FROM ARREST.

A summons served by leaving a copy at the residence of a judge, privileged from arrest while in the performance of his judicial duties, or traveling to and from his court, can not claim the privilege against the service when at home and not about setting out on his judicial circuit.

[Cited in Atchison v. Morris, 11 Fed. 583.]

[This was an action of trespass on the case by James L. Lyell against Daniel Goodwin. The defendant filed a motion to vacate the writ of the summons and the service thereof. See Case No. 8,616.]

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

Mr. McReynolds, for plaintiff.
Mr. Fraser, for defendant.

OPINION OF THE COURT. A motion is made in this case to quash the writ on the ground that the defendant was a judge of the supreme court of the state, and as the summons was served on him while at his residence in Detroit, not engaged in the actual performance of his judicial duties, but, as alleged, was preparing to leave home on the same, or the next day, to meet the court in which he presided, in the county of ——, and that his departure, at the time stated, was necessary to reach the court at the commencement of the term which was fixed by law. The case was submitted to the court on the argument which had been made before the district judge, and on the opinion which he had pronounced. Judge McLean observed, the facts in this case differ, in my judgment, substantially from those on which the judgment of my brother judge was given. I have looked into his elaborate and learned opinion, and I am inclined to think that the service of the process, in this case, may be sustained without infringing upon the principles laid down in that one. The process, in this case, as in the other, was a summons; and when a copy was left at the residence of the defendant, he was not actually engaged in holding court, nor was he in the act of traveling to or from court. And if, under such circumstances, a mere notice could not be served on the defendant, it would be difficult to imagine at what time such service could be legally made. The question arises under the law of Michigan, and not under the common law, unless its principles have been adopted by legislation or judicial decision. Without entering into a discussion of the principles involved, I would state that I am inclined to sustain the service of the summons, and I would suggest to the counsel, if they desire to take the question to the supreme court, we will certify the point, as to the legality of the service. The court ordered the point to be certified to the supreme court, under the act of congress [1 Stat. 73]. Afterwards the case was settled and discontinued.

Case No. 8,618.

LYELL v. LAPEER COUNTY.

[6 McLean, 446.] [1]

Circuit Court, D. Michigan. June Term, 1855.

COUNTIES—COUNTY TREASURER—ORDER OF BOARD OF SUPERVISORS—PRESENTMENT AND DEMAND—NOTICE OF DISHONOR—NEGOTIABILITY—JURISDICTION OF FEDERAL COURT.

1. Counties are established by law, and need not be proved.

[Cited in Cluck v. State, 40 Ind. 273.]

2. Rev. St. Mich. 1846, p. 70, § 40, providing, "that the county treasurer shall pay money on the order of the board of supervisors, countersigned by the chairman and signed by the clerk," an order in that form will be presumed to be correct, and the official act of the board of supervisors.

3. Such an order is a county liability, drawn by one county officer upon another, for payment out of county funds, and no presentment and demand and notice of dishonor are necessary.

[Cited in Pelton v. Crawford Co., 10 Wis. 72; International Bank v. Franklin Co., 65 Mo. 114.]

4. The statute expressly authorizes such orders for county indebtment, to be drawn by the board of county supervisors, and does not provide that they may not be negotiable.

5. An action lies against the county upon such county orders in the United States court, when the sum in controversy and the character of the parties confer jurisdiction.

[Cited in M'Lean v. Hamilton Co., Case No. 8,881; Vincent v. Lincoln Co., 30 Fed. 752.]

[Cited in Savage v. Crawford Co., 10 Wis. 54.]

Motion for a new trial.

Gray, Campbell & Toms, for plaintiff.
Hand & Goodwin, for defendants.

[Before McLEAN, Circuit Justice, and WILKINS, District Judge.]

WILKINS, District Judge. This action was brought by the plaintiff [James Lyell], a subject of the queen of Great Britain and Ireland, against the board of supervisors of the county of Lapeer, on a county order described in the declaration as follows: "$500 —— —— receivable for taxes, ——, No. 1089. Treasurer of Lapeer County, pay to G. Williams or bearer, $500. By order of the Board of Supervisors, with interest. G. A. Griffin, Chairman. Wm. Beech, Clerk. Lapeer, June 22, 1848." During the trial a number of exceptions were taken to the rulings of the court, and the questions raised form (with the principal objection as to the power of these county functionaries to grant such orders to county creditors,) the basis of the present motion. The order having been produced and identified by the plaintiff, it was further proved that it was in the form usually observed by the various boards of supervisors of the organized counties of the state, in the liquidation of county indebtment; and that the parties by whom it was executed, held, at the time, to the organized county of Lapeer, the official relation of chairman and clerk of the board of supervisors, which the paper represented, and that a demand was made by the bearer upon the treasurer of the county for payment.

1. It was contended by the plaintiff's counsel that "the board of supervisors of Lapeer county" was not a corporation, and there was no evidence of such fact given to the jury. The county of Lapeer was organized by a public law of the state, and therefore need not be proved. And by the Revised Statutes of 1846, each organized county is declared to be a body politic and cor-

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

porate, with authority to contract debt for county purposes, and with liability to be sued on its contracts. Rev. St. 62, § 3. By a subsequent section, it is provided that "whenever any controversy or cause of action shall exist between any county and an individual, such proceedings shall be had in law or equity, as in other suits between individuals, and in all such suits, the name in which the county shall sue or be sued, shall be "The Board of Supervisors" of such "County." These legislative provisions are not superceded by the 1st section of article 10 of the constitution of 1850, which declares "that all suits and proceedings, by or against a county, shall be in the name thereof." It is certainly not to be reasonably supposed that the new constitution, by this clause, restricts suits for or against counties, to the political or geographical designation by which one county is territorially known from another. The law of 1846, in existence when this contract was made, employs the same language as designative of geographical bounds; and to carry into effect its provisions in relation to suits, directs by name the functionaries upon whom process is to be served. A county is an empty name, for judicial purposes. It would serve no object to sue in that name, without further provision as to the functionary which should legally represent the county in court. The legal name of the county is given by law, and that name or title is the "Supervisors of" said "County." The constitution leaves the old law in force. But if the objection was valid, it should have been pleaded in abatement, and the right name given. Great injustice would now be done by countenancing such an objection, after the case has progressed to an issue.

2. It is further urged that this court has no jurisdiction in the cause, the defendant being a political body of the state, and not amenable to legal process in the United States court. By Rev. St. 1846, p. 66, §§ 2, 7, it is provided that "the board of supervisors of each county shall have power to examine, settle and allow all accounts against the county, and that all such accounts shall be presented to and be adjusted by the board of supervisors, who shall have power to direct the raising of such moneys by taxation, as shall be necessary to defray the county charges and expenses." This provision, it is contended, gives the board of supervisors the exclusive jurisdiction of all claims against the county, and even limits their subject matter to accounts and county charges for incidental expenses. The county warrant upon which the suit is instituted, purports on its face, to be "by order of the supervisors," and for an account settled and adjusted by them; and consequently within the power conferred upon the board "to examine, to settle and to allow." It is drawn upon the treasurer of the county, as the officer intrusted with the county funds. It is made payable with interest, forasmuch as the board, knowing the pecuniary concerns of the county, and that its treasury was then unable to meet the demand, thus "settled" the same, anticipating the exercise of the other power conferred—"the raising of the money by taxation."

The note described in the declaration, and introduced as part of the plaintiff's testimony, is properly termed "the evidence of the claim," and of its allowance by the legal authority of the county. It is the custom of such organizations, when claims are allowed, to issue their orders on the treasury for their payment. The debt exists, independent of the order or warrant, and the form in which such instruments may be framed, does not affect the question of power. The case of Brady v. Supervisors of New York, in 2 Sandf. 460, so much relied upon, does not cover the facts of the case under consideration. The statutes of New York required that every claim should first be presented to the board of supervisors for audit, and consequently the court held that as such had not been the fact, that the action did not accrue until after such presentation. Such was the principle of the decision. But here the order for payment is evidence that the claim has been duly presented, as required by the statute, and properly allowed by the competent authority. The board has already acted on the subject matter, and adjudicated the claim. Wherefore the necessity of a re-presentment of this order to every new board as a county charge? The treasurer must have funds wherewith to pay, and if the treasury be empty, it would be but a repetition, ad infinitum, of the same matter for allowance and settlement. Such is not the requirement of the statute. Unquestionably, the matter of claim must first be presented to the county board for allowance and by it be settled; but when allowed and settled, and the claim assumes, by the action of the county board, the shape of a county warrant or order, it may, if unpaid from any cause, be the subject of a suit against the county. The statute having declared the organized counties of the state corporations for the purposes of suit, and conferred upon them the power to contract debt, it follows that such contracts may be enforced by suit. The rights of the contracting parties are reciprocal. If the county can sue, it can be sued. And whatever remedies the state may bestow upon its counties to enforce their just claims, and whatever tribunals may be organized by state legislation for the determination of controversy between its own citizens and bodies politic, yet such legislation cannot affect remedies conferred upon others by the laws of the United States. It cannot compel foreign suitors to select the tribunals of the state in which alone to seek the recovery of their just demands; it cannot deprive a party of a right

of action secured to him by the constitution and laws of the United States. The plaintiff, a foreigner, brings his action of assumpsit, and specially declares upon the county order exhibited in evidence, and it has been settled in the case of Bank of Columbia v. Patterson [7 Cranch (11 U. S.) 299] 2 Pet. Cond. R. 501, that assumpsit is the proper form of action. The claim having been allowed, the county assumed its payment, and gave to its creditor this evidence of their assumption.

It is unnecessary to consider the argument of the counsel in relation to the power of the United States court to issue a mandamus to state officers, as the question does not necessarily arise. This court is now asked for judgment upon the verdict. The proper enforcement of that judgment by the appropriate process, is another matter. But the form deemed necessary by the supervisors, in framing their warrant upon the county treasurer, has occupied other objections to this verdict upon the part of the defendants. The order is numbered 1089, as a measure of precaution, by the clerk, and as a check upon the treasurer. A declaration is prefixed, forming no part of the substance of the order itself, that it will be "receivable for taxes." And the treasurer is directed to pay the sum specified to a person named, "or to bearer." Now it is contended that the case made by the plaintiff on such paper does not entitle him to recover, because the instrument on its face is negotiable, and the statute confers no such authority upon the supervisors of the county; that it is a bill drawn by one set of county officers upon another county officer, and by the bearer ordered to be paid to the present holder; and that, being negotiable, there was no proof of acceptance or notice for non acceptance. The statute meets all these objections. By its clearly expressed provisions, the board of supervisors are directed to meet annually in their respective counties, to organize by the selection of one of their number as chairman. The county clerk is directed to serve as clerk of the board, and to keep a record of its proceedings, to preserve and file all accounts audited and allowed, and to attest by his signature all orders of the board on the treasurer for the payment of money. This board, thus organized, are also expressly authorized "to examine, settle and allow" all accounts presented against the county, to direct the payment of the same by the necessary orders, and (in the language of the statute law) "as it incidentally may deem expedient." This board is also authorized to borrow money, not exceeding $15,000, for the erection of county buildings and bridges, and to provide for the payment of the same with interest thereon. It is also fully authorized to make provision for all the expenses of the county. The statute also provides that a county treasurer shall be biennially elected, who shall have the custody of the moneys belonging to the county, from whatever source derived, and who is restricted in disbursing the same to the written or printed orders or drafts of the board of supervisors, signed by its clerk, and countersigned by its chairman. No particular form of words in which these orders shall be framed, is anywhere prescribed in the statute. Nor is the board of supervisors confined, in the negotiation of a loan of money for the purposes specified, to any particular record or evidence of the transaction. The clerk must make a record of it, and the board can direct such further evidence of the same, as they may deem expedient, to be given to the capitalist loaning the county his money; and the same, when received, is directed to be placed in the county treasury, subject to the drafts or orders of the board of supervisors, signed and countersigned by the clerk and chairman. And when such orders are so granted, they import ability and fidelity in the auditing tribunal, which allowed the accounts on which they are based. It is not for the court to go back of the order, in a case like the present, and inquire whether or not the supervisors were deceived or misled,—whether or not they exceeded their power in borrowing more money than the law allowed. The order speaks for itself; and being under the sum of $2,000, the limit fixed by section 10th, over which a loan cannot be negotiated without special notice, it will be presumed that it was fair in its inception, and in its transfer to other parties, and was for a legitimate consideration. Fraud cannot be inferred from the face of the paper; and it is not consistent with the policy of the statute, nor would it subserve any public purpose to sanction, without evidence of fraud, the repudiation by one county board of the solemn acts of its predecessors. The board, having power to contract for certain purposes, "as may be deemed expedient, and having power to borrow money, it is within the spirit and scope of their authority, to issue—either in payment of adjusted accounts, or, as certificates or evidences of money loaned, such orders on the county treasury, as that described in the declaration. And more especially where an account has been examined and allowed, is it competent for the board to direct it to be paid by the treasurer in such way as shall work no injustice to the county creditor, by affording him the power, in the form of the draft, to raise money upon it, should the county treasury not be in sufficient funds at the time to liquidate the amount." And, although the instrument is in mercantile form —"payable to order"—it is not mercantile currency, and subject to the mercantile law as to presentment and notice of dishonor. It is no more than a county order, made payable to bearer for the convenience of the county creditor, and correspondent with the existing exigency of the county treasury. It is the evidence of a county liability, assumed by the appropriate functionaries; drawn by one county officer upon another, and calling for pay-

ment out of the county funds. On its face it is official, on its face it is notice to the county, and being outstanding, the evidence of its non-payment is of county record. It is in effect, a bill, drawn by the county on itself, of which there need be no notice of dishonor. Notice is only required where knowledge is necessary to enable the drawer or indorser to take means for self-protection. The principle does not apply where the drawer and drawee are identical.

In carrying out the provisions of the statute, in relation to public buildings, or other necessary county improvements, (a statute designed to meet the wants of a new county) it was necessary to clothe the counties with authority to contract debt, and to anticipate the resources of future taxation. To induce immigration, roads must be made, bridges built, court houses and jails erected, &c. The spirit of the statute embraces the negotiation of loans upon the prospective value of the taxable property of the county. Each organized county is required by law, at its own expense, to provide suitable court houses and jails, and fireproof offices for public and private records: and for these purposes money can be legally borrowed by the supervisors. The history of the county shows, that newly organized counties could not, without great oppression, respond to the demand of the statute, and borrow money, for any purpose, without making provision for interest, and the immediate negotiability of their corporate evidences of indebtment. The objection to this verdict on the ground that the board of supervisors could not lawfully make a negotiable order on the county treasury, payable on demand to bearer, and with interest, is not considered sufficient. The other reasons for a new trial are embraced within the view taken by the court as to the extent of the official authority of the county board. It does sufficiently appear, that the order or draft, upon which the action was instituted, was made by the statutory authority of the county legally expressed. The statute provides, that the treasurer shall pay such drafts, when signed and countersigned by chairman and clerk as required—there was evidence that G. Griffin was the reported chairman, and William Beech was the reported clerk, in the year 1848, of the board of supervisors of Lapeer county. If such was not the fact, the testimony could have been easily rebutted or overcome by higher proof within the power of the defendant, viz: the public records of the county in possession of defendant.

McLEAN, Circuit Justice. This was taken under advisement at the last term, it having been tried by a jury at a previous term, before the district judge, at which time certain questions of law were raised, with the view of having them adjudged by a full bench. This action was brought on the following instrument: "$500, receivable for taxes, No. 1089. Treasurer of Lapeer County, pay to G. Williams or bearer, five hundred dollars, by order of the Board of Supervisors with interest. Lapeer, June 22d, 1848. Signed, Wm. Beech, Clerk, and G. A. Griffin, Chairman." The declaration set forth this instrument specially, to which the general issue was pleaded, without affidavit. Afterwards an affidavit was filed, without application to the court or notice to the plaintiff. Under the rules of court, a copy of the declaration was served on the defendants, which was notice to them, and they have appeared. At the trial parol evidence was given of the signatures of the parties to the instrument, and that they acted in the capacities assumed.

It was objected that the defendants are not a corporation, and that on the trial there was no proof of that fact. The counties of a state are organized under a general law, of which the court will take notice. There was, therefore, no proof on this point required.

It is also objected, that the action is misconceived, as the first section of the tenth article of the constitution of 1850 declares, "that all suits or proceedings by or against a county, shall be in the name thereof." This, it is supposed, supercedes the 27th section of the revised law of 1846 (page 65) which authorizes suits to be brought against a county, in the name of the "Board of Supervisors." This would be the case had a proper plea been filed, and had not the new constitution in the same section provided, that the existing law should remain in force until changed.

It is also urged, to show a want of jurisdiction in this case "that the board of supervisors has exclusive jurisdiction of the subject matter of this suit; and that the statute requires all demands against a county to be presented to and settled by such board. And the case of Brady v. Supervisors of New York, 2 Sandf. 460, is referred to as sustaining the objection. That the statutes of New York and Michigan are the same, that "all accounts against any county shall be presented to and settled by the board of supervisors." The decision referred to in Sandford was right, as it involved an open account, which had never been adjusted. But that has no application to the case before us. The note or whatever it may be denominated, is an order by the board of supervisors, on the treasurer of the county for the payment of five hundred dollars, with interest. This is, therefore, a promise of payment of a debt acknowledged to be due. The 32d section of the act which regulates proceedings against counties, declares (Rev. St. 1846) that when a judgment shall be recovered against the board of supervisors, &c., no execution shall be awarded or issued upon such judgment; but the same, unless reversed, shall be levied and collected as other county charges, &c.; and it is argued the only mode by which this duty of the county officers can be enforced is, by mandamus; and that as this court cannot issue such a writ to a state officer, it can exercise

no jurisdiction in the case. And the cases of Kendall v. U. S. 12 Pet. [37 U. S.] 524, 615; McIntire v. Wood [7 Cranch (11 U. S.) 504] 2 Pet. Cond. R. 588. Where it was held, that the power of the circuit courts of the United States to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. And it was held in the Case of Kendall, that the jurisdiction of the circuit court of the United States for the District of Columbia, in this respect, under the law of congress, was greater than the other circuit courts of the United States.

On the obtainment of a judgment, it is the duty of the supervisors to levy a tax on the county and pay it. Now, the objection which is urged against the jurisdiction of this court is, that the county officers in the present case may fail to do their duty, and this court cannot coerce them by mandamus. This is a presumption which cannot be entertained, as now urged, and consequently, the point need not be decided. This court, sitting within the state of Michigan, administers its laws, following in most instances, the remedies provided by the local laws. Those remedies are adopted by acts of congress, or by rule of court, and they become, in effect, the laws of the United States. And these laws are acted on by the courts of the United States, under the construction given to them by the state courts. Under the statute of the state, the courts of the Union sustain a creditor's bill, and give effect to a new remedy created by statute, where such remedy is appropriate to the exercise of a common law or chancery jurisdiction. But the question as to the power of this court to issue a mandamus in the present case, is not now before us, and need not be decided. It may be that the remedy in the state court may be more simple and more effectual than in this court, but this is not a matter for our consideration. The plaintiff having a right to sue in this court, has sought his remedy here, and we can exercise no discretion in the case, which does not rest upon legal principles. A verdict has been obtained by the plaintiff, and the question is now made, whether he shall realize the fruits of the verdict, or be thrown out of court, and pay the costs which have accrued. The objections to the form of the order, on which the action is brought, are not sustainable. It is evidence of indebtment by the county, and a peremptory order to the treasurer to pay the amount. A bank might as well say, when one of its notes is presented for payment, that it is no evidence of an obligation to pay, as for the treasurer in this case to object. As the supervisors have power to borrow money, a presumption may be raised that the order in question was given for money loaned, or in payment for labor, or some article of value received. It is evidence of indebtment which can only be set aside by showing fraud in the county officers, in which the plaintiff participated. The want of power in the supervisors to give such an instrument is alleged. The law gives them power to loan money, and have they no power to acknowledge the indebtment? Under such a restriction, they could hardly be expected to be successful borrowers. The powers of the supervisors are ample under the statute, and there is nothing in the case which shows that their powers were not strictly and legally exercised. A demand on the treasurer was proved on the trial. If the treasurer had set up in his defense, that he had the means of payment in his hands, and was always ready to pay the order, it might show that the suit had been prematurely commenced. But as the order bears date seven years ago, it is not probable that the treasurer has had the means of payment. A county cannot claim the immunity of not being sued under the eleventh amendment of the constitution. If every county could throw itself on its sovereignty, and hold at defiance the judicial power of the Union, we should have in the country more sovereignty than law. It is again objected that the supervisors have no power to contract to pay interest. They have the power to loan money, but no power, it is contended, to agree to pay interest. This argument would have been stronger, had it rested on a usage not to pay interest, instead of a want of power to agree to pay it.

Upon the whole, I see nothing in this case, which authorizes us to set aside the verdict. A judgment is, therefore, rendered.

Case No. 8,619.

LYELL v. MAYNARD.

[6 McLean, 15.] [1]

Circuit Court, D. Michigan. June Term, 1853.

EVIDENCE—COPY OF PATENT BY COUNTY RECORDER.

A certified copy of a patent, by the recorder of a county, is not evidence, as the law does not require the patent to be recorded in the county. [Cited in Moran v. Palmer, 13 Mich. 375.]

At law.

Davidson & Halbrook, for plaintiff.

Campbell, Hawkins & Morgan, for defendant.

OPINION OF THE COURT. This is an action of ejectment. To sustain the right of the plaintiff, a certified copy of the patent was offered for the land in controversy, which was objected to, as the law did not require patents emanating from the general government to be recorded. THE COURT held that the copy was not evidence certified by the recorder of a county, as there was no law requiring the patent to be recorded in the county, or declaring that such a copy

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

should be evidence. Patents are recorded in the general land office, and a certified copy from that office is evidence.

Case No. 8,620.

LYELL v. MILLER et al.

[6 McLean, 422.] [1]

Circuit Court, D. Michigan. June Term, 1855.

TAXATION OF COSTS.

There can be no taxation of costs, except under the act of 1853 [10 Stat. 161]. That law abolishes all previous laws on the subject, without any reservation.

[Cited in Ethridge v. Jackson, Case No. 4,541.]

At law.

OPINION OF THE COURT. This is a motion in regard to the taxation of costs. The above cause was submitted to a jury, and before a verdict was rendered the plaintiff submitted to a non-suit. A motion was made to set aside the non-suit, which was overruled by the court. The taxation is made in part under the present fee bill, and in part under the late one. The act of 26th February, 1853, which is now in force, declares, "that in lieu of the compensation now allowed by law to attorneys, solicitors and proctors in the United States courts, to United States district attorneys, clerks of the district courts, marshals, witnesses, jurors, commissioners and printers, in the several states, the following, and no other compensation, shall be taxed and allowed." The above law applies to all taxations of costs, after it took effect, and it abolished all prior laws on the subject. As there is no provision in the present act that, for services previously rendered, cost should be taxed under the former law, there can be no taxation under it.

Case No. 8,621.

LYELL v. ST. CLAIR COUNTY.

[3 McLean, 580.] [1]

Circuit Court, D. Michigan. June Term, 1845.

COUNTIES — SUIT AGAINST COUNTY — JUDGMENT AGAINST COUNTY—DUTY OF SUPERVISORS—REMEDY AT COMMON LAW — EQUITABLE RELIEF—CREDITOR'S BILL—EXECUTION ON COUNTY PROPERTY.

1. A county is made subject to a suit by an act of the state.

[Cited in Vincent v. Lincoln Co., 30 Fed. 753.]

2. At common law a county was not liable to a suit.

3. On a judgment being obtained against the county, the supervisors are required to levy the amount on the people of the county. And if they shall fail to do this, a mandamus may be issued to compel them.

4. This is a common law remedy, but the object of this bill is to subject certain bonds and mortgages to the satisfaction of the judgments which cannot be reached by mandamus. The remedy at law, therefore, is not adequate.

5. A creditor's bill may be filed against a county. No objection is perceived why an execution may not be levied on the property of a county.

In equity.

Lee, Stuart & Joy, for complainants.

Mr. Terry, for defendants.

OPINION OF THE COURT. This is a suit in chancery, and is brought by the complainant to subject certain bonds, mortgages and other assets, under the control of the defendants, to the payment of two judgments at law recovered against them. Executions were issued on the judgments, which were returned nulla bona. The defendant demurred to the bill. In the Revised Acts of Michigan of 1846 (page 65), it is provided in the twenty-sixth section, that "whenever any controversy or cause of action shall exist between any of the counties of this state, and between any county and an individual or individuals, such proceedings shall be had either in law or equity, for the purpose of trying and finally settling such controversy, and the same shall be conducted in like manner, and the judgment or decree therein shall have the like effect, as in other suits or proceedings between individuals and corporations." The next section provides, that a suit against a county shall be in the name of "the board of supervisors of the county." At common law a county could not be sued. 2 Term R. 667; 7 Mass. 187; 2 Serg. & R. 371. The thirty-third section provides, that "when a judgment shall be recovered, the board of supervisors shall levy and collect the amount as other county charges." Under this provision it is insisted that the remedy was by mandamus, and not by a bill in chancery. There can be no doubt that a mandamus may be issued to compel, under certain circumstances, a public officer to do his duty. Smith v. Com'rs Portage Co., 9 Ohio, 25; Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371; Johnston v. Supervisors Herkimer Co., 19 Johns. 272.

The grounds of the present bill are to subject, in payment of the judgments, certain bonds, mortgages, &c., held by the county, and which cannot be reached by a mandamus. It is made the duty of the supervisors to levy on the county the amount of the judgment, and this duty may be enforced by a mandamus, but that is not the object of the present bill. It is a creditor's bill, which is authorised and regulated by the statutes of Michigan, and under which this court gives relief. Suits against counties are placed on the same footing, as against individuals, by the statute, so that it would seem a creditor's bill may be filed against the supervisors of a county. The objection that a fieri facias cannot be issued against a county is technical, and is by no means

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

conclusive of the objection founded upon it. The statute which regulates a creditor's bill, requires a fieri facias to be returned nulla bona before the bill is filed. In other words, this evidence of the inadequacy of a remedy at law is required. But this has been done in the present case, and the objection is, that the writ could not be issued against a county. This is not admitted. A judgment having been legally obtained, it is not perceived why the property of the county may not be levied on. The power given to the supervisors to levy the amount by a tax on the county, is cumulative, and does not necessarily prohibit the ordinary course of the execution, as in case of an individual. In Massachusetts the doctrine is established, that on a judgment against a county or town, the property of any citizen may be taken in satisfaction. 6 Metc. [Mass.] 552. But this doctrine is not sustainable in this state. The imposition of a tax by the supervisors, they being subject to a mandamus, is a more reasonable and just mode. The county being made subject to a suit, no serious objection is perceived, against reaching the rights in question by the ordinary exercise of chancery powers, independently of statutory provisions. The demurrer is overruled.

Case No. 8,622.

LYLE et al. v. The CONESTOGA.

[8 Leg. Int. 21, 154; 5 Pa. Law J. Rep. 95.]

District Court, E. D. Pennsylvania. Jan. 3, 1851.[1]

COLLISION—PROBABILITY OF TESTIMONY—CONFLICT OF TESTIMONY.

[1. Where, in a collision between a steam tug and a schooner, the testimony is in direct conflict, the court will, after examining all the circumstances, give its decision with the side whose testimony is the most reasonable.]

[2. A collision occurs between a steam tug and a schooner, and the latter is sunk. There is a direct conflict in testimony between the parties, each accusing the other of being wholly at fault. An examination of the injury done to the defendant steam tug by the collision shows that the tale as told by the witnesses for the defendant is the most probable. Upon this state of facts the court decides for the defendant.]

In admiralty.

R. Rundle Smith, for libellants.

R. P. Kane and H. Wharton, for respondents.

KANE, District Judge. On the 19th of October last, a little before five o'clock in the morning, the schooner Margaret, a small river or canal boat, proceeding down the river, with a cargo of lime, destined for Hook creek, a small estuary above Marcus Hook, when about three hundred yards above its mouth, came into collision with the steamer Conestoga, a heavily laden steam tug, coming up to Philadelphia, and sunk almost immediately. The wind was from the N. W., blowing fresh; and the tide ebb about two-thirds spent. The libel, which is sworn to by the captain of the schooner, asserts that she was kept as close to the Pennsylvania side of the channel as it was safe to do; that he and his crew made every effort to avoid the collision, that they hailed the steamer repeatedly and audibly to keep clear, as she was seen "coming towards" the schooner; but that the steamer held her course, and took no notice of their outcries either before or after the injury. The answer, sworn to by the charterers of the Conestoga, imputes all the blame to the mismanagement of the schooner, and claims damages against her. It avers that the steamer was heading N. E. by E. for the town of Chester, and moving nearly parallel with the Pennsylvania shore, and at about 100 yards from it; that the schooner, when first seen, was about 300 yards off, heading directly down the river, and at such a distance to leeward, that if she had kept her course, she would have passed about twenty yards clear of the steamer; but that when she had approached within a very short distance, or about one-half of the steamer's length off, she suddenly luffed right across the steamer's bows, and although the steamer was instantly stopped, yet the force of the tide brought the larboard side of the schooner against the bow of the steamer with such violence as to produce the injury to both vessels. In answer to the allegation that they paid no attention to the outcries of the schooner's crew after the accident, it avers that the officers of the steamer did not suppose the schooner had been seriously damaged, and that their own vessel was so much injured as to urge them to hasten onward to have her repaired.

On the pleadings, it is apparent that the ruling question is, as to the positions of the two vessels, and the courses they were steering before the encounter. If the schooner, passing down the river with a favorable tide and the wind abeam, was so far to leeward of the steamer, that by keeping on her course she would have passed clear of her, then she was bound to keep on, and had no right to throw herself across the steamer's bows. If, on the other hand, the two vessels were "coming towards" each other on a right line, or nearly so, then it was the duty of each to port her helm; and the steamer in that case having the open river before her, and the schooner having the shore close to her starboard, the steamer is answerable for not having given way. The evidence on this question of direction and course is directly conflicting. Rhinehart, who was at the schooner's helm, says: "The steamer was about 300 yards from us when we first saw her. The schooner was going down the river; the steamer heading right across the river, at, as near as could be, heading from the Jersey

[1] [Reversed in Case No. 8,622a.]

to the Pennsylvania shore. She did not alter her course after I hailed her. We did not change our helm at all after we saw her, I could not luff away closer to the shore; we were too near it; and I was afraid to put her helm out, or keep her away, for fear of running into the boat, as she was heading towards us." He says again: "When we first saw the steamer, she was heading for the Pennsylvania shore; she was about 300 yards from us when we first hailed her." Evans, one of the hands of the schooner, says: "I suppose we were within two or three hundred yards from the creek when the steamer ran across the river, and headed us off. Capt. Lyle and Mr. Rhinehart both hailed her when she came within hailing distance; but she did not alter her course or diminish her speed in consequence of the hailing." "The schooner was laying her course for the creek when the steamer struck her, close to the shore, as near the course as she could possibly run." Again he says: "When I first saw the steamer she was heading right at us." Wood, the other of the schooner's crew, was below at the time of the collision, and the captain's account of it, somewhat meagre of details, and therefore unsatisfactory, is embodied in his libel, as I have already recited it. This is all the direct evidence in support of the libellant's case. If it be true, the act of the steamer was most wanton and unjustifiable, and that of the schooner altogether blameless. The steamer, according to it, came across the river from the Jersey to the Pennsylvania side, heading a strong wind, and encountering the adverse tide where it was strongest, merely to strike against the schooner. For she could have had no other object; and had she failed in attaining this, she must have gone aground by her own impetus, for the schooner was as close to the channel edge as it was safe for her to be, and the steamer had the greater draught of water. Nor is this all. Sharp, another witness for the libellants, was on board a vessel at Marcus Hook piers when the Conestoga came by, and he says she pressed so close to him that he was afraid she would strike his vessel. We must suppose the steamer then to have crossed towards the Jersey shore after this, and to have returned, breasting the tide twice in the same half mile, and within some 20 or 30 minutes, if Rhinehart and Evans are to be relied on. The first direct witness on the part of the respondent is Edward Robinson, the pilot of the steamer. He says he took the helm immediately after passing Marcus Hook, and when the steamer was about a length from the pier; that he kept close under the windward or Pennsylvania shore, parallel with it, and as close in as he could with safety; "our object in keeping so far to windward," he says, "being to get a slack tide to stem against in coming up, being heavily laden, and the boat being very slow at the best of time." When about half or three-quarters of a mile above Marcus Hook, he saw the schooner ahead about 300 yards off, heading directly down the river, and about 20 yards to leeward. She continued to keep that course, he says, until the two vessels were about the length of the steamer from each other, when a voice from on board her called out "Keep way," or "Keep off," and immediately afterward she luffed up, or rounded to cross the steamer's bows. He says, that at the word "Keep off," he starboarded his wheel for an instant, although he thought it unnecessary, yet intending to give the schooner more room to pass, as he supposed the man on board the schooner was frightened by the two vessels passing so near each other; but observing immediately afterwards that the schooner was coming across his bows, he stopped his engine, and put his helm hard a port. Captain Tuft, who acted as mate of the steamer, and had left the helm and gone below after passing Marcus Hook, testifies that when he left the deck she was heading for Chester piers, very close in, out of the tide. Being deeply laden, he says, "we run her in, in order to get her ahead some; she could hardly hold her own against the current. If she had been in the main ship channel, she couldn't have held her own; I suppose our speed was about three knots, if it was that." Hearing the halloo, he hurried on deck, and found the steamer heading as before, and the schooner athwart her bows, heading square in for the Pennsylvania shore; the two vessels just about to be foul of each other. Riley, the engineer on duty, of course, did not see the collision, and cannot testify as to the direction of the two vessels or their distance. So far as his testimony goes, it negatives the assertion that the steamer was coming across the river. The only other person on board the steamer who witnessed the circumstances is Walter, one of the deck hands. He was, on the after part of the deck at the time of the halloo, and going forward "saw a schooner just rounding to across the steamer's bows." He cannot tell exactly how far she was off, but thinks about the length of the schooner. "The steamer," he says, "was heading about as fair for Chester piers as we could make it out, about 100 yards from shore, and the schooner about 20 yards outside the steamer. The schooner, when we got forward, was heading for shore right across the river; she appeared as though she had had a straight course down the river, and had turned right round; her sails were all to the eastward." The schooner, he repeats, was coming down the river, and she luffed, and shot across towards the Pennsylvania shore.

This is, I believe, a summary of the direct evidences on both sides; and I confess the account given by those on board the steamer strikes me as much the more probable of the two. It consists with the objects which both vessels had in view. The steamer, struggling

to make headway against the tide, and with the wind from the northwest, would naturally keep close under the shore, where the tide is always less rapid, and where the wind would retard her least. The schooner, bound down the river, would keep the tideway and wind full, till she was nearly opposite her place of destination, and would then luff up to reach it. The other story supposes that the schooner was willing to forego the benefit of the favoring tide by keeping outside the channel, and that the steamer was desirous of encountering it where it was most adverse, and making tacks back and forth across the river as if she was under sails. The only error according to both respondents' statement was that the schooner changed her direction when she found she was too close to the steamer; according to the libellants the schooner's course was unseamanlike, and the steamer's absurd. But there is a fact in the case which relieves us from the necessity of weighing probabilities. It is the character of the injury which the steamer received in the collision. About this there is no dispute; and it proves conclusively that the part of the steamer which first came in contact with the schooner was the starboard side of her stem. Now, this could not have happened by any possibility on any version of the libellants' story, for there can be no doubt that the steamer was coming up the river, and not going down. Coming up the river, as the libellant says she was, or crossing the tide on her way up, as the witnesses for the libellants affirm, it would have been her larboard side, and not her starboard, which must have branted the collision. And, on the other hand, the injury, which the steamer would receive from a collision such as the respondents describe, would be exactly such as was found on the steamer's bows,—the schooner, luffing suddenly from the tideway towards the Pennsylvania shore, would impinge first on the steamer's starboard bow. Indeed there is no other possible theory of the collision, but that asserted by the respondents, which is not fatally inconsistent with this unquestioned fact, that the force or resistance which did the injury to the stem of the Conestoga, the body against which she impinged, or which she impinged against her, was on her starboard bow. This, of course, decides the case against the libellants.

The course taken in the argument, and the somewhat varying opinions which were expressed by the experts who were examined, respecting the rules of river navigation, make it proper for me to say, that this court adopts without limitation what it supposes to be the rules of the English Trinity House. I recite them succinctly here, for the information of those who are engaged in navigating our coast and river. If two sailing vessels are approaching each other in such a manner, that they may probably come together if both hold their course: then, 1. If both are going free, or with the wind abeam, both are to port the helm, so as to pass larboard side to larboard. 2. If both are going closehauled, or by the wind, the vessel on the larboard tack is to bear away, so as to pass larboard side to larboard. 3. If one is going with the wind fair, and the other closehauled, or by the wind, the vessel having the wind fair is to give way, and the vessel going closehauled is to keep her wind. Steamers are regarded as sailing vessels that have the wind free; therefore, 4. When a steamer is approaching a sailing vessel going closehauled or by the wind, in such a manner as to hazard a collision between them, the steamer is to give way, and the vessel going closehauled is to keep her wind. 5. When two steamers, or a steamer and a sailing vessel, with the wind free, are approaching each other in such a manner as to hazard a collision, both are to port the helm so as to pass larboard side to larboard. These five rules, it will be remarked, apply to those cases only, in which the two vessels are approaching each other in such a manner that they may come together if both hold their course. In other cases, the rule which has been practically sanctioned by the courts of admiralty and which the present case illustrates, may be expressed thus: 6. Where two steamers or two sailing vessels with the wind free, or a sail vessel with the wind free and a steamer are approaching each other, but in such a manner that by each keeping her course they will go clear of each other, neither is to change her course when near the other without necessity, unless it be to increase the distance between them. I do not wish to be understood as deciding beforehand that these rules admit of no exceptions. There doubtless are such, that refer themselves to the direction and force of tides, the depth of channel way, and the draught of vessels, and the intricacies that sometimes embarrass the navigation of a crowded thoroughfare. But the exceptions are few; and the circumstances must be very nearly imperative, to exclude a particular case from the operation of the general rules. In decreeing for the respondent in the case immediately before me, I feel reluctant to award damages against the libellants. I believe they did not intend to do any wrong, but that they probably were ignorant of the rule of navigation, and lost their self-possession as they found themselves approaching the steamer. They have suffered heavily in the loss of their vessel. If a precedent can be found for such a course, I shall dismiss the respondents' claim for damages. At present I dismiss the libel with costs; and will hear from the counsel of the parties before I go farther. Decree accordingly.

[NOTE. On appeal to the circuit court, the learned judge, after examining the testimony in the case very carefully, reached the conclusion that the steamboat Conestoga was in fault. The decision of the district court was reversed, and decree entered for libelants. Case No. 8,622a.]

Case No. 8,622a.

LYLE v. The CONESTOGA.

[4 Am. Law J. (N. S.) 183.]

Circuit Court, E. D. Pennsylvania. 1851.[1]

COLLISION—CONFLICT OF TESTIMONY—ACCOUNTABILITY OF STEAM VESSELS.

[1. Steamboats should be held to a rigorous rule of accountability. Steam vessels are always considered as having the wind free, and must always give away.]

[2. In the case of a collision between two vessels, and a direct conflict of testimony, the court will, in deciding the case, look to the reasonableness of the two stories, deciding for the more reasonable story, bearing in mind that in these cases the probabilities are that neither side tells the whole truth. Case No. 8,622, affirmed.]

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

[This was a libel by the owners of the schooner Margaret against the charterers of the steamer Conestoga, for damages for collision. The claimants filed a cross-bill for damages from the same collision. The court, dismissing the libel, reserved its decision as to the claim of the respondents. Case No. 8,622. Libelants appealed.]

R. R. Smith, for libellant.

Mr. Kane and H. Wharton, contra.

GRIER, Circuit Justice. I have heard this case twice argued, and very ably argued, by the learned counsel. I have carefully examined the testimony two or three times, and have been unable to get rid of the conviction that the steamboat was, in this case, (as in almost all others,) in fault for this collision with the schooner, and that her owners should pay for the loss incurred. There are no principles of law in dispute in this case. The rules which govern cases of this sort are well stated by the learned judge of the district court. The law imposes on the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel close-hauled, and of showing it had done so; if not, the owners are responsible for the loss that shall ensue. Steam vessels are always considered as having the wind free, and must always give away.

The difficulty in this case, as in most others, is with the facts, not the law. It is vain to expect the truth from the steersman or pilot of the colliding boat. He will not admit that he was drunk or asleep, or paying no attention, and not keeping a proper look-out. In all instances where a steamboat runs down a sailing vessel, by attempting to pass under her bows when she should have ported her helm, the pilot invariably swears that the vessels were steering entirely clear of one another, when suddenly, as they were about to pass, the schooner luffed right across the bows of the steamboat, and the pilot of the schooner invariably swears, that, while the boats could easily have passed the larboard of each other, without even porting the helm, the steamboat turned right across the track of the schooner and run her down. Take the story of the steamboat pilot as true, and the schooner must have purposely run under the bows of the steamboat; while, by the story of the other, the steamboat must have purposely run down the schooner. And such is the case before us. I do not believe the statement of either of the pilots; they each endeavor to make out a strong case for their own side, but make it a little too strong. I have observed in all such cases that other persons on board the steamboat, whose attention is never turned to the matter until the very moment of the collision, will very honestly swear that the schooner luffed across the bows of the steamboat, because it would appear so to them, who could not distinguish between the motion of their own boat and that of the other. Besides, when through the carelessness of a steamboat, a schooner, running closehauled to the wind, is about to be run down, the steersman will naturally cause her to luff to the wind, to lighten the effect of the collision. In many, if not all cases, the luffing, if there be any at all before the collision, is caused by the apprehension of immediate and certain collision, and is not the cause of the collision. There may be cases (I have known one) in which the steersman of the schooner, by attempting to get out of the way, when he should have left that duty entirely to the steamboat, has, by his ignorance and officiousness, been the cause of the collision. But I cannot be satisfied from the testimony in this case, that it comes within that description.

These points seem to me clear: The steamboat, in passing Marcus Hook, had sheered out considerably into the river, and was running a northeast course, which would take her towards the western shore, as she was desirous to keep near it. The schooner was laying her course from the middle of the river for the mouth of Hook Creek, where she intended to stop. It was before daylight in the morning, when, though vessels might be seen at some distance, their exact position or course could not be so easily distinguished; those on board of the schooner might easily suppose that the steamboat was in the middle or far side of the river, for her relative position in the river would not be easily discovered without a correct estimate of her distance. The pilot of the steamboat might on a hasty view, form the same notion as to the position of the schooner. He would take it for granted that the schooner would continue on down the middle of the river, as he was ignorant of her intention to run to the mouth of Hook Creek, and knowing his own intention to run as near the shore as he could, he concluded that there would be no danger of the boats approximating, when, in fact, they were approximating a point at which their course would intersect. The captain or

[1] [Reversing Case No. 8,622.]

mate had retired, evidently under this supposition. The lookout had retired to warm himself at the chimneys. The pilot supposing the schooner to be on her course down the river, says, "he could not tell where she was bound, further than down the river;" instead of running obliquely for the shore, keeps on his course for the point of intersection, he hears the hails and shouts from the schooner as he approached her, and, instead of porting his helm, he admits he "starboarded his wheel a little," and this was all he did, by his own statement, to avoid the collision, with the exception of attempting to stop his boat after the collision had become inevitable. It was his duty to keep out of the way and avoid the collision. I am not satisfied that he did anything to that end, even from his own statement. Either from a want of a proper look-out, or from his own inattention, he had failed to observe that the course of the schooner was to the mouth of the Hook creek, and "that" (in the words of Captain Tuft,) makes a difference and a very important difference in the case. The character of the injury received by the steamer in the collision, is supposed to confirm the story of the steamboat pilot and refute that of the pilot of the schooner. This is true, if we must assume that one of them has spoken the whole truth, and the other is entirely false. But, as I have said, the tale of either of them, as the whole truth, is incredible; they each tell the stereotyped story, to be found in every case of the kind, and always false. Allowing the usual percentage upon the admission of the pilot of the steamboat, that he "starboarded his helm a little," and that the schooner had luffed into the wind to evade the force of the collision, when it had become inevitable, as she would naturally do, there is no difficulty in perceiving that the starboard side of the stem of the steamboat might first come in contact with the schooner. On the whole I am convinced, from a careful examination of the testimony: 1. That the steamboat had not a proper look-out, under the circumstances of her situation. 2. That the schooner was running her proper course for the point of destination. 3. That the steamboat pilot, either from want of attention in himself, or of a proper look-out, was not aware of the fact. 4. That he took no proper measures to avoid the collision, when he might have done it with ease, and that starboarding his helm, when warned by the shouts from the schooner of the probable collision, only increased the certainty of it, and shows from his own confession, his want of attention or proper lookout, and an absence of all proper endeavors to avoid a collision till it was too late.

I am convinced that it was necessary to the safety of sailing vessels, that steamboats be held to a rigorous rule of accountability. If the story of the steamboat pilot, that the schooner, running a course clear of the steamboat, suddenly luffs in the wind to throw herself in the way of the steamboat, apparently with the intention of getting herself run down, and floats herself against a steamboat standing still and is thus sunk,—I say, if such a story is expected to be believed, it must be better corroborated than it has been in this case. Let judgment be entered for the libellant, and the case referred to the clerk to assess damages.

[For proceeding respecting costs, see Case No. 9,070.]

LYLE (PICKETT v.). See Case No. 11,125.

LYLE (SIMS v.). See Cases Nos. 12,891 and 12,892.

Case No. 8,623.

LYLES v. ALEXANDRIA.

[1 Cranch, C. C. 473.] [1]

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

PLEADING—DEFECTIVE DECLARATION.

A declaration against "the common council of Alexandria," for work and labor done for "the mayor and commonalty," must show how the new corporation is liable for the debts of the old.

This was an action of assumpsit for work and labor done by the plaintiff for the town of Alexandria, under its old charter of 1779, when its corporate name was "The Mayor and Commonalty of the Town of Alexandria," and this suit was brought against the corporation under its new charter of 1804, by the corporate name of "The Common Council of Alexandria." The declaration stated the work was done for the mayor and commonalty, &c., but did not aver that the new corporation, (the common council, &c.) was liable for the debts of the old, nor refer to the new charter by which it was so made liable.

And for this cause THE COURT (DUCKETT, Circuit Judge, absent), arrested the judgment.

E. J. Lee, for plaintiff.

Mr. Taylor, for defendant.

Case No. 8,624.

LYLES v. ALEXANDRIA.

[1 Cranch, C. C. 361.] [1]

Circuit Court, District of Columbia. Nov. Term, 1806.

BILL OF EXCEPTIONS—REFUSAL OF JUDGE TO SIGN

The court will not sign a bill of exceptions, which states that it contains all the evidence in the cause, unless, &c.

THE COURT (DUCKETT, Circuit Judge, absent,) refused to sign a bill of exceptions stating that it contained all the evidence offered in the cause; that fact not appearing to be agreed by the parties, and the court not being satisfied that the whole evidence was stated.

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

Case No. 8,625.

LYLES v. STYLES.

[2 Wash. C. C. 224.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1808.

PARTNERSHIP — PARTIES JOINTLY CONCERNED IN AN ADVENTURE—JOINT OWNERS—POWERS AND RIGHTS.

1. The plaintiff and the defendant were jointly concerned in an adventure to St. Domingo, which was placed under the management of the defendant, who commanded the vessel in which it was shipped, and who was to dispose of it on joint account. In a letter, addressed by the plaintiff to the defendant, before the vessel sailed, the plaintiff advised that the property should be sold for cash or produce. The defendant sold the property for bills on the French government, which, having been remitted by the plaintiff to France, were not paid. This being a joint concern, the defendant had the power and the interest of a partner, as to the disposition of the cargo.

2. The joint owner might advise, but he had no right to order; and the paper addressed by him to the defendant, was to be considered as advice only.

3. If the conduct of the defendant was fair, in the transaction, he is not answerable to the joint owner for the loss sustained by taking the bills.

[Cited in Jenkins v. Peckinpaugh, 40 Ind. 138.]

Action upon an account. The principal question of law arose on the following facts: The plaintiff shipped on board the defendant's vessel, which he commanded, a parcel of goods, on the joint account and risk of plaintiff and defendant, to be carried to Port Republican; where, by agreement, the same were to be sold by the defendant, for the joint account, without any charge by defendant for freight or commission. The bill of lading and invoice corresponded. It was proved, by a clerk, of the plaintiff, that in order to diminish the duties to be paid at Port Republican, where the duties were then charged on the invoice, that an invoice was, by the clerk, with the consent of defendant, made out, charging the goods at half their real value. Before the defendant sailed, the plaintiff put into his hands a paper, containing his views of what should be done with the cargo, particularly advising that no part of it should be left unsold in St. Domingo; and that it should be disposed of for cash or produce. Nothing was heard of the defendant, after he sailed, for nearly a year; but certain bills, drawn at St. Domingo on the French government, were forwarded by the defendant to his wife in Philadelphia, with directions to sell them at forty per cent. discount. They could not be sold for any thing. The plaintiff received them, and after some time sent them to his correspondent in France, in order to get them paid. But they have never yet been paid.

Witnesses were examined, to prove that the French, at St. Domingo, were in the habit of seizing goods brought there, and paying for them in bills drawn on the government. The account of sales of this cargo rendered by defendant, was according to the low invoice.

It was contended, by Mr. Tod, for plaintiff, that the defendant had misconducted himself, in selling for government bills, particularly in the face of the plaintiff's instructions; and, therefore, that the whole loss of them should fall upon him.

Mr. Gibson, for defendant, insisted that the defendant had acted fairly, and was not liable for the loss to the plaintiff, to which he was as much exposed as the defendant; that there was good reason for believing that the goods were taken from the defendant, and the bills forced upon him; and that, at all events, the plaintiff, by receiving the bills, had waived all objection.

WASHINGTON, Circuit Justice (charging jury). The plaintiff and defendant were jointly concerned in this adventure, and the defendant had the power and interest of a partner, as to its disposition. The letter from the plaintiff to the defendant, is improperly called a letter of instructions, or even an agreement by defendant, to sell for cash or produce. The plaintiff had a right to advise, but not to order; and such is the style of the letter. If you are of opinion that the conduct of the defendant was perfectly fair, then there is no ground upon which to charge him with the loss of these bills.

The jury, as to this part of the account, found according to the charge.

LYLES (UNITED STATES v.). See Cases Nos. 15,645 and 15,646.

LYLES (VOWELL v.). See Cases Nos. 17,020 and 17,021.

Case No. 8,626.

LYMAN v. ARNOLD et al.

[5 Mason, 195.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1828.

EASEMENTS—LIBERTY TO DIG CANAL — PROPERTY RIGHT IN MATERIALS DUG UP.

A liberty granted in a deed "to dig a canal through the grantor's land," does not include, as an incident, the proprietary interest in the soil, when dug up and removed.

[Cited in note to Welch v. Wilcox, 101 Mass. 162. Cited in Bean v. Coleman, 44 N. H. 544.]

Bill in equity [by Thomas Lyman against James Arnold and others] for an injunction to prevent a removal and sale of certain stones dug out of a canal, and also for relief. The cause came on to be heard upon the bill, answers and depositions.

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

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

J. L. Tillinghast, for plaintiff.
Whipple & Searle, for defendants.

STORY, Circuit Justice. The present suit is a bill in equity brought for an injunction and relief, on account of an asserted claim by the defendants of a right to take, remove, and sell, certain stones and other materials dug out of a canal, which the plaintiff has constructed through the land of the defendants, under an agreement for that purpose. The plaintiff alleges, that these stones and materials are his own property, and that a sale has been made of a part of them by the defendants; and as to the residue, which are still on the land of the defendants, and on which they were rightfully placed, they have obstructed the plaintiff in the removal and use of them, &c. The title of the plaintiff is set forth in various ways in the bill. In the first place, it is derived, as an incident to a written grant; in the next place, from a parol grant, or contract; and in the last place, from the acquiescence of the defendants, which, under the circumstances of the case, has operated as a constructive fraud upon him by inducing him to make the canal, and incur heavy expenses, on the faith of a full right to such stone and materials. I lay out of the case all consideration of the two last heads of title, because they are expressly denied in the answers, and there is no sufficient proof to support them against such denials. The whole question, therefore, resolves itself into the first head; and to the consideration of that the attention of the court will be exclusively addressed.

On the 12th of May 1814, James Arnold, (one of the defendants,) by his deed of that date, conveyed to Daniel Lyman and Samuel G. Arnold (under one of whom the plaintiff claims title) a certain tract or parcel of land in Cumberland, in Rhode Island, the boundaries whereof are mentioned in the deed, together with one half of the water in Pawtucket river at Woonsocket Falls, at the dam there erected on said river, with liberty to dig a canal through the grantor's land, and across the road from the canal, in which the grantor then took out the water from his pond into the trench on the easterly side of the road, to the northward of the grantor's old machine shop, doing no injury to the grantor's buildings, and from thence to the land by the said deed conveyed, but no deeper than the canal already dug by the grantor, with liberty, at the expense of the grantees, to widen the grantor's canal, as far as might be necessary for the full improvement of the privilege by said deed conveyed, without injury to the grantor, and without deepening his canal; and the said canal not to be deepened by either party without the consent of the other; the grantees sufficiently and substantially, at their own expense, to cover the canal to be dug by them from the grantor's canal to said trench, and forever thereafter to be at the one moiety or half part of the expense of repairing, supporting, and rebuilding the dam across the river: To have and to hold the same premises to the said Daniel Lyman, and Samuel G. Arnold, their heirs and assigns, with all the appurtenances, privileges, and commodities, to the same belonging, or in any wise appertaining.

Such are the substantial clauses in the deed. The stones and other materials now in controversy were dug out of the canal thus authorized through the grantor's land. It is material to state, that they are not now claimed by the plaintiff, as necessary or proper, or even desirable for the purpose of constructing, or securing, or embanking the canal. But the claim is, that the grant above recited contains a good conveyance of all the soil, stones, and materials so dug up in the course of that canal, exclusively to the use of the grantees, and that the defendants or any of them have no right to intermeddle therewith. In short, the claim is of an exclusive property by grant to all the stones, soil, and materials throughout the whole extent of the canal, in the grantor's land, and to the length, breadth, and depth, which it is authorized to be dug. I give no opinion, what would be the result, if the title now set up to these materials were merely to the use of them, for the purpose of constructing, securing, or embanking the canal, or indeed for any other purpose connected with its existence or necessary use. That point does not arise upon these pleadings, and is not involved in the present discussion. The question is, whether the absolute property in these materials passed by this grant to the original grantees in the deed. In the construction of grants, that is doubtless to be adopted, which gives entire and liberal effect to the intention of the parties. When the object is distinctly seen, the ordinary means, by which it is to be attained, are presumed to be within the purview of the parties. If the use of a thing is granted, whatever is necessary for the enjoyment of such use, or for the attainment of such use, is, by implication, granted also. Co. Litt. 56a; Shep. Touch. 90; Saunders' Case, 5 Coke, 12; 4 Bac. Abr. "Grants," 1, 5; Perkins' "Grant," 111, 112, 116. But if it be not necessary, but may be a convenience only, it is not granted. Plow. 16a; Com. Dig. "Grant," E, 11. So, too, grants are to be construed according to the subject matter, and the natural presumptions arising from their terms, and thus to render them expositions of rational intentions. If a contract is made allowing a person to dig coals or turf in another's land, the law presumes, that the coal or turf is to belong to the grantee. So, if a license is given to one to work another's mine, the presumption is, that he is to have the produce of his labour. The reason of such an interpretation of the contract is, that the grant is supposed to be

intended for the benefit of the grantee, and to give him a substantive interest, and not to impose a burthen. If he had no interest in the thing for the labour bestowed upon it, he could have no recompense, and the grant, as such, would be utterly worthless and nugatory. But if a grant were to dig in another's soil, and lay a drain or pipes, it would not be so clear, that the grant included the property of the removed soil. See Pomfret v. Ricroft, 1 Saund. 321, 322, and note b. It would not be necessary to the fair enjoyment of the privilege. And Plowden (Comm. 16a) instructs us, that if it would be a mere convenience to the party, it would not pass as an incident, unless it were also necessary. The case put at the bar affords another strong illustration of the true principle. If a grant is made of a way over another's land within particular boundaries, that may include the right to dig up and level the soil, or even to remove parts, so as to make the way passable; and to use the soil for this purpose; but all this would be perfectly consistent with the right of the soil remaining in the original proprietor. Where a highway is made over another's land, the soil still remains in the owner, subject to the easement. See Jackson v. Hathaway, 15 Johns. 447; Perley v. Chandler, 6 Mass. 454; Stackpole v. Healy, 16 Mass. 33; Robbins v. Borman, 1 Pick. 122. If there are trees on it, they are his. If it be necessary to cut them down and remove them, in order to make the highway, still the property of the trees, so cut down, is unchanged. The reason is, that nothing is deemed included to pass, as an incident to an easement, but what is necessary to its reasonable enjoyment. The change of property in such trees is not necessary to such enjoyment. The case of Lord Darcy v. Askwith, Hob. 234, affords an illustration of this doctrine. There the lease was of certain coal mines, and the lessee cut down trees for the use of the coal mines; and being sued in waste, he pleaded, that he cut them down, and used them for the making of puncheons, corses, and other utensils in and about the coal mines, without which they could not dig, and get the coals out of the pits, and he did bestow them accordingly. On demurrer, the court held the plea bad, because, though a grant of a thing did carry all things included, without which the thing granted could not be had; yet that must be understood of things incident, and directly necessary. Another illustration is in Harrison v. Parker, 6 East, 154, where it was held, that if a party builds a bridge, and dedicates it to the public, he still retains his proprietary interest in the materials, and as soon as they cease to be used as a part of the bridge, he is entitled to recover them. Saunders' Case, 5 Coke, 12, is not at all at variance with these principles. In that case, there was a lease of certain lands, on which there was an open mine. The lease conveyed the same land with all the profits &c.; and it was held no waste to work the open mine; and the reason was, that, being an open mine, the intention of the parties must be presumed to be to grant all those things, which might be used in the then state as profits of the land. The mere fact, that a person having a grant of a privilege, servitude, or easement, in the land of another, bestows his labour upon the soil, or separates it, and gives it value thereby, constitutes no sufficient ground to infer a change of property in the soil; for such labour is bestowed in order to enjoy such privilege, servitude, or easement.

In order to decide, therefore, what is contained in the grant in the present case, it is material to consider the terms of the deed, and the apparent object of the parties. The object of the parties is to grant the right to make a canal at the expense, and for the use and benefit of the grantees across the grantor's land. This is plainly to be inferred from the very terms of the deed. The words are, "with liberty to dig a canal through the grantor's land," and it is afterwards spoken of as a "privilege." A reasonable interpretation of this language must be, that the liberty to dig the canal includes the right to use it, when dug; for without such right, there could be no improvement of the privilege, or any benefit to the grantees. The principal right, franchise, easement, or servitude, call it which you may, is the canal, and the liberty to dig up the soil for this purpose would have followed, as an incident, even if it had not been expressly given. There is not one word in the deed, which purports to grant any right in the soil itself, either before or after its removal. In this respect, there is a total silence. How then is it to be inferred? If at all, it must be, because such a right to the soil flows as a necessary incident to the express grant. Now the "liberty to dig a canal" does not necessarily require, that the soil dug up should pass to the grantee; for there may be the most perfect enjoyment of that liberty without it. If the soil is separated and removed, and the canal is dug, it is wholly immaterial to the exercise of that right, what afterwards becomes of it. Suppose the fact to be, that trees should stand in the route of the canal; would they, after they were dug up or removed, belong to the grantee, or remain in the original owner? I apprehend, in the latter; and if so, in what respect does that differ from the case of the soil. Each, before the severance, was part of the freehold. Why should one pass, any more than the other, to the grantee, if not necessary for the purposes of constructing the canal? The argument of the plaintiff proceeds upon the ground, that the property of the materials might be beneficial to him, and constitute some recompense for his labours. Be it so; but that

does not make it a matter of right. There may be many conveniences, which yet do not pass as incidents to a grant. When the parties make their contracts, it is their duty to provide for such conveniences. When the law is called upon to interpret their acts, it has nothing to do with such matters; it can act only upon necessary incidents, or implications. My opinion is, that in the present deed, there is no express grant of any right to any soil; that it is not implied as an incident to any thing granted; that the liberty to dig a canal imports no more than a right to separate and remove the soil for the purposes of the canal; and, that such a liberty is quite consistent with the proprietary interest in the soil remaining in the grantor. Upon this ground, I think, the bill must be dismissed.

It is unnecessary to touch the question, whether this case be a fit case for equity jurisdiction, supposing the bill were maintainable in point of fact, as it is contended a complete remedy exists at law. We may leave that point for decision, when it becomes necessary to the judgment of the court. Bill dismissed.

LYMAN (BANK OF UNITED STATES v.). See Case No. 924.

LYMAN (BARING v.). See Case No. 983.

Case No. 8,627.

LYMAN et al. v. BROWN et al.

[2 Curt. 559.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1855.

PLEADING—LIS PENDENS PLEADED IN ABATEMENT—FOREIGN JUDGMENT—MERGER—PLEA IN BAR.

1. Lis pendens in a foreign country is not a good plea in abatement.

[Cited in Loring v. Marsh, Case No. 8,514; Pendergast v. The General Custer, 10 Wall. (77 U. S.) 218; Brooks v. Mills County, Case No. 1,955; Hughes v. Elsher, 5 Fed. 264; Latham v. Chafee, 7 Fed. 523.]

2. A foreign judgment does not merge the original cause of action, and cannot be pleaded in bar of an action founded thereon.

[Cited in New York, L. E. & W. R. Co. v. McHenry, 17 Fed. 418; Mellin v. Horlick, 31 Fed. 866. Cited, but not followed, in McMullen v. Richie, 41 Fed. 503.]

[Cited in Ault v. Zehering, 38 Ind. 434. Cited in note in Eastern Tp. Bank v. Beebe, 53 Vt. 177.]

This was an action in which the plaintiffs [William Lyman and others] counted on bills of exchange, accepted by the defendants [Brown, Hibbard, Browne & Co.] and indorsed to the plaintiffs. The original writ, by which the action was commenced, was returnable to and entered at the last term. Personal service was made on some of the defendants, who were copartners, and all of them appeared by attorney, and pleaded that they never promised, &c.

Mr. Jenckes for defendants, moved for leave to plead, puis darrein, that the plaintiffs had recovered a judgment against the defendants for the same cause of action, in a court of record, in the Province of Lower Canada.

Mr. Jenckes, for the motion.
Mr. Ames, contra.

CURTIS, Circuit Justice. The defendant could not have pleaded the lis pendens in a foreign jurisdiction, in abatement of this action. White v. Whitman [Case No. 17,561], and cases there cited; Lindsay v. Larned, 17 Mass. 197; Colt v. Partridge, 7 Metc. (Mass.) 570; Casey v. Harrison, 2 Dev. 244; Maule v. Murray, 7 Term R. 470; Bayley v. Edwards, 3 Swanst. 703; Foster v. Vassall, 3 Atk. 589; Dillon v. Alvares, 4 Ves. 357; Salmon v. Wootton, 9 Dana, 423. I am aware that this law has been doubted. and in a few cases such a plea has been said to be sufficient. Ex parte Balch [Case No. 790]; Hart v. Granger, 1 Conn. 154; Ralph v. Brown, 3 Watts & S. 399.

It seems to me that the ground upon which the plea of a prior suit pending has been held to be sufficient to abate the second suit. is not applicable, where the second suit is pending in a foreign country, or even in another state of this Union. That ground, I understand to be, that the defendant shall not be twice vexed for the same cause of action, where the court can see that in each, the remedy is substantially the same. But the court must be able to see that the remedy in each suit is substantially the same. Thus a writ of right is not abated by the pendency of a writ of entry for the same land. Com. Dig. "Abatement," H, 24. Nor trespass in C. B. by replevin in the sheriff's court. White v. Willis, 2 Wils. 87. Nor an action by assignees of a bankrupt by a prior suit by the bankrupt. Biggs v. Cox, 4 Barn & C. 920. And where a distinct jurisdiction is sought, whose process, as to person or property, may obtain a satisfaction not within the reach of that in the first suit, how can the court see that the remedy is substantially the same? If a judgment be recovered in one state, the plaintiff may immediately sue upon it in another. He is not bound to show that he has exhausted the means of relief under it, in the state where it was recovered. If he may sue a second time in another state, for the same debt, as soon as a judgment has been recovered, and without taking out an execution, why may he not sue a second time on the original cause of action, before recovering a judgment? It may be said the defendant would be thus compelled twice to defend himself. But where the suits are in different states, one successful defence would be a bar in

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

the other suit; and if one suit is in a foreign country, though perhaps it is not fully settled that a judgment for the defendant on one, would be treated as a final bar on the other, yet if it would not, then the defendant may be compelled to defend himself a second time, and this whether both suits are, or are not pending at the same time. I have considered this question, in this case, because if it be allowable for a creditor to seek two remedies at the same time in different jurisdictions, and the pendency of the first suit cannot be pleaded in abatement of the second, he ought to be allowed to conduct each of them to a judgment; since it is only by so doing he can make each effectual as a remedy; and where, as in this case, the discretion of the court is appealed to, for leave to plead puis darrein, the court ought not to use its discretion so as to deprive the creditor of a remedy in this jurisdiction.

But I do not rest my decision on this ground, for I am satisfied I ought not to allow the plea to be filed, because it would not be a defence. What is asked for is, leave to plead the Canadian judgment in bar of the action, upon the ground that the recovery of that judgment has merged the original cause of action on the bill of exchange, so that it no longer exists, and cannot form a ground for a judgment in this suit. That it can only be pleaded in bar, and if a good plea, is so, as showing a merger, is clear. Bank of U. S. v. Merchants' Bank of Baltimore, 7 Gill, 415; Marsh v. Pier, 4 Rawle, 273.

There is some uncertainty concerning some of the effects of a foreign judgment. See Story, Confl. Law, § 603–608; 2 Smith, Lead. Cas. 448, note to Duchess of Kingston's Case, 1 Rob. Prac. 205; and the most recent case I have met with, where the subject was elaborately examined by the court of king's bench, Bank of Australasia v. Nias, 4 Eng. Law & Eq. 252. But there is none as to this particular. It does not operate as a merger of the original cause of action. Hall v. Odber, 11 East, 124; Smith v. Nicolls, 5 Bing. N. C. 208; Harris v. Saunders, 4 Barn. & C. 411. The fact that assumpsit lies on a foreign judgment is decisive, that the demand has not passed into a security of a higher nature, so as to operate as a technical merger. Taylor v. Bryden, 8 Johns. 173, and the more recent cases, in which it has been held that a judgment in a state of the Union, merges the original cause of action, and that consequently assumpsit will not lie, rest exclusively on the effect of the constitution and laws of the United States, and admit the distinction as to merger, between these and foreign judgments. Andrews v. Montgomery, 19 Johns. 162; Boston India Rubber Co. v. Hoit, 14 Vt. 92; Napier v. Gidiere, 1 Speer, Eq. 215; In re Colt's Estate, 4 Watts & S. 314.

The result is, that this plea of a foreign judgment, recovered during the pendency of this action, would not be a bar, and the motion for leave to file it must be denied.

Case No. 8,628.

LYMAN v. LYMAN et al.

[2 Paine, 11.] [1]

Circuit Court, D. Vermont. Oct. Term, 1829.

GENERAL AND UNLIMITED PARTNERSHIP — PARTNERSHIP TRANSACTIONS — JOINT FUNDS — REAL PROPERTY — LEGACY — WILL — CONSTRUCTION — PAROL EVIDENCE — HUSBAND AND WIFE — FAMILY EXPENSES — DISSOLUTION OF PARTNERSHIP — ACCOUNTING — CONTRACT TO MAKE A WILL — RESCISSION — COMPENSATION FOR IMPROVEMENTS AFTER DISSOLUTION OF PARTNERSHIP — COMPENSATION FOR PARTNER'S SERVICES.

1. Two brothers, in 1784, entered into copartnership without any agreement in writing, the principal object of which at first was to carry on the business of trade and merchandise, and boating on the Connecticut river. It was understood between them that all their property was to be in common, and that each should be at liberty, on joint account, to do any kind of business, make any contracts, or enter into any speculation at his discretion. This partnership lasted until 1820, and during the period of its continuance, one brother, who had a numerous family, resided in Vermont, and the other, who had no children, in Connecticut, and the family expenses of both were defrayed out of the joint funds, no account whatever being kept of them, and no partnership account having been kept or settled during the whole period. As the capital and means of the brothers increased their business was extended, and they entered into navigation at large, and each imported goods, built, purchased and sold vessels, purchased land in different states, turnpike and toll-bridge shares, and built bridges and took the deeds and evidences of title to both or either, as he pleased. In the absence of any written agreement between the parties, or any verbal contract with respect to the extent of the copartnership and share, the nature of their connexion was to be collected from the course of their business, their casual declarations, and occasional letters and ratifications of each other's previous acts. It was *held* to be impracticable to draw any line or set any fixed limits to the partnership that would do equal justice to the parties, but that the partnership must be considered as general and unlimited, and all their property of every description as held in common, and that the separate acts of one, however ill judged, disastrous and unsatisfactory to the other, if done in good faith, were partnership transactions.

2. Where a lot of ground belonged to one of the partners before the commencement of the partnership, but buildings were afterwards erected upon it with the joint funds, of much greater value than the lot, and the proceeds of the property when sold were applied to the uses of the firm without objection, the whole was *held* to belong to the partnership.

3. At an early period in the partnership one partner received a large legacy under the will of a third person, and without the knowledge of the other partner applied it to the use of the partnership; *held*, that as everything was intended to be held in common, and after such a lapse of time, all individual interest in the legacy was to be considered as abandoned.

4. Whether one partner has a claim upon the firm for private funds put into the concern without the knowledge of his copartners. Quaere.

5. Parol evidence of an intent on the part of the testator that the bequest should be for the

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

joint benefit of both brothers, rejected; no such intent appearing from the will.

6. Another legacy left to the wife of a partner was for the same reasons *held* to belong to the joint property, as when received it became the property of the husband.

7. The understanding that no charge was to be made for family expenses was *held* to extend to the expenses of the children while minors and members of the family, as the parent might command their services, but not to advances made them after they became of age.

8. Salaries paid to the children, after they became of age, as clerks, *held* to be a charge against the partnership.

9. Lands bought by a commercial partnership, for the partnership purposes, are considered, in equity, as forming part of the partnership fund and stock in trade, and standing on the same footing as the personal property, particularly during the lives of the partners; and in a court of equity, it is immaterial whether the title is vested in one or both of the partners, for it considers the partner having the legal title, as a trustee for those beneficially interested.

10. There was evidence that, in 1814, one of the brothers wished to dissolve the partnership, but agreed to continue it on the other promising to make a will in favor of himself and family; that the will was made and afterwards destroyed, and that for this reason the brother in whose favor it was made in 1820 dissolved the partnership without the other's consent; and it was *held*, that the destruction of the will did not justify the dissolution of the copartnership, but that the dissolution was a rescinding of the contract by one brother, which liberated the other from any obligation to make the will.

11. Whether such a contract to make a will would have been enforced if it had not been rescinded. Quaere.

12. The defendant insisted that the real estate should be divided by allowing each party to retain what stood in his name and was in his possession at the time of the dissolution, at its then valuation; and if there was a balance, crediting it to the party entitled to it. But the court *held* that a partner is always entitled to have the partnership wound up by a sale of all the property, as the best mode of ascertaining its value.

13. The prayer of the bill was for an account, and that the joint fund be divided between the parties, and for general relief; but that a sale of the property was included in the prayer for general relief, and not inconsistent with the specific relief prayed.

14. It was contended that the court could not enforce an order of sale, except of the lands lying within the district; but *held* that the order would not require the agency of any officer out of the jurisdiction of the court; that it was to act only on the parties; and that the powers of the court were amply sufficient to direct a public sale of the land, and to compel the parties to convey the title accordingly.

15. The property in separate portions had remained, by tacit consent, eight years after the dissolution, in the possession of the different parties, and each had made valuable improvements on the part in his possession, and it was referred to commissioners to ascertain and report the value of such improvements, to be allowed to the party making them.

16. But this was done only from the extraordinary character of the case, which would not admit of the application of rules by which ordinary partnerships are settled, one of which was admitted to be, that one partner could not call upon the other for compensation for improvements made after the dissolution.

17. A partner is not entitled to compensation for his services, except by special agreement; and the same rule applies after a dissolution. Each partner then becomes, with respect to the property in his hands, a trustee for the other; and it is well settled that a voluntary trustee is not entitled to compensation for personal services, but only for actual charges and expenses.

18. The costs directed to be made out before any decree should be made as to costs.

In equity.

THOMPSON, Circuit Justice. The general object of the bill filed in this cause was to have an account and settlement of a partnership concern, which had existed between Justin and Elias Lyman for twenty-five years and upwards, the transactions of which have been very extended and multifarious, and are involved in great obscurity for the want of proper books and accounts with respect to some part of the concerns, and, indeed, an entire want of any accounts as to some matters which have been drawn under examination; and all this embarrassment much increased by the want of any articles of partnership, or any satisfactory evidence showing a definite contract or understanding between the parties as to the nature and extent of the partnership. Under such complicated difficulties, heightened, we are sorry to say, by the acrimony with which the controversy has been carried on, it is hardly to be expected that exact justice can be done, or entire satisfaction given to the parties. The conclusions, however, to which we have arrived, are the result of our best judgment, after an attentive and laborious consideration of the case. The bill as to Wyllis Lyman has been dismissed by consent of parties, reserving the question of costs; and the commissioners find no account whatever between the complainant and Elias Lyman, Jr. The bill as to him must also be dismissed, and the question of costs is reserved. Elias Lyman and Lewis Lyman have put in separate answers, and testimony has been taken and submitted to commissioners appointed by the court. And the cause now comes before the court upon numerous exceptions taken to the report of the commissioners by the respective parties, which we will proceed to consider.

The first exception taken by Elias Lyman to the report of the commissioners relates to the nature and extent of the partnership. The commissioners have reported, that as early as the year 1795, Justin and Elias entered into partnership, and that all the property that they or either of them then owned was understood to be common between them, under an agreement or understanding between them that each one should be at liberty to do any kind of business, make any contracts, or enter into any speculation at his discretion, and that this general and unrestricted partnership continued until the 22d of January, 1820, when it was dissolved by Elias, without the consent of Justin. The nature and extent of the partnership is not defined by any articles of copartnership, but is to be collected from the acts and declarations of

the parties, and the course of business which has in fact been carried on by them.[2] It would seem a little extraordinary that a partnership of so unlimited and undefined a character should be entered into between any parties; and its continuance in this case is only to be accounted for from the relationship of the parties, and some peculiar circumstances with respect to the final disposition of the property of one of the partners, he having no children to inherit it, and the understanding and expectation that the whole would inure to the benefit of the family of the other. It is not to be expected but that a partnership concern for such a length of time, and so loosely conducted, will be involved in doubt and difficulty; and if exact justice shall not be meted out to the parties, the fault will rest upon themselves for having involved their transactions in so much obscurity. It would be a useless undertaking to go through a minute detail of the various circumstances which have attended the course of business between these parties, and from which the nature of their connection is to be collected. All that is deemed necessary is to state generally the conclusion to which we have arrived from an attentive examination of the proofs.

The bill alleges the partnership to have been one of the most general description, extending to all business of every kind, into which either of the parties chose to embark, the principal object of which, at the commencement, was to carry on the business of trade and merchandise, and the boating business upon the Connecticut river. But as their capital and means increased, their business was extended, and that they entered into navigation at large, imported goods, built, purchased and sold vessels, and entered into and pursued any sort of trade and merchandise, and other business, at discretion. That the partners, being located at different places, each partner purchased land, turnpike shares, built bridges, purchased shares in toll-bridges, and purchased and sold any kind of estate whatever at pleasure, and paid out of the funds of the partnership, and took the deeds or other evidences of title to both or either of the said partners, as convenience or other motive might require; and that during all the time of the existence of the partnership, there were never any articles of partnership in writing expressive of the terms thereof, nor did either of the partners keep any account of family or personal expenses, but all such were paid out of the joint funds. The defendant, Elias Lyman, admits there never were any written articles of copartnership, but does not undertake to set out or define the nature or extent of the partnership. He alleges, that as early as the year 1784, he and his brother Justin

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[2] General reputation of a partnership, existing between two or more individuals, standing alone and not offered in corroboration of facts and circumstances, is inadmissible in evidence to prove a partnership. Halliday v. McDougall, 20 Wend. 81, 22 Wend. 264; Smith v. Griffith, 3 Hill, 333. See McPherson v. Rathbone, 11 Wend. 96; Whitney v. Sterling, 14 Johns. 215. In an action against several as partners, one of the defendants is brought into court; he alone is brought into court; the plaintiff is entitled to recover, if he shows that this defendant is a member of the firm. It is not necessary in such case to prove that the other defendants were members of the firm. Halliday v. McDougall, 22 Wend. 264, reversing the decision of the supreme court, 20 Wend. 81. Where a note or bill is payable to a firm, strict proof is required that the firm consists of the plaintiffs on the record. McGregor v. Cleveland, 5 Wend. 475. The declarations of one of several partners cannot be given in evidence to prove a partnership; they are testimony only against the party making them. McPherson v. Rathbone, 7 Wend. 216. Where two or more are charged as partners, articles of agreement between them are admissible in evidence, (although not conclusive,) for the purpose of showing what the true nature of the connection between the parties was at the time it commenced; but their declarations made at a subsequent period, would not be admissible. Mitchell v. Roulstone, 2 Hall, 351. In the absence of all proof to the contrary, partners will be presumed to be equally interested in the partnership funds. Gould v. Gould, 6 Wend. 263. In an action against the administrators of a deceased partner, the surviving partner is a competent witness to prove the partnership. Grant v. Shurtel, 1 Wend. 148. A witness, a commission merchant in New York, testified that he had become acquainted with, and did much business for a merchant in Antigua, and understood, in the course of his business, and from general report, that he was a partner in a house or firm in London, on whom he had drawn a bill of exchange, though the witness had not known or heard of the drawer or drawee until more than six months after the bill was drawn; held, that this was sufficient evidence prima facie, to show that the drawer of the bill was a partner in such firm. Gowan v. Jackson, 20 Johns. 176. Two persons signing a joint note, is no evidence of a partnership between them. Hopkins v. Smith, 11 Johns. 161. If B. and C. have acknowledged the existence of articles of copartnership between them and A., which, upon due notice, they refuse to produce at the trial, the jury may reasonably infer that if produced, they would have shown the fact of partnership. Whitney v. Sterling, 14 Johns. 215. But the mere acknowledgment of B. and C., that A. was their partner, is not sufficient to bind him. Id. In an action against A., B. and C., as secret partners, the declarations and acts of A., though evidence to show that he considered himself a secret partner with B. and C., are not admissible directly to charge or implicate B. as a partner. Whitney v. Ferris, 10 Johns. 66. In an action of assumpsit against A. and B., as partners, they pleaded that the promise, if any, was made by A. and B. jointly, with one C. and not by A. and B., &c. Held, that the declarations of A. and B., or of C., were not admissible evidence in support of the plea. Sweeting v. Turner, Id. 216. A. and B. are partners in one concern, under the firm of A. & Co., and A. is also a partner with C. in a distinct concern. A. & Co. drew a bill of exchange on C., who refuses to accept it; in an action against A. & Co., as drawers of the bill, a promise by C., after he had been arrested, to pay it, is not evidence that he was a partner with A. in the firm of A. & Co. Bogert v. Lingo, 3 Caines, 92. The existence of a partnership, the firm of the partnership, and whether a note was given on a partnership transaction, are facts which may be left to the jury to infer from the evidence. Drake v. Elwyn, 1 Caines, 184.

commenced the boating business on the Connecticut river as partners, and continued that business until the year 1794, a part of which time they were connected with one Masten in the business. That about the time last mentioned, they began to enlarge and extend their business of boating; and soon after, and by slow degrees, commenced and carried on the regular business of merchandise in the name and under the firm of Justin & Elias Lyman. He denies that he ever, on his part, entered into any speculation out of the ordinary course of their boating and mercantile business, without the knowledge, approbation and consent of Justin prior to the year 1814, this being the time when the contract is alleged to have been entered into respecting the will of Justin; and he denies that by any contract, either express or implied, the said partners were at liberty to enter into any sort of trade and speculation at discretion, out of their ordinary concerns of boating and regular mercantile transactions, or that they ever did so except the unauthorized and unwarrantable speculations of Justin, set out in the answer, and some transactions of his own subsequent to the contract in June, 1814, respecting the will. The answer is very far from defining with certainty and precision the nature and extent of the partnership even in the understanding of the defendant Elias. It is difficult to comprehend what is meant by the term "regular mercantile transactions," as used in the answer. And it is admitted by defendant's counsel, that the partnership extended to every transaction which had the assent of both parties; and that in all the contracts and dealings of each, both are bound as to third parties. And Elias only seeks to throw upon Justin the loss in cases which were such a gross diversion of the partnership fund, that the consent of Elias could never be presumed to the transaction. Admitting the partnership was in some measure limited, under the modification contended for, we are not aware of any one transaction that would not be embraced within it. It has not been pretended that there was any actual fraud committed by Justin. The utmost extent of the charges against him are the want of judgment and discretion, by reason of which he embarked in some wild and extravagant speculations. And although, in many instances, when Elias first came to the knowledge of them, he was dissatisfied, yet he always finally aided and assisted in carrying the contracts into execution, by applying the partnership funds in his hands to that purpose: and whether his consent was previously given, or the transaction subsequently ratified, was immaterial; in either case, he became a party to it. In the absence of any written agreement between the parties, or any verbal contract with respect to the extent of the partnership, and where the nature of the connection between them is to be collected from the course of their business, their casual declarations and occasional letters, it is utterly impracticable to draw the line or set any fixed limits to the partnership that would do equal justicé to the parties. To consider every transaction which Elias might have disapproved of, as out of the partnership, and thereby throw all the losses upon Justin, would be inequitable, and not warranted by any fair construction of the course of dealing between the parties. It is a much more reasonable, as well as equitable conclusion, to consider the partnership general and unlimited, and that all their property of every description was held in common.[3] If the conduct of either party was such as not to meet the approbation of the other, it was within his power at any time

[3] Two partners being by agreement equal in interest, are each bound to contribute an equal share of the advances required, but one falls short and the other makes up the deficiency. The defaulting partner sells out his interest to a stranger, and the other unites with the purchaser in releasing the retiring partner. Held, that the release extends to all claims which the continuing partner had upon the retiring partner on account of the inequalities of their advances; for when two or more are equal partners, and one furnishes more than his share of the funds for the use of the firm, the excess constitutes a debt due by the firm, not by the other partner, to him who made the advances; and if one fails to contribute his due share, the deficit is a debt due by him individually to the firm. Conwell v. Sandidge's Adm'r, 5 Dana, 212. A. agreed to give his notes for a certain sum to B., for half of B.'s stock in trade, the two to be partners thereafter. B. believing that A. could execute the notes at any time, suffered him to act as a partner, to buy and sell goods in the partnership name; but A. failed to execute the notes for his share of the stock, and advanced no money to the concern. Held, that the delivery of the notes was a condition precedent, and that no partnership existed until A. complied with it. McGraw v. Pulling, 1 Freem. Ch. [Miss.] 357. If a partnership be established, it is prima facie one of equal interests. Reybold v. Dodd's Adm'r, 1 Harr. [Del.] 401. In the state of New York, no written articles are necessary to constitute a copartnership which is to take effect immediately; although a written agreement may be necessary to bind the parties to enter into a future copartnership which is not to commence until after the expiration of a year. Smith v. Tarlton, 2 Barb. Ch. 336. But even where there is a parol agreement to enter into a copartnership at a future day, and specifying the terms of such copartnership, it seems that if the parties go into copartnership at the prescribed time, without agreeing upon any new terms, the former parol agreement will be presumed to constitute the terms upon which such copartnership was entered into and carried on. Id. A copartnership which is entered into and commenced immediately is not invalid, although one of the declared objects of the copartnership is to purchase real estate for the purposes of the firm, and as a site for the transaction of its business. Smith v. Tarlton, 2 Barb. Ch. 336. A person cannot claim to be a member of a partnership composed of a number of persons, unless all the persons composing said firm have agreed to accept him as such. Channel v. Fassitt, 16 Ohio, 166. Equity often declares partnerships utterly void in case of fraud, imposition and oppression, in the original agreement; or decrees a dissolution of partnership unobjectionable in its origin, but which subsequent causes have rendered onerous and oppressive. Howell v. Harvey, 5 Ark. 270. Persons who

to have put an end to the partnership. We think the evidence in the cause will admit of no other conclusion than that the parties intended a partnership or connection in business of the most unlimited character; and it is of little importance whether it commenced in the year 1784, as contended by Elias, or whether in 1795, as contended by Justin. They began with little or no property, and their business, in its origin, was confined to the boating business on the Connecticut river; but as their means increased, their business was extended to other objects, and in the end branched out in a very extended manner, embracing a vast variety of concerns that certainly could not fall within the ordinary understanding of regular mercantile transactions, including the purchase and sale of real as well as personal property, the title to which was sometimes taken to one or the other, or both, but with the understanding that it was for the use and benefit of both. All the acts, and declarations, and correspondence of the parties, led inevitably to this conclusion; and, indeed, the answer of Elias substantially admits the same thing: and declarations made by Elias and Justin, as proved by a number of witnesses, puts the question beyond a doubt that everything was understood to be held in common: and the real estate must, in this respect, stand upon the same footing as the personal. And in a court of equity, it is immaterial whether the legal title is vested in one or both the partners; for, in such case, a court of equity will consider the party having the legal title as a trustee for those beneficially interested. Lands, therefore, bought by a commercial partnership for the purpose of the partnership concern, are considered in equity as forming a part of the partnership fund and stock in trade, particularly during the lives of the partners. This is the settled doctrine of chancery, and has not, indeed, been drawn in question by the defendants' counsel.

2. This view of the connection in business between these parties will have an important bearing upon many of the items which have been drawn into discussion on the hearing of this cause. It may be proper here, before noticing the particular items of dispute, to dispose of the question in relation to the will of Justin Lyman. This has probably been the source of most, if not all, the unpleasant controversy that has arisen between these brothers. Much evidence, as well oral as that which is to be collected from the correspondence between the parties, has been taken, to show that in the year 1814 the partnership had sustained many losses by reason of the alleged mismanagement of the business on the part of Justin. That Elias became dissatisfied, and wished a dissolution of the partnership, to which Justin was opposed. And it is set up on the part of the defendants, that in order to induce Elias to continue the partnership, an arrangement or contract was entered into by which Justin was not thereafter to take an active part in the business of the concern; and that he was, by his will, to give to Elias and his family the whole of his estate, with some small specified reservation; that such will was made, but afterwards revoked and destroyed, and which is set up on the part of Elias as the reason for dissolving the partnership. Upon the evidence taken in the cause, the commissioners have reported that no certain definite legal contract with regard to such will has been established. It is not deemed necessary to go into an examination of the evidence upon this subject; for, admitting such contract to have been made in the year 1814, as set up by the defendant Elias in his answer, it is not perceived how it can have

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subscribe for shares in joint stock companies and pay deposits, but do not comply with the full conditions of the association, and never become entitled to profits, are not liable for debts unless they are active in contracting them, or hold themselves out as partners. The same principle will apply, as far as it can, to a suggested limited partnership not carried through. West Point Foundry Ass'n v. Brown, 3 Edw. Ch. 289. It would seem, that there can be a limited partnership in the running of a steamboat. Id. Where a feme covert entered into a written agreement with her son to form a copartnership in fact, and for a continuance of the same for a period beyond the death of the husband of such feme covert, and such copartnership commenced under such written agreement, during the coverture of such feme covert, and continued after the death of her husband for upwards of six years to the time of her own death. Held, that such copartnership related back to the time of the execution of such written agreement, so as to give both parties the same benefit which they would have been entitled to if the feme covert had not been married when the copartnership originally commenced. Everit v. Watts, 10 Paige, 82. It is a general rule, applicable especially to cases of a single adventure, when the capital of one party is money, and the other personal services, they are not partners inter se in the technical sense, merely because they had a mutual interest in the profits, nothing else appearing. In such cases, he whose capital is service is not liable for any part of the money capital of the other lost in the adventure. Heran v. Hall, 1 B. Mon. 159. A new member cannot be admitted into a partnership without the consent of all the partners. Mathewson v. Clarke, 6 How. [47 U. S.] 122. But a partner may assign his interest in the partnership to another, who, after the expiration or dissolution of the partnership, may maintain a bill for his share of the profits. Id. A partnership as to third persons may arise by mere operation of law, and without the intention of the several parties thereto. Hazard v. Hazard [Case No. 6,279]. The actual intention of the parties will alone constitute a partnership between themselves. Id. If two persons agree that one of them shall, as compensation for his services in a particular business, receive a certain portion of the profits, without being liable for the losses of the concern, this does not, as between themselves, constitute them partners. Id. Where advances are made, and responsibilities assumed by one individual to enable another in establishing and carrying on a particular business, without benefit or advantage to accrue to the party making the advances, although there be an agreement that he shall have the control and disposition of the property acquired by the means thus furnished; this does not constitute them partners. Taylor v. Perkins, 26 Wend. 124.

any effect upon the subjects of inquiry now before the court. This contract could not have worked a dissolution of the partnership; for, according to Elias' own statement in his answer, a continuance of the partnership formed a part of the contract, and, indeed, was the consideration upon which Justin promised to make a will and dispose of his property in the manner set up by Elias: and although one part of the agreement was that Justin was to withdraw from any active concern in the business, yet in point of fact he did continue to take an active part in the business of the partnership, and entered into large contracts and speculations in the name of the firm, and which Elias recognized as partnership acts, although they resulted in great losses to the company, and now form some of the most important items of complaint. Elias, with full knowledge of all this, and which, according to his own showing, was in direct violation of the agreement, still continued the partnership, and did not seek to dissolve it until the year 1820. But, independent of all these considerations, a conclusive answer to all this pretended agreement about the will is, that Elias has himself rescinded the contract on his part. There was no time fixed for this will to be made. If made by Justin at any time during his life, it would be a compliance with his agreement, and he might yet fulfil the contract on his part: he has not by any act, disqualified himself from so doing; and Elias, by recognizing and sanctioning the contracts made by Justin after the year 1814, has waived all complaints of a violation of the agreement on that ground. And yet, in the year 1820, he, in express violation of the agreement on his part, has dissolved the partnership, the continuance of which was the principal, if not the sole inducement, on the part of Justin, to make his will as set up by Elias. He having rescinded the contract on his part, there can be no possible ground on which he can claim anything from Justin on this account, and particularly as Justin has done no act to disqualify himself from fulfilling the contract on his part, if any such was ever made, and was one that could have been enforced had Elias sought to have it carried into execution, instead of rescinding it. We must, therefore, lay out of view everything in relation to this will, and consider the case entirely independent of it.

3. The next general branch of the controversy relates to the stock in trade, and involves the inquiry whether either party has any claim on account of any individual or separate property put into the partnership concern.[4] The allowances claimed by the complainant, and which have been rejected by the commissioners, embrace: 1. The value of the Beckwith House. 2. The legacy under the will of Harvey Hyde. 3. The legacy under the will of Sarah Goodwin.

1. It is contended on the part of the complainant that all these items were separate and individual property, which has been applied to the use of the partnership, and for which the complainant is entitled to credit in the settlement of the partnership accounts. With respect to the first, it is contended that the property was owned by Justin before the commencement of the partnership, and must of course have been his private property. The evidence as to the commencement of the partnership is extremely vague and uncertain. The bill alleges that this was properly owned by the complainant previous to the commencement of the partnership, and charges the value to be $2,000; admits, however, that the buildings were afterwards repaired and enlarged out of the funds of the partnership, and the property sold in 1815 for $4,000, and the money applied to the use of the firm. The answer alleges the cost of the lot to have been only $200, and that it was paid for out of the partnership funds.

[4] In stating an account between partners, the true dates as furnished by the books of account themselves, ought to be assumed. Stoughton v. Lynch, 1 Johns. Ch. 467. The period of the dissolution of a partnership is the proper time to make a rest, and adjust the balance of the partnership account, and the partner against whom the balance is found is chargeable with interest thereon. Id. Joint owners or partners are not entitled to charge each other for services rendered in the care and management of the joint property, unless there is a special agreement for that purpose. Franklin v. Robinson, 1 Johns. Ch. 158; Bradford v. Kimberly, 3 Johns. Ch. 434. But, where the several partners, who are joint owners of a cargo, appoint one of the partners their agent or factor, to receive and sell it, receive the proceeds, &c., a compensation is necessarily implied in such special agreement. And as such factor, he has a lien on the goods or their proceeds not only for his advances, responsibilities, &c., but for the balance of his general account. Id. 431. The solvent partner, and the assignees of a bankrupt partner must all join in a suit at law. Murray v. Murray, 5 Johns. Ch. 70. In settling the accounts of a mercantile concern, in a controversy between the partners only, it is sufficient to examine and state the books of the copartnership, without requiring vouchers in support of each specification. Fletcher v. Pollard, 2 Hen. & M. 544; Brickhouse v. Hunter, 4 Hen. & M. 367. Where one joint owner assigns his interest in the freight and cargo of a particular vessel, on a particular voyage, the other partner who has got possession of the proceeds of such freight and cargo, is entitled to retain them until he is paid or indemnified for what he has paid or advanced more than his share, for outfits, repairs or expenses of the ship for that particular voyage or adventure, but not for any claims he may have against his copartner, arising from former distinct voyages and adventures, in which they were concerned together in the same or other vessels; they not being general partners in trade, nor any connection existing between the different transactions on voyages. Mumford v. Nicoll, 20 Johns. 611, 4 Johns. Ch. 522. The solvent partner is entitled as against a bankrupt partner, to no more than his share of the surplus, after the partnership debts are paid. Murray v. Murray, 5 Johns. Ch. 70. A partner who goes abroad on his own personal affairs, is not entitled to charge his expenses to the partnership. Mumford v. Murray, 6 Johns. Ch. 17, 452. Equity has not an exclusive jurisdiction in matters of account, whether partner-

The only claim which the complainant could upon any plausible ground sustain, would be for the original cost of the lot; for he admits the improvements were paid for out of the partnership funds; and in addition to this, the evidence shows that their father assisted in making such improvements, for the joint benefit of both his sons. And when the property was sold in 1815, the money was applied to the use of the firm without any charge or claim by Justin that it was private property. This affords a strong presumption, that it was not at all times so considered by him, and may fairly be viewed, under the circumstances, as a waiver of any such claim.

2. The legacy under the will of Harvey Hyde, amounting to upwards of $4,000, was received in the year 1806, and applied to the use of the firm. It has been attempted on the part of the defendants to show that although this was in form a legacy to Justin, it was intended for the benefit of him and Elias jointly. Such evidence was altogether inadmissible. The will is plain and explicit, and could not be explained or contradicted by any parol evidence. But although this must be considered originally as the private property of Justin, we think, under the circumstances, he must be considered as having voluntarily applied it to the use of the firm in such manner as to relinquish all claim upon it as private property. It was not thus applied with the knowledge or consent of Elias, nor any charge whatever made of it against the firm, or any claim to it as private property ever set up until recently. And if it should be admitted that in ordinary partnerships one partner might have a claim upon the firm for private funds, put into the concern without the knowledge of the copartners, (which, however, is by no means intended to be admitted,) yet we think the claim cannot be sustained in the present case. The general course of business between the parties, their acts and declarations, show very satisfactorily that everything was intended to be held in common between them; and after such a lapse of time, and under such circumstances, all individual interest in this legacy must be considered as abandoned.

3. These considerations and this view of the case will apply, also, to the legacy in the will of Sarah Goodwin, as well that which consisted of the furniture, which was disallowed by the commissioners, as the money legacy, which was allowed to Justin. It is not perceived that any well-founded and substantial difference exists between them; and the only circumstances in which this legacy differs from that of Harvey Hyde, are that the one was a bequest to Justin himself, and the other to his wife; and an entry with respect to the latter was made in Justin's books, in New York. But this was made by his clerk, and without his knowledge or direction, and without the knowledge or consent of Elias. The circumstance that the bequest was to his wife, cannot vary the case. When received, it became the property of the husband. The report of the commissioners must, therefore, with respect to this legacy ($331 11), be corrected, and this sum considered as common property.

4. The next subject of inquiry, which appears naturally to arise in order, relates to the claims which have been set up by Elias, for an allowance against Justin, for the losses which have been sustained upon several contracts and branches of business entered into and undertaken by him. These relate:[5] 1. To the Worcester and Stafford Turnpike stock. 2. The land purchased by Justin, in Green county, in the state of New York. 3. The loss sustained upon the purchase of the ship Resource. 4. The loss upon the purchase of the ship Carrier. The

ship or otherwise. Duncan v. Lyon, 3 Johns. Ch. 360. An action of account may be brought at law by one partner against another. So an action of covenant, where there is a covenant to account. So also an assumpsit will lie on a promise in writing by one partner to take part of goods bought, in which they were to be equally concerned as to profit and loss. Id. It is not a correct principle, that one partner is chargeable with all the earnings of the concern, without evidence that he had received them, while he is credited only with such sums as he proves he has paid away; especially where the other copartners had equal access to the books, and equal management of the affairs. The partners are chargeable only with what they have respectively received. Richardson's Ex'rs v. Wyatt's Ex'x, 2 Desaus. Eq. 471. The bad debts must be borne equally by the whole concern, during the lives of the partners; and the executors of a deceased partner forbidding payment to the executor of the last surviving partner, the bad debts shall fall on the concern. Id. The partner who kept the house was allowed board out of the partnership funds, for the journeymen and apprentices, as reported by the master. Id. A partner having withdrawn from a mercantile company, and being afterward erroneously included in a suit against a new company formed by the other partners, may be relieved in equity against a judgment therein obtained, upon the ground that one of the company prevented his making defence at law, by assuring him the matter should be adjusted. Lee v. Baird, 4 Hen. & M. 453. Upon a dissolution of a copartnership a settling of its accounts becomes indispensable, and must include all debts due to the company, whether from its members or others, and all debts due from the company, either to the partners or to strangers. But upon a partial division of capital, such a settlement is not indispensable, whether upon an agreement for such a division, any one of the partners can be required to take his own debt in payment of his part of the capital depends upon the fact whether the debt be then demandable. If it be, this may be insisted upon, but if it be not, the agreed division of capital does not per se change the character of the debt. Attorney General v. State Bank, 1 Dev. & B. Eq. 553.

[5] In the state of New York, although a court of equity considers and treats real property as a part of the stock of the firm, it leaves the legal title undisturbed, except so far as is necessary to protect the equitable rights of the several members of the firm therein. Buchan v. Sumner, 2 Barb. Ch. 165. Where real estate

losses sustained upon these several transactions appear, from the evidence, to be very great; but there is nothing from which we can draw the conclusion of any fraudulent conduct on the part of Justin. There might have been a want of judgment and discretion, but all was done in good faith; and if the parties were partners in these transactions, as has already been decided, it follows, as matter of course, that the loss must be sustained by the firm, and cannot be thrown upon the individual partner, through whom it has been sustained. It is, therefore, unnecessary to enter into an examination of the voluminous testimony which has been taken upon these several subjects.

5. Another subject of inquiry, which has given rise to much discussion, and upon which the commissioners have made different reports, relates to what has been called the Simeon Lyman note, dated 10th November, 1815, for $4,649 95. In the first report, this was considered a partnership note, and binding on the firm, and that it had been paid by Justin out of his own private property, or in such a manner as to discharge the firm from any liability upon it. This has, however, been corrected in the second report, on the ground that this note, or the one given by Thomas Lyman as a substitute for it, had been paid by Justin out of property put into his hands by Henry Lyman, and not out of his own private funds. It is not perceived how this circumstance, which alone seems to have changed the report of the commissioners, can have any influence upon the question as between Justin and Elias Lyman. It is not pretended but that this note was originally given towards payment for the Green county lands; and, indeed, it was upon this ground that it was urged, on the part of Elias, that he was not bound to contribute towards the payment; contending that this purchase was a private transaction of Justin's. If such was the view taken by the court of this purchase, it would certainly follow that Elias could have no concern with the payment of this note. But this purchase has not been so considered, but that it was a partnership transaction; and the note being given towards payment for it, it was a partnership debt. And where one partner discharges a partnership debt out of his own individual funds, equity will always enforce a contribution. Whether this note has been paid out of funds which Justin held of Henry Lyman, or not, is immaterial. We cannot enter into any inquiry of the transactions between Justin Lyman and Henry Lyman. He is no party to this suit; and a decree in

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is conveyed to copartners, in their individual names, for the use and benefit of the firm, or is so conveyed to them in payment of debts due to the partnership, the legal title vests in the grantees thereof, as in an ordinary conveyance of real estate. And by the common law, where land was purchased with copartnership funds, for copartnership purposes, and was conveyed to all the partners generally in fee, it would at law, create a joint tenancy; so that neither could convey more than his share of the land during the lives of his copartners. And upon the death of either of the copartners without having severed the joint tenancy by a conveyance, the legal title to the whole of the land would survive to the other copartners. Id. But under the statutes of New York, relative to joint tenancies, the several copartners to whom such a conveyance was made, would become tenants in common of the legal title. And upon the death of either, the undivided portion of the legal title thus vested in the deceased partner, would descend to his heirs-at-law, without reference to the equitable rights of the several partners in the land, as a part of the property of the firm. Id. A partner has no remedy against his copartner for money paid or advanced on account of the partnership, or for profits made during its continuance, until a final settlement of the partnership. Camblat v. Tupery, 2 La. Ann. 10. Vide Story, Partn. 221, 348, and notes. Where a debt is due to a copartnership at the time of the bankruptcy of one of the individual members of the firm, the legal title to the share of the debt belonging to the bankrupt partner, is vested in his assignee by operation of law: and an action at law to recover the debt, must be brought in the joint names of the other copartners and of the assignee in bankruptcy. Coe v. Whitbeck, 11 Paige, 42. But the solvent partners have the right to bring such suit in the joint names of themselves and of such assignee, without the consent of the assignee, upon giving him indemnity against costs. Id. For a forcible expulsion from a partnership establishment, in the profits of which the expelled partner was to have an interest after the cost was reimbursed, the expelled partner is entitled to damages equal only to the probable injury which is the prospect of profit. Jones v. Morehead, 3 B. Mon. 377. A partner may assign his interest to another, who, after the expiration or dissolution of the partnership, may maintain a bill for his share of the profits. Mathewson v. Clarke, 6 How. [47 U. S.] 122. Where a partner fraudulently, without the consent of his copartners, applies the partnership funds to his private purposes and profit, or invests the same in his own name, or for his own use, his copartners may, if they can distinctly trace the investment, follow it, and treat it as trust-property held for the benefit of the firm, by the partner, or by any person in whose hands it may be, except a bona fide purchaser, without notice. Kelley v. Greenleaf [Case No. 7,657]. Where one partner, without the knowledge and consent of the other, appropriated partnership funds to the purchase of real estate, upon which there was a mortgage, a decree was rendered in favor of the plaintiff, and the real estate ordered to be sold by a master, and the proceeds to be applied, first, to the discharge of the mortgage, and the residue to the discharge of the debt due to the partnership. Id. If the defrauding partner dies, his representatives stand in no better situation than the partner himself would if living. Id. So private creditors of the deceased partner are not entitled to make claim thereto. Id. The functions, rights and duties of partners, in a great measure comprehend those both of trustees and agents. Id. Where a debt is due to a copartnership at the time of the bankruptcy of one of the individual members of the firm, an action at law to recover the debt must be brought in the joint names of the solvent copartners, and of the assignee of the bankrupt: the legal title to the debt being vested in them jointly by operation of law. Coe v. Whitbeck, 11 Paige, 42. But the solvent partners have the right to bring the action in the names of themselves and the assignees of the bankrupt, without the consent of such assignees, upon giving them an indemnity against costs. Id.

this cause would not be binding upon Henry Lyman or his assignees. Their controversies with Justin cannot be drawn in question here; they are transactions inter alios. If this was a partnership note, and has been paid by Justin, not out of partnership funds, he is entitled to contribution from Elias. The report in this respect must, therefore, be so far corrected as to make this note, and the costs and expenses which have been incurred about it, a partnership concern; deducting therefrom $1,500 paid by Thomas Lyman. It seems to be admitted that Justin has paid $5,595 67; but whatever has been paid must be borne by the partnership.

6. Another exception to the report taken on the part of the complainant, is the rejection of the account contained in the schedule marked O, said to have been taken from what he calls a log-book.[6] This account was rejected because he refused to produce the book in which it was contained. The rejection of this account upon the first hearing was certainly proper. The original book should have been produced, and the account, unsupported by proof, could not be admitted. It was immaterial whether it was a regular book of accounts or not; whether called a log or a diary, or whatever name was given to it, was of no importance. It was a book containing the original entries of the items of which the account was made up, and the refusal of the complainant to produce it afforded a presumption that the same book would furnish evidence beneficial to the opposite party. On the second hearing, this account was again offered, supported by the oath of the party, but rejected because he still refused to produce the book. We think the account was properly rejected the second time. It was the right of the opposite party to have it produced, for under the circumstances there was reason to suppose the book would show credits or contain some entries favorable to the defendants; and the only mode in the power of the commissioners to protect the rights of the opposite party was by rejecting the account, unless the book was produced. It appears, however, from the report of the commissioners, that receipts and vouchers in support of some part of this account were offered in evidence, but rejected. These, we think, should have been admitted, and the account allowed so far as established by such vouchers. To what portion of the account they applied, was not shown on the argument, nor have we been able satisfactorily to ascertain the amount from the mass of papers submitted to us. The amount, however, which shall be found thus supported must be allowed. This can probably be easily ascertained by the parties, and if not, it must be referred to the proper officer to examine and report thereon.

7. Another general branch of the controversy relates to family expenses of the respective parties during the continuance of the partnership. The commissioners refused to enter into an examination of such expenses, on the ground that neither party had kept any account in relation thereto, and that both understood that none was to be made or charged on either side. This view of the case, we think, is fully supported by the evidence and the admission of the parties, and is a strong circumstance in corroboration of the general and unlimited connection between the parties in business, and that all

[6] The log-book of certain vessels is, in the United States, made evidence by act of congress of the fact of desertion by a seaman. See Ing. Abr. 612, § 2. It is, however, never conclusive, but only prima facie evidence, and may be rebutted. Jones v. The Phoenix [Case No. 7,489]; Malone v. Bell [Id. 8,994]; Thompson v. The Philadelphia [Id. 13,973]; Douglass v. Eyre [Id. 4,032]; Orne v. Townsend [Id. 10,583]. The log-book, in general, ought not to be admitted to establish any facts save such as are contemplated by the act of congress. Jones v. The Phoenix, supra. It is in no sense per se evidence, except in certain cases provided for by statute. It does not import legal verity; and in every other case is mere hearsay not under oath. It may be used against persons, however, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defence. But it cannot be received as evidence for such persons, or others, except by force of a statute rendering it so. Per Story, J., in U. S. v. Gibert [Case No. 15,204]. On an indictment of several seamen for a revolt and confining the master, they defended on the ground (among others) that the master was insane. To rebut this, the prosecutor offered the log-book, kept by the master during the period of his alleged derangement, in which, as he said, he made entries every night; held, that it was inadmissible. U. S. v. Sharp [Id. 16,264]. An entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted on; it is necessary, in order to show that no consent was given, and no release was intended by receiving the delinquent again on board, as well as to ascertain the fact of desertion generally with greater accuracy. Malone v. Bell [supra]; Phoebe v. Dignum [Case No. 11,110]; Douglass v. Eyre [supra]. Whether the entry in the log-book, in order to be evidence, must have been made (according to the letter of the act of congress) on the very day on which the alleged desertion took place, does not appear to be as yet authoritatively settled. In Phoebe v. Dignum, supra, the court seem strongly to favor the notion that it must. But Hopkinson, J., in Douglass v. Eyre, supra, contends that it need not under all circumstances; for in some cases it would be impossible. At any rate, the entry purporting to have been made on the day, is prima facie evidence that it was so made, and it lies on the opposite party to show the contrary. Where the log-book is offered, it must be identified; and where the party offering it called a sailor belonging to the vessel, who deposed to the handwriting of the mate in several parts of it, and that during the voyage he saw him marking the words "log-book," &c., on the cover; held notwithstanding this testimony, that as the book may not have been kept on the voyage, but might afterwards have been made up by the mate to suit the purposes of the cause, it was not sufficiently identified. And this, though the opposite party had given notice to produce the log-book. U. S. v. Mitchell [Case No. 15,791]. See, further, as to a log-book as evidence, Bixby v. Franklin Ins. Co., 8 Pick. 89; Smallwood v. Mitchell, 2 Hayw. [N. C.] 145, 146.

their property was held in common. This rule must be understood, however, as applying only to expenses incurred for the children whilst they were under age and remained members of the family, and the parents had the right to command and avail themselves of the benefit of their services. The evidence and admission of the parties cannot fairly be considered as extending beyond this; and whatever advances were made to the children of either party after they were of age, and by way of portion to them, must be accounted for. To this extent, it was a withdrawal and separation of a part of the partnership property from the concern, and applying it to purposes altogether distinct and unconnected with their business or the expenses incident to it. These advances are but trifling, as claimed to have been made by Elias to two of his children, viz., about $517 to his son Wyllis, and $600 to his daughter on her marriage. These advances, whatever they were, must be charged against Elias. If, however, all the advances to Wyllis were made for his education, and whilst he remained a member of his father's family, although after he was of age, it is not intended should be charged against Elias.

8. Another subject of complaint on the part of Justin is, the allowance made by the commissioners for the services of Lewis Lyman and Norman Lyman, as clerks for the firm. The allowance which has been made appears to the court to be pretty high, but it is a subject upon which we think we ought not to interfere. The commissioners were under better advantages to judge upon that subject that we can be; but that the firm was properly chargeable with expenses of clerk-hire cannot be questioned, and it was immaterial whether such clerks were the sons of one of the parties or mere strangers. No allowance has been made for them whilst they were under age, and the parent entitled to their service. After that period, they were entitled to their own earnings, and would have had a right to leave the service of their father. So far, therefore, as an allowance has been made for their services after they were of age, and whilst in the employment of the partnership, or in and about the business of the concern, we think is properly chargeable against the firm. Payment has actually been made by Elias to Norman, and he is entitled to contribution from Justin, although Norman may not have fully accounted for the property in his hands.

9. The exception, on the part of Elias, to the allowance made Justin of his account marked P, amounting to $1,651 64, must be overruled. It is admitted that these were expenses incurred about the Green county lands, and must follow the decision respecting that patent. These lands having been considered partnership property, the expenditures embraced in the account now in question must be borne by the concern.

10. The exceptions taken by Lewis Lyman to the report will depend upon the light in which the arrangement between him and his father Elias, preparatory to the dissolution of the partnership, is to be considered. If it was an absolute sale of the property, there can be no grounds upon which Lewis can claim commissions for his services in the collection of the debts due to, and the payment of those due from the firm; and in such case there can be no surplus for which he can be made accountable. But if he acted as an agent for the concern, and has faithfully discharged his duty as such, he is entitled to compensation either by way of commissions or otherwise. The complainant has not, by his bill, treated this as an agency concern, but as a fraudulent transaction, charging it to have been a pretended sale, without any consideration whatever of all the goods, wares and merchandise contained in their stores in Hartford (Vermont) and Montpelier, and all the notes, book-accounts, and stock, and yarn at the cotton factory, &c. And Lewis Lyman, in his answer, also treats it as a purchase. He states that his father offered to sell to him all the goods then on hand, and all the demands due Justin and Elias, at what was called that end of the concern, meaning the goods in Hartford and Montpelier, in Vermont; and the demands there accruing upon his paying all the debts due from the firm at that end of the concern, and a certain part of the debts contracted at Hartford, in Connecticut, the light goods to be invoiced at their cost in Boston, and all heavy goods at their cost and transportation, and all other goods—that is to say, goods purchased at earlier periods in the same proportion, having reference to their actual costs: to which proposition he agreed. That an invoice was taken of the goods upon the above principles, and the goods removed, and that he gave his father a bond to pay the debts he had undertaken to pay, for the goods and debts so delivered to him, he taking the debts at his own risk. And from the bond given by Lewis, it appears clearly to have been a sale of the goods, and not an agency concern. The answer of Elias to this part of the bill is not very intelligible. He states that Lewis Lyman agreed to purchase all the stock in trade in the stores at White River and Montpelier, and the notes and accounts, &c., and setting out the terms of the contract substantially the same as stated by Lewis, and avers that the goods were inventoried and sold, as he verily believes, at their true and just value. But he does allege, that Lewis was to account to him and Justin for whatever balance there might be in his hands arising from the sale of the said goods at the price agreed on, and arising from such of the securities and accounts, transferred as aforesaid, as could be collected.

Whatever construction is to be put upon this answer of Elias, it can in no manner prejudice the rights of Lewis. It is not evi-

dence against him, nor is there any testimony to support this view of the transaction; and Lewis does not, in his answer, admit himself accountable for any surplus. He does not, to be sure, set out a statement of the account, and the result growing out of the transaction; but this was not called for by any charge in the bill, or any special interrogatory put. The bill charged the transaction to have been a fraudulent sale, without consideration; and this statement might have been made for the purpose of showing the consideration, and to meet the charge of fraud alleged in the bill, and for that purpose it was very proper. The only inquiry, therefore, that can arise with respect to this transaction, is, whether it was a fraudulent sale or not. The principal ground of complaint relates to the discount upon the cotton yarn. The discount allowed by Elias was sixty-five per cent.; and it is claimed that only forty per cent. should have been allowed. The evidence in relation to this cotton is somewhat contradictory, and the discount allowed would seem to have been greater than the weight of evidence would fairly warrant. But we cannot undertake to say that it furnishes evidence which will warrant us to pronounce the sale fraudulent; nor do we think there is any evidence in the case that would justify setting aside the sale as fraudulent. The claim for commissions was properly rejected, and the account between Lewis and the firm restated, putting the transaction upon the footing of an absolute sale, and of course discharging Lewis from responsibility for any surplus.

11. There can be no doubt but that the firm is chargeable with the eight notes dated the 6th of November, 1819, drawn by Norman Lyman, and endorsed by Elias, in the name of the firm. They were applied to the use of the firm, and it is of no consequence that Justin had refused to endorse them. The partnership still existed, and Elias had the legal right to bind his copartner in matters coming within the scope of the partnership. These are all the items which have been drawn in question by the respective parties under their exceptions to the reports of the commissioners, so far as they relate to personal property, and the conduct of the parties in the management of the business during the continuance of the partnership. But a still more embarrassing inquiry remains, as to the mode and manner in which the concerns of the partnership are to be settled and distribution of the funds made.[7] This does not, however, arise so much from the want of adequate powers in the court, as from the fears entertained that injustice may be done to the parties by reason of the loose manner in which their business has been con-

[7] Where a partnership is admitted an account can be had, notwithstanding the defendant denies there is anything due to the complainant, and even though the answer alleges that the latter is indebted to the former. And where, on the taking of the accounts, an indebtedness appears (i. e. by the complainant to the defendant), the defendant can have a decree for the balance. Scott v. Pinkerton, 3 Edw. Ch. 70. Where A. is a partner in two distinct firms, neither firm can sue the other for an amount alleged to be due. Rogers v. Rogers, 5 Ired. Eq. 31. If A. be insolvent, the proper course is for the firm claiming to be the creditor firm, to charge him on its books for the amount believed to be due. Id. If A. be insolvent, then the accounts of the creditor firm should be adjusted, and a bill may be brought by the remaining members of that firm against the debtor firm to recover the amount due from the latter after deducting what may be due to A., if anything, upon the adjustment of the accounts of the creditor firm. Id. When in a copartnership there is no specific agreement as to the division of losses and profits, they are to be divided equally. Jones v. Jones, 1 Ired. Eq. 332. To effect a complete settlement of partnership concerns, the interference of a court of equity may be necessary; and when necessary for that purpose, it will entertain jurisdiction, whether an action of account would or would not lie between the parties. Gillett v. Hall, 13 Conn. 426. Therefore, where the parties to the articles of partnership were A. on one part, and B. and three other persons on the other part, and A. brought his bill in chancery for an account against B. and others, alleging that some of the defendants forcibly and fraudulently seized upon notes, accounts and other papers belonging to the partnership, and took them from the plaintiff's possession, and still withheld them; it was held that this was a proper subject of equitable jurisdiction. Id. Where the original bill sought the adjustment of a partnership account, and a supplemental bill was filed, calling for the production of papers in the defendant's hands, to be lodged with the clerk of the court for inspection, and praying for an injunction against them with respect to the partnership debts and effects; it was held, that the matters alleged in the supplemental bill might properly be considered in connection with the original bill, in deciding upon the question of jurisdiction; and in this view, the jurisdiction was unquestionably sustainable. Id. In Connecticut, no action at law will lie between partners for the settlement of a partnership account, where their number exceeds two. Id. 433. A., B. and C. borrowed money jointly, but appropriated individually unequal sums. The benefit to each is according to the amount appropriated by each; and in the event of the insolvency of either, the loss should be sustained by the solvent partners in the proportion of the sum employed by each for his own use. Kincaid v. Hocker, 7 J. J. Marsh. 333. To settle and adjust a copartnership, and to recover the balance due the active from the dormant partner, who has been in the receipt of none of the property or avails of the copartnership, but owes a balance to the active partner, from its being a losing concern, a bill in chancery is the only remedy. Spear v. Newell, 13 Vt. 288. Where A. and B., partners, sold a stock of goods to C. and D., partners, taking their notes for the amount; and D. afterwards withdrew from the latter firm, and A. became partner with C., by purchase, paying for the interest by a receipt against the notes originally given by C. and D.; B. had no interest in this new partnership, and was not entitled to be made a party to a bill by A. for a settlement and account. Howell v. Harvey, 5 Ark. 270. Where A., B. and C. are in partnership, and C. sells all his interest in the property and credits to D., who takes his place in the firm, and a bill for settlement and account is subsequently filed by B. against A. and D., C. need not be made a party. Id.

ducted and the undefined and unlimited nature of their partnership connection. It seems that in the course of their business, the partnership extended, among other things, to the purchase and sale of real estate; the conveyances generally, having been taken to the individual partner who made the purchases, although admitted on all hands to have been intended for the benefit of the firm. There can be no doubt that under the circumstances of the case, these lands are to be considered as stock in trade, and, upon the dissolution of the partnership, to be equally divided between the partners; and how this is to be done is the question. On the part of the defendant Elias, it is contended that the real estate should be specifically divided, leaving each party in possession of what he held in his own name at the dissolution, according to its then valuation, he being accountable to the other for the balance and the interest thereon, as the same shall be found on such valuation. On the part of the complainant, it is contended that the property should be sold under the order of the court, leaving each party to bid for the same at his election, and the value to be thus ascertained and the proceeds divided between them. Some objections have been made to this latter mode of winding up the concerns of the partnership, arising out of the state of the pleadings and the powers of this court. These must be disposed of in the first place.

It is said that the complainant's bill is not so shaped as to authorize an order for the sale of the property; that such order cannot be granted without a specific prayer to that effect.[8] This, we apprehend, is a mistaken view of the bill. The specific relief prayed is, that the defendants may render an account of all property, real and personal, in the possession of either of them, or of any other person, belonging to the said Justin and Elias, or the proceeds thereof; and that an account may be taken of all and every the partnership dealings, transactions and property, from the time of the commence-

[8]A party cannot travel out of the matter alleged in his bill, to make a ground of relief. Bank of U. S. v. Schultz, 3 Ham. [Ohio] 62. No relief can be given except a proper case be made by the bill. Knox v. Smith, 4 How. [45 U. S.] 298. It is not sufficient that it appear by the defendant's own showing, or from the proof that he has acted unjustly and inequitably. Id. If the object be to set aside a deed as fraudulent, the fraud, with the facts connected with it, should be alleged. Id. The prayer of a bill must be consistent with the case stated in the bill. McCosker v. Brady, 1 Barb. Ch. 329. Where a bill of partition alleged that a will under which the defendants claimed title to a part of the premises was invalid, and prayed that it might be annulled and cancelled and declared void, or in case the same should be declared to be valid, then that the plaintiff might have a partition of the premises; it was held that the prayer for a partition was inconsistent with the case made by the bill. Id. If a party is ignorant as to a particular fact, and wishes to obtain the proper relief as that fact should ultimately appear to be, he should frame the statements in his bill as well as the prayer for relief, so as to present the case in a double aspect. Id. It is not, in general, necessary to charge in the bill confessions and statements made by the defendant. Jenkins v. Eldredge [Case No. 7,266]. An interrogatory must be relevant to the matters charged; otherwise the defendant need not answer it. Story, J., Brooks v. Byam [Id. 1,947]. Where the complainant doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so, if the court should decide against him in one view of the case, it may afford assistance in the other. Strange v. Watson, 11 Ala. 324. Vide Story, Eq. Pl. 40–43; 5 Port. [Ala.] 26. A bill may be framed with a double aspect, where it is doubtful what relief the complainant is entitled to, on the facts of his case. Colton v. Ross, 2 Paige, 396; Foster v. Cook, 1 Hawks, 509; Lloyd v. Brewster, 4 Paige, 537; Lingan v. Henderson, 1 Bland, 252. In such case the relief prayed for may be in the alternative; but it must be consistent with the case made by the bill. Id. Where the case made by the bill entitles the complainant to one of two kinds of relief, but not to both, the prayer should be in the disjunctive. Id. So, if it be doubtful whether the facts of the case entitle him to the specific relief prayed for, or to relief in some other form, his prayer concluding for relief should be in the disjunctive. Id. In such case, although the complainant should not be entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief consistent with the case made by the bill. Id. But where the complainant prays for particular relief, and for other relief in addition thereto, he can have no relief inconsistent with such particular relief, although it should be founded upon the bill. Id.; Foster v. Cook, 1 Hawks, 509; Chalmers v. Chambers, 6 Har. & J. 29. Where there is a prayer for particular relief, and for general relief, if the particular relief cannot be decreed, the complainant may resort to the general prayer, and pray ore tenus, any relief warranted by the bill and the facts. Allen v. Coffman, 1 Bibb, 469. But where there is no obstruction to the particular relief, he cannot abandon it, and ask a different decree under the general prayer. Id. Under the prayer for general relief, the plaintiff in equity cannot recover a claim distinct from that demanded, or put in issue, by his bill. Sheppard's Ex'r v. Starke, 3 Munf. 29; 1 Munf. 554, note; Robson v. McArthur's Heirs, 6 Pet. [31 U. S.] 82; Butler v. Durham, 2 Kelly [2 Ga.] 414; Chalmers v. Chambers, 6 Har. & J. 29. Where a bill was filed to have a mortgage deed recorded, which had been omitted to be recorded within the six months, and the bill closes with a general prayer for other and further relief, &c., a decree that the mortgaged premises be sold, &c., is not within the relief prayed by the bill. Id. A bill for one purpose cannot be made to answer another. Id. Where a bill charges that an act of the legislature is contrary to the constitution of the United States, and in violation of the rights of the complainant, and illegal and void, the court will not, under the general prayer for relief, declare such act unconstitutional or void. Smith v. Trenton Delaware Falls Co., 3 Green, Ch. [4 N. J. Eq.] 505. In bills in equity seeking relief, if any part of the relief sought be of an equitable nature, the court will retain the bill for complete relief. Traip v. Gould, 15 Me. 82. If the bill pray that a contract for slaves sold in violation of the constitution be annulled, it should offer to restore the slaves. Martin v. Broadus, Freem. Ch. [Miss.] 35. Where a party who has bought land and been let into possession, seeks to enjoin collection of the purchase-money, on the ground of fraud or a failure of title, he must pray a rescision of the contract, he cannot withhold the purchase-money and likewise keep the land. Williamson v. Raney, Id. 112. If the prayer of a bill be for an injunction alone, no other relief can be granted. Id. To a bill, praying a decree for the

ment thereof, and that it may be decreed that the complainant take from the joint fund the amount of the money put into the concern of his private property, with the interest thereof; and that the residue thereof may be equally divided between the parties. In addition to this, there is a general prayer for relief. The specific prayer only asks for an account and division of the funds belonging to the partnership, but does not designate any mode in which the amount of the fund is to be ascertained. And the general prayer will authorize the court to adopt any mode consistent with equity and good conscience, and according to the course of chancery proceedings, and which shall not be inconsistent with the case made by the bill and the specific relief prayed. An order for

payment of a lost bond, an affidavit of the loss must be annexed. Pennington v. The Governor, 1 Blackf. 78; Taliaferro v. Foote, 3 Leigh, 58; Peart's Heirs v. Taylor, 2 Bibb, 556. Contra, Cabell's Ex'rs v. Megginson's Adm'rs, 6 Manf. 202. On a bill to rescind a contract, the court cannot decree a specific execution. Thus, on a contract for the sale of lands the vendee failing to show sufficient grounds for rescinding the agreement cannot have a decree for specific execution. Rochester v. Anderson, Litt. Sel. Cas. 146. Where a party resorts to a court of equity on account of a lost paper, upon a subject cognizable at law, but for the loss, an affidavit of the loss of the paper must be annexed to the bill; but where the subject-matter of the writing is properly cognizable in equity, an affidavit of the loss is not necessary. Peart's Heirs v. Taylor, 2 Bibb, 556. If an answer on oath has not been waived as to one of the defendants, the complainant, upon an application to dissolve the injunction, cannot be permitted to read the affidavits, annexed to the bill for the purpose of contradicting the positive answer of that defendant on oath. Haight's Case, 4 Paige, 525.

A bill with a double aspect, may be filed where the complainant is in doubt whether he is legally entitled to one kind of relief or another, upon the facts of the case as stated in the bill, in which case his prayer should be framed in the alternative, so that if the court decides against him as to one kind of relief prayed for, he may still obtain the proper relief under the other branch of his alternative prayer. Lloyd v. Brewster, 4 Paige, 537. So, also, where the complainant is entitled to relief of some kind against the defendants, upon the facts stated in his bill, if the nature or kind of relief to which he is entitled depends upon the existence of a fact of which he is ignorant, he may allege his ignorance of such fact, and may frame his prayer for relief in the alternative, so as to obtain the appropriate relief according as the fact shall appear at the hearing of the cause. Id. By the practice in Connecticut, it is not necessary to annex to a bill of interpleader, an affidavit of the absence of collusion. Nash v. Smith, 6 Conn. 421. Where a plaintiff resorts to a court of equity for relief, on the ground that a deed on which his claim depends has been lost or destroyed, the claim being such that if he had the deed he would have complete remedy by action upon it at law, the bill must distinctly aver the loss or destruction of the deed, and it must be shown that it could not be found upon due search, otherwise the court of equity has no jurisdiction of the case. Taliaferro v. Foote, 3 Leigh, 58. Where the complainant makes an officer of a corporation a party defendant for the purpose of obtaining a discovery as against the corporation, no relief, either general or special, should be prayed against such officer; and the prayer of the bill should be so framed as to show distinctly, that the relief sought is intended to be confined to the corporation; and that no relief whatever is to be asked as to the officer of the corporation at the hearing, even as to costs. McIntyre v. Trustees of Union College, 6 Paige, 239. If the bill contains no prayer, either for specific or general relief, it is considered as a bill of discovery merely, although the word "decree" is erroneously inserted in the prayer for process of subpoena; but if the bill prays any relief whatever against a defendant, who is made a party for the purpose of discovery only, such prayer makes it a bill for relief as well as discovery as to such defendant, and authorizes him to put in an answer containing a full defence. Id. A bill in chancery, seeking to transfer the jurisdiction of a case proper for a court of law, on the ground that the material facts were known to the defendant only, ought to be accompanied with an affidavit. Munday v. Shatzell, Litt. Sel. Cas. 373. If a bill, besides the usual prayer for general relief, contains a prayer for specific relief, the plaintiff is entitled to other specific relief, so far as it is consistent with the case stated in the bill. Wilkin v. Wilkin, 1 Johns. Ch. 111; Allen v. Coffman, 1 Bibb, 469; Cook v. Mancius 5 Johns. Ch. 89. The relief to be given under a general prayer in a bill, must be agreeable to the case made by the bill, and not different from, or inconsistent with it. Chalmers v. Chambers, 6 Har. & J. 29; Wilkin v. Wilkin, 1 Johns. Ch. 117; Franklin v. Osgood, 14 Johns. 527; English v. Foxall, 2 Pet. [27 U. S.] 595. Where a bill was filed to have a mortgage deed recorded, which had been omitted to be recorded within six months, and closes with a general prayer for other and further relief, &c., a decree that the mortgaged premises be sold, &c., is not within the relief prayed by the bill. Id. Under the general prayer, the complainant is entitled to any relief consistent with the case made, though inconsistent with the specific relief prayed for. Bailey v. Burton, 8 Wend. 339. In a bill in equity between partners, a prayer that the defendant may be held to render an account of all moneys and effects of the firm received by him, and of all other matters relating to the concern, is equivalent to a prayer for general relief. Miller v. Lord, 11 Pick. 11. Where a bill is for discovery and relief, in a case where discovery is the only ground of equity jurisdiction, it must be sworn to; but if the bill is for discovery merely, no affidavit is necessary. McElwee v. Sutton, 1 Hill, Eq. 33. A general prayer in the bill for relief, will authorize a decree for the specific relief appropriate to the case. Brown v. McDonald, Id. 302. A bill seeking to transfer to this court a matter properly cognizable at law, must be verified by oath. Lynch v. Willard, 6 Johns. Ch. 346. Though the bill should contain neither a special nor general prayer for relief, yet if the defendants answer the allegations, and submit themselves to the decree of the court on the merits, the defect as to the prayer will be disregarded by an appellate court. Smith v. Smith, 4 Rand. [Va.] 95. Praying that the heirs may be made defendants, without taking out process against them, or naming them in the bill, is not making them defendants. Huston v. McClarty's Heirs, 3 Litt. 274. Upon a motion to dissolve an injunction, if the complainant relies upon affidavits annexed to the bill under the 37th rule of the court of chancery, to contradict the answer, the defendant has a right to read affidavits or other evidence in support of his answer. Brown v. Haff, 5 Paige, 235. Under the general prayer, any relief warranted by the case as set forth in the bill, may be granted, though not orally asked for. Lingan v. Henderson, 1 Bland, 251. Where a prayer for specific relief in a bill in chancery is accompanied with a prayer for general relief, the complainant is entitled to other specific relief not inconsistent with the case stated in the bill; but no relief can be granted under the general prayer entirely distinct from, and independent of the special relief prayed. Thomason v. Smithson, 7 Port. [Ala.] 144.

the sale of the real estate would involve no such objections in this case.

Another objection which has been made to such an order, is, that as the lands lie in different states, the order could not be enforced, except as to the lands within this district or state. This objection cannot be well founded. Such an order does not require the agency of any officer out of the jurisdiction of this court. The order is to act upon the parties in the cause; and the transfer of the title is to come from them, and not from the person through whose agency the sale shall be made. It is not like the case of land sold under execution. If the court has not the power to order a sale, it has not jurisdiction over the subject-matter at all, and cannot divide the land or compel either party to release his title to that lying in another state, and suits must be commenced in each state where the land lies. Such inconvenience in the administration of justice cannot be tolerated, and the powers of this court, we think, are amply sufficient to direct a public sale of the land, and to compel the parties to convey the title accordingly. An order for the sale of the property may operate injuriously upon the interest of Elias, under the circumstances in which he is placed. But this will arise from his own negligence in permitting such a length of time to elapse without having the partnership concerns settled. If this had been done immediately upon the dissolution, and before he had made any improvements, no injury could have arisen from such a sale The dissolution was his own act; and the continuance of such an undefined partnership was at his own option, he could have dissolved it at any time; and if parties will be so improvident, where they have it in their power fully to protect themselves, courts of justice cannot always redeem them from the penalties of their imprudence. It is well said, in one of the cases on this subject, if men will thus enter into partnership, as into a marriage, for better and worse, they must abide by the consequences. The cases in the books are certainly very strong to show that the complainant has a right to require a sale of the property. It is laid down by Gow, in his valuable treatise on Partnership (page 291), that when the common property of the partnership is ascertained, either party may insist upon a sale of the whole concern. That one partner has no claim upon his individual proportion of a specific article, but may require the whole concern to be wound up by a sale, and have a division of the produce of the aggregate joint effects. That one partner cannot separate his share from the bulk of the joint property, nor compel his copartner to accept what, according to a valuation, his interest may be worth. That is not the mode in which a court of equity winds up the concerns of a partnership; but in every case in which that court interferes in closing the transactions of a partnership, it directs the value of the stock to be ascertained in the way in which it can be the best ascertained, viz., by a sale, and its conversion into money; and in these rules and principles it seems well supported by adjudged cases and the course of courts of chancery. In the case of Crawshay v. Collins, 15 Ves. 220, it is laid down, that upon the dissolution of a partnership, each partner becomes tenant in common in each and every article embarked in the concern, and has a right to have the value of the property ascertained by a sale. And in Fox v. Hanbury, Cowp. 445, it is said the right of the several partners is not to an individual proportion of a specific article, but to an account; the property to be made the most of and divided. And in Featherstonhaugh v. Fenwick, 17 Ves. 309, the same rule is fully recognized, that upon the dissolution of a partnership, when there are no articles prescribing the terms, the law ascertains what shall be the consequence of the dissolution, viz., that the whole of the joint property must be sold off and the whole concern wound up; and that one partner cannot insist upon taking the share of another at a valuation. The circumstances of that case were somewhat like the present. One question before the court was, whether one partner was bound to adjust the partnership concerns in the manner proposed by the other: which was, that a value should be set upon the partnership stock, and each one take his proportion according to such valuation, or should take away his share of the property from the premises. The master of the rolls was clearly of opinion that the other partner was not bound to accept the proposition, but had a right to have the whole concern wound up by a sale and a division of the produce. Other cases might be referred to in support of the same doctrine, if necessary; but the rule seems to be too well established to require any further confirmation.

An order must, therefore, be entered for a sale of all the real estate belonging to the partnership at the time of the dissolution, and the title to which is now either in Justin or Elias Lyman. The purpose for which the sale is to be made, is to ascertain the value of the property at the dissolution. It must be sold, however, as it now is, and at its present value; and to secure to each party the benefit of his improvements, the cause must be again referred to ascertain the value of the improvements made by the respective parties, and the report of the commissioners, with respect to the rents and profits since the dissolution, must stand over until the return upon such sale shall be made, and the coming in of the report relative to the improvements. This order will not, of course, extend to the Cairo patent lands, the title to which stands in the name of Simeon Lyman; nor is any notice intended to be taken of any part of the controversy in which he is interested. He is not a party to this suit, and no decree made in it can affect his rights. The report of the commissioners, with respect

to the deduction of twenty-five per cent. from the nominal retail price upon goods received by Justin, in payment for the lands sold to Henry Lyman, and, also, with respect to the evidence rejected by them on the second hearing, and the disallowance of the complainant's charge for the good will of the store at Hartford, is confirmed.

The statement of the accounts between the parties, must be corrected in the several particulars mentioned in this opinion, which may probably be done by the parties themselves; and if not, a reference must be made to a proper officer to restate the accounts with such corrections. And a final decree thereupon is reserved until the coming in of the return upon the sale of the real estate, and the report upon the value of the improvements made by the respective parties since the dissolution of the partnership.

Upon the coming in of the report, numerous exceptions were taken by the parties, and were argued and disposed of at the October term, 1830. The following is the only part of the opinion then delivered, involving questions of professional interest:

THOMPSON, Circuit Justice. It has also been urged upon the court to expunge from the accounts all allowances which have been made for improvements by either party upon the real estate after the dissolution of the partnership. This is one of those extraordinary and complicated cases of partnership that it is difficult, and indeed impracticable, to do complete justice between the parties, by applying to it the general rules applicable to ordinary partnerships. It may, perhaps, be admitted as a general rule, that after the dissolution of a partnership, one partner cannot call upon another for compensation for improvements made on the partnership property after the dissolution. This, as a general rule, is undoubtedly just and equitable. Such improvements are voluntary, and it might be deemed the folly of the party to make them, as it would be in his power immediately to cause a distribution to be made of the property, and each partner to take possession of his share. All just allowances will always be made for the costs and charges for taking care of the property until partition can be made, where no unnecessary delay takes place. It is not, however, without precedent for a court of chancery, when a dissolution has taken place without the consent of all the partners, and the partnership property continued to be employed, as before the dissolution, to hold the partner who thus employs the common stock accountable for all the profits. In the present case, the improvements which have been made by the respective parties may very fairly be considered as made by consent. There was at least no objection, and an implied acquiescence may be inferred from the circumstance, that it appears to have been the understanding of both parties that each one was to retain possession of what he held at the dissolution, accounting to the other for the balance and interest, however it might be found on the winding up of the business. And if under such impression improvements were made, supposing them to be on the individual property of each, it would be inequitable for the other to throw the whole cost of the improvements upon him who made them; although it is fairly to be inferred that it was the understanding of the parties that each was to retain the possession of such part of the real estate as he held at the dissolution, accounting for the balance. Yet this was not so satisfactorily established as to warrant the court in acting upon that ground; and besides, so much time has elapsed since the dissolution of the partnership, and such changes in the property have been made, that it would be difficult, if not impracticable, to ascertain the value at the time of the dissolution. Most of the improvements have been made by Elias, and it is Justin who now insists upon the sale of the property; and it would be highly inequitable, under such circumstances, that he should take his share of the property according to its present value, without bearing any of the expense of the improvements. The court does not, therefore, feel disposed to modify the manner in which the accounts in this respect have been taken between the parties; and we do not think we are, upon this point, deviating from the rules and principles adopted in courts of equity, under such special circumstances. With respect, however, to the compensation for personal services which has been taken into the statement of the accounts, the rule appears to be inflexible. No case has fallen under my observation where a compensation has been allowed to one partner against another, without a special agreement for that purpose. It is considered that each joint owner, in taking care of the joint property, is taking care of his own interest, and the law never undertakes to measure and settle between partners their various and unequal services bestowed on their joint business. This must be left to be regulated by special contract, otherwise it is deemed a case of voluntary management. And the same rule applies after the dissolution. Each party becomes, with respect to the property in his hands, a trustee; and it is a well-settled rule, that a voluntary trustee is not entitled to compensation for his personal services; he is entitled to all just allowances for actual charges and expenses in managing the trust, but no more; and this on the principle that the act was voluntary on his part: and the objection to such compensation claimed on the part of Elias, applies with great force in the present case. He was the party who dissolved the partnership, and it was in his power immediately to have settled the partnership concerns, and discharge himself from all care and attention to that which belonged.

to his copartner. 15 Ves. 226; 1 Anst. 94; 2 Brown, Ch. 656; 1 Johns. Ch. 38, 165; 2 Johns. Ch. 117; 3 Johns. Ch. 433. All allowances that have been brought into the accounts on either side, for the personal services of either partner, must be stricken out.

The question with respect to costs is not free from difficulty. It is a well-settled rule that costs in chancery rest in the sound discretion of the court under the circumstances of the case, and are not governed by the statutes of costs applicable to common law proceedings. 11 Ves. 458; 1 Johns. Ch. 77, 89, 182. The due exercise of this discretion is often attended with difficulty, particularly when the proceedings have been so various and protracted as in the present case. Justice may require some special order with respect to the costs; and to enable the court to exercise their discretion, with a due regard to justice and equity, it is deemed advisable that a bill of the costs and expenses on each side should be made out and presented to the court, before a final disposition with respect to the cost is made. In relation to the depositions introduced at the last term, with respect to some transactions of Lewis Lyman in the receipt of moneys, and the payment of certain debts in Boston, the court has had considerable difficulty. The testimony is somewhat contradictory, and too obscure to enable the court to come to any satisfactory conclusion respecting it. And considering the great delay in not bringing it forward at an earlier stage of the controversy, we think proper to lay it entirely out of view in closing this transaction.

The cause must now be referred to a commissioner, barely to restate the accounts between the parties, correcting the same in the particulars mentioned in this opinion; and a final decree entered thereupon, except as to the costs, with respect to which the final decree is reserved until the coming in of the accounts of the respective parties, required to be made out and submitted to the court; upon the coming in of which a final decree respecting the costs will be entered as of the last term.

Case No. 8,629.

LYMAN v. MYERS.

[Cited sub nom. Lyman Ventilating & Railroad Co. v. Myres, in Lyman Ventilating & Refrigerator Co. v. Lalor, Case No. 8,632. Nowhere reported; opinion not now accessible.]

Case No. 8,629a.

LYMAN v. NEVINS.

[Nowhere reported; opinion not now accessible.]

LYMAN (PARSONS v.). See Cases Nos. 10,779 and 10,780.

LYMAN (UNITED STATES v.). See Case No. 15,647.

Case No. 8,630.

LYMAN PATENT REFRIGERATOR CO. v. OSWALD.

[Cited in Lyman Ventilating & Refrigerator Co. v. Lalor, Case No. 8,632. Nowhere reported; opinion not now accessible.]

Case No. 8,631.

LYMAN VENTILATING & REFRIGERATOR CO. v. CHAMBERLAIN et al.

[2 Ban. & A. 433; [1] 10 O. G. 588; Merw. Pat. Inv. 141.]

Circuit Court, D. Massachusetts. Sept. 23, 1876.

PATENT—COOLING AND VENTILATING ROOMS—INVENTION—COMPLETENESS—DESCRIPTION—CONSTRUCTION.

1. The construction of the reissued letters patent granted March 10, 1874, to Stephen Cutter, assignee of Azel S. Lyman, No. 5,786, for an improvement in methods of cooling and ventilating rooms given by the circuit court of the United States in the Southern district of New York, in Lyman Ventilating & Refrigerator Co. v. Lalor [Case No. 8,632], adopted and followed.

2. Although the description may be so full and precise in the application for a patent as to enable one skilled in the art to which it appertains to construct what it describes, it does not attain the proportions or the character of a complete invention, until it is embodied in a form capable of useful operation.

3. Upon the construction given by the court to the Lyman patent: *Held*, that the invention claimed to have been infringed was anticipated, and that the patentee was not the original and first inventor thereof.

[This was a bill in equity filed by the Lyman Ventilating & Refrigerator Company to restrain the defendants Newell Chamberlain and others from the infringement of a reissued patent. The original letters patent were granted to Azel S. Lyman March 25, 1856. No. 14,510.]

Brown & Holmes, Whitney & Betts, and E. J. Cramer, for complainants.

Proctor, Warren & Brigham and Dickerson & Beaman, for defendants.

SHEPLEY, Circuit Judge. The reissued letters patent granted March 10, 1874, to Stephen Cutter, assignee of Azel S. Lyman, No. 5,786, for an improvement in methods of cooling and ventilating rooms, have repeatedly been the subject of litigation, and the claims of the patent have repeatedly been the subject of judicial construction. In the suit of these same complainants against William Lalor, in the Southern district of New York, Judge Blatchford delivered an elaborate opinion, giving the construction of the most important claims in the reissued patent. [Case No. 8,632.] This opinion, which was delivered September 10, 1874, was upon a motion for preliminary injunction. The same construction which was

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

given by Judge Blatchford is contended for by the complainants in this case. As the same construction has been substantially repeatedly given in the circuit court, in the Northern, Southern and Eastern districts of New York, in the Second judicial circuit, I adopt that construction as the law of this case.

The invention of Lyman, as thus construed, consists in a combination of a proper reservoir, holding the cooling material in an elevated position, so as to create the required circulation, with a conduit or conducting structure which will surround the cooling material or the cooled air, or both, and give to the cooled air its downward motion, in a determined direction, in its application to a room in which this reservoir and conduit are elevated, or in relation to which they hold this elevated position for the purpose of cooling, purifying, and ventilation. There must be a reservoir for the cooling material open at or near the top for the current of lighter and warmer air to come in contact with the cooling material and become condensed, and, by its greater specific gravity, to fall through the cooling material downward to and over the floor of the room, and in so doing displace the lighter and warmer air, forcing it upward toward the top of the compartment to be again, by contact with the ice in the reservoir, condensed, precipitating its moisture, and again falling by specific gravity downward, thus keeping up a continual circulation; and there must be something which will answer the requirement of the patent as a "descending conduit," to give to the current of cooled air a determined downward direction.

With this description of the invention of Lyman, as described and claimed in the reissued patent, the question whether Lyman was the original and first inventor of what is claimed in the reissued patent, may now be considered with reference to the evidence upon that issue in the record in this case, which is much more full than the testimony in any of the cases before referred to.

In the case against Lalor, Judge Blatchford decided, in accordance with the very well considered and able opinion of Judge McKennan, in the case of Northwestern Fire-Extinguisher Co. v. Philadelphia Fire-Extinguisher Co. [Case No. 10,337], that the application of Thaddeus Fairbanks made September 5, 1846, rejected February 6, 1847, and withdrawn July 27, 1847, did not, of itself, afford sufficient evidence of an invention which antedated the invention of Lyman. The learned judge says, "It is not shown that prior to the date of the original patent to Lyman, much less prior to the date of Lyman's invention, a refrigerator was actually constructed embodying what was set forth in the application of Fairbanks." He, therefore, comes to the conclusion, sustained by the opinion of Judge McKennan in the case cited, that although the description may be so full and precise in the application for a patent as to enable one skilled in the art to which it appertains to construct what it describes, it does not attain the proportions or the character of a complete invention, until it is embodied in a form capable of useful operation.

In this case the evidence is perfectly conclusive of the construction, both in 1846 and 1849, by Thaddeus Fairbanks, of refrigerators which embodied the invention set forth in Fairbanks' application, and that such refrigerators continued in practical and public use and are in existence and produced in evidence in the case.

Upon the construction of the patent claimed by the complainants, and upon the construction given to the claims of the patent by Judge Blatchford, these Fairbanks refrigerators furnish a perfect defence upon the question of novelty. Upon any construction which can be given to the Lyman patent, "the poor man's refrigerator" or "the barrel refrigerator," made by George Whittier, at Danversport, Massachusetts, which contained an elevated ice-box, rack, cold-air chamber, and descending conduit or flue separate from the ice-box and extending nearly to the bottom of the refrigerator, giving a determined downward direction to the current of cold air, must be considered as anticipating the Lyman patent, and the same remark is applicable to the upright refrigerator made by George Whittier and used by James D. Black, and to "The Mead & Whittier refrigerator," so called. The defendants in this case do not use any combination which is not clearly proved to have been in public and practical use prior to the date of the invention of Lyman, and, therefore, cannot be held to be the infringers of any invention of which he was the first and original inventor.

Bill dismissed, with costs.

[For another case involving this patent, see Lyman Ventilating Co. v. Lalor, Case No. 8,632.]

Case No. 8,632.

LYMAN VENTILATING & REFRIGERATOR CO. v. LALOR.

[12 Blatchf. 303; 1 Ban. & A. 403; 6 O. G. 642; Merw. Pat. Inv. 139.][1]

Circuit Court, S. D. New York. Sept. 10, 1874.

PATENTS—INVENTION—WHAT CONSTITUTES.

1. A written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention, within the meaning of the patent laws, so as to defeat a subsequent patent to an independent inventor, even though it be deposited in the patent office, as part of an application for a patent.

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 1 Ban. & A. 403; and here republished by permission.]

2. To attain the character of a complete invention, it must be embodied in a form capable of useful operation.

3. The reissued letters patent granted to Stephen Cutter, March 10th, 1874, for an "improvement in methods of cooling and ventilating rooms," (the original patent having been granted to Azel S. Lyman, as inventor, March 25th, 1856, and extended for seven years from March 25th, 1870, and reissued to said Lyman, December 26th, 1871,) defined, as to the meaning of the claims in it.

4. The principle and mode of operation of the apparatus described in it, explained.

5. Various alleged prior inventions, examined and distinguished.

[This was a bill in equity by the Lyman Ventilating & Refrigerator Company against William Lalor.]

John J. Allen and Edward J. Cramer, for plaintiff.

Edward N. Dickerson and Charles C. Beaman, Jr., for defendant.

BLATCHFORD, District Judge. This suit, and several others, are brought on reissued letters patent granted to Stephen Cutter, March 10th, 1874 [No. 5,786], for an "improvement in methods of cooling and ventilating rooms." The title to this patent is vested in the plaintiffs for the whole of the United States, except the Eastern district of New York, and that part of the city of New York lying westerly of Broadway and Fifth avenue, and a few counties in New Jersey, the title for such excepted territory being vested in the Lyman Patent Refrigerator Company. The original letters patent were granted to Azel S. Lyman, as inventor, March 25th, 1856 [No. 14,510]; and were extended for seven years from March 25th, 1870, and were reissued to Lyman, December 26th, 1871, and were then assigned to said Cutter, and reissued to him, as above stated, March 10th, 1874.

The first claim of the reissue sued on is in these words: "The combination of a descending conduit, or cold air flue, or either, with a reservoir for containing cooling material, substantially in the manner and for the purposes described." This claim differs only in the addition of the words "or either" from the first claim of the reissue of 1871. The first claim of the reissue of 1871 was sustained in two suits in equity, on final hearing, one before Judge Hall, in the Northern district of New York, in March, 1872,—Lyman v. Myers [Case No. 8,629]; and the other before Judge Benedict, in the Eastern district of New York, in January, 1874,—Lyman Patent Refrigerator Co. v. Oswald [Id. 8,630]. In both of those suits it was sustained against the alleged prior invention of Thaddeus Fairbanks, a patent for which was applied for September 5th, 1846, and rejected February 6th, 1847, and withdrawn July 27th, 1847. Long after such withdrawal, John C. Schooley obtained from Fairbanks, for the sum of $5, an assignment of Fairbanks' alleged invention, and an application was again made for a patent for it, and a patent was granted to Schooley, as assignee of Fairbanks, August 12th, 1856. Judge Benedict, in the case against Oswald, says: "The proofs show that Fairbanks abandoned his invention long prior to the issue of the patent upon it. His application for a patent, made in 1846, was rejected on the 27th of July, 1847, and he then withdrew his application. No subsequent effort to obtain a patent or preserve his invention, or to put it into use, appears ever to have been made by him. The patent for the invention, subsequently issued August 12th, 1856, was obtained by one Schooley, as assignee of Fairbanks, who obtained an assignment of the invention from Fairbanks, for the sum of $5, nearly ten years after the withdrawal of the application and abandonment of the invention by Fairbanks, the inventor." To this it may be added, that, on the present motion, nothing is shown in reference to the invention of Fairbanks, except the papers from the patent office, and an affidavit by Schooley showing the foregoing facts. It is not shown, that, prior to the date of the original patent to Lyman, much less, prior to the date of Lyman's invention, a refrigerator was actually constructed embodying what was set forth in the application of Fairbanks. The alleged invention of Fairbanks, as anticipating Lyman, must, therefore, be laid out of view. As regards anything shown in the original application of Fairbanks, made in 1846, and rejected and withdrawn in 1847, it is well settled, that a written description of a machine, although illustrated by drawings, which has not been given to the public, does not constitute an invention, within the meaning of the patent laws. Evidence that such a description was made does not show, of itself, a prior invention. Such a description has not the same effect as a printed publication. It lacks the essential quality of such a publication, for, even though deposited in the patent office, it is not designed for general circulation, nor is it made accessible to the public generally, being so deposited for the special purpose of being examined and passed upon by the patent office, and not that it may thereby become known to the public. Although it may incidentally become known, the deposit of it is not a publication of it, within the meaning of the statute or the law. Moreover, although the description may be so full and precise as to enable any one skilled in the art to which it appertains, to construct what it describes, it does not attain the proportions or the character of a complete invention until it is embodied in a form capable of useful operation. Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co. [Case No. 10,337].

In answer to the present motion for injunction, various other alleged prior inventions are set up. To understand their bearing, it is necessary, first, to define clearly what the plaintiffs cover by their patent. The specifi-

cation states the invention to be one of "improvements in cooling, drying and disinfecting rooms." It says: "My improvement in cooling, drying and disinfecting consists in the peculiar construction of the box or reservoir for holding the ice or other cooling material. The object sought to be accomplished by this construction is the production of a current of cool air in a determined direction, without mechanical aid and irrespective of place. The principle I employ is that which is exemplified in the hydrostatic column, and my use of it may be understood by the following comparison: If we suspend a cake of ice freely in the air, and near the ceiling of a closed room, slight currents would soon be produced by the disturbance of the equilibrium, consequent upon the cooling of the air in contact with the ice. These currents would be feeble, because the cold descending air would spread out over a wide base, and the temperature soon become equalized by mixing with warm air. If, however, we should place around the sides and under the ice a conduit, such as a pipe or box of sufficient size to surround the ice, the air, as it is cooled, would fall down and soon fill the same, but still have a tendency to spread laterally, in consequence of its gravity, and, therefore, it would exert pressure on all sides, similar to a non-elastic fluid. If one or more openings were made in the bottom of the same, this air would pour out with a certain force, due to the difference of the temperatures outside and inside, and to the height of the column, obeying precisely the same laws which would govern a non-elastic fluid. The construction of a refrigerating box on this principle enables me to employ it to various useful and valuable purposes, such as the preservation of meats and vegetables, ventilating, cooling, drying and disinfecting apartments in hospitals, sleeping and other rooms. The reservoir, when adapted for holding ice as the cooling material, is a box open at or near the top and in or near the bottom. It may be divided into two compartments, by a grating, as shown in fig. 1—in such case, the latter serving to support the ice, while the space beneath may form a cold air chamber, E, and allow the free settling of the cold air from all parts of the grate. When enclosed in an air tight compartment, as is shown in fig. 1, at A, and the box D charged with ice, the moisture will be extracted from the air, at the same rate that its temperature is reduced, in the following manner: The air in A is at first of the temperature of the surrounding medium, and its hygrometrical condition is the same. Ice being now introduced into the box D, the air in contact will be immediately reduced in temperature, condensation takes place, and moisture is deposited. The condensed air, being of greater specific gravity, falls into the air chamber E, flowing thence, similar to the flow of water, through F, downward to and spreading over the floor, and, in so doing, displaces the lighter and warmer air, forcing the latter upward toward the top of the apartment. As it there comes in contact with the ice, the condensation and precipitation of moisture goes on until a minimum temperature is reached. Thus, a continual circulation is kept up, in such manner that the whole of the air must circulate through the ice-box. Of course, all articles, such as meats and vegetables, would be deprived of their moisture in a like degree with the air, the latter being brought to the condition of great purity and dryness. The water falls to the bottom of the cold air space E, where it may be caught by a trough or lip, and thence discharged to the outside by a suitable pipe. * * * For further disinfecting, a charcoal-box or other suitable agent may be employed, as shown at B; or, by placing it at y, where the warm and moist air passes over, to be cooled and dried. Instead of a single opening or flue, in or at the bottom of the ice-box, or below the lowest level of the ice, several may be employed in combination with one cooling reservoir; or, where the apartment is of considerable size, more than one reservoir for the cooling materials, and openings or flues in like manner, may be arranged, either to increase the circulation, or to reduce the temperature and drying, or both, as may be required. The discharge pipe F may be of different lengths, according as the blast is to be more or less forcible, the higher the column the greater being the weight and velocity of the discharge." Only the 1st, 3d, 4th and 5th claims of the patent are involved in the present controversy. The first claim is above set forth. The 3d, 4th and 5th are in these words: "3. In a closed refrigerating chamber, an open bottomed cooling reservoir, provided with an aperture for the ingress of the air above the cooling material, in combination with a drip to prevent the falling of the water into the chamber below the cooling reservoir, substantially as described. 4. In a refrigerating chamber, an ice-box open above and below, and provided with a grate for supporting the ice. 5. In a refrigerating chamber, a receptacle for cooling material, divided into two compartments, the one serving to support the cooling material, and the other to allow the settling of the cooled air, substantially as described."

It is apparent, from this description, taken as a whole, that the principle and mode of operation of the apparatus described is, that the cooling of the air in the air-tight compartment or refrigerating chamber is to be produced, not by conduction, or by the contact of such air with a metallic or other substance to which a low temperature is imparted by cooling material in a cooling reservoir, but by the free passage and circulation of such air from the top downward, through and in contact with the cooling material in the cooling reservoir, and then out into such compartment or refrigerating chamber, and then upward outside of the

cooling reservoir, and into the top of the cooling reservoir again, all the openings being entirely within the refrigerating chamber or compartment, and the direction of the current from the top downward being determined by the fact that the cooling material is surrounded by an enclosure which acts as a conduit. In connection with such establishment of a cooled current of air in a determined direction, the moisture in the air, gathered by it from articles in the refrigerating chamber, or from other sources, is deposited on the cooling material, in the cooling reservoir, as the air passes in direct contact therewith. Thus, the whole of the air must circulate through the cooling reservoir until a minimum equable temperature of the air is attained, and desiccation and refrigeration go on simultaneously. When, therefore, the first claim of the patent claims "the combination of a descending conduit or cold air flue, or either, with a reservoir for containing cooling materials, substantially in the manner and for the purposes described," a combination, to be the same combination, whether as an infringement or as anticipatory, must not only be a combination of such two instruments, but must be one having the principle and mode of operation, and operating in the manner, and effecting the purpose, of the combination described in the patent.

On the question of novelty, the defence sets up a refrigerator built by Mace & Healy, in February, 1851, for one Van Arsdale, in the house No. 31 East 21st street, in the city of New York, as a part of the house, where it still is. The ice is placed in an ice-chamber in the upper part of the refrigerator. The bottom of the ice-chamber is slatted, so that the cooled air and the drip of water can pass down between the slats. Underneath these slats is a solid drip roof of zinc, sloping each way from the centre, and terminating on each side a very short distance from the side of the refrigerating chamber, the edges of the roof being turned down. The water runs down the roof and over these edges, and then falls down to the bottom through narrow vertical spaces formed on each side by sheets of metal running down parallel to the sides of the chamber, just within the overhang of the turned down edges of the drip roof, and running down nearly to the bottom of the chamber. It is claimed that these narrow vertical spaces act as conduits not merely for the water but for the cooled air, and that the latter can pass under the lower edges of the sheet of metal into the chamber. It is also claimed that there are openings between the upper edges of these sheets of metal and the overhangs of the drip roof, though this is disputed. Now, it is very plain that this structure does not embody what is covered by the first claim of the plaintiffs' patent, as above defined. There is a reservoir for containing ice, combined with a descending conduit, and it may be that a small proportion of cooled air will, at some time in the operation of the apparatus, find its way down the narrow vertical spaces and out into the chamber. But, none of it or of any other part of the air in the chamber will find its way again into the ice reservoir, whether there be or be not openings over the tops of the vertical partition-sheets of metal. There is no such circulation of air as there is in the plaintiffs' structure. The Van Arsdale refrigerator does its work by conduction, by the contact of the air in the chamber with the cooled metallic drip roof and the cooled metallic vertical partitions, and not upon the principle of the plaintiffs' structure.

The defence also introduces evidence as to a movable refrigerator called the Harpel refrigerator. It is claimed that Mace & Healy, at 168 Allen street, New York, before July, 1852, made at least a dozen refrigerators, containing an ice-box in the top and back, wholly of zinc, which had two rows of holes near the top in the side towards the chamber, and a grate or wooden rack at the bottom of the ice-box, on which the ice rested, so that the cooled air and the water passed down through the grate, and the water fell upon an incline sloping away from the body of the chamber, and was carried off by a pipe, while the air passed through a row of holes in a vertical piece of metal near the side of the chamber, between the incline and the grate, and so into the chamber, and around into the ice-box again through the two rows of holes first mentioned. One of these refrigerators is said to be in existence. Harpel says he bought it in 1852. He gives no more specific date, except that it was while Mace & Healy were in Allen street. Gray, who did the carpenter work on the refrigerators, fixes the date of doing such work as being before October, 1852, because Mace & Healy moved at that date from Allen street to Houston street, but he gives no more definite date than that it was before July, 1852, and he gives no reason for fixing it as early as July, in 1852. Elsewhere, he says that he helped to make such refrigerators "in 1851 and 1852." Mace says the refrigerators were made while Mace & Healy were in Allen street, and that they moved from there in October, 1852. He gives the time of making and selling them as "in the years 1851 and 1852." Metzinger says he worked as zinc worker for Mace & Healy from April to July, 1852, at Allen street, and then did the zinc work for them for such refrigerators. Lyman carries back his construction of a refrigerator embodying the combination covered by the first claim of the plaintiffs' patent to "the spring or early summer of 1852." The Harpel refrigerator was not produced before the court, nor was it submitted to the examination of the plaintiffs' agents or experts; but, even if it be assumed that it, and others made like it, embodied what is found in the first claim of the

plaintiffs' patent, the loose evidence as to date cannot be allowed to prevail against Lyman's invention. The books of Mace & Healy are not produced or referred to for evidence as to date. None of the testimony, all of which is ex parte and by affidavit, antedates, even on its face, the invention of Lyman, except the general language of Gray and of Mace, that it was in 1851 and 1852 the refrigerators were made. Gray says he was at work as a journeyman on the carpenter work of refrigerators for Mace & Healy, in 1851 and 1852, at Allen street, but he assigns no more specific date to the refrigerators in question than that it was "before July, 1852," although he afterwards refers to the refrigerators as made "in 1851 and 1852." This evidence is too loose and inconclusive to be allowed to prevail, on a motion for a preliminary injunction, against a patent of such long standing, and which has been sustained on final hearing, and extended and reissued.

A refrigerator alleged to have been made by one Whittier, in Danvers, Massachusetts, in 1846, is also set up in defence. It was planned by one Mead, for his private use. Whittier was a carpenter and did the wooden work. Mead did the zinc work. Whittier says that the cooling chamber occupied the whole of one end, and the lower half of the other end, of the refrigerator; that the ice-box was placed in the upper portion of the latter end, and extended across the whole width, and lengthwise from about the middle of the length to within from one and a quarter to two inches of the inner wall at the end in which the ice-box was placed; that the side of the ice-box nearest the middle of the refrigerator was open for about two and a quarter inches from the top; that the opposite side of the ice-box had an opening about three inches in width across the whole side, the bottom of the opening being one and a half or two inches from the zinc bottom of the ice-box; that the ice-box was of zinc, and its bottom sloped slightly each way towards the centre; that a drip-pipe was affixed to the bottom, and passed through the refrigerator and below it; and that slats of wood were placed over and across the zinc bottom of the ice-box, the ice resting on the slats, and being thus kept above and free from the drip. Whittier says that the result of this construction was, that, when the ice-box was supplied with ice, a constant circulation of air within the refrigerator was created, through the opening at the top, and through the ice, and down into the cooling chamber, and up again into the ice-box through the opening at the top. He adds: "The location of the ice-box and its general shape were devised by Mr. Mead, but I myself suggested the openings to remedy a defective working of the refrigerator." This shows that the refrigerator was made and put to work without the openings, and worked defectively. Without the openings it was necessarily, a refrigerator operating solely by conduction. Therefore, when Mead and Whittier first made the refrigerator and put it to work, they had no conception of the principle of having a current of cooled air to circulate. Then the openings were made. Mead used the refrigerator for a time, and then sold it to one Johnson. Its history is not further traced. Whittier then says: "I made myself two or three other refrigerators on the same general principle prior to 1850, but varied the construction of the bottom of the ice-box by elevating the framework of wooden slats above the zinc bottom, and adding a wooden lining inside of the zinc box. The flow of cold air was then through the channel between the slat floor and the zinc bottom. I also changed the slope of the zinc bottom, so as to make it slant across the whole bottom of the ice-box and terminate in a depression from which the drip-pipe led out." It thus appears that the Mead refrigerator was regarded by Whittier as experimental, for no more were made like it, but when he came to make others he varied the construction. He says he sold the two or three he so made. Their history, or how they operated in practice, we are not told. Certainly, if the true principle of constructing refrigerators, that embodied in the plaintiffs' patent, had been successfully and practically developed in the two or three refrigerators made and sold by Whittier, it seems very strange that no more than two or three were made in a space of four years, and that the value and merit of the invention were not more fully recognized. The making of the two or three refrigerators by Whittier is not shown to have given rise to the manufacture and introduction of refrigerators embodying the first claim of the plaintiffs' patent, for, although Whittier says, that "since 1850" he has "built other refrigerators on the same general plan," he does not say when he built them, or that the first he built of them was not built very recently, and in view of the Lyman patent. The evidence as to the Whittier structure is not such that it can prevail against the plaintiffs' patent, in its present posture.

Another refrigerator, deposed to by one Wells, is also adduced. Wells testifies, that, between 1846 and 1856 there were made in Boston, in the shop of one Patten, for whom he then worked as a journeyman cabinet maker, many hundred refrigerators, which were sold for use in Boston and elsewhere; that the refrigerator was lined with zinc, and divided by a zinc vertical partition, at right angles with its front and rear, into two spaces, in the proportions of one-third and two-thirds; that a row of holes was pierced through this partition near its top and another row near its bottom; that the ice was placed in the smaller division of the refrigerator, and the larger division was used as the cooling chamber; that the ice was raised from the bottom of the ice-box

by a rack or frame pierced with holes; and that there was a circulation of air through the upper holes, the ice, and the lower holes. A model of one of these refrigerators is produced. This model shows that the ice was not placed in an elevated position, but was placed at the bottom of the smaller division, the rack resting on such bottom. The upper surface of the rack is below the lower holes in the partition. In the ice-chamber there are arrangements for shelves to be placed above the ice, on which to put articles to be cooled. The description and drawing of the plaintiffs' patent clearly show that, to carry out Lyman's invention, the ice-box is not to be placed in the relative position to the other parts of the structure in which it is placed in the Wells structure. Such description and drawing represent the ice-box as placed in the extreme upper part of the cooling chamber. The operation of the Wells structure must have been substantially by conduction by means of the metal, and there is in it no practical development of the principle of Lyman's structure, in respect of circulation. Although Wells states that, prior to 1851, at least 500 of such refrigerators were made and sold, yet it is not shown that all which were ever made have not passed out of existence, superseded by structures built upon the plan of Lyman's.

The defence also introduces the affidavit of Darius Eddy, who says that, since 1847, he has been in the business of making refrigerators, and is still in it; and that, from 1847 to 1850 he made and sold, in Boston, two refrigerators of the following description: The refrigerator was in the usual form of an upright refrigerator. It was made with an inside and outside box, but, in the rear, the filling usually placed between the inner and outer boxes was omitted, so as to leave a vacant space. This space was divided vertically, at right angles with the front and rear of the refrigerator, from the top to near the bottom, so as to make two flues or channels for the passage of air. The ice-chamber occupied the whole of the top of the inside box. The ice rested upon a rack shelf placed in the ice-box, the ice-box being of zinc. Below the ice-box, and occupying the whole remaining portion of the inside box, was the refrigerating chamber. In the left hand side of the ice box, near the bottom, holes were opened from the ice-box into the left hand open space behind, for the cold air to pass into such space, and descend to its bottom. Just above the bottom, other holes were pierced, leading into the refrigerating chamber. In the right hand side of the refrigerating chamber, and near its top, and just below the ice-box, a third row of holes was pierced, leading into the right hand flue behind, for the warm air to pass from the refrigerating chamber into such right hand flue and rise to its top. Near the top of said flue a fourth row of holes was pierced, leading into the ice-box, for the warm air to pass into the ice-box. It is claimed that this structure developed the same principle of the self-operating circulation of the air and deposit of its moisture on the ice, that is found in Lyman's structure. There may be in it an idea of circulation, but the structure is not the same as Lyman's. The descending conduit is not combined with the ice-reservoir substantially in the manner of Lyman's, nor have the two the same mode of operation. In the Eddy structure, there would be a circulation in the supplemental space behind, probably. The partition is described as not extending to the bottom, but as leaving a free space underneath it. So, too, there would be a ventilation afforded to the ice-box and the refrigerating chamber by means of the use of the holes and the spaces behind. But, the structure was evidently one of the class that cooled by conduction, as its principle of operation, the ice-box being of zinc.

It is to be remarked, that the court is not furnished with any testimony of experts, by the defence, to the effect that any of these alleged prior structures embodied substantially the combination found in the first claim of the plaintiffs' patent. Every presumption is to the contrary, for it does not appear that the extensive use now made of structures substantially like Lyman's is traceable to any of these alleged prior structures. In fact, the more numerous and diversified the forms and arrangements which existed prior to Lyman's, the more certain is it, that they, none of them, reached the principle of Lyman's, because his principle, once practically developed by him, superseded the prior structures.

It remains to see what are the structures sought to be enjoined. There is a dispute as to how the structure of Lalor is arranged. The plaintiffs show that it has an ice-box in an elevated position, in the refrigerating chamber, with an opening over the top of that side of it which is towards the refrigerating chamber, so as to permit the free passage of air over the top of such side from the refrigerating chamber into the ice-box; that the refrigerating chamber is closed; that the ice-box has a grating in it near its bottom, for the passage of the cold air and of the drip; that the drip falls upon two inclines, one sloping each way towards a central point, from each of two sides of the ice-box, but the two not meeting in the centre, and the drip being caught by a pan which is under the central space between the inclines and overlaps their inner edges; that the cold air passes through the grate, and down through the space between the inclines, and over the edges of the pan, and so into the refrigerating chamber; that there is no opening in any side of the ice-box, except the opening, before mentioned, at the top; and that all the cold air which passes out of the ice-box, passes down through the grate

at the bottom. Lalor shows, that, in the same side of the ice-box in which there is the opening at the top, there is another opening near the bottom, about six inches wide, through which the cold air passes from the ice-box into the refrigerating chamber; and that, although the ice rests upon a rack through which the drop falls into a pan, there is no opening for the cold air to pass out over the pan. It is immaterial which, in the particulars in dispute, is the true description of Lalor's structure; for, in either form, it infringes the first claim of the plaintiffs' patent. In either form it has a descending conduit combined with an ice-reservoir, substantially in the manner and for the purposes described in the plaintiffs' patent, as such combination has been hereinbefore defined. The ice-box is open at the top and "near the bottom," in the language of the plaintiffs' specification. The sides of the ice-box perform the office of a descending conduit, while the grate holds up the ice and makes a reservoir. The air passes in above and upon the ice and down through the ice, and, when cooled by it, is conducted out from below. It may be that the operation of the structure is inferior to that of the one in which the cold air passes out through the grate at the bottom, but the operation, as a whole, is the same as that of the Lyman structure. I find that Judge Benedict, in the Eastern district of New York, has enjoined, under this patent, the structure of one Abel, which had no opening in the bottom of the ice-box for the passage out of cold air, but had one entire side of the ice-box slatted vertically, except adjacent to its top and bottom, so that the air passed in near the top and passed out near the bottom. I concur in the correctness of that decision. In accordance with such view, the arrangement of Lalor, with the egress opening in the side of the ice-box, is, a fortiori, an infringement of the first claim of the patent. If the egress be through the bottom, there is equally an infringement of such claim. In order to infringe, it is not necessary that there should be a tube, chamber or conduit below the ice-box, to conduct the cooled air from the ice to or near to the bottom of the refrigerating chamber. As before said, the sides of the ice-box are a conduit. The specification of the patent so expressly states. It speaks of placing around the sides of, and under, a cake of ice placed near the ceiling of a closed room, a box of sufficient size to surround the ice, and calls such box a conduit. The first claim refers to such a conduit when it speaks of a descending conduit. The specification, in describing, and the drawing, in exhibiting, a structure with the cold air passing through the grate below, and then down through a flue to near the bottom of the refrigerating chamber, was setting forth what the specification was required to set forth, namely, what was regarded at the time by the inventor as the best embodiment of his invention. But, the first claim rightfully claims the descending conduit, whether the box without the flue or the box supplemented by the flue, to confine and give direction to the cooled air, in combination with means of holding the cooling material in position, when the combination operates substantially in the manner and for the purposes described.

The structure of Kopp is like the description of Lalor's structure given by the plaintiffs, as above set forth, and, therefore, is an infringement of the first claim of the patent.

The structure of Dorn & Smitzer is like the description of Lalor's given by the plaintiffs, except in certain particulars. The plaintiffs claim that the structure of Dorn & Smitzer, in addition to having a horizontal aperture at the top of the ice-box, opening into it from the refrigerating chamber, has other horizontal openings, parallel with the upper one, along the same side of the ice-box, and a grate at the bottom, through which the cold air and drip pass, and a pan underneath sloping entirely in one direction, and so arranged that the cold air can pass down over each edge of it. The defence claims, that, in Dorn & Smitzer's structure, the cold air can pass down only over one edge of the drip-pan, and not over both edges of it, and that there is no opening between the inner edge of the drip-pan and the back of the structure, but only an opening between the outer edge of the drip-pan and the outer corner of the ice-box into the body of the chamber; and that the slats on the side of the ice-box, which confine the ice, are not horizontal, but are vertical slats separated by two horizontal beams, to which they are nailed, the vertical slats extending from the top to the bottom of the ice-box. It makes no difference which is the correct description in these particulars, for, either form is an infringement of the first claim of the patent. The openings through the grate effect the main purpose of the structure, the egress in the side being additional.

The plaintiffs show the structure of Ayen to be like their description of the structure of Dorn & Smitzer. The defence claims that the drip-pan of Ayen is depressed in the centre, and is in close contact, on one side, with the side of the structure, and that the descending air passes out only between the outer corner of the ice-box and the outer edge of the drip-pan. Either form is an infringement of the first claim of the patent.

The plaintiffs show the structure of Hoffman to be like their description of the structure of Dorn & Smitzer, except that the drip-pan is inclined both ways towards the centre, the cold air passing down over each edge of it. The defence claims, that, in the structure of Hoffman, the ice-box once had a slatted bottom and a side of horizontal slats; that now the bottom of the ice-box is floored over with a solid floor of boards; and that the inner edge of the drip-pan is

in close contact with the side of the structure. Either form is an infringement of the first claim of the patent.

The structure of Cunningham is like the plaintiffs' description of the structure of Hoffman, except that the side of the ice-box which has an opening at the top of it is solid below that opening, and the inner edge of the drip-pan is in close contact with the side of the structure. It infringes the first claim of the patent.

The plaintiffs show that the structure of Schlang is like the structure of Cunningham. The defence claims, that underneath the ice-grating, and over the drip-pan, there is a curved sheet of zinc, with the concave face upward, which comes into contact with the back of the structure, on one side, and nearly in contact with the outer side of the ice-box, on the other side, and receives the drip, and has a hole in its centre, for the water to escape; that all the air which passes out passes over the outer edge of this curved sheet; that no air passes through the curved sheet; and that the curved sheet compels all the air to go out sidewise at the lower corner of the ice-box. In either form this is an infringement of the first claim of the patent.

The plaintiffs show that the structure of Burkle is like their description of the structure of Ayen, except that the inner end of the drip-pan is in close contact with the side of the structure. The defence claims that the side-slats to the ice-box are set vertically, and not horizontally. Either form infringes the first claim of the patent.

I find that Judge Benedict, in the case of Crowell, has enjoined a structure like those which the plaintiffs show to be the structures of Cunningham and Schlang, as being an infringement of the first claim of the patent, and that, in the case of Schaefer, he has enjoined, as such infringement, a structure like the description by the defence of the structure of Dorn & Smitzer. He says, in the latter case, and I concur with him: "The front side of the ice-box is so constructed as to allow air to pass out through slits in the side; but, making such slits in the side of the ice-box does not work any substantial change in the refrigerator. Although, perhaps, not as effective as without the slits, it still contains the characteristic elements of the invention of Lyman, as described in the first claim of the reissue" of March 10th, 1874, "and clearly is an infringement upon that patent." In the structure of Schaefer, in addition to the slats in the side of the ice-box, there was a grating in the bottom of it, and the cold air could pass down and over one edge of the drip-pan into the refrigerating chamber.

I have carefully considered all the matters presented in these cases, and am of opinion that the injunctions asked for must be granted, as to the first claim of the patent.

[For another case involving this patent, see Lyman Ventilating & Refrigerator Co. v. Chamberlain, Case No. 8,631.]

Case No. 8,633.

LYMAN VENTILATING & REFRIGERATOR CO. v. SOUTHARD.

[12 Blatchf. 405; 1 Ban. & A. 627.] [1]

Circuit Court, N. D. New York. Jan. 19, 1875.

COSTS—SECURITY.

A corporation created by the state of New York, and having its principal office in the Southern district of New York, brought a suit in equity in the circuit court for the Northern district of New York. On a motion by the defendant that the corporation give security for the costs of the suit: *Held*, that it must give such security.

[Cited in Hugunin v. Thatcher, 18 Fed. 105; Miller's Adm'r v. Norfolk & W. R. Co., 47 Fed. 266.]

[This was a bill in equity by the Lyman Ventilating and Refrigerator Company against John Southard. The defendant moves for an order directing complainant to give security for costs.]

William H. Bright, for plaintiff.

Edward W. Paige, for defendant.

WALLACE, District Judge. This is a motion by the defendant to compel the complainant to file security for costs. The complainant is a corporation created by the laws of the state of New York, and its principal office is located in the city of New York, as appears by the bill.

The provisions of title 2, c. 10, pt. 3, of the Revised Statutes of the state of New York, relative to security for costs, are adopted by the rules of this court. If, therefore, the corporation complainant resides in the city of New York, it is a non-resident of this district, and not within the jurisdiction of this court. A private corporation must be held to reside where its principal office is located. Its residence depends, not on the habitation of its stockholders, but on the official exhibition of its legal and local existence. Ang. & A. Corp. § 107.

It is urged, however, against the motion, that, by force of section 983 of the Revised Statutes of the United States,—Act May 20, 1826 (4 Stat. 184),—by which writs of execution upon judgments or decrees obtained in a circuit court of the United States, in any state which is divided into two or more districts, may run and be executed in any part of such state, any decree which may be obtained against the complainant can be enforced in this district, and it cannot be said, therefore, that it resides beyond the jurisdiction of the court, within the meaning of the rule. The same argument was held untenable at a very early day by the high court of chancery in England, where a rule similar to the one under consideration prevailed, requiring security for costs on the part of complainants residing out of its jurisdiction; and it was held that a plaintiff resident in Ire-

[1] [Reported by Hon. Samuel Blatchford, District Judge, reprinted in 1 Ban. & A. 627, and here republished by permission.]

land must give security, notwithstanding the Act 41 Geo. III., by which an attachment could issue to Ireland to enforce there any order or decree made by the English court of chancery. Mullett v. Christmas, 2 Ball & B. 422; Ker v. Dutchess of Munster, Bunb. 35; Hill v. Reardon, 6 Madd. 46. A similar conclusion was reached in the courts of this state, where a plaintiff residing in Brooklyn was required to give security for costs under the Revised Statutes, in an action in the superior court of New York City, notwithstanding the statute by which judgments of that court could be enforced in any part of the state. Gardner v. Kelly, 2 Sandf. 632; Bolton v. Taylor, 18 Abb. Pr. 385. These decisions must be held decisive in the present case. The motion is granted.

Case No. 8,634.

In re LYNCH et al.

[7 Ben. 26.] [1]

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

RENT OF BANKRUPT'S PREMISES AFTER AN INJUNCTION IN BANKRUPTCY—OCCUPATION BY MARSHAL—ALLOWANCE TO LANDLORD.

Where summary proceedings for dispossession under the statutes of the state of New York were taken by a landlord, and the tenants, pending the proceedings, were put into bankruptcy, and the proceedings in the state court were enjoined: *Held*, that the landlord was not necessarily entitled to rent, on the terms of the lease, from the date of the service of the injunction to the date of the adjudication of bankruptcy; that he was not to prove his debt for the rent for the period, as a general creditor, but must be paid by the assignee a proper allowance on application to the court; and that the same rule applied to the period after the adjudication, before the landlord regained possession of the premises.

[Cited in Re Lucius Hart Manuf'g Co., Case No. 8,592; Re Ives, Id. 7,116.]

A. leased premises to Lynch & Bernstein at $8,000 a year, payable quarterly. On a default of payment he commenced summary proceedings, under the statutes of the state of New York, to dispossess them, on April 9th, 1873, before the end of the first year. Two days afterwards a petition was filed to put L. & B. into bankruptcy; and A., and the magistrate before whom the dispossessing proceedings were pending, were that day enjoined by the bankruptcy court from any further proceedings till further order of said court. The marshal took possession of the premises and the property therein, under the warrant, on April 19th, and continued in possession till the property was sold, on April 29th; and the landlord did not obtain possession of the premises till May 1st. At the request of counsel, the register certified, for the decision of the court, the question, whether the landlord was entitled to be paid, out of the assets of the bankrupts, the rent in full, of said premises, from the 11th of April, when he was enjoined from taking proceedings to recover possession of said premises, or only from the 19th of April, when said tenants were adjudged bankrupts.

BLATCHFORD, District Judge. The landlord is not entitled necessarily, as a question of law, to full rent of the premises, from the date of service of the injunction to the date of the adjudication, at the rent prescribed by the lease. What compensation he is entitled to, if any, for such period, or for any period subsequent to the adjudication, is not presented for decision on the certificate.

The register subsequently certified to the court, by request of counsel and on the same facts, the questions: Is the landlord to prove his debt for the rent from April 11th to the adjudication, as a general creditor, or is he to be paid in full under the lease, or how is he to be compensated for rent during that period? How is he to be compensated for rent from April 19th to May 1st, when he recovered possession?

BLATCHFORD, District Judge. 1. The landlord is not to prove his debt for the rent from April 11th to the adjudication, as a general creditor, and is not necessary to be paid at the rate in the lease, and is to be compensated for the use of the premises during that period by applying to the court and having a proper allowance made and paid by the assignee, in view of all the facts in the case.

2. The same rule applies to the period from April 19th to May 1st.

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

Case No. 8,635.

In re LYNCH et al.

[16 N. B. R. 38; [1] 24 Pittsb. Leg. J. 205.]

District Court, S. D. New York. June 30, 1877.

DEPOSITION FOR PROOF OF DEBT—FOREIGN COUNTRY.

Proof of debt can only be taken in a foreign country before one of the officers authorized by section 5079 of the Revised Statutes to do so.

[In the matter of Robert V. Lynch and William Emberson, bankrupts.]

By the Register:

I, James F. Dwight, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, and is thus stated: Facts: The attorneys for James Hardy, trading as James Hardy & Co., Nottingham, in the county of Nottinghamshire, kingdom of Great Britain, offered for filing a deposition for proof of debt, made by said Hardy and executed and acknowledged before one Fras. Geo. Rawson, United States consular agent at said Nottingham aforesaid, which deposition I refused to file "because not taken before any of the officers authorized

[1] [Reprinted from 16 N. B. R. 38, by permission.]

by the 5079th section of the Revised Statutes to take proofs of debt in a foreign country." The attorneys for the creditors, Messrs, Arthur, Phelps, Knevals and Ransom, object to the decision of the register, rejecting the proof, and pray that the following question may be certified to the court for its decision: "Did the register err in refusing to file said deposition for proof of claim for the reasons indorsed thereon? As required by the practice I state as my opinion: That the statute having designated before whom proofs may be taken in foreign countries, others are not authorized to take them. All of which is respectfully submitted, this 29th of June, 1877.

BLATCHFORD, District Judge. Upon the certificate of James F. Dwight, register, etc., in charge of the above entitled matter, the following is the decision of the court: The question is answered in the negative.

Case No. 8,636.

LYNCH v. ASHTON.

[3 Cranch, C. C. 367.] [1]

Circuit Court, District of Columbia. Dec. Term, 1828.

ORPHANS—JUSTICE OF THE PEACE—POWER—CONTRACT—PART PERFORMANCE—SPECIFIC PERFORMANCE.

1. Justices of the peace have no power to bind out orphan children on a day in which the orphans' court is in session.

2. It is only where there is a contract in part executed that the court can compel the parties to execute it in an equitable manner, under the seventh section of the Maryland act of 1793, c. 45.

Petition, by an apprentice, to be discharged from the indentures, because not bound by the orphans' court, but by two justices of the peace, on a day in which the orphans' court was in session; in which case this court decided, in October last, in the case of May v. Bayne [Case No. 9,331], that the justices had no power to bind out an apprentice.

THE COURT (nem. con.) was of opinion, in this case, that there was no contract, for want of jurisdiction in the justices of the peace, who undertook to bind out the boy.

And CRANCH, Chief Judge, said, the boy has no power to bind himself; nor has the mother alone, or with his assent, a right to bind him out, without the authority of some tribunal. The two justices had no authority to bind him out, as the orphans' court was in session on that day. There was, therefore, no contract; and it is only where there is a contract in part executed, that this court can compel the parties to execute it in an equitable manner, under the Maryland act of 1793, c. 45, § 7.

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

Case No. 8,637.

LYNCH et al. v. CROWDER.

[12 Law Rep. 355.]

District Court, S. D. New York. 1849.

ADMIRALTY—JURISDICTION—FOREIGN SEAMEN—EQUITY—COSTS.

1. Jurisdiction of the admiralty court in suits by foreign seamen examined and explained.

[Cited in brief in Saunders v. The Victoria, Case No. 12,377. Cited in Ex parte Newman, 14 Wall. (81 U. S.) 169.]

2. Rule as to costs.

[This was a libel by Thomas Lynch and others against William Crowder, for wages.]

This was a British ship, with a British crew, shipped in England, and bound to Staten Island, and thence to a port of discharge in the United Kingdom. She brought out a cargo for Quebec, and passengers to Staten Island, where, on her arrival, the men requested to be discharged. The weight of the evidence is that the master assented to their leaving the vessel, and going to the British consul's office for their tickets of nationality and service. The master subsequently refused to consent to the discharge of the crew, or to pay them their wages, and the written dissent of the British consul to the crew's being permitted to sue in the United States courts for their wages is filed.

BETTS, District Judge. The principle which the court has repeatedly announced, and to which it is always disposed to adhere, is to decline taking cognizance of suits by foreign seamen when the voyage is not completely broken up or terminated, or the seamen have been wrongfully separated from the ship, or placed in a state of destitution here. The rule is founded upon the common interest all commercial nations have in preserving the services of their seamen to the vessel during the whole period of their engagement, and especially to secure their return home with the ship to the place of their allegiance. It would be pernicious to the interests of trade and commerce to encourage seamen in suits for wages in foreign ports, as the master or vessel, and frequently both, must in that way be interrupted in the business of the voyage, and the general adventure be subjected to embarrassing delays and losses. The occasional hardship which seamen must be subjected to by the enforcement of the rule will be more than compensated in the advance of the commercial benefits of trade and navigation, and in giving greater confidence to owners and masters in the fidelity of crews, and to the crews a stronger motive to fulfil punctually the terms of their engagements.

I do not perceive that the principle is varied at all by the consent of the master that the crew may leave his vessel. They may acquire by that a right in their home judicatories to wages for the full voyage, the same as if it had been entirely perform-

ed, but no act of wrong is done them, and others are placed in no condition of necessity to appeal to a foreign tribunal for means of subsistence. It will probably be found in general that they ask and obtain their discharge with a view to more profitable employment.

But what to my judgment is still more conclusive against the maintenance of this suit by them is that the official representative of their own country disapproves of their acts, and solicits that the court will not entertain the action, connected, moreover, with the consideration that the court would be compelled to look into all the circumstances leading to and accompanying the alleged discharge, to determine whether it was really voluntary on the part of the master, or whether it was coerced from him, or even perhaps whether there is not a guilty connivance between him and his men in granting it. Everything touching the validity of the supposed discharge belongs most properly to the courts where the litigants and this ship belong, and the law common to them all is the rightful criterion by which their rights and remedies should be adjusted.

I shall accordingly decline taking cognizance of the action, and order the libel dismissed. But as, on the proof before me, it is made to appear that the master gave his unreserved consent to the libellants, allowing them to leave the ship; and as he has furnished no proof that he recalled that consent before they had incurred costs, in endeavoring to secure them, and as such breach and violation of his original consent has imposed on them the loss of such suits, it is no more than reasonable that, in being acquitted of the men's demand, he should be compelled to make good in part this particular injury, sustained by means of his own acts. I shall, therefore, order, farther, that the respondent pay the libellants summary costs in this suit.

LYNCH (SEDGWICK v.). See Cases Nos. 12,614 and 12,615.

LYNCH (UNITED STATES v.). See Case No. 15,648.

LYNCH (WASHINGTON v.). See Case No. 17,231.

Case No. 8,637a.

The LYNCHBURG.

[Blatchf. Pr. Cas. 49.] [1]

District Court, S. D. New York. Aug. Term, 1861.[2]

PRIZE:—ACTION—ESSENTIALS OF ANSWER—CONDEMNATION—LIEN FOR ADVANCES—BILL OF LADING.

1. What statements are necessary in an answer and claim.

2. Vessel and cargo condemned as enemy property.

3. What is necessary to be proved by parties claiming a lien for advances on enemy property captured as prize in an enemy vessel.

4. In prize law, a bill of lading transmitted to a party to cover his advances on cargo shipped does not pass the title to the cargo.

In admiralty.

BETTS, District Judge. The schooner Lynchburg was captured, with the cargo laden on board of her, on the 13th of May, 1861, at the mouth of Chesapeake Bay, off Cape Henry, by the United States steamship Quaker City, under the command of Acting Master S. W. Mathews, and both were libelled by the United States and other captors as prize of war. It is alleged that the schooner and cargo were enemy's property, belonging to citizens and residents of the state of Virginia, and, also, that when captured they were attempting to violate the blockade of the port of Richmond.

Three several claims are interposed in defence to the libel in this suit. Richard O. Haskins and nineteen others answer and claim as owners of the vessel, being all of Richmond, and admit that the schooner and part of her cargo were owned by residents within the state of Virginia, as charged in the libel. They deny an intention to violate any blockade of that port, or knowledge or notice of such blockade. They also deny that the blockade was laid by any competent authority. Charles T. Wortham & Co., also of Virginia, claim to be owners of 1,008 bags of coffee, part of the cargo of the schooner, and take issue upon other allegations of the libel; and they also claim an interest in 504 other bags of coffee, part of said cargo, marked "Ma." Charles H. Pierson, as agent for John Currie and others, also interposes an answer and claim, as owners of the schooner and carriers of the cargo, and claims for their interest as carriers only. No test oaths accompany either of the answers of the claimants, except the answer and claim of Brown Brothers & Co., who intervene upon a transfer or lien of 2,045 bags of coffee, part of the aforesaid cargo. They allege, in substance, that they made an advance of credit to Maxwell, Wright & Co., about the 16th of November, 1860, to the amount of £20,000, for the purchase of Brazilian produce, under which credit the said firm of Maxwell, Wright & Co. drew drafts of the claimants for £6,090, on the condition, expressed therein, that the coffee purchased should be held by the claimants until their advances were reimbursed thereon. The claimants being loyal citizens, and the said Maxwell, Wright & Co. neutrals, it was claimed that such arrangement between them vested the possession and ownership of the coffee in the claimants until the repayment of their advance. On a subsequent motion, before the court, and also on the final hearing in court, it was admitted

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

[2] [Affirmed in Case No. 8,639.]

by the United States attorney that 1,551 bags of said coffee covered by that title should be released and discharged from this arrest and suit in favor of Brown Brothers & Co.

The answers and claims put in to the libel are drawn up with very unnecessary diffuseness. They employ the formalities in statement and defence perhaps appropriate for bills for discovery in equity, but presenting no matters necessary for them to maintain by pleadings in defence to a prize suit. Indeed, each claim includes, in a single clause, all the answer called for in prize actions, which is a brief assertion that the property seized is not liable to condemnation and forfeiture. There is no controversy, on the trial, that the schooner was owned by residents in Virginia, nor that 1,008 bags of coffee, part of her cargo, belonged to Wortham & Co., claimants, also residents there. The further defence is, that the residue of the cargo (504 bags) is subject to the title or lien of Brown Brothers & Co., not enemies. The vessel was registered in Richmond, January 25, 1861, as the property of owners residing at that place, and was captured at sea on her voyage to her home port. The rule sufficiently declared in preceding suits on this hearing, and made applicable to this one, subjects the vessel to condemnation and forfeiture for that cause, as prize of war. The answer of Charles T. Wortham & Co., claiming to be owners of 1,008 bags of coffee, and also to have an interest in the 504 other bags of coffee, as above stated, part of the cargo of the vessel, and admitting themselves to be residents of Virginia, places their whole interest in the cargo in the same predicament, and for like cause, as also all portions of the cargo, if any, not claimed or falling within the claim of Wortham & Co. The United States district attorney having consented to the restoration of 1,541 bags of coffee to Brown Brothers & Co., as belonging to them, and being neutral property, and no proof of any other claim than that of Wortham & Co. being before the court for any residue of the cargo seized, the judgment of the court will be entered in favor of the libellants, against both the schooner and the residue of cargo not restored, as above stated, with costs.

On the attendance of counsel before the judge, subsequent to the above order for judgment in the case of the Lynchburg, to settle the terms of the decree to be entered therein, it was insisted on the part of the claimant, Brown Brothers & Co., that the decree ordered was defective, in omitting to direct separately the condemnation of 504 bags of coffee, composing part of their claim of 2,045 bags mentioned in the pleadings, or its restoration to them. The judgment was given by the court under the impression that the claim of Brown Brothers & Co. had been satisfied by the restoration to them of 1,541 bags of coffee, or otherwise, in connexion therewith, (and so it is insisted by the United States attorney was the fact,) and that no contest remained in court with these claimants, in respect to the residue of the 2,045 bags for which they originally intervened in the cause; and that, consequently, no other claim to this portion of the coffee remained to be considered than that of C. T. Wortham & Co., or some unknown owner at the port of destination. The counsel for the claimants, Brown Brothers & Co., however, insisting that their claim to 504 bags of coffee, (the residue of the 2,045 bags,) alleged to have been hypothecated as security for their advance for its purchase, yet remains undetermined and outstanding, and that they are now entitled to a decree for the restoration of that residue to them, as their absolute property, by virtue of the shipment under the original bill of lading, the court has re-examined the pleadings and proofs in the cause, with a view to rectify the error, if one has occurred, before fixing the terms of the decree, and entering final judgment thereon. On reconsidering the pleadings and proofs, I am of opinion that the decree, as rendered, is technically correct: (1) Wortham & Co. also claimed the 504 bags of coffee embraced in the general claim of Brown Brothers & Co. (2) Brown Brothers & Co. do not prove the amount of their advances actually paid in the purchase of the coffee claimed by them, nor do they specify such amount in their claim and answer, or in the test oath appended thereto. (3) No proof is given by the claimants that the value of the 1,541 bags of coffee restored to them is not equivalent to the sum of their advances used in purchasing the whole 2,045 bags; and the reasonable presumption is, that the restoration of two-thirds of the quantity consigned as security satisfied the whole credit. (4) The claim to an absolute ownership of the 2,045 bags was placed before the court in the oral argument, and in the written points filed in the cause by the counsel for the claimants, upon the proposition of law, that a bill of lading, transmitted to them by the shipper to cover advances, passed to them the title to the cargo purchased therewith. If this doctrine be correct as to mere commercial transactions, it does not prevail in prize courts, in derogation of the rights of captors, when the interest of the claimants is only a debt, although supported by liens equitable and tacit, or legal and positive, even of the character of bottomry bonds, when not signified on the ship's papers at the time of her capture. The Frances Irvin's Claim, 8 Cranch [33 U. S.] 418; The Tobago, 5 C. Rob. Adm. 218; The Marianna, 6 C. Rob. Adm. 24. (5) Here, the vessel at enemy's bottom; the bill of lading consigned the cargo to order or assigns, at large, at an enemy's port, and, on the surrender of the principal portion of the consignment to the claimants, no other evidence was given in establishing the facts that the remainder of the shipment was owned by them, or yet stood under hypothecation to them on the bill of lading.

If, then, the court concluded, erroneously, that the whole interest in the shipment had been satisfied and abandoned on the surrender of 1,541 bags of coffee to the claimants, yet the judgment is correct as it was rendered, including the condemnation of the 504 bags, because, by intendment of law, that portion belonged to Wortham & Co., and was not shown by the proofs to be exempt from capture as prize.

The decree in this case was affirmed by the circuit court, on appeal, July 17, 1863 [Case No. 8,639], as to the vessel and cargo, except as to the 504 bags of coffee. As to those, the claimants were allowed to give further proofs. Ultimately the 504 bags were restored, by consent, to the claimants.

[For proceedings incidental to this suit, see Case No. 8,638.]

Case No. 8,638.

The LYNCHBURG.

[Blatchf. Pr. Cas. 57.] [1]

District Court, S. D. New York. Aug., 1861.

BAIL—INSUFFICIENCY—SALE OF GOODS DELIVERED ON BAIL—ADDITIONAL SECURITY—DIFFERENCE BETWEEN ACTUAL VALUE AND ORIGINAL BAIL—PROPERTY SEIZED AS PRIZE—SALE—GOODS IN HANDS OF BONA FIDE PURCHASER.

1. The cargo having been delivered to the claimants on bail before hearing, it afterwards appeared that it had been appraised at less than its real value, and that the security was in too small an amount. A motion was made that the cargo be restored to the custody of the court, but it appearing that it was no longer in the possession of the claimants or the bail, but had passed to bona fide purchasers, the court awarded monitions against the claimants to pay into court the difference in amount between the proceeds or value of the cargo delivered to them and the amount of the bail.

2. Property seized as prize may be pursued in rem into the hands of all persons who become possessed of it, or by monition against such persons, if its proceeds have been brought into court.

3. It matters not whether the prize goods remain in kind or have been disposed of bona fide by sale. The holder of the thing or of its proceeds may be compelled, by monition, to deliver the same into court, to be there disposed of according to the rights of the captors.

4. And this may be done as against persons having the proceeds of prize property in their hands, when an insufficient stipulation has been taken, on a delivery on bail.

In admiralty.

BETTS, District Judge. After the capture of the above schooner and cargo, a motion was made, by consent of the proctors of the several parties, that Joseph Ruch be appointed sole appraiser to appraise the value of the said schooner and cargo, and such order was granted by the court on the 17th of June last. On the 20th of June the appraiser reported that he had appraised the vessel as worth $5,000, and the cargo as worth $24,593 85. On the back of the appraiser's report was indorsed a consent, signed by the assistant United States attorney, that the cargo be divided and valued as follows: The 1,008 bags, claimed by Wortham & Co., at $8,197 95, and the remaining 2,045 bags, claimed by Brown Brothers & Co., at $16,395 90. Under the consent an admission was written by the assistant district attorney, of due service of notice of justification of the sureties for giving bond, on the delivery of the cargo above mentioned. Both indorsements were, apparently, signed July 1, 1861, and were, with the report, filed July 10, 1861.

On the hearing of the cause in court, July 16 and 17, an order was made, by consent of the proctors for the libellants, and upon the motion of the proctor for the claimants, Brown Brothers & Co., that 1,541 bags of coffee embraced within their claim be restored to the said claimants. On the same proceedings, the proctors for the libellants, on notice to the proctors for the claimants, C. T. Wortham & Co., that the appraiser, in making the before-mentioned appraisements, had, by mistake of computation, undervalued and reported the said coffee as a sum much less than its actual worth, to wit, that the coffee appraised by him at $24,593 85 should have been valued and reported worth $56,212, as shown by his amended report, signed by the said appraiser July 9, 1861, applied for an order that the cargo delivered to the claimants, on such appraisement should be restored to the custody of the court, or for other relief. Affidavits produced on the part of the claimants, C. T. Wortham & Co., against the motions made by the libellants, were read and filed, and arguments were addressed to the court by both parties, on the facts and the law claimed and set up on each side. As it was understood by the court, from the statements of the depositions, and the allegations of counsel, on the first discussion of the motion, that the property was no longer in actual possession of the claimants, or the sureties upon the bonds and bail given, the court directed the hearing to proceed upon the merits of the cause, without regard to the aforesaid collateral application. After the disposition of the cause upon the general issue, an order was granted, August 30th, in relation to the aforesaid collateral motion, that the first report made by the appraiser be vacated and set aside, unless rectified by consent of the respective parties, and that no delivery of said appraised cargo be made to any of said claimants thereunder until such appraisement be corrected and filed anew, with the condition appended to such order that if the cargo so appraised, or any part of it, shall have been bonded and delivered under such bail bonds by the United States marshal to the claimants, or any of them, and yet remains in their possession or under their control, the same be forthwith replaced in custody of the marshal, subject to the further order of the court. A copy of that order was served on the proctors of C.

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

T. Wortham & Co., by the libellants, with notice of the motion now under consideration, for carrying the order into effect. The motion was brought to hearing between those parties on the 3d of October instant. No appearance was made on the part of Brown Brothers & Co., on this application, nor is there any evidence given that they received notice thereof except an affidavit made by their proctor of August 30, 1861, to the effect "that the first appraisement by Ruch, the appraiser, had been fair and just, and that Brown Brothers & Co., immediately on its completion, and before anything was heard by them of the alleged error, on receiving the amount for which they held this part of the cargo from Messrs. Wright, Maxwell & Co., absolutely gave up, parted with, and delivered the same, in perfect good faith, and in reliance that their title to it had become perfect by such bonding and the delivery of it to them, and have not since had the same or any control thereover whatever," which affidavit was offered to the court, on the part of the libellants, as presumptive evidence that the supposed ownership and title of Brown Brothers & Co., had been assigned or transferred to the other claimants, C. T. Wortham & Co., or their agent, who represented their interests in this suit.

The facts in proof on the part of the claimants show that neither they nor their sureties, nor the marshal, are in possession of the coffee so captured and discharged on bail, and that, accordingly, it no longer remains in custody of the court, or subject to its disposal by summary order. On the contrary, the surrender of it upon appraisal, and at the sum appraised, was made with the full assent of the United States attorney, and so long after the appraisal had been made, and its terms known to the libellants, that there is no equity on their part to demand its surrender by, or dispossession from, purchasers thereof in good faith. The only remedy the libellants can make title to at this time, in respect to the cargo, is to hold the claimants personally responsible for the value or products of the same, at the time the same was released on stipulations or bail. The sureties to these stipulations or bonds can be made liable to the libellants for no more than the amounts for which they stipulated or became obligated, nor will the amount of that liability be determined on summary motion, but is more appropriately ascertained by the court in due course of procedure, by appropriate action or suit. Property seized as prize may be pursued into the hands of all persons who become possessed of it, in rem, or if its proceeds are brought into court, by monition. It matters not whether the prize goods remain in kind, or have been disposed of bona fide, at private sale or by auction. The holder of the thing, or of its proceeds, may be compelled, by monition, to deliver the same into court, to be there disposed of according to the rights of the captors. The Pomona, 1 Dod. 25; The Herkimer, Stew. Vice Adm. 128; The Alligator [Case No. 248]; 1 Wheat. Append. 3, 4. And the court may proceed in these cases upon its own authority, ex officio, as well as upon the application of parties, and enforce its decrees against persons having the proceeds of prize in their hands, when insufficient stipulation has been taken on a delivery on bail. 1 Wheat. Append. 4. Citations, monitions, and warrants are the processes by which the jurisdiction of courts proceeding according to the course of the civil law is exercised, and they are to be employed in courts of the United States under the process act of congress of September 29, 1789, § 2 [1 Stat. 93]. Manro v. Almeida, 10 Wheat. [23 U. S.] 473.

Brown Brothers & Co., although not called upon specifically by notice in this motion, or otherwise, therefore come within the scope of the powers which the facts disclose by the affidavits require the court to exercise, as these claimants are alleged to have had delivered to them the aforesaid 504 bags of coffee, at a valuation, in the appraisement, below the actual worth of the articles.

The libellants are accordingly entitled to sue out monitions against the claimants, C. T. Wortham & Co., or their agent, and against Brown Brothers & Co., to pay into court the difference in amount between the proceeds or value of the bags of coffee delivered to them respectively and the sum of the stipulations or bonds given by them respectively on such delivery of the coffee to them respectively, on bail. Orders can be taken in court accordingly.

[See cases Nos. 8,637a and 8,639.]

Case No. 8,639.

The LYNCHBURG.

[Blatchf. Pr. Cas. 659.] [1]

Circuit Court, S. D. New York. July 17, 1863.[2]

PRIZE — CONDEMNATION PROCEEDINGS — FURTHER PROOF.

Decree of the district court, so far as it condemned the vessel and all of the cargo except 504 bags of coffee, affirmed. As to the 504 bags of coffee, further argument ordered as to the proprietary interest therein; and either party allowed to produce further proof upon it.

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

[This was a suit for the condemnation of the schooner Lynchburg and her cargo, captured by the United States steamship Quaker City. A decree for claimants was entered (Case No. 8637a), and an appeal is prosecuted therefrom.]

NELSON, Circuit Justice. There is no dispute in this case that the vessel, and also a

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

[2] [Affirming Case No. 8,637a.]

portion of the cargo, belong to citizens of Virginia and residents of Richmond. The cargo consisted of coffee, of which 2,045 bags are claimed by Brown Brothers & Co., of New York, citizens of a loyal state. Of these, 1,541 bags were restored to them, and the residue were condemned. I desire to hear a further argument upon the question as to the proprietary interest in the residue of the 2,045 bags of coffee, beyond the 1,541 claimed by Brown Brothers & Co., and either party may produce further proof upon it.

The decree below is affirmed as to the vessel, and all of the cargo except the residue of the 2,045 bags of coffee, after the restoration of the 1,541 bags.

LYNCHBURG, The. See Cases Nos. 6,451 and 12,261.

LYNDALL (ROBY v.). See Case No. 11,972.

Case No. 8,640.

LYNDON v. GORHAM et al.

[1 Gall. 367.] [1]

Circuit Court, D. Rhode Island. Nov. Term, 1812.

PARTNERSHIP — DEBTOR—TRUST RELATION—PARTNERSHIP PROPERTY—EXECUTION.

1. A debtor to a partnership cannot be held as trustee for the several or joint debt of one of the partners.

2. The corporeal property of a partnership cannot be taken in execution to satisfy the several debt of one partner, unless such partner would have an interest in the property after settlement of all accounts; and then to the extent of that interest only.

[Cited in Re Corbett, Case No. 3,220.]

[Cited in brief in McDermot v. Laurence, 7 Serg. & R. 439. Cited in Winston v. Ewing, 1 Ala. 129; Sheedy v. Second Nat. Bank, 62 Mo. 17; People's Bank v. Shryock, 48 Md. 434.]

See Story, Partn. §§ 373–384, where the authorities are collected and commented on.

[This was a suit by Nathaniel Lyndon against Gorham and Greene, and Silliman, their trustee.]

From the answer of the trustee in this case it appeared, that he had effects in his hands of the firm of Gorham & Lawrence, but not of the firm of Gorham & Greene, or of either of them separately. The single question for the consideration of the court was, whether the share of one partner in a partnership credit could be attached under a foreign attachment, to pay the several or joint debt of one partner.

Mr. Robbins, for plaintiff, argued, that such a credit might be attached; that it was not necessary, that all the partners should be before the court, in order to ascertain whether the partner sued was a debtor or creditor of the joint fund. He likened it to a case of goods owned by partners, which might be seized on execution, and the moiety of the judgment debtor might be sold on execution. And in answer to a question from the court, as to the proportion for which the trustee in this case ought to be held responsible, he said, that as the shares of the partners did not distinctly appear, the presumption of law was, that they were entitled in equal moieties, and in that proportion the present trustee should be held.

Burrill & Silliman, for trustee, argued shortly to the contrary.

STORY, Circuit Justice. In order to adjudge the trustee responsible in this suit, it must be decided, that the funds of one partnership may be applied to the payment of the debts of another partnership, upon the mere proof, that the principal debtor has an interest in each firm. If this be correct, it will follow that a separate creditor of one partner will have greater equitable, as well as legal rights, than the partner himself has. The general rule undoubtedly is, that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless upon such an account the partner be a creditor of the fund, he is entitled to nothing. And if the partnership be insolvent, the same effect follows. West v. Skip, 1 Ves. Sr. 240; Doddington v. Hallet, Id. 497; Fox v. Hanbury, Cowp. 445. Now the party sued as a trustee in this suit is a total stranger to both partnerships. There is nothing before the court, from which it can ascertain the situation of the partnership, whether solvent or not, whether Gorham be a creditor on the fund or not, and if a creditor, what is his proportion of interest. If therefore the trustee be held, it must be from some stubborn rule of law, which rides over all these difficulties. I know of no such rule.

I have the authority of Lord Hardwicke and Lord Mansfield, in the cases above cited, for holding that a creditor cannot be in a better situation, than the partner himself, as to his right upon the joint funds; and their opinions are fully corroborated by more recent authorities. But I have been pressed with the common case of a separate execution against the tangible partnership property, in which it is said, that the moiety of the judgment debtor may be sold on the execution. There are certainly decisions, which countenance this opinion, and perhaps it may be considered, that at law the sheriff has a right to seize such property in execution. Heydon v. Heydon, 1 Salk. 392; Bachurst v. Clinkard, 1 Show. 173; Jacky v. Butler, 2 Ld. Raym. 871; Eddie v. Davidson, 2 Doug. 650; Parker v. Pistor, 3 Bos. & P. 288; Chapman v. Koops, Id. 289; Morley v. Strombon, Id. 254. But still it by no means follows, that he can sell and convey an indefeasible title to a purchaser of a moiety of the property. He may sell the interest of the partner therein, but he sells it cum onere; and although

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

the parties may be driven into a court of equity, to ascertain their respective rights, yet if upon the whole it appears, that the judgment debtor had a nominal interest only in the fund, I do not think that the authorities which are cited show, that a greater interest can be conveyed under the execution, and if the partnership be insolvent, that any interest can be conveyed. In Fox v. Hanbury, Cowp. 445, Lord Mansfield says: "No person deriving under a partner can be in a better condition than the partner himself;" and he cites with approbation the opinion of Lord Hardwicke, in Skip v. Harwood [West v. Skip, supra], from his manuscript note. "If a creditor of one partner take out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner." The same doctrine is explicitly avowed in the court of exchequer, in Taylor v. Field, 4 Ves. 396, where the court say, "the right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion, that the corpus of the partnership effects is joint property, and neither partner separately has any thing in that corpus; but the interest of each is only his share of what remains after the partnership accounts are taken." Vide King v. Sanderson, Wightw. 50; same effect even against the king. Vide, also, Waters v. Taylor, 2 Ves. & B. 299. And in Pierce v. Jackson, 6 Mass. 242, which, since the argument, I have had an opportunity of consulting, these principles seem fully adopted. In that case the court held, that a creditor of a partnership was entitled to payment before a creditor of one partner only, although the latter had made the first attachment. The case then put by counsel, admitting it to apply to the present, does not prove all that it was supposed to do. But it will be recollected, that in such case the other partner has his remedy at law, as well as in equity; that he may bring his action against the sheriff, if he sell more than the debtor's moiety. In the present suit, no such remedy lies. If the trustee be adjudged responsible in this suit, there would seem to be a complete severance of the partnership debt; at all events, he could be held, as a debtor to the partnership, only for the remaining moiety. And it may be doubtful, if the judgment creditor could be obliged to refund, when the money had been adjudged to him by the regular judgment of the court; at all events, in states where no court of equity exists, the case would be attended with many embarrassments. I consider that the present is a process in the nature of a bill in equity, to reach the funds of a debtor, and subject to all the liens and equities between the original parties; and in order to do complete justice, it is necessary that all proper parties should be before the court. If the other partner had been sued as a trustee, and upon his disclosure it had clearly appeared, that the partnership was solvent, and that Gorham was a creditor to the fund, some of the difficulty of the case would have been obviated. Perhaps even then it might deserve consideration, how far the separate funds of one partner should, under this process, be applied in the first instance to discharge debts of a partnership, which was not shown to be solvent, nor the partner a debtor thereto. However I give no opinion on this point. In the present case I am satisfied, that the trustee ought not to be charged.

I feel pleasure in adding, that my present opinion is fully supported by the decision of the supreme court of Massachusetts, in Fisk v. Herrick, 6 Mass. 271.

Let the trustee be discharged, with costs.

By the statute of Rhode Island (1 Laws, 208), a foreign attachment issues only in cases, where the debtor resides out of the state, or conceals himself therein; and by section 3, "if it shall appear by the oath of the person or persons, who have been served with the copy of any writ as aforesaid, that he or they have not any of the personal estate of the defendant in their hands, that then such action shall be dismissed, and the person, who shall appear to defend such suit, shall recover his cost."

THE COURT therefore ordered, that the writ should be dismissed; and awarded judgment "that the plaintiff take nothing by his writ."

LYNN (GOODWIN v.). See Case No. 5,553.

Case No. 8,641.

LYNN v. HALL.

[2 Cranch, C. C. 52.] [1]

Circuit Court, District of Columbia. July Term, 1812.

SET-OFF—SEPARATE DEBT OF ONE PARTNER.

The defendant cannot set off a separate debt of one partner against a partnership claim.

[This was a suit by Lynn, surviving partner of Lynn & Dodson, against Hall.]

The defendant offered to set off a claim against Dodson alone.

THE COURT (nem. con.) refused.

LYNN (MECHANICS' BANK v.). See Case No. 9,382.

LYNN (MECHANICS' BANK OF ALEXANDRIA v.). See Case No. 9,384.

LYNN (UNITED STATES v.). See Case No. 15,649.

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

Case No. 8,642.

LYNN v. YEATON.

[3 Cranch, C. C. 182.] [1]

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

EXECUTORS AND ADMINISTRATORS—ASSETS—SALE OF TRUST PROPERTY—PROCEEDS.

If a deed of trust, for the benefit of children, be set aside by a decree in equity, as being fraudulent as to creditors, and the trustee, who is also executor of the grantor, be decreed to sell, and pay the creditors out of the proceeds of the trust property; those proceeds are assets, as to the creditors; and the money, paid to them, is money paid by the executor; and may be recovered by him, as executor, from the person for whose use he paid it.

Assumpsit for money paid, laid out, and expended by the plaintiff, as executor of the will of John Wise, out of the assets, to discharge a debt due by the defendant to Robert Young, for which Wise was surety. Verdict for the plaintiff, subject to the opinion of the court, upon the following case:

John Wise made his will, and made the plaintiff his executor, and afterwards made a deed of trust to the plaintiff of all his property, for the benefit of his children and grandchildren. Robert Young, a creditor of John Wise, brought suit in equity against the cestuis que trust, and the trustee and executor, to set aside the deed as fraudulent as to him; in which such proceedings were had that the court decreed that so much of the funds in the hands of Lynn, as trustee, should be sold by him to pay the debt to Robert Young, the complainant in that suit; and that he should charge the same to the respective cestuis que trust, according to their respective interests in the trust-fund; and that he transfer the residue of the trust-fund to the cestuis que trust, in proportion to their respective interests therein. Under this decree the trustee paid the debt to R. Young, and now brings suit, as executor of John Wise, against W. Yeaton, to refund the same, for the benefit of the cestuis que trust.

Mr. Taylor, for defendant, contended that the money paid by the plaintiff to R. Young, never was assets of the estate of John Wise, and never was in his hands as executor, and therefore he could not, in that character, recover it of the defendant. The money either belonged to him as trustee, or to the cestuis que trust.

Mr. Jones, contra. The deed was fraudulent, and therefore did not prevent the passing of the property to the executor; because the executor represents the creditors, and as to them the deed was void. If there had been no executor, it would not have been necessary for the creditors to have brought their suit in equity. They might at once, have resorted to the grantee, and charged him, at law, as executor de son tort. Barber v. Fox, 2 Saund. 137, note. The effect of the decree is to nullify the deed, and to make the property assets; and the plaintiff, as executor, has a good right to recover from the defendant, the amount of the assets thus applied to his use.

Mr. Taylor, in reply. The deed was good between the parties and those claiming under them. The executor cannot maintain an action, or assert a claim, which the testator could not maintain or assert. The deed was good against subsequent creditors. The testator was estopped by his own deed. The plaintiff could not have been charged at law with this property as assets. If the executor and trustee had not been the same person, the executor could not have recovered this property from the trustee as assets. The plaintiff did not, as executor, pay the money to R. Young. He paid it under the decree, in his character as trustee, and in that character he was decreed to pay it, and to transfer the residue to the cestuis que trust; which he could not have done in his character of executor.

THE COURT (nem. con.) ordered the judgment to be entered up on the verdict for the plaintiff, being of opinion that the money arising from the sales was assets to the extent of the claims of the creditors, and that the plaintiff paid it in his character of executor.

[The defendant brought this suit by writ of error before the supreme court, where the sentence of the court below was sustained. 5 Pet. (30 U. S.) 224.]

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

[2] [Affirmed in 5 Pet. (30 U. S.) 224.]

Case No. 8,643.

In re LYON.

[1 N. B. R. 111; [1] Bankr. Reg. Supp. 24; 6 Int. Rev. Rec. 135.]

District Court, S. D. New York. Oct. 7, 1867.

BANKRUPTCY—EXAMINATION—EXCEPTIONS—MOTION TO STRIKE OUT ANSWERS—MOTION TO CERTIFY QUESTIONS TO THE COURT.

In the examination of a bankrupt by creditors, the register will pass upon questions objected to, and formal exceptions being taken, he will, at the close of the testimony, entertain motion to strike out answers or admit excluded questions, and certify the questions to the court.

[In the matter of Isidor Lyon, a bankrupt.]

In this case the register, Edgar Ketchum, certifies the following questions to the court:

Order having been made by consent for the examination of the bankrupt on the 25th day of September, 1867, at 3 o'clock, and the bankrupt being duly sworn and examined, the following questions were asked by Mr. Gray: Question. "Where do you get the means to support your family?" A. "By earning my living. No particular business. Anything I can find. I don't know exactly how long I

[1] [Reprinted from 1 N. B. R. 111, by permission.]

have been engaged in that business. I have always made money when I could do so legitimately." Question. "What was the last legitimate act of business you transacted by which you made money?" A. "Today; selling a barrel of spirits, as a broker, not belonging to me." Question. "For whom?" Objected to by the bankrupt's counsel. The register thinks it ought to be answered. If the spirits did belong to another, the subject is ended. If the deponent is in any way mistaken, and the spirits in fact belonged to him, the creditor should be allowed to discover it. Mr. James, the bankrupt's counsel, demands that the question thus made be certified to the judge. Question. "What was the other and last previous transaction to the one mentioned in which you made money?" Mr. James objects to this question on behalf of the bankrupt, on the ground that no inquiry is relevant as to the manner in which he has earned his livelihood, since his adjudication of bankruptcy, unless foundation is laid for imputing to him possession of property which ought to be given up to his assignee. The register thinks the interrogatory a proper one, as tending to discover and ascertain the truth in respect to that which the counsel thus allows. Mr. James demands that the question be certified to the judge.

BLATCHFORD, District Judge. The register will follow the practice established by my decision dated October 1st, 1867 (In re Levy [Case No. 8,298]. The clerk will certify this decision to the register, Edgar Ketchum, Esq.

Case No. 8,644.

In re LYON.

[7 N. B. R. 182; [1] 4 Chi. Leg. News, 421.]

District Court, D. Minnesota. 1872.

SALE OF PERSONAL PROPERTY—PASSING OF TITLE—ASSIGNEE IN BANKRUPTCY—DISCRETION.

A written contract provided that the ownership of personal property was not to pass until the stipulated price had been paid. *Held*, that under the contract the ownership would remain in the vendor although the vendee had possession, and all but a small portion of the money due had been paid; that if the assignee in bankruptcy shall deem it for the interest of the creditors, he may pay the balance due to the vendor and hold the property for the benefit of the estate.

[Cited in Adams v. Lee, 64 N. H. 422, 13 Atl. 787.]

[In the matter of J. H. Lyon, a bankrupt.]

NELSON, District Judge. A petition is presented by C. Schulenberg, who alleges that he is the owner of certain property now in the possession of the messenger or assignee in bankruptcy in this case, and praying that by an order of this court he may have the same restored to him. This petition was filed on the twenty-sixth day of June, eighteen hundred and seventy-two, and by an arrangement between the solicitors an answer was filed upon the same day by the creditors, who commenced the proceedings in invitum against the bankrupt. An agreed statement of facts was also filed, and the case was submitted upon written briefs for the decision of the court. The proceedings are somewhat informal, and I should not be inclined to consider the case as presented by the pleadings, on the ground that the solicitors had mistaken the practice, were I not assured that the parties on both sides would submit to the decision rendered and did not desire an appeal.

The petitioner claims, and the agreed state of facts so shows, that the possession of the property in controversy in Lyon, the bankrupt, was by virtue of an agreement between the latter and him, to sell it upon certain conditions precedent to be performed by the vendee before any right of ownership passed from the vendor: that the vendee had failed to perform such conditions, by the non-payment of the purchase money as it fell due. The creditors deny that the possession of the property was delivered under the agreement, and claim that there was a waiver of the original agreement (which was in writing,) and that by the acts of the petitioner, who was the vendor, the ownership passed at the time of delivery, as well as the mere possession, and was so intended. It will be necessary to a proper understanding of the controversy to recur to the agreement, which is as follows: "Whereas, the undersigned, Charles Schulenberg, of Detroit, Michigan, of the first part, has agreed to sell to J. H. Lyon, of St. Paul, Minnesota, of the second part, the following property, that is to say, three * * * billiard tables * * * all for the sum of twelve hundred dollars and ten cents, as follows: (here follow the time and amounts of the different payments) and for which sums unpaid the party of the second part has given to the party of the first part his notes, and upon the payment thereof, and performing all other conditions on his part herein mentioned, the party of the first part will execute and deliver a good and valid bill of sale, as of this date, for said property. And the party of the second part agrees * * * to have insured and kept insured for the use and benefit of the party of the first part, the said property, for the full amount at all times unpaid therefor. (Here follow other conditions not material.) And it is further agreed that the party of the second part may have possession of said property and retain the same, if the above conditions and agreements on his part are performed. * * * And it is distinctly agreed and understood, that the title to said property and right thereto is retained by the party of the first part, and does not pass by this agreement until the purchase money * * * is fully paid, according to above terms, and any payments

[1] [Reprinted from 7 N. B. R. 182, by permission.]

made shall be forfeited if any default occurs under this agreement. * * * Dated at St. Paul, Minn., this twenty-seventh day of September, eighteen hundred and seventy-one. C. Schulenberg, per A. A. Sanger. J. H. Lyon."

The acts of the vendor relied upon by the creditors to show a change in the conditions of the written contract which would affect the rights of the parties under the same, and transfer the ownership of the property to the vendee, with the right of possession, are: I. That the vendor instructed his agent to get the two notes first named in the agreement endorsed to his satisfaction in his settlement with the vendee. II. That the property was shipped to the petitioner's agent, and the freight and shipping bills were transferred to the bankrupt upon the execution of the agreement, the signing of the notes, the endorsement of the same, and the delivery of the policy of insurance. The agreement is very clear and distinct in its terms, and contains conditions not unusual in conditional sales, where the ownership does not pass until all the conditions precedent are performed by the vendee.

These contracts are sustained as against creditors of the vendee in every state, save, perhaps, Pennsylvania, in which state it may have been the policy of the courts to discountenance the possession of personal property and exercise of ownership of the same as against creditors where delivery is made under a written contract, although by the express terms of the same the ownership is not to pass. I confess I am unable to feel the force of the reasoning which would change the entire terms of the contract between the parties, and instead of carrying out their intention, fail to give effect to their clearly expressed will. It is true there is an apparent ownership of property which might enable the party to obtain credit and impose on his creditors; but this is true in all cases where there is a mere possession of property, even under a contract of bailment.

The fact that the two notes were endorsed does not affect the contract. The vendee appears to have yielded to the request of the vendor and procured an endorser, but he could have enforced a performance of the written agreement on the part of the vendor, as soon as he had complied with the conditions expressed in the contract, unless it had been the clear understanding and intention of the parties that the first two notes named were to be endorsed by a responsible person. We must presume, from the willingness of the vendee to procure an endorser, that such was the case, for there is no pretense that he protested against doing it.

The ownership of the property was not to pass until the purchase price had been paid, and even if the vendee had paid all but a small portion of the same at the time of the surrender of the possession to him, and the contract had been signed, and the delivery made under it, still the ownership would have remained in the vendor until the final payment. Creditors even could not enforce their claims without paying to the vendor the remaining portion of the purchase money. I do not think the delivery of the shipping bills affected the question of ownership after the execution of the contract, the delivery of the notes, and the policy of insurance. Lyon was entitled to the right of possession, and the shipping bills were given him so as to enable him to obtain it from the warehouse or the carrier. The possession of the bill of lading and shipping are explained by the contract between the parties., and the rights of the parties are therein defined.

Upon the whole, I shall order the property to be restored to the petitioner, unless the assignee, who has been appointed since the proceedings have been commenced, should deem it for the interest of the creditors to pay the balance due the petitioner under the agreement, and hold the property for the estate. Ordered accordingly.

Case No. 8,645.

The LYON.

[Brown's Adm. 59.] [1]

District Court, D. Michigan. March, 1861.

NEGLIGENT TOWAGE—COLLISION—VESSEL AT ANCHOR.

1. Where a number of vessels, connected by long lines, are towed astern of a tug, they are to be considered as under the government and control of the tug, and for any damage done to them, by the want of ordinary care on her part, the tug is responsible.

2. A tug coming down a river one mile in width, and encountering a vessel anchored upon the windward side of the channel, was *held* in fault for not passing the anchored vessel to leeward, it appearing that about three-fourths of the navigable water was upon that side.

Action against the tug Lyon and her master to recover damages done to the schooner Tom Dyer, by a collision with the brig Hollister. The libel averred that, in November, 1859, the captain of the tug contracted with Richard Stringham, the master of the schooner Tom Dyer, to tow her from Lake Huron to Lake Erie, for the usual compensation; that, in pursuance of said contract, his vessel was attached to the tow of the Lyon, and placed under her control and guidance; that she was not towed safely, but that, through the negligence and fault of the master and crew of the Lyon, she was brought into collision with the brig Hollister, a vessel lying at anchor in Lake St. Clair, suffering damages to the amount of $130. The answer admitted an agreement to tow, denied any special agreement to tow safely, admitted the collision alleged, but denied it was occasioned by the fault of the tug.

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

John S. Newberry, for libellant.
W. A. Moore, for claimant.

WILKINS, District Judge. The brig Hollister was at anchor in the River St. Clair, and, so far as the proof indicates, near the middle of the channel, but nearer the western than the eastern shore of the river, which was stated to be about one mile in width at the place of collision. The answer admits that the Tom Dyer had her master and full complement of men on board, but charges that the collision occurred entirely from the negligence of her master and crew. The case involves the construction of the contract of towage, which certainly, whether expressed specially or not, implies that the vessels in tow are for the time under the government of the master and crew of the tug, and that ordinary care and diligence on the part of the latter will be used to avoid any injury to the vessels in her charge. There may exist circumstances under which the vessel in tow may be in fault, as where she disobeys the orders of the tug, or recklessly throws herself out of line; but, as a general rule, the ship in tow is under the direction of the tug, and if obedient, and a collision occurs, the latter must be held responsible for the damage. In The Duke of Sussex, 1 W. Rob. Adm. 270, the action was in rem against the tug. The defense was, that at the time of the collision, the tug was towing the vessel under the direction of a pilot on board the vessel. It was held, by Dr. Lushington, "that if the orders of the pilot were obeyed, the owners of the vessel were not responsible; but otherwise, if they were not obeyed." Because, as the same learned judge declared, in The Gypsey King, 2 W. Rob. Adm. 537, where the action was brought against the vessel towed, "a vessel in charge of a licensed pilot, although under the tow of a steamtug, is to be considered as navigated by the pilot, and not by the tug." "But otherwise, when the navigation is controlled by the steamtug, which is, of course, liable for negligence, or want of ordinary skill or care. A steamer towing a sail vessel has the wind free, and the vessel towed is under her control and guidance." I, however, cannot coincide with the opinion of Judge Kane, in the case of Vanderslice v. The Superior [Case No. 16,843], decided in the Eastern district of Pennsylvania, and hold tow steamboats common carriers as to the vessels they have in tow. The contract is one of mere transit pilotage, and not of freight or carriage. The occupation of the common carrier is to carry at all hazard; the business of the steamtug is simply to afford the advantage of steam power to sail vessels wind bound. The contract, nevertheless, does demand seamanship, knowledge of the navigation and the obstructions of the river, usual vigilance, sufficient and competent force, the necessary lookout and lights; and the want of either will necessarily place the tug in fault, and render her liable for all damages.

The two important facts being conceded, namely: 1st. That there was a contract of towage; and, 2d. That there was a collision, the only question remains,—was the tug skillfully managed, and did she employ ordinary diligence and care? From the examination I have given the testimony, I cannot but consider the management of the Tom Dyer blameless. She had her full complement of men, and followed the course and direction of the tug, which was running a W. S. W. course, heading on to the light-house on Hog Island. This is proved by Stringham and West, and uncontradicted but by the engineer of the tug, whose occupation renders his testimony somewhat untrustworthy, when opposed to that of the captain and mate of the schooner. It is also in proof that the course pursued would bring the vessels near the American channel bank. The position of the Hollister then becomes of great importance. If she was out in the lake, where there was ample space to pass to the eastward and no risk, and yet so near the west bank as to make the attempt to pass on that side hazardous, the tug must be held in fault. It would not be good seamanship to attempt to pass to the windward of a vessel anchored near the shore, with a tow of vessels, when there was abundant space to the leeward. But if the Hollister was anchored in the middle of the channel, at that point a mile in width, it would be optional to pass on either side. In cases of this description, ex necessitate, great reliance must be placed on the testimony of experienced navigators, acquainted with the course and points of the river, who are present and give attention to the trial and evidence. Their opinion is of great weight and consideration, but not always controlling. These witnesses state that, coming down the river with a tow, when it is uncertain whether a vessel in sight is at anchor or not, the best course is to give her her own side, which was, as the court understood these witnesses, the American side of the brig. Captain Dailey, a witness called by the libellant, is still more explicit on this point, and having heard the testimony as to the course of the tug, he says "he should, under all the circumstances, have taken precisely the same course, and gone to the starboard or westerly side of the brig, just as was pursued by the tug." But neither of these gentlemen pass upon the propriety of going to the leeward of the brig, where there was ample space and unquestionable safety. If three-fourths of the channel was on the leeward side of the brig—and that fact is fixed by the preponderance of the testimony—the leeward side of the brig was the right course in towing these three vessels, 250 feet apart, because from the wind and drift a collision with the Hollister was at least a possible occurrence. Moreover, there was not a competent crew for the management and conduct of so important a towage. A captain, a pilot and a wheelsman do not come fully up to the

strict requirements of law. There was no lookout, unless the master was such.

The supreme court has held, in The New York v. Rea, 18 How. [59 U. S.] 225, "that a trustworthy and constant lookout, so stationed as to obtain accurate information as to vessels ahead, and whose special business is to perform that duty, is essential to all steamers traversing waters where sail vessels are often met with, and the omission would be prima facie evidence of fault on the part of the steamer." The captain or the pilot may perform these duties, but in case of collision it would become necessary to prove clearly that this duty was strictly performed. That they might have passed the brig safely in the course they took, is unquestionable; that they did not, is proved; that a constant lookout would have discerned in time the safest course, is likewise unquestionable; and for such a fault the tug should certainly be responsible. The towage of vessels through our rivers in the northwest, connecting our interior seas, and so intimately associated with our trade and commerce, is a most important branch of maritime service. Public policy requires that these tugs, although not common carriers, should be held by courts to a strict accountability. Here, although experienced navigators give it as their opinion that the course taken by the tug was a right course, was there not under all the circumstances, the wind and drift considered, another and safer course to the leeward side of the brig? The wind was from the northwest, blowing across the river, and the natural tendency was to drift the tow into perilous proximity to the vessel at anchor. I cannot consider this as manifesting ordinary care or vigilance on the part of the master of the tug. Cutting the line by the Tom Dyer might have saved her, but the omission to do so does not exonerate the tug, if her fault brought the Tom Dyer into such perilous position. The tug led the line, the Tom Dyer obediently followed. The tug, as the pilot of the tow, must have observed the position of the Hollister, and her relation to the shore before she passed her. What, then, would sound judgment dictate? There could be no danger by passing to the leeward; there must have been doubt, at least, as to the westerly course, considering the wind and drift; and disregarding that doubt was a want of ordinary care that places the tug in fault, and makes her liable under her contract. The damage resulting from the collision was not considerable, the pecuniary amount involved of small magnitude, but the principle to be established is of great importance to our interior navigation. Ordinary care is the application of a sound judgment to the surrounding circumstances, and a tug, as a pilot, will be deemed in fault in going between a vessel at anchor and the shore, when the wind and drift make the leeward side the safest course.

I do not consider this opinion as adverse altogether to that of the experts, in whose judgment I have great confidence, but I feel bound, by every obligation of duty, to hold that in cases of this description, where two courses are open, that is to be selected which is the less perilous to the vessels in tow. Decree for libellant.

Case No. 8,646.

LYON'S CASE.

[Whart. St. Tr. 333.] [1]

Circuit Court, D. Vermont. Oct. 9, 1798.

SEDITIOUS LIBEL—PROVINCE OF JURY—INTENT OF PUBLICATION.

[On the trial of an indictment for seditious libel, the jury have no concern with the question of the constitutionality of the law. Act July 14, 1798 (1 Stat. 596). The only questions for them to determine are whether defendant published the writing, and, if so, whether he did it seditiously; that is, with intent to make the government and president odious and contemptible, and bring them into disrepute.]

[This was an indictment, under the act of July 14, 1798, against Matthew Lyon, for the publication of a seditious libel.]

The indictment which was found on October 5, 1798, contained three counts, the first of which, after averring the intent to be "to stir up sedition, and to bring the president and government of the United States into contempt," laid the following libellous matter: [2] "As to the executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness, and accommodation of the people, that executive shall have my zealous and uniform support: but whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice; when I shall behold men of real merit daily turned out of office, for no other cause but independency of sentiment; when I shall see men of firmness, merit, years, abilities, and experience, discarded in their applications for office, for fear they possess that independence, and men of meanness preferred for the ease with which they take up and advocate opinions, the consequence of which they know but little of—when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate."

The second count consisted of having ma-

[1] [The report of this case, with the exception of the syllabus, was prepared by Francis Wharton, Esq.]

[2] The materials of this case, which, with the greatest difficulty, I have collected, are drawn chiefly from the New York Spectator of Oct. 24, 1798, a paper then said to be under Mr. Hamilton's control, and of course decidedly Federal, and from the Aurora of Nov. 15, 1798, whose politics were equally decided the other way. I have made very general inquiries for fuller details, but the Vergennes paper of that day goes no further than those just cited, and I understand that a fuller report is not now to be obtained.

liciously, &c., and with intent, &c., published a letter, said to be a letter from a diplomatic character in France, containing two paragraphs in the words following: "The misunderstanding between the two governments (France and the United States), has become extremely alarming; confidence is completely destroyed, mistrusts, jealousy, and a disposition to a wrong attribution of motives, are so apparent, as to require the utmost caution in every word and action that are to come from your executive. I mean, if your object is to avoid hostilities. Had this truth been understood with you before the recall of Monroe, before the coming and second coming of Pinckney; had it guided the pens that wrote the bullying speech of your president, and stupid answer of your senate, at the opening of congress in November last, I should probably had no occasion to address you this letter. —— But when we found him borrowing the language of Edmund Burke, and telling the world that although he should succeed in treating with the French, there was no dependence to be placed on any of their engagements, that their religion and morality were at an end, that they would turn pirates and plunderers, and it would be necessary to be perpetually armed against them, though you were at peace: we wondered that the answer of both houses had not been an order to send him to a mad house. Instead of this the senate have echoed the speech with more servility than ever George III. experienced from either house of parliament."

The third count was for assisting, counselling, aiding, and abetting the publication of the same.

Saturday, Oct. 7. The defendant, being still in custody, (having been arrested on a bench warrant immediately after the finding of the bill,) pleaded not guilty, and put in bail for his appearance on Monday, October 9.

Monday, Oct. 9. The panel being called, a juror named Board, was challenged for cause by the district attorney, (Mr. Charles Marsh.) Question. Have you formed or expressed an opinion as to the guilt or innocence of the accused? Answer. No.

The district attorney then produced one of the deputy sheriffs who had summoned the jury, who testified that he heard the juror say he thought Mr. Lyon would not, or should not, be condemned.

PATERSON, Circuit Justice. Let the juror stand aside, and unless there is not enough to form a jury without him, you need inquire no further.

Two jurors were challenged by the defendant for cause. Against one no evidence was produced, and there appears to have been no examination of him on his venire dire. The other was shown to have been the author of an article in a newspaper, inveighing politically and personally against the defendant.

PATERSON, Circuit Justice. The cause shown is sufficient, as a difference of this nature is a disqualification.

The box having been filled, and the jury sworn, the defendant interposed an additional plea, to the effect that the sedition law was unconstitutional, which plea was stricken off by the court.

The district attorney having opened the case, produced a letter from the defendant, dated Philadelphia, July 7, 1798, and post marked on the same day, which was printed in Vermont on July 23. The authorship of the letter and the fact of publication were admitted by the defendant. It was further proved that the defendant had several times read at public meetings in Vermont the letter (known at the time as the "Barlow" letter) from which the libellous matter in the second count was taken. Several witnesses were called to show that the defendant, both in public and in private, had extensively used the letter for political purposes, and in doing so had frequently made use of language highly disrespectful to the administration. On cross examination it appeared that on one occasion he had endeavoured to prevent it from being printed.

The prosecution having closed its case, the defendant stated his defence to consist in three points: First, that the court had no jurisdiction of the offence, the act of congress being unconstitutional and void, if not so generally, at least, as to writings composed before its passage; second, that the publication was innocent; and third, that the contents were true.

On the first two points he offered no testimony, but on the third he proposed to call Judge PATERSON, the presiding judge, and Judge SMITH.

Judge PATERSON being then on the bench, was then asked by the defendant, whether he had not frequently "dined with the president, and observed his ridiculous pomp and parade?" Judge PATERSON replied that he had sometimes, though rarely, dined with the president, but that he had never seen any pomp or parade; he had seen, on the contrary, a great deal of plainness and simplicity.[3] The defendant then asked whether he (the judge) had not seen at the president's more pomp and servants there, than at the tavern at Rutland? To this no answer was given.[4] No other witness was called.

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[3] The oddity of this proceeding—in which the fact of the defendant's asking a judge on the bench such a question as this, is only equalled by the judge setting to work to give a regular answer—can only be explained on the ground that the defendant, having no counsel, did not know any better, and that the court were unwilling to curtail him in his supposed defence. The answer, as reported in the Aurora, is the same as above, varying, however, the last line to "in place of pomp and parade, I have seen a good deal of hospitality, without much ceremony."

[4] The report in the Spectator continues: "And it was evident Mr. Lyon expected no more." That in the Aurora makes up for this by giving

Mr. Marsh, district attorney, addressed the jury at length, urging, (1) the libellous nature of the offensive passages, which were clearly within the act of congress, and (2) the declared intentions with which they had been used by the defendant, which expressly came up to the innuendoes.

Judge SMITH, (the then chief justice of Vermont,) who then appeared as counsel for the defendant, declining to reply, in consequence of the shortness of time allowed him for preparation, he having been called into the case at the bar, the defendant addressed the jury at great length, insisting on the unconstitutionality of the law, and the insufficiency of the evidence to show anything more than a legitimate opposition.

Before PATERSON, Circuit Justice, and HITCHCOCK, District Judge.

PATERSON, Circuit Justice (charging jury). "You have nothing whatever to do with the constitutionality or unconstitutionality of the sedition law. Congress has said that the author and publisher of seditious libels is to be punished; and until this law is declared null and void by a tribunal competent for the purpose, its validity cannot be disputed. Great would be the abuses were the constitutionality of every statute to be submitted to a jury, in each case where the statute is to be applied. The only question you are to determine is, that which the record submits to you. Did Mr. Lyon publish the writing given in the indictment? Did he do so seditiously? On the first point, the evidence is undisputed, and in fact, he himself concedes the fact of publication as to a large portion of libellous matter. As to the second point, you will have to consider whether language such as that here complained of could have been uttered with any other intent than that of making odious or contemptible the president and government, and bringing them both into disrepute. If you find such is the case, the offence is made out, and you must render a verdict of guilty. Nor should the political rank of the defendant, his past services, or the dependent condition of his family, deter you from this duty. Such considerations are for the court alone in adjusting the penalty they will bestow. The fact of guilt is for you, for the court, the grade of punishment. As to yourselves, one point, in addition, in exercising the functions allotted to you, you must keep in mind; and that is, that in order to render a verdict of guilty, you must be satisfied beyond all reasonable substantial doubt that the hypothesis of innocence is unsustainable. Keeping these instructions in your mind, you will proceed to deliberate on your verdict."

At about eight o'clock in the evening of the same day, after about an hour's absence, the jury returned with a verdict of guilty.[5]

The defendant being called up for sentence, a postponement was obtained till the next morning, when, after upon a representation of his circumstances, it appearing that he was almost insolvent, Judge PATERSON addressed him as follows: "Matthew Lyon, as a member of the federal legislature, you must be well acquainted with the mischiefs which flow from an unlicensed abuse of government, and of the motives which led to the passage of the act under which this indictment is framed. No one, also, can be better acquainted than yourself with the existence and nature of the act. Your position, so far from making the case one which might slip with a nominal fine through the hands of the court, would make impunity conspicuous should such a fine alone be imposed. What, however, has tended to mitigate the sentence which would otherwise have been imposed, is, what I am sorry to hear of, the reduced condition of your estate. The judgment of the court is, that you stand imprisoned four months, pay the costs of prosecution, and a fine of one thousand dollars, and stand committed until this sentence be complied with."

NOTE. The sedition laws, of which this trial was the first fruit, received the president's signature on July 14, 1798. The first section imposes a penalty on illegal combinations. The remaining sections are as follows:

"Sec. 2. And be it further enacted, that if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the congress of the United States, or the president of the United States, with intent to defame the said government, or either house of the said congress, or the said president, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations

a still stronger turn the other way. "The judge, conscious that there was some difference between the table at Braintree, and the humble fare of a country tavern, with the privileges of half a bed, made no reply, but smoked a cigar."

[5] The report in the Spectator, says: "It is said that eleven of the jurymen were ready to find a verdict immediately on leaving the bar, but that one doubted. On which they read over the papers, and recapitulated the evidence, and the doubting juror said, it was impossible to acquit him. During the course of the trial, Mr. Lyon repeatedly observed that the jurors were packed, and brought from towns known to be inimical to him, for the purpose of crushing him; but the court, at its last May session, ordered the clerk to summon the jury from the towns, from which they actually came, so that it was impossible any reference could have been had to him. He also complained, that he was hurried to trial, and therefore was not prepared; but the public may rest assured that both on Saturday and Monday, the court several times told him the cause might be continued, that he might have ample time to prepare himself with evidence and counsel. There was a crowded auditory, and there has been no attempt to impeach the court, or jury of any impartial or improper conduct; on the contrary, there seemed to be a unanimous approbation of the court, the attorney and the jury."

therein for opposing or resisting any law of the United States, of any act of the president of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any foreign nation against the United States, their people or government, then such person being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

"Sec. 3. And be it further enacted and declared, that if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

"Sec. 4. And be it further enacted, that this act shall continue and be in force until the 3d day of March, one thousand eight hundred and one, and no longer: provided that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law during the time it shall be in force." 1 Stat. 596.

The circumstances attending the passage of this act have been already noticed in the introduction to this work, and the legal and constitutional questions arising under it will be found fully discussed in the ensuing trials of Callender and Cooper.

Of the defendant in this case himself, who, for many years, was so famous in American politics, no biography, as far as I can find, has been written; and I have been obliged to depend upon the newspapers of the day, but more particularly upon the kindness of Henry Stevens, Esq., of Barnet, Vermont, for the collection of a few incidents in a life much more remarkable for the violence of its vicissitudes, and for the interest of its adventures, than for the intrinsic eminence of its subject. Matthew Lyon came over in 1755, or thereabouts, from Ireland, pennyless and friendless, and being then in his boyhood, was sold out to pay his passage, as the custom was, to Mr. Liversworth, at Cambridge, Massachusetts, the purchase-money being, as it was said, "a pair of three-year-old bull stags." To Vermont, where Mr. Liversworth lived, Lyon of course proceeded, and is said to have served out his time faithfully, making up by New England schooling, and by the free intercouse with the thin though bustling population in which he was now placed, for his early utter ignorance. Good-nature and enterprise, of which he was always possessed, and a sort of half-education, which by this time he had picked up, brought him, soon after he reached twenty-one, into contact with some of the leading men in the sparse and wild country which the border counties of Vermont then presented; and shortly before the battle of Saratoga, he became a subaltern officer in a corps of militia stationed on the frontier, in connection with the Northern division then under the command of General Gates. It was in this capacity that an incident occurred which once or twice threw its shadow on his future life. Whether it was the intense cold of the weather, or the excessive remoteness of the post, making direct supervision impracticable, or the nearness to their homes, for it was on the Onion river, and they were all Vermonters, it cannot now be said; but in the neighbourhood of Thanksgiving Day, or thereabouts, the men began to take their departure for their homes, and in a short time the officers followed them. Of course a return to the post when the sky was more genial did not atone for the prior desertion, and the result was that Lyon was cashiered by General Gates. A reversal of the sentence was made the next year, however, by General St. Clair, who succeeded to the command of the Northern department, and the delinquent corporal shortly afterwards was promoted by General Schuyler to the office of paymaster in Warner's regiment. This office he soon abandoned, in consequence of a squabble with a brother officer, and being now in the vigour of early manhood, with some little capital, and with much more enterprise, he returned to Vermont, where, in the village of Fair Haven near Skeensborough, he started paper-making, type-casting, printing, publishing, ore digging, hollow-ware casting, and iron ware manufacturing generally. The general assembly of Vermont granted him power to raise by lottery "600 bushels of wheat," for such was the standard of value in those days, in order to enable him to enlarge his furnace, so as to cast "flat irons, spiders, bake-pans and dish-kettles," which in his petition he called the "solid coin in the state." In so primitive a state of society, where wheat was currency, and iron ware coin, the little village of Fair Haven soon became a large town, capable of looking down over its shoulder at the famous city of Vergennes, the only city in Vermont, which at the time contained hardly more private houses than it did public buildings, being "sixty" altogether; and so great was the plastic power of the new visitor, that the very creeks that were hurrying to empty themselves into the lap of Lake Champlain stopped on their way to lend a hand in turning the wheels of the huge saw-mill, "the like of which," it is said in a cotemporaneous paper, "never was seen before, as in the making of nail-rods and paper, as well as in the grinding of corn." Even the bark of the bass-wood tree, which formerly had been used only for the twisting of Indian baskets, was turned to a new purpose, and "The Scourge of Aristocracy and Repository of Important Political Truth," the political mouthpiece of Mr. Lyon, was printed on paper made by himself of material thus selected. With the class of politicians of whom Thomas Chittenden, then governor, Ethan Allen and Ira Allen were the representatives—the leaders of the "stern democracy," as it may really be called, of that manly though poor population—he soon became intimate, marrying about the time Governor Chittenden's daughter. Unfortunately, however, for his solvency as well as his reputation, not contenting himself with issuing, at very irregular periods, bass-wood sheets, covered with fierce denunciations of the peerage of the Cincinnati, or of the pageantry of the drawing-rooms, he ran for congress, and took his seat just in time to participate in the legislation of Mr. Adams's last two years. In Philadelphia his history had preceded him, nor were those who despised the lowness of his birth, and the humiliation of his early life, held back from turning him into a popular butt by any excess of exterior civilization on his part. To Cobbett's slashing pen an attraction like this was irresistible, and on Tuesday, June 6, 1797, hardly before Lyon was warm in his seat, he was thus saluted in Porcupine's Gazette: "The Lyon of Vermont.—To-morrow morning at eleven o'clock will be exposed to view the Lyon of Vermont. This singular animal is said to have been caught in the bog of Hibernia, and when a whelp, transported to America; curiosity induced a New Yorker to buy him, and moving into the country, afterwards exchanged him for a yoke of young bulls with a Vermontese. He was petted in the neighbourhood of Governor Chittenden, and soon became so domesticated, that a daughter of his excellency would stroke and play with him as a monkey. He differs considerably from the African lion, is more clamorous, and less magnanimous. His pelt resembles more the wolf or the tiger, and his gestures bear a remarkable affinity to the bear; this, however, may be ascribed to his having been in the habit of associating with that spe-

cies of wild beast on the mountains: he is carnivorous, but not very ferocious—has never been detected in having attacked a man, but report says he will beat women. He was brought to this city in a wagon, and has several days exposed himself to the public. It has been motioned to cage him, as he has discovered so much uneasiness at going with the crowd. Many gentlemen who have seen him do not hesitate to declare they think him a most extraordinary beast." 6 Porc. Works. 16. But Matthew Lyon was not the man to bear with this long. His natural good sense—and from the brief reports of his speeches he seems to have been well stored with this essential commodity—entitled him, he felt, to a more respectful treatment than this, and naturally enough he did not see why his early privations should be the subject of ridicule in a country which pretends to recognize all men as by birth equal. Several times he intimated this, but ineffectually, till at last Mr. Griswold ("Roger," of long gubernatorial memory), having one day, in front of the great hickory fire which was burning in the house of representatives, alluded in his presence to the "cashiering" under General Gates, a personal conflict ensued, which, repeated a few days after, was of so disgraceful a character as to lead to votes, wanting but little of a majority, for the expulsion, first of one and then of the other of the combatants. See "Report of Committee of Privileges," &c., 2d Feb. 1798—published by order of the house of representatives. See also 3 Jeff. Cor. 372.

It was in the recess between the two sessions that the trial in the text took place. It was undoubtedly a bold step on the part of the administration, for the alleged libels were written before the passage of the law, though published afterwards. The defendant was an active opposition member of the house of representatives, where the vote was so equally balanced as to make his withdrawal of national political consequence; and he was then a candidate for re-election. A conviction under these circumstances was calculated to inflame the country; nor was this feeling allayed by the publication throughout the land of the following letter from Lyon himself to General Mason, then a senator from Virginia:

"In jail at Vergennes (the only city in Vermont, it contains about sixty houses and seventy families), October 14, 1798.

"Dear General: I take the liberty to trouble you with a recital of what has happened to me within about ten days past. On Thursday, the 5th of this month, I was informed that a grand jury had been collected to attend the federal court at Rutland, about fifteen miles from my place of residence; that they were selected from the towns which were particularly distinguished by their enmity to me; that the jury was composed of men who had been accustomed to speak ill of me; that they had received a charge to look to the breaches of the sedition law; and that they had some publications of mine under consideration. The same night a friend called, and assured me that a bill was found against me, and urged me to be out of the way of being taken—he declared to me, that it was the wish of many of my friends. He informed me that the petit jury were taken from the same towns where the grand jury were; and that from every examination there were not more than two out of the fourteen which were summoned, who had not opposed me in the late election. He mentioned several zealous partisans for presidential infallibility among them, and one who had been lately writing the most virulent things against me, in his own name, which were published in a newspaper. My answer to all this was, it could not be honourable to run away—I felt conscious that I had done no wrong, and my enemies should never have it to say that I ran from them. An officer of the court had been in my neighbourhood the same evening to summon witnesses; I had told him, if the court wanted me, he need bring no posse, he might come alone, I would go with him, there should be no resistance. Accordingly on Friday evening, the same officer, a deputy marshal, came with a warrant for my apprehension, which he gave me to read, and accepted of my word and honour as bail to meet him at Rutland court-house the next morning about nine o'clock. I was there accordingly; and soon after the court was opened I was called to the bar to hear the indictment read. It consisted of three counts; the first for having maliciously, &c., with intent, &c., written, at Philadelphia, a letter dated the 20th of June, and published the same at Windsor, in the newspaper called the Vermont Journal, containing the words following: (Here follow the passages set out in the text, pp. 333–4.) The third count was for aiding and abetting, &c., in publishing the same. I was called upon to know if I was ready to plead to the indictment. I answered, that I was always ready to say I was not guilty of the charges in the indictment, but that I was not provided with counsel, there being no person at Rutland I was willing to trust with my cause; I had sent to Bennington for two gentlemen on whom I could rely, Messrs. Fay and Robinson, who would be here by Monday. It was then signified to me, that I might have the trial postponed until the session of the court in May next. This I could not wish for, as that session was to be at Windsor, over the mountain, where they were sure of having a unanimous jury, such as they wanted. In the fourteen jurymen before me, I thought I saw one or two persons who knew me, and would never consent to say that I was guilty of an intention of stirring up sedition; I was unwilling to remain under a censure of the kind; for these reasons I chose to come to trial; I accordingly gave bonds for my appearance the next Monday. Saturday and Sunday were violent stormy days, and at the opening of the court on Monday, I had heard nothing of my counsel, nor my messenger; I so informed the court, and told them I thought we should hear from them in an hour, for which time the court adjourned. Within that time my messenger returned, with news that Mr. Fay's wife was very sick, and Mr. Robinson, who is a member of the legislature, was preparing to attend, and could not be at Rutland so soon as that time. Mr. Smith, who is our chief justice, was present, although he and I had been formerly competitors for the representation of this district in congress; he is a Republican, and many of my friends are now his friends; they applied to him to assist me, and I understood he had consented. Thus circumstanced, I proceeded to trial. So ignorant was I of law proceedings, that I expected to object off the inveterate part of the jury, without giving particular reasons, or supporting them by evidence: I was, therefore, unprepared. The attorney for the United States was called on to say if he had any objections to the jury. He said he had to a Mr. Board; he believed he had given an opinion in the cause; to prove which, he called upon a deputy sheriff, who swore he had some conversation on the Saturday before, with Mr. Board, in which he understood Mr. Board to speak as if he thought that Mr. Lyon would not be condemned, or some such thing; Judge Paterson inquired if there was not enough for the panel without him, Mr. Board. He was answered, there were thirteen more. Mr. Board was ordered off. Thus was the only man swore away, that knew me enough to judge of my intentions. No one doubts that the deputy sheriff began a discourse with Mr. Board on purpose to have something to swear. Mr. Board said, he expected that was the case when he came to him, and he carefully avoided conversing with him. I objected to two of the jury on account of their violent opposition to me; and although unprepared with regard to truth, I called on some

persons present to see if they could recollect any virulence made use of by those two; and I sent for the newspaper to prove the abuse of the one who had published; the judge observed, that a difference in political opinion could be reason against a juryman, and as there were twelve beside, he ordered the person who had been libelling me, off. Here I plead to the jurisdiction of the court, on account of the unconstitutionality of the law. My plea was overruled, but I was told I might make use of the arguments in any other stage of the trial.

"The attorney, on the part of the United States on the first count, produced my original letter, on which was the Philadelphia postmark, July 7. He attempted to bring some evidence to show that the letter did not arrive at Windsor until after the 14th of July; the printer's boy thought it did not arrive until the 20th, and Mr. Buck saw the setting from it about the 23d, or later; I acknowledged the letter. As to the second count several evidences were brought to swear they heard me read the letter, said to be the letter from a diplomatic character in France, from a manuscript copy, supposed to be in my own handwriting; they were inquired of whether the reading of the letter caused any tumult? One of the evidences, a young lawyer, and another person an associate of his, said that they thought it did at Middletown. One of them said he heard a person say, there must be a revolution, and they both agreed that there was a noise—and some tumult after the reading of that letter and some other papers. On my inquiring of them the cause of the tumult, and there opinion, if there would have been any tumult there, if they had not followed me on purpose to make a disturbance? they acknowledged, they thought if they had not been there, there would have been no disturbance; and they also agreed, that the tumult was caused by the other people's disliking their being there and their conduct then; they agreed also that I refused to give an opinion upon the letter. In proof of the third count, the attorney produced evidence to show that the printed pamphlet, entitled a copy of a letter from a diplomatic character in France, was taken from a manuscript in my hand, and the printer said he received the copy from my wife. The evidence all agreed that I had ever been opposed to the printing of the letter and gave for reason, that I had promised the gentleman to whom the original had been written, that I would not suffer it to be printed. The young lawyer said that I told him, there were not above one or two passages in the letter which could be called seditious. The attorney proceeded to sum up the evidence and dwelt on everything which he thought proper to point out the appearance of evil intentions. As soon as he had seated himself, or before Judge Paterson rose and was proceeding to give his charge to the jury, I interrupted him with an inquiry into the cause why I should not be heard; he politely sat down and directed me to proceed. My defence consisted of an appeal to the jury, on the unconstitutionality of the law, the innocence of the passage in my letter, and the innocence of the manner in which I read the letter. It was said I spoke two hours and upwards. Mr. Smith declined speaking, as he was unprepared. The attorney replied as decently as any man of his profession and principles would. The charge from the judge was studiedly and pointedly severe. After telling the jury, if they leaned any way, it ought to be in favour of the defendant, he proceeded to dwell on the intention and wickedness of it, in the most elaborate manner; he descended to insinuate that the Barlow letter, as it was called, was a forgery; he said, let men of letters read that letter and compare it with Barlow's writings, and they would pronounce it none of his. He told the jury that my defence was merely an appeal to their feelings, calculated to excite their pity; but mercy, he said, did not belong to them, that was lodged in another place; they were to follow the law, which he explained in his own way, and supported the constitutionality of it. The jury retired about eight o'clock in the evening, and in about an hour they returned with a verdict, Guilty! The judge observed to me, that I had then an opportunity to show cause why judgment should not be pronounced against me, and to show what was my ability or inability to pay a fine, as a man of large property, in such a case, ought to be obliged to pay a greater fine than one of smaller property. I replied, I did not expect anything that I should say would have any influence on the court, in the present stage of the business. The judge said I might think of it until morning, and the court adjourned until nine o'clock next morning; I then attended, and after being called upon, I observed to the court in reply to what had been said to me upon the score of property, that a few days ago I owned a property, which I estimated, some years since, at twenty thousand dollars; in the present state of the affairs of our country, I did not expect it would fetch half that sum. I had lately made over all the productive part of it, to secure some persons who were bound to me for debts, to the amount of sixteen or seventeen hundred dollars: there still remained enough to be worth much more than the court were impowered to fix the fine at; but in the present scarcity of cash, and the prospect of lands soon to be sold very cheap, I did not know that I could possibly raise two hundred dollars in cash upon it.

"The judge, after an exordium on the nature of the offence, the malignity of it in me, particularly being a member of congress, and the lenity of the sedition bill, which did not allow the judges to carry the punishment so far as common law did, pronounced sentence that I be imprisoned four calendar months, pay a fine of one thousand dollars, and stand committed until the judgment should be complied with. This sentence was unexpected to all my friends as well as myself; no one expected imprisonment. The marshal is a man who acted as clerk to some persons whom I had occasion to transact some business with about a dozen years since, when he first came into this country, in which he behaved so that I have ever since most heartily despised him: this he has no doubt seen and felt. The moment sentence was pronounced, he called me to him, and ordered me to sit down on a certain seat in the court-house: he called two persons to give me in charge to, one of them the person who followed me to Middletown to insult me, and was on the trial improved as an evidence. I asked if they would go with me to my lodgings a few minutes, so that I might take care of my papers? I was answered in a surly manner, No; and commanded to sit down. I stood up. After the court adjourned, I inquired what was to be done with me until my commitment. I expected I should be confined in the prison in Rutland, the county where I lived; I was told that the marshal was authorized to imprison me in what jail in the state he pleased, and that I must go to Vergennes, about forty-four miles north of Rutland, and about the same distance from my seat at Fair Haven. I inquired what were the accommodations there? and was answered in a manner peculiar to the marshal himself, that they were very good. I told the marshal, since it had become my duty to go there, he needed no assistance, I would go with him. He said he would not trust to that, and prepared two troopers, with their pistols to guard me. He ordered me to ride just before them; in this manner I left Rutland. After riding a few miles he overtook us and rode by us; he rode pretty fast and whispered to one of the young men: I learned his intention was, to get to Middlebury, the shire town of Addison county, in order to throw me into a

dirty dungeon-like room for that night. I did not mend my pace; he came back and scolded; insulted and threatened; he repeated it. His friends, I was told, expostulated with him, and the humane young men, who were employed as guards, told him they would rather watch me all night, than that I should be thrown into the jail; we lived at a tavern about four miles short of Middlebury jail; the young men watched: the next day we arrived at this place; there are two roads to come into it, one comes up straight to the jail-house, by but two or three houses; the other is circuitous, taking almost the whole length of the little city in its course. I was foremost and inclined to take the nearest road, but the gentleman, by that route, would lose a share of his triumph; he ordered us in a peremptory tone into the circuitous road through the city. On the way from Rutland, he undertook to direct me, and stop me as to speaking, and told me I should not have the use of pen, ink and paper. On Wednesday evening last I was locked up in this room, where I now am; it is about sixteen feet long by twelve wide, with a necessary in one corner, which affords a stench about equal to the Philadelphia docks in the month of August. This cell is the common receptacle for horse-thieves, money-makers, runaway-negroes, or any kind of felons. There is a half-moon hole through the door, sufficient to receive a plate through, and for my friends to look through and speak to me. There is a window place on the opposite side, about twenty inches by sixteen, crossed by nine square iron bars; all the light I have is through this aperture; no fire-place in the cell, nor is there anything but the iron bars to keep the cold out; consequently I have to walk smartly with my great coat on, to keep comfortably warm some mornings.

"On Thursday morning last, I asked a friend for his pen and ink, in presence of the jailer. It was offered me; but the jailer said, it was against his orders, I must not have it. The marshal paid me a visit on Thursday evening, he examined the cell, looked on my little table to see what was there: but he found nothing but Volney's Ruins, the late laws, some of the president's messages, and a list of the petit jury. I inquired of him before, or then, what situation I was to consider myself in with regard to the use of pen and ink? His answer was, I might use them, but he must see everything I sent out of the jail; if I concluded otherwise, (looking at a chain that lay on the floor,) he said he would put me in a situation that I could not write. I asked him what he meant by that? He told me I was at his disposal, and if I did not behave like a prisoner, he would send me to Woodstock jail. I told him there would be one advantage in that, he would not be there always, and I should get rid of the sight of him. On Friday, for the first time, two brothers-in-law were admitted to come in to see me. Some of my friends expostulated with the marshal on the subject of denying me pen and ink; and in the evening I observed a man hammering on the prison door. You seem much concerned about that door (said I); there has scarce been an hour since I came here, but there has been some person hammering at the door, or putting on new bolts or bars. It is all useless, said I; if I wished to come out, they could not hold me; and as I do not, if my limits were marked by a simple thread, I would not overstep it. He replied, he was only nailing up an advertisement. Next morning, when the house was very still, I heard some person step up and read the advertisement on the door; it contained a preamble concerning my having complained that I was debarred the use of pen and ink and paper, and a declaration that I had leave to furnish myself with those things, and use them as I thought proper, signed by the marshal. As soon as I could get my eye on a person that would go and fetch General Clark, my friend and brother-in-law, who is a member of the legislature now sitting here, I sent one. He came. I desired him to read the advertisement, and tell me what I should do concerning the treatment of Fitch, the marshal. He said he would go and see Fitch, and see how he explained the business—he went to Fitch's house, but could not find him; some other business occupied him the rest of the day. I next morning sent for a number of friends, who got admittance, and after some conversation on the subject before the jailer, and getting his explanation of the advertisement, that he considered me now allowed to write, without submitting my productions to the marshal, I was solemnly invested with pen and ink. The first use I have made of it, after a line to my wife, is to write you this long, prolix account of the fruits of this beloved sedition bill. You may remember that I told you, when it was passing, that it was doubtless intended for the members of congress, and very likely would be brought to bear on me the very first; so it has happened, and perhaps I, who have been a football for dame fortune all my life, am best able to bear it. I have long disobeyed your injunction to write to you, waiting to be able to give you an account of the elections.

"The noise that has been made about the public and private negotiations of our envoys at Paris, has answered the purposes of the aristocrats completely, (on the other side of the mountain, I mean, Morris's district,) to exasperate the unthinking people against every Republican. Governor Robinson had more than half of the votes on this side of the mountain; but Tichenor has got a great majority; in the whole he had 6,211; Robinson, 2,805, beside, I am told, there were about five hundred for him, which were lost by inaccurate returns; there were also 332 scattering votes.

"Monday, October 15.

"I have just learned that Morris is re-elected, and I have received the list of the votes for representatives to congress in this district; they stand for your friend

Lyon,	3,482	
Williams,	1,554,	an aristocratic candidate.
Chipman,	1,370,	do brother to your little horsenail maker.
Spencer,	285,	and several other aristocrats.
Israel Smith,	274.	and several other Republicans.
	30	given in for governor, and the representatives of the several towns in assembly, by one accident or another, put into the box for representatives to congress.
	6,985	
	3,482	
	3 503"	

Lyon's imprisonment was enforced with a rigour which excited the great mass of his constituents to such a pitch as to lead to a popular rising, the avowed object of which was, to tear down the prison. This, however, he succeeded in suppressing, and in fact his whole demeanour was marked with great prudence and tact. His wife, with her sisters, the daughters, as has been noticed, of Governor Chittenden, having one day visited him, the usual barrier to their entrance was removed, and she was permitted to enter the cell. At this moment some less prudent friend intimated that now was the period to escape. "That he shall not do," said the prisoner's wife, "if I stand sentinel myself." The spirit, energy, and devotion shown by this eminent lady during her husband's imprisonment, gave fresh vigour to his supporters, and courage to himself. In fact, so awkward did his position become to the administration, that the cabinet panted for an excuse to liberate him. His determination to give up nothing on the one hand, coupled with his constant and watchful exhortations to his supporters to yield the most implicit obedience to the law, made the difficulty peculiarly embarrassing. Had he apolo-

gised on the one hand, or stormed on the other; had he either petitioned for a pardon, or connived at a rescue; he could easily have been disposed of. But neither of these would he do. An attempt to induce him to take the former step, backed, it was intimated, by a high promise, failed. An attempt to involve him in the latter, he himself frustrated. In the mean time another vote was taken for congress in his district—an election having failed on the first trial from want of a choice—and the result was that Mr. Lyon received 4576 votes, to 2444 for Mr. Williams, the Federal candidate, and was returned by a majority of about 600 over all. On February 8th, 1799, in a letter dated at Vergennes jail, he returned his thanks to his constituents for their vote, and proceeded with a degree of ardour which his long imprisonment might easily explain, to animadvert upon the existing administration. (See Aurora, Feb. 8th, 1799.) The feeling thus created, was aggravated by Mr. Adams' reply to the parties who came on to Philadelphia to represent to the president the loss their interests suffered from the detention during the session of their representative in prison,—"repentance must precede mercy." The powerful revolutionary interest with which Lyon in early life had been connected rallied to his support, and though for Mr. Adams, the electoral vote, after considerable struggle, was secured. Vermont immediately afterwards finally left the Federal party.

On Mr. Lyon's return to Philadelphia, he was met by the following resolution: "Resolved, that Matthew Lyon, a member of this house, having been convicted of being a notorious and seditious person, and of a depraved mind, and wicked, and diabolical disposition, and of wickedly, deceitfully, and maliciously contriving to defame the government of the United States, and of having, with intent and design to defame the government of the United States, and John Adams, the president of the United States, and to bring the said government into contempt and disgrace, and with intent and design to excite against the said government and president, the hatred of the good people of the United States, wickedly, knowingly and maliciously written, and published certain scandalous and seditious writings or libels, be, therefore, expelled from this house." This was opposed by Mr. Gallatin and Mr. Nicholas, and upon being put to the vote, there appeared 49 for it, and 45 against it, and was of course lost, two-thirds of the members present not concurring in the vote. Cobbett, of course, did not let this opportunity of having a slap at his old antagonist pass unused. In Feb., 1799 (10 Porc. 107), he says: "Lyon looks remarkably well for a gentleman just out of jail. This man's re-election, while confined as a criminal, is a new and striking proof of the excellence of the system of universal suffrage, and must convince every one except a perverse royalist, that the American government is, as Mr. Lang says, 'the only lawful government on earth.' Happy must the nation be where it is but a single step from the dungeon to the legislature! Well might the pathetic Mr. Murray, (speaking on the old alien law,) express his fears, that the influx of foreigners would 'contaminate the purity and simplicity of the American character.'" In 1801, Mr. Lyon, at the close of the sixth congress, being the last in Mr. Adams' administration, declined a re-election, and left Vermont for Kentucky, where neither his business nor his political activity abated. In 1803, one session having run by in the mean time, he made his appearance in Washington, which had then become the seat of government, as a Kentucky representative. House Journal, 7, and 8 Cong. 402. The tables were now turned, as what in his last legislative campaign had been a minority, powerful, it is true, but the subject of banter and sometimes of something harsher still, had now become a majority so preponderating as almost to bear down dissent by the mere force of numbers. From having been the butt of the house, Mr. Lyon found himself now one of its heroes. The intolerant disposition with which majorities view the idiosyncrasies of their opponents, which first had worked against him, had now shifted to the other side; and perhaps if he had been disposed to turn the tables, he might have made the lank visages of the Connecticut members as much a subject of amusement as in former times they had made his own bearishness of look and manner. But to do him justice, this "wild Irishism," which had not been rubbed off in the mountains of Vermont, had at last been reduced in the forests of Kentucky. He is said by those who recollect him at this stage to have been a man of respectable bearing, and of frank and almost engaging manner; making up by his openness of temper and force of mind for his great defects of education and training. He continued to sit as a member from Kentucky through the eighth, ninth, tenth, and eleventh congresses, retiring in 1811, having previously refused the commissaryship of the Western army tendered to him by Mr. Jefferson.

After his withdrawal from congress, Mr. Lyon (or Col. Lyon, as he appears by this time to have been called) returned to Kentucky, where a short time afterwards he received from Mr. Monroe the appointment of United States factor for the Cherokee Nation. This drew him west of the Mississippi, and though by this time an old man, he displayed in the uncleared plains of the then outskirts of the Union the same surprising activity that he had shown in the once border lands of Vermont and Kentucky. Not content with sending to the press from time to time epistles which for good sense and political sagacity take rank decidedly above the average, and which exhibit a style which, though retaining its point, had by this time lost its roughness, he kept himself still in the ranks of that outpost of pioneers which is always a little ahead of civilization. Just before his death, when in his seventy-seventh year, he performed a journey which was recorded at the time by the hardy people who saw it, as a wonder in its way, and the history of which deserves now to be rescued from the newspapers where it long has lain dormant. See Niles' Reg. June 29, 1829, p. 287. His home was then at Spadre Bluff, a "town," as it was called, on the Arkansas river, about one hundred and forty miles above Arkansas City. About the first of the year 1822, he set to work to load a flat boat, which he himself had built, with furs, peltries, and Indian commodities, which he safely launched in the Arkansas river, and as safely piloted to New Orleans. Soon furs, peltries and Indian commodities were exchanged both for iron ware, almost equal in variety to the products of his old forge at Fair Haven, and for everything else that was necessary for the factory at Spadre Bluff, among which was included the machinery for a gigantic cotton gin, weighing fourteen hundred pounds. The outward passage was begun on the first of February in a climate and in a season eminently severe; but it did not chill the fires of the old pioneer, for on his way back, not content with pursuing the straight road home, he stopped at the mouth of White river, stored his freight there, and paid a flying visit to his Kentucky friends, having gone through within three months a journey of over three thousand miles, and this under weather and current so adverse that many a time he was obliged to spend hours in wading through the shallow stream, guiding his hands while they attempted to drag along the grounded flat boat, and always insisting upon doing his part in "rowing, steering, or cordelling." But this was the last time he was to drop down the current of the Mississippi, or visit, by way of an interlude, his second home

in Kentucky, for robust as he was, the chill of old age was at hand, and like the night of northern climates, was destined to drop upon him without the notice of an intermediate twilight. On August 1st, 1822, at Spadre Bluff, in his seventy-seventh year, died Matthew Lyon, loved as a neighbour, for he was full of that chivalrous spirit of generosity which is not a strange inmate of an Irish heart; and valued as a friend, for upon that warm temperament had been grafted the fertility of expedients belonging to the American pioneer.

The repayment to Mr. Lyon of the fine imposed in the trial in the text, was during his life brought before several successive congresses, but though it obtained at different periods the approval of the individual branches, for a long time, through the negligence encountered by private bills at the end of a session, it did not secure their concurrent sanction. At last, on July 4th, 1840, a bill to pay the sum with interest to Mr. Lyon's legal representatives, having passed through both houses, received the president's signature, having been preceded by a report of a committee in which the principles upon which the trial was conducted were emphatically repudiated, and a series of prior reports referred to, in which the same positions were taken. See 1st Sess. 26th Cong., Doc. 86, House Rep. Thus just forty years after the passage of the sedition law was its last vestige effaced, and its doctrines finally disowned.

LYON (BERTRAM v.). See Case No. 1,362.

Case No. 8,647.

LYON et al. v. FIFTY-SIX THOUSAND FOUR HUNDRED AND TWELVE FEET OF LUMBER.[1]

District Court, D. Connecticut. May, 1859.

SHIPPING—SEAWORTHINESS—INSUFFICIENT CREW.

[A sloop laden, both in hold and on deck, with lumber, *held* unseaworthy, in that she was manned by only three men, one of whom had lost a leg; and also in respect to physical condition, it appearing that she was 32 years old, had never been rebuilt, and had many rotten timbers, and that her seams opened, so as to cause her to fill, during a storm so moderate that she was able to carry her usual sails without damage thereto, and which was weathered without injury by a similar vessel, similarly laden.]

[This was a libel by Lyon and Billard to recover possession of a lot of lumber and shingles, which were shipped on board the sloop Columbus, and which the master refused to deliver.]

INGERSOLL, District Judge. The libel in this case alleges that in the month of November, in the year 1858, at Albany, in the state of New York, there was shipped for the libelants, on board the sloop Columbus, whereof Charles Johnson was master, and consigned to them, 56,412 feet of pine lumber, and 120 bundles of shingles, in good order and well conditioned, and that thereupon the said master signed a bill of lading for the same, agreeing to deliver the same to the libelants in the like good order, at New Haven, Conn., on the payment of freight at the rate of one dollar twenty-five cents per thousand feet for the lumber and twelve and a half cents per bundle for the shingles, the dangers of the seas only excepted. That soon thereafter the said master in said sloop, with said lumber and shingles on board, sailed from said port of Albany, but that owing to the unseaworthiness of the Columbus, and her being insufficiently manned, and to the negligence and insufficiency of the master and crew in her navigation, she became, before the completion of the voyage, disabled from the performance thereof, and that thereupon, near the port of Westport, in Connecticut, the said master of the Columbus caused the said lumber and shingles to be transshipped from the said sloop and put on board the sloop Michigan, John Johnson, master, to be transported in her to the port of New Haven, in fulfillment of the contract in the bill of lading. That, the Michigan having arrived at the port of New Haven with the lumber and shingles on board, the libelants were ready and offered to pay the master of the Michigan, or whoever should otherwise appear to be entitled or authorized to receive the same, the freight money as agreed, and demanded the delivery of the lumber and shingles both of the said John Johnson and the said Charles Johnson, but that they, confederating to deprive the libelants of the said lumber and shingles, refused to deliver the same, unless your libelants should pay to them or one of them, over and above the freight stipulated to be paid, a further large sum, to wit, seven hundred dollars. That no portion of the same has been delivered, with the exception of forty-two bundles of shingles. The libel prays that the merchandise mentioned may be delivered to the libelants, and that the said Charles Johnson and John Johnson may be decreed to pay the damages which they (the libelants) have sustained, together with their costs.

Charles Johnson, the master of the Columbus, appears, and makes answer to the libel. He admits that he was her master and owner; that he at Albany took on board the lumber and shingles stated in the libel to be transported to New Haven, and executed the bill of lading as therein stated. He admits that the merchandise in the bill of lading mentioned was not transported to New Haven in the Columbus; that on the voyage it was transshipped on board the Michigan, and by the latter vessel carried to New Haven, at which latter port the libelants were ready to receive the same and pay the freight and charges as agreed upon in the bill of lading, and that they tendered the said freight and charges, and demanded the delivery to them of the lumber and shingles in the libel mentioned, which he refused to do, unless the libelants would also pay certain other charges which the claimant insisted were right and proper, and which other charges, as the claimants insist, accrued in saving the property from

[1] [Not previously reported.]

the perils of the seas, and were not comprehended in the terms of the bill of lading. He insists that the lumber and shingles were properly stowed; that at the commencement of the voyage the Columbus was properly officered, manned, and equipped, and was seaworthy in every respect; that on the voyage, in consequence of a violent gale of wind, the vessel sprung a leak, filled with water, and with the lumber on deck became unmanageable, and that in consequence thereof the danger was imminent that the lumber and shingles on deck would be lost; that there would be no danger to the vessel if the lumber on deck were thrown overboard, but that to save the same to the libelants he drove the vessel on shore, by which his vessel became greatly damaged, and his life and the lives of his crew were put in peril, and all for the purpose of saving the lumber and shingles for the libelants. For this service, which he claims to be in the nature of a salvage service, he claims he should be paid, and that he refused to deliver the lumber and shingles to the libelants because they refused to pay for such latter service.

The first question presented is, was the Columbus, at the commencement of the voyage, properly manned and equipped, and in every respect seaworthy? If she was not, then it is admitted by the respondent that the claim which he makes is unfounded, and that the decree as prayed for should be in favor of the libelants. The Columbus, with the lumber on board, sailed from Albany about the 22d of November, 1858. She proceeded on her voyage, stopping at various places as far as Norwalk Islands, where she arrived on Saturday evening, the 27th of November, and came to anchor for the night. Early in the morning, on Sunday the 28th of November, she again set sail, with a view to proceed on her voyage to New Haven. The weather at the time was cloudy. Early in the day it blew strong from the northeast, accompanied with thick snow. About 4 p. m. it was discovered that she was leaking. The water in the hold increased so fast that in about half an hour she filled. The lumber on board kept her from going to the bottom. After it became evident that she must fill with water, she was headed for the shore. She stuck on a sand bar near Stratford, where the lumber on deck was secured fast, and the crew went on shore. The leaks, so far as discovered, were occasioned by the opening of her seams occasioned by the strain produced by the winds and waves. The blow was not so violent as to occasion any loss to any portion of the deck load, or to occasion its shifting. None of the sails or rigging of the vessel were carried away. During the whole of the time she had her forward and main sail set with two reefs in them. These were all the sails she ever carried. Another vessel, of about the same size as the Columbus, laden with a cargo of lumber on deck and in the hold, from Albany, bound to New Haven, was in the Sound on the same Sunday, and was in the storm, and arrived at her port of delivery that night without loss or damage.

From the evidence before the court I come to the conclusion that the Columbus was not seaworthy for the voyage, and that in consequence of such unseaworthiness the disaster that took place occurred. She had only three men on board all told; one of them, the cook, had lost one leg. This complement of men for a winter's voyage from Albany to New Haven, at a time when violent snowstorms are to be expected, in such a vessel, heavily laden as she was, with a cargo of lumber on deck and in the hold, was certainly insufficient. Prudent navigators go more strongly manned, although many navigators navigate their vessels with no more men than the Columbus had on board. In this respect she was unseaworthy.

In another respect she was unseaworthy. She was at least thirty-two years old. She had never been rebuilt. Though she had, a short time before the disaster, been repaired, many of her timbers and plank were rotten. The blow was not violent enough to open the seams of a staunch vessel in the way the seams of the Columbus were opened. After the disaster, she was not deemed fit to repair, and has been forsaken by her owner to go to destruction.

With this view of the case, without considering other questions that have been made, the decree must be in favor of the libelants.

LYON (HALSTED v.). See Case No. 5,968.

Case No. 8,648.

LYON v. NINE HUNDRED AND TWENTY-EIGHT BARRELS OF SALT.

[See Case No. 10,272.]

LYON (PECKHAM v.). See Case No. 10,899.

LYON (UNITED STATES v.). See Cases Nos. 15,650 and 15,651.

Case No. 8,649.

In re LYONS.

[2 Sawy. 524;[1] 19 Int. Rev. Rec. 78; 1 Am. Law T. Rep. (N. S.) 167; 1 Cent. Law J. 137.]

District Court, D. California. Jan. 29, 1874.

MARRIED WOMEN ADJUDGED BANKRUPT.

By the laws of California a married woman living separate and apart from her husband is liable to suit on indebtedness contracted by her while so living. She may therefore be adjudged a bankrupt.

[Cited in Kinney v. Sharvey, 48 Minn. 96, 50 N. W. 1025.]

[See note at end of case.]

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

[In the matter of Julia Lyons, a bankrupt.]

W. H. Fifield, for petitioning creditor.
Whitney & Naphtaly, for respondents.

HOFFMAN, District Judge. The question raised by the demurrer in this case is whether the respondent, being a married woman, is liable on a contract to pay rent, and if she has committed an act of bankruptcy, can be adjudged bankrupt. It appears that the husband of the respondent has long since renounced and abandoned all his marital rights and duties. For twelve years Mrs. Lyons has lived separate, and apart from him, supporting herself and her minor children by her own exertions. In the course of her business as keeper of a lodging-house, she has contracted an indebtedness for rent, and being so indebted, and in contemplation of bankruptcy and insolvency, has made, as is alleged, an assignment of her property, in fraud of the bankrupt act [of 1867 (14 Stat. 517)].

It is urged by the respondent's counsel that the contract of a married woman for the payment of money is void, and that the petitioning creditor has no debt which the court can recognize. On this point numerous authorities are cited. But as they, for the most part, are decisions under the act of April 17, 1850 [St. Cal. 1850, p. 254], and the amended act of May 12, 1862 [St. Cal. 1862, p. 518], no examination of them is necessary. The decision of the question before us turns upon the force and effect to be given to the act of March 9, 1870 (Laws 1870, p. 226). The first three sections of that act are as follows: Section 1: "The earnings of the wife shall not be liable for the debts of the husband." Section 2: "The earnings and accumulations of the wife and her minor children living with her, or being in her custody, while the wife is living separate and apart from her husband, shall be the separate property of the wife." Section 3: "The wife, while living separate and apart from her husband, shall have the sole and exclusive control of her separate property, and may sue and be sued without joining her husband, and may avail herself of, and be subject to, all legal process in all actions, including actions concerning her real estate." The fourth section prescribes the mode in which she may convey her real estate.

The object of these enactments is apparent. It was to secure to the wife, when abandoned by her husband, the fruits of her own industry, and to enable her to support herself and children out of her earnings and accumulations, free from his interference or molestation. For this purpose her earnings and accumulations, which at common law belonged to her husband, are declared her separate property, and her rights in respect of such property are carefully defined. She is to have the sole and exclusive control of it; she may separately sue or be sued, and may avail herself of, and be subject to, all legal process in all actions.

That the principal intention of the legislature was to protect deserted wives in their just rights, and not to impose upon them additional liabilities, is admitted. For this purpose they were placed in the position of quasi femmes sole, and were granted all the powers necessary to enable them to earn their own livelihood, and to retain and enjoy the fruits of their industry.

But to accomplish this object, it was evidently necessary to create new liabilities, as well as to confer new rights. The capacity to sue for moneys earned by or due to her was clearly indispensable to enable the wife to attain the object contemplated by the law. Justice and reason, and even her own interests, demanded that she should herself be liable for all debts contracted by her. For, without such liability, how could she obtain the credits usually necessary in the conduct of any business, and what could be said of the morality of a law which should announce to a woman that for all debts and demands due to her she shall have the right to sue and enforce payment, but as to debts due by her she may plead her coverture as a conclusive bar to the action.

The separate property of a married woman has, on general principles of equity, been held liable for debts contracted in respect to it, or in and about its management and improvement. The act of 1870 created a new species of separate property in the earnings and accumulations of the wife, while separated from her husband.

The equitable principles already adopted by the courts, and usually enforced by statute, required that this new species of separate property should be liable for debts incurred in its creation or management, and in the course of the business, the proceeds of which the statute enables the wife exclusively to enjoy. Further discussion, however, is needless, as the language of the act is too explicit to be mistaken. It enacts that the wife separated from the husband "may sue and be sued, and that she shall be subject to all legal process in all actions." This language is obviously inconsistent with any exemption from liability to suit for a just debt on the pretext that, being a married woman, her contracts for the payment of money are void.

The respondent being thus found to have incurred a valid indebtedness and a liability to be sued therefor, as if a femme sole, she may, if she has committed an act of bankruptcy, be adjudged a bankrupt. Hil. Bankr. p. 49; Avery & H. Bankr. pp. 33, 34; In re Kinkead [Case No. 7,824].

The demurrer is overruled, and the respondent allowed ten days to answer the petition.

[2] [NOTE. Whether a married woman may be proceeded against under the bankrupt act would seem to depend in each particular case upon her

[2] [From 1 Cent. Law J. 137.]

power of making contracts or of engaging in trade or other business independently of her husband. The general rule of the common law is that a married woman possesses no such power, but that, if she enters into contracts or engages in trade or other business with her husband's consent or ratification, she acts simply as his agent; and hence that the fruits of such contracts or the accumulations of such trade or business belong to him, and not to her. Bish. Mar. Wom. § 733; Switzer v. Valentine, 4 Duer, 96; Jenkins v. Flinn, 37 Ind. 349. Wherever this rule of the common law obtains in full force, it is clear that she cannot be adjudged a bankrupt. In re Goodman [Case No. 5,540].

[But this rule admits of exceptions, and these may be arranged into two classes: (1) Exceptions created by local custom or by local law; (2) exceptions growing out of a temporary cessation of the coverture.

[Under the first of these exceptions, is the case, of frequent occurrence in the English books, where a married woman acts as a sole trader, according to the custom of London. Ex parte Carrington, 1 Atk. 206; Lavie v. Phillips, 3 Burrows, 1776. 1 W. Bl. 570. See, also, in Pennsylvania, Burke v. Winkle, 2 Serg. & R. 189; in South Carolina, Newbiggin v. Pillans, 2 Bay, 162; in Louisiana, Christensen v. Stumpf, 16 La. Ann. 50; Spalding v. Godard, 15 La. Ann. 277; Bowles v. Turner, Id. 352; in California, Melcher v. Kuhland, 22 Cal. 522; Abrams v. Howard, 23 Cal. 388. Under the same head would fall those cases like Jenkins v. Flinn, supra, where, by statute in particular states, a married woman may, under certain circumstances, contract liabilities, carry on business, and sue and be sued independently of her husband, and as a femme sole. In these cases there would seem to be no doubt that she is amenable to the bankrupt law; as in New York, In re O'Brien [Case No. 10,397]; Graham v. Starks [Id. 5,676]; or in Illinois, In re Kinkead [supra]. Thus, it was held in the last case in the United States district court at Chicago, by Blodgett, J., that, where a husband and wife carried on a business in partnership, their status was such, under the statutes of Illinois relating to married women, that the firm might be proceeded against in bankruptcy, and hence that the partnership creditors were entitled to a preference, in the distribution of the assets, over a creditor of the husband whose demand had accrued prior to the organization of the firm. And it was intimated that the wife would be separately adjudicated a bankrupt if it should be found necessary in the course of the proceeding to do so, in order to reach any individual property she might have. In the case of In re Goodman [supra], determined in the United States district court for Indiana, before Gresham, J., the principle above stated is fully recognized; but when applied with reference to the statutes of Indiana relating to married women, as interpreted by the supreme court of that state, the case resulted in the dismissal of the petition. It was found under the Indiana statutes, as expounded by the state supreme court: (1) That a married woman cannot engage in any kind of trade or business on her own account unless she have separate property; (2) that if a married woman, not having separate property or means of her own, engage in and carry on business, the profits, if any there be, belong to the husband as the earnings of the wife; and (3) that a married woman in Indiana, possessed of no separate estate, is relieved of none of the disabilities imposed upon her by the common law. The petition failed to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, and it was held to follow that she could not be adjudged a bankrupt. So in the case of In re Slichter [Case No. 12,943], in Minnesota, where the statute allows a married woman, under certain circumstances, to engage in trade in her own name, upon obtaining a license from a probate justice, in which case the business and profits become her separate property, and she is bound by her contracts as a femme sole, Nelson, district judge, held that a married woman, who had been engaged in business as a member of a partnership firm, but without complying with the statute, could avail herself of the plea of coverture to defeat the bankruptcy proceedings against her.

[Under the second head, which embraces the question whether a married woman may be adjudged a bankrupt where the marriage relation has been temporarily interrupted, the books furnish many instructive decisions defining the circumstances under which, independently of local custom or statute, a married woman may be separately sued. These decisions embrace cases where a married woman lives apart from her husband on a separate maintenance, in which case it has been held and afterwards denied, in England, that the wife may be sued at law as a femme sole. Corbett v. Poelnitz, 1 Term R. 5. Contra, Compton v. Collinson, 1 H. Bl. 350; Clayton v. Adams, 6 Term R. 604; Marshall v. Rutton, 8 Term R. 545. And Chancellor Kent states (2 Comm. 161) that the rule of Corbett v. Poelnitz has never been adopted in this country. It has also been held in England that a wife may be sued at law whose husband is an absent alien enemy, and is under an absolute disability of returning (Derry v. Duchess of Mazarine, 1 Ld. Raym. 147); or where he had been transported (Sparrow v. Carruthers, Coke, Bankr. Law, 29); or had been banished or had abjured the realm (Lady Belknap v. Weyland, 1 Co. Litt. 132b, 133a). So it has been held in Massachusetts that a married woman who had been divorced a mensa et thoro might sue and be sued as a femme sole in respect of property acquired or debts contracted by her subsequently to the divorce. Dean v. Richmond, 5 Pick. 461; Pierce v. Burnham, 4 Metc. [Mass.] 303. And it has been held in the same state that a femme covert, whose husband had deserted her in a foreign country, and who had thereafter maintained herself as a single woman, and for five years had lived in that commonwealth, the husband being a foreigner, and having never been within the United States, was competent to sue and be sued as a femme sole. Gregory v. Paul, 15 Mass. 31. And the question is now said to be settled in Massachusetts, as a necessary exception to the rule of the common law, placing a married woman under a disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a femme sole. "It is," said Shaw, C. J., "an application of an old rule of the common law, which took away the disability of coverture where the husband was exiled or had abjured the realm." Gregory v. Pierce, 4 Metc. [Mass.] 478. And, within the meaning of this principle, the residence of the husband within another of the United States is held to be equivalent to his residence in a foreign state. Abbot v. Bayley, 6 Pick. 89. "But," said Shaw, Ch. J., in Gregory v. Pierce, supra, "to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce de facto, as far as he can do it, the marital relation, and leave his wife to act as a femme sole. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm."

[In Love v. Moynehan, 16 Ill. 277, 282, the supreme court of Illinois, after reviewing many modern cases, hold the law to be "that where the husband compels the wife to live separate from him, either by abandoning her or by for-

cing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them as a feme sole, during the continuance of such condition."

[So it has been held in a recent case in Georgia that, on general principles, a married woman, whose husband has deserted her and resided in another state, has the right to contract and be contracted with, to sue and be sued, as if sole. Clarke v. Valentino, 41 Ga. 143. See, also, as supporting the same view, the following cases: Rhea v. Rhermer, 1 Pet. [26 U. S.] 105; Cornwall v. Hoyt, 7 Conn. 427; Arthur v. Broadnax, 3 Ala. 557; James v. Stewart, 9 Ala. 855; Roland v. Logan, 18 Ala. 307; Rose v. Bates, 12 Mo. 47; Starrett v. Wynn, 17 Serg. & R. 130; Bean v. Morgan, 4 McCord, 148; Valentine v. Ford, 2 Browne (Pa.) 193. It would seem to follow by reasonable analogy that where a married woman is, for any such reason, liable to be sued as if sole, at least in an action at law, she may, if otherwise amenable to the provisions of the bankrupt act, be proceeded against thereunder. Accordingly, it was held in England, in Ex parte Franks, 7 Bing. 762, that the wife of a convict sentenced to transportation was liable to be made a bankrupt, she having become a trader, although her husband had not been sent out of England. The sentence of transportation against her husband rendered her liable to suit generally; and the fact that she had become a trader brought her within the provisions of the English bankrupt law.] [2]

LYONS (ALLEN v.). See Case No. 227.

LYONS (GAY v.). See Case No. 5,281.

LYONS v. The LADY FRANKLIN. See Case No. 7,982.

LYONS (MUNSON v.). See Case No. 9,935.

Case No. 8,650.

In re LYTLE et al.

[14 N. B. R. 457; [1] 11 Phila. 522; 3 N. Y. Wkly. Dig. 303; 5 Am. Law Rec. 306; 9 Chi. Leg. News, 18; 33 Leg. Int. 349; 1 Cin. Law Bul. 246; 24 Pittsb. Leg. J. 14.]

District Court, W. D. Pennsylvania. Sept. 11, 1876.

DISCHARGE OF DEBTOR — COMPOSITION — LEVY OF EXECUTION ON PERSONAL PROPERTY — JURISDICTION OF DISTRICT COURT.

1. If a resolution of composition has been duly ratified, it confines the secured creditor to his security, and discharges the debtor from personal liability for the secured debt.

2. If a composition is entered into for cash payments, secured by a mortgage on real estate, the district court has no jurisdiction to restrain a creditor from levying an execution on personal property, although the name of such creditor was properly placed on the list of creditors.

[Cited in Re Hinsdale, Case No. 6,526; Re Negley, 20 Fed. 500.]

[Cited in Pupke v. Churchill, 91 Mo. 81, 3 S. W. 831.]

Motion to dissolve an injunction.

Smith & Raymond, for the motion.

Rodgers & Oliver, contra.

KETCHUM, District Judge. On the 1st day of November, 1875, J. L. Lytle & Company filed in this court their petition in voluntary bankruptcy. November 19, 1875, they were adjudicated bankrupts. No assignee was ever appointed. November 26, 1875, they filed their petition for a meeting of creditors, to enable them to offer terms of composition under the 17th section of the act of June 22, 1874 [18 Stat. 182]. The meeting was ordered, and composition entered into December 10, 1875, by which they were to pay forty cents on the dollar, cash, in two installments of twenty per cent. each, one payable March 1st, 1876, the other May 1st, 1876; the payment thereof to be secured by the mortgage of Joseph L. Lytle, and his mother, Isabel Lytle, on all the real estate of the said Joseph L. Lytle, in the twenty-third ward of the city of Pittsburg, to Thomas T. Wightman, in trust for the creditors. February 28, 1876, the proceedings were approved by the court, and the resolution ordered to be recorded, and the statement of assets and debts ordered to be filed. Among the creditors, in the statement of creditors' addresses and debts, were named T. B. Young & Company, and Thomas B. Young, who were returned as secured by liens of judgment upon real estate. They were notified of the meeting of composition, also of the inquiry on approval of the composition by the court. They took no part in the composition or inquiry. They neither offered to release their liens and come into composition for their whole debts, nor to apply for ascertainment of the excess of their debts beyond the value of the securities, and to come in for the difference. August 11, 1876, the said T. B. Young & Company, and Thomas B. Young, issued executions on their judgments out of the courts of common pleas of Allegheny county, and levied upon the stock of goods of the said J. L. Lytle & Company, in their store, in the city of Pittsburg. August 22, 1876, J. L. Lytle & Company filed a petition in this court for an injunction praying the court to restrain the plaintiffs in the executions from interfering with the property levied upon. August 24, 1876, the court ordered an injunction as prayed for. August 26, 1876, the said T. B. Young & Company, and Thomas B. Young, moved the court to dissolve the injunction and dismiss the petition.

The court ordered the injunction, under the authority given by the act to enforce the compositions, but with many misgivings at the time, in view of the status of the property in question. It is clear that the proceeding in composition is a proceeding in bankruptcy, and is an alternative mode of carrying out the principles and effectuating the purposes of the bankrupt law. It is, in fact, substituting the disposition of the debt-

[2] [From 1 Cent. Law J. 137.]

[1] [Reprinted from 14 N. B. R. 457, by permission.]

or's estate, by himself and a majority of his creditors, subject to the approval of the court, for the distribution by the assignee in simple bankruptcy. As in simple bankruptcy, all creditors who have had notice are bound by the proceedings, so in composition, all who have had notice, and whose names, residences and debts have been returned and filed by the debtor, are bound by the composition. The section of the act relating to composition declares that the provisions of a composition accepted by the resolution, in pursuance of said section, shall be binding on all the creditors whose names and addresses and the amount of whose debts are shown in the statement of the debtor, produced at the meeting at which the resolution shall have been passed; but shall not affect or prejudice the rights of any other creditors.

There is no exception, either expressly or by implication, of secured creditors from its binding force. In my view it comprehends more than the stipulation that the debtor shall pay, and the unsecured creditors shall receive a certain amount of money, in satisfaction of their debts. As in simple bankruptcy, the distribution among the unsecured creditors binds the secured creditors to look to their securities for their debts, and discharges the debtor from all personal liability, so this provision, besides the enforcement of the stipulations of the composition, means, also, that the composition shall confine the secured creditor to his security, and discharge the debtor from personal liability for the secured debt. If it does not, then the provision for composition may be regarded as useless in any case where there are secured debts; for, in every such case, before the debtor could, with any safety, proceed to a composition, he would, in his insolvency, be obliged to raise money to pay off the liens upon his property, to prevent the secured creditor, in his stronghold, from defeating his composition, and harassing him indefinitely with executions. I cannot believe any such results were intended by the lawmakers, no less than giving the creditor who is secured in full the power to prevent the debtor from paying his other creditors any portion of their debts, and from obtaining his discharge. But this court cannot follow a debtor after his discharge in bankruptcy, or by composition, and with its jurisdiction, protect him from suits wrongfully brought on the debt from which they may be discharged; nor can it follow property that has passed from its jurisdiction and protect it. In this case a composition was entered into for cash payments, secured by a mortgage on real estate. The composition in its terms in no way involves the property in question, either as security or otherwise, and is entirely independent of any disposition of it. It was left, so far as appears by the record, unconditionally in the possession of the debtor, where it has been from the beginning. On the recording of the resolution of composition, the debtor and his creditors having taken from the court the distribution of the assets of the debtor, all control and jurisdiction over the debtor's property went with it, and from that time the court has had no power over it.

Upon full consideration we have concluded that we had no power to issue the injunction in this case, and, therefore, dissolve the said injunction, and dismiss the petition.

Case No. 8,651.

LYTLE v. FENN et al.

[3 McLean, 411.] [1]

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

JUDGMENTS—MOTION TO SET ASIDE—FAILURE TO GIVE SECURITY FOR COSTS—IN EJECTMENT—SERVICE OF NOTICE—AGAINST CASUAL EJECTOR.

1. A failure to give security for costs, under the general rule of the court, no cause for setting aside a judgment.

2. Nor is the misapprehension of counsel a ground for doing so, under ordinary circumstances.

3. A judgment against the casual ejector, is different from an ordinary judgment, and may be set aside for good cause, after the expiration of the term at which it was entered.

4. In the notice offered to the declaration, the tenants should be named, and on them the notice should be served.

5. When the tenants are not named in the notice it is defective, and does not authorise a judgment against the casual ejector.

6. On the merits, connected with circumstances of great hardship, the court, in the exercise of their discretion, will set aside a judgment against the casual ejector at a subsequent term from that at which it was entered.

Mr. Corry, for plaintiff.

Messrs. Morris and Krepsey, for defendant.

OPINION OF THE COURT. At the last term a judgment was obtained against the casual ejector, and a motion is now made to set the judgment aside, on the following grounds: (1) There was no security for costs given by the plaintiff. (2) The tenant in possession was instructed by his counsel that no steps would be taken in the case at the last term. (3) The notice was defective, in not being directed to the tenants in possession.

It is insisted that the lessor of the plaintiff being in default, for not having given security for costs, as required by the rule of court, that no default could be enforced by a judgment against the casual ejector. The want of security may be taken advantage of by motion at any time during the progress of the cause; but after judgment, by default or otherwise, this objection cannot be made. If this were not different from an ordinary judgment, this motion could not now be heard. For after the expiration of

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

the term the court cannot ordinarily set aside or modify a judgment. They may correct any clerical error in the entry of the judgment, but this is the extent to which their power may be exercised under the common law. In Waters' Heirs v. Harrison, 4 Bibb, 87, it is said, that in ejectment the court need not be very strict in requiring cause to be shown to set aside a judgment against the casual ejector. 1 Caines, 503. The court will go further to protect the possession, when it can be done without injury to the plaintiff's claim, than it is willing in other cases to proceed. Judgment against the casual ejector irregularly obtained, will, as a matter of course, be set aside (5 Cow. 418); and as the situations of claimant and defendant in ejectment, are materially different, the courts are liberal in their rules for setting aside judgments against the casual ejector, although regularly signed; and will grant them, even after execution executed upon affidavit of merits or other circumstances which at their discretion they may deem sufficient. Doe v. Roe, 4 Burrows, 1996; Dabbs v. Paffer, Strange, 975; Doe v. Roe, 5 Taunt. 205.

When judgment has been obtained against the casual ejector and writ of possession has been executed, on an affidavit of merits and of fraud or surprise, and the payment of costs, the court will set aside the writ and award restitution. The misapprehension of the counsel as to the proceedings of the last term, that no step would be taken, can afford no ground on which to set aside the judgment at a subsequent term.

As to the defectiveness of the notice: The notice in this case is not directed to any of the tenants, but the person serving the declaration swears that he served a copy of the declaration on James Denham and other tenants in possession. In Craig v. Clarke, 3 A. K. Marsh. 252, it is said that a notice in ejectment is in the nature of process, and cannot be aided by any statement of the person serving the declaration, or by the defendants' appearing and excepting, unless they enter into the common rule, and the court say that a defect cannot be aided by any statement of the person serving the declaration. In Beal v. Siverts, 1 A. K. Marsh. 154, the court say that the declaration and notice answer the place of process to coerce an appearance, and the notice should, with the certainty of an original writ, state to what court the tenants are to appear. Tillinghast's Adams, 229. The name of the tenant in possession must be prefixed to the notice. And again, the notice must contain the Christian and surname of the tenant or tenants in possession. But it seems from Doe v. Roe, 5 Moore, 73, that the notice will be sufficient, although the address to the tenant be altogether omitted, provided it be stated in the affidavit of service, that the tenant was duly served with a copy of the declaration before the assoign day, and acknowledged such service.

In the present case there was no acknowledgment of the service by the tenants. The court could not know who were tenants, unless the affidavit of the person making the service be taken; and on that alone judgment was entered against the casual ejector. The consequence of such a judgment is to turn out of possession all the tenants on whom a notice was served. It seems to us that the tenants against whom the action is brought, should be named in the notice, and this should govern the person making the service. Any departure from this certain and safe rule would occasion great uncertainty and confusion. If the notice, as is manifest, is in the place of process to bring the party into court, the naming of the persons in possession would seem to be indispensable. How is the person who serves the notice to know who are in possession. He must go beyond the process to ascertain the fact. And if he may do this in so important a matter as this, why may he not do the same thing in the service of other process. When the tenants are named in the notice, the service is made on the responsibility of the plaintiff, as it should be, and, in case of a mistake, he is accountable for the costs. It seems to us that in this case the notice was essentially defective, and did not authorise the judgment.

The affidavit of Denham shows that he has been in possession forty years, has defeated several ejectments in the state court, on the title now set up, and that he claims under a patent from the United States. Stronger merits could not be shown, and on this ground, connected with the other circumstances of the case, we think the judgment against the casual ejector should be set aside. Judgment set aside, cause entered and consent, rule, &c.

LYTLE (UNITED STATES v.). See Case No. 15,652.

M.

Case No. 8,652.

MAAS v. The PEDEE.

[39 Hunt, Mer. Mag. 330.]

SHIPPING — NONDELIVERY OF CARGO — CRIPPLED CONDITION—POWER OF MASTER TO SELL—PERISHING CONDITION.

[1. A vessel is not responsible for the nondelivery of a cargo pursuant to the bills of lading where she puts into port in a crippled condition, owing to the disabling of her crew from disease.]

[2. The master has authority in law, where the cargo is in a perishing condition, to cause the same to be sold at public auction, if he acts bona fide and under evidence showing a stringent necessity at that time for so doing.]

[3. The master, having put into a port of necessity, finding his cargo of hides filled with vermin and in a perishing condition, is justified, acting under competent advice, in selling it at public auction.]

[This was a libel in rem by Ferdinand Maas against the schooner Pedee for failure to deliver goods under the terms and conditions of a bill of lading.]

This was an action brought to recover for the nondelivery of 553 hides, shipped at Aspinwall on July 2, 1855, under a bill of lading consigning them to the libelant at this port. The schooner left Aspinwall well manned and provided, but the crew were soon disabled by disease, and she was blown on the coast in almost a helpless condition, but was at last got into Carthagena in a crippled condition. A portion of the hides were found filled with vermin, and in a perishing condition. A survey was called on the cargo by the master of the schooner, under the advice of the American consul and resident merchants conversant with the trade. A sale of the hides was advised, as being in a perishing condition. The master decided that to be the best course for the interest of the owners of the hides and the ship, and they were accordingly sold at auction. After being cleaned and prepared, they were shipped to New York, and brought, on sale, a considerable advance on the auction price.

HELD BY THE COURT (BETTS, District Judge): That the run of the schooner to Carthagena, and her detention there, were the result of inevitable necessity, and the vessel is not responsible to the libelant for nondelivery of the cargo, pursuant to the bills of lading, arising from that cause. That the auction sale was made in good faith by the master, and under the urgency of an apparently extreme necessity. That the master has authority in law to cause cargo in his charge, being in a perishing condition, and which he is unable otherwise to save or transmit pursuant to the contract of affreightment, to be sold at public auction for the benefit of whom it may concern, if he acts bona fide and under evidence showing a stringent necessity for so doing. The reality of the peril or urgency which can justify a master in such an act is not to be determined by the after results. That the master becomes in such a case, by implication, clothed with power, if acting in entire good faith, to sell either ship or cargo, or both; and his acts in so doing will be upheld by the law, if upon all the facts before him it may be reasonably supposed a prudent owner personally present would have directed or approved the sale. That on the facts the master was justified in ordering the sale of the hides in question. Libel dismissed, with costs.

MABEY, The R. L. See Cases Nos. 6,333 and 6,334.

Case No. 8,653.

MABIE et al. v. HASKELL et al.

[2 Cliff. 507.] [1]

Circuit Court, D. Massachusetts. Oct. Term, 1865.

PATENTS—SHOE LASTS—COMBINATION—PURPOSE OF DESCRIPTION IN PATENT.

1. The claim in a patent for an improved shoe-last was as follows: "The sectional shoe-last a, b, c formed in the manner specified, with the measurement 4 (which is the line drawn across the last from the corner of the toe to the back of the heel, at the upper part) as short as the measurement at the line 6 (which is the line drawn around the base of the last, from the corner of the toe to the centre of the heel at the junction with the sole), for the purposes as specified." *Held*, that the claim was not for a combination, where the invention consisted of a new arrangement of several old elements, but was for the peculiar form of the described device, in which the toe was elevated higher than usual, the back of the heel thrown forward, and which was as short in the first measurement described as in the second.

2. The purpose of the requirement of law, that an invention shall be described, in the patent, in such full, clear, and exact terms as to enable one skilled in the art to construct and use the same is twofold: first, that, when the patent has expired, the public may avail themselves of its benefits; second, that, while the patent is in force, the public may not ignorantly infringe it, for want of clear definition of its character.

3. It is not a defence to the charge of infringement upon a patent for an improved shoe-last, that it cannot be construed to embrace boot-lasts, when it appears in evidence that respondents had used the invention, without alteration, in the manufacture of boots as well as shoes.

4. It was set up in defence that the respondents did not infringe the rights of the complainants, because the last made by respondents was made in two, while that of complainants was made in three sections. *Held*, that such a defence only had force where the patent of the complainant was for a combination, all the elements of which were old, and which was only

[1] [Reported by William Henry Clifford, Esq., and here reprinted by permission.]

infringed when the entire arrangement or combination was wrongfully used.

[Cited in Rees v. Gould, 15 Wall. (82 U. S.) 194; P. P. Mast & Co. v. Rude Bros. Manuf'g Co., 3 C. C. A. 477, 53 Fed. 124.]

This was a bill in equity founded upon letters-patent [No. 36,495] on a certain improvement in shoe-lasts. The inventor, one Nathaniel Jones, during the pendency of his application, assigned the entire interest to the complainants, to whom the patent issued September 16, 1862. The bill charged that the defendants had on the 1st of June, 1863, infringed the patent, and prayed for an injunction and for an account. The defences were: First, that the assignor of the complainants was not the original and first inventor of the improvement set out in the patent; second, that the invention was not described in such full, clear, and exact terms as to enable a person skilled in the art to construct it; third, a denial of infringement on the part of the respondents.

T. S. Wakefield, for complainants.
J. W. Hubbard, for respondents.

CLIFFORD, Circuit Justice. The state of the art at the date of the invention is first described by the inventor. He states that it was usual, prior to his invention, to form the bottom of the last, so that a straight line would touch the bottom of the heel, and the sole of the foot part, raising the toe end of the last but little above a projection of that line, while the last at the back end of the heel was almost at right angles to such a line. The injurious effect of such a construction was, as the inventor states, that in walking, the person wearing such shoes found that the heel of the foot was apt to slip up and down in the shoe, and that the shoe itself, or the upper leather thereof, was apt to wrinkle over the front of the foot and at the side of the ankle. The reasons of the difficulty, as explained, are that a line measured around the lower edge of the last, from the corner of the toe to the centre at the back of the heel, was less, in a last so constructed than a line measured from the same point of the toe to the back part of the last, near the top thereof, which made the shoe, as compared with the foot, measure most in the wrong place. Having stated the difficulties to be overcome, he proceeds to describe his invention, and says that it consists in so forming the last and cutting the "uppers," that the measurement from the point of the toe to the centre at the back shall be as small or smaller than the measurement at the lower part of the last, which improvement is effected, as the specification states, by raising the toe of the last, and drawing in the upper part of the last at the back above the heel. The beneficial effect of a last so formed is, that the shoe takes a bearing on the upper part and sides of the foot, sufficient to prevent the motion of the heel in the shoe, and the sole being made nearly in the form it will assume after the shoe is worn, there will be no wrinkles in the upper leather of the shoe. The next step of the inventor is to describe what he calls his improved last, and "the principle on which it is shaped." Reference is then made to the drawings; and the statement of the inventor is, that the device there delineated will show more fully the peculiarity of shape given to the shoe, demonstrating that the alleged peculiarity of shape or form is the characteristic feature of the invention. Figures two and four of the drawings represent the last in three sections. Part a is the main section of the last; part b is the usual front or instep piece; and part c is a heel section formed by sawing off the back part of the last diagonally from near the junction of the sole with the back of the last. The statement of the specification is, that these sections are held together by dowels and a screw. The peculiar shape of the last is again pointed out by reference to the red lines in the drawings; and the allegation is, that the toe of the last, constituting the patented invention, is elevated higher from the base line, as there indicated, than is usual, and that the back of the heel at the upper part is thrown forward. The extent of these changes is such that a line drawn across the last from the corner of the toe to the back of the heel, at the upper part, will be as short or slightly shorter than a line drawn around the base of the last from the corner of the toe to the centre of the heel, at the junction of the sole. Whereas the reverse of that, as the inventor states, is true in lasts made prior to his invention. The representation also is, that the patterns for "uppers" are cut with reference to the peculiar shape of the last, and that many advantages result from the use of this invention. One is, that the shoe can be made for a higher instep than with the old lasts, without interfering with the mode of obtaining a correct draught of the heel and sides of the shoe. When completed, also, the shoe assumes a shape adapted to the form and position of the foot; so much so, that if a fit be made moderately tight, the shoe will remain on the foot without any lacing, and the heel will not move up and down in walking, because the leather will set closely to the sides of the foot. Such is the description of the invention as set forth in the specification and as illustrated in the drawings. The claim of the patent is as follows: "What I claim and desire to secure by letters-patent is the sectional shoe-last (a, b, c) formed in the manner specified with the measurement 4 (which is the line drawn across the last from the corner of the toe to the back of the heel at the upper part) as short as the measurement at the line 6 (which is the line drawn around the base of the last from the corner of the toe to the centre of the heel at the juncture with the sole), for the purposes and as specified." Evidently the claim is not for a combination, as where the inven-

tion embraces several old elements, and the improvement consists in some new arrangement of those elements, whereby a new and useful result is obtained. On the contrary, it is quite clear that what the inventor claims is the forming the last as described, that is, that the toe of the last shall be elevated higher than what was usual prior to the date of the invention, and that the back of the heel shall be thrown forward, as shown in the drawings, and that the last, "formed in the manner specified," shall be as short or slightly shorter in the first measurement described in the claim than in the second measurement. Carefully examined, it is clear that it is a patent for the peculiar form of the described device, and not for a combination, as understood in the decided cases.

The respondents deny that the assignor of the complainants is the original and first inventor of the improvement, and upon that question the parties have examined more than forty witnesses. The parties must be content, under the circumstances, with the statement of the conclusion of the court upon matters of fact, as the separate examination of the testimony of the witnesses would extend the opinion to an unwarrantable length. Suffice it to say, after an attentive perusal of the testimony, I am of the opinion that the invention in controversy is both new and useful. Elevating the toe will not accomplish the result, unless that change be combined with the described alteration at the heel; and it is a great mistake to suppose that the alteration at the heel of the last consists merely in making the particular measurement shorter by cutting off the heel part of the last at the top. The patented improvement contemplates nothing of the kind, but the heel part is thrown forward, which has the double effect to produce the proper swell on the sides of the last, and also to shorten the line from the corner of the toe to the back of the heel at the top. Attention to the true construction of the patent and to these explanations will show that the most of the testimony introduced by the respondents is either erroneous or has no application to the real nature of the invention.

The second defence set up by the respondents is, that the invention is not properly described in the specification, but I am of the opinion that the objection is entirely without merit. Instead of being indefinite and insufficient, as is supposed, the description is in fact unusually full and precise. The requirement is, that it shall be in such full, clear, and exact terms as to enable any one skilled in the art to make, construct, and use the invention. The purpose of the requirement is twofold: first, that when the term has expired and the invention becomes public, such means of information may be accessible as will enable others to avail themselves of its benefits; and, second, that, while the patent is in force, others may be informed of the precise claim, and not ignorantly infringe upon the exclusive right. The meaning of the requirement is, that the specification shall be so clear that it may be understood by ordinary mechanics, and that the thing described can be made from the description and the drawings. Hogg v. Emerson, 11 How. [52 U. S.] 606. The description in this case is full and satisfactory, and the objection is overruled.

The third defence is a denial of the charge of infringement; but the denial is special, and on that account deserves to be carefully considered. The improvement as claimed is for shoe-lasts, and the argument is, that it cannot be considered as including boot-lasts. But the evidence shows that the respondents have used it for the making of shoes as well as boots, and that the improvement is suited for the making of the latter as well as the former, so that the objection in any point of view cannot prevail. The remaining ground assumed by the respondents, in this branch of the case, is, that they do not infringe, because, as they insist, the last they make, use, and vend is a last of two sections, and not of three, as described in the specification of the complainants' patent. They insist and well insist, that where an invention consists merely in a combination of elements, all of which are old, a party is not guilty of infringement who uses only a part of those elements. The leading case upon that subject is that of Prouty v. Ruggles, 16 Pet. [41 U. S.] 340, in which the opinion was given by the late chief justice. The instructions given to the jury in that case were, that, unless it was proved that the whole combination was substantially used in the defendants' machine, the act complained of was not a violation of the plaintiffs' patent, although one or more of the parts specified were used in the combination of the defendants. Exceptions were taken to that part as well as to other parts of the charge, but the exceptions were overruled, upon the ground that none of the parts were new, and that the patent was for a combination, and that the invention consisted merely in arranging different parts of the machine in the manner stated in the specification, for the purpose of producing a certain effect. The correctness of that decision cannot be denied, but the answer to it as applied to this case is, that the improvement in question is not a combination, as has already appeared. Hall v. Wilds [Case No. 5,954].

In view of the whole evidence, I am of the opinion that the respondents are guilty of infringement, as is alleged in the bill of the complainants.

The complainants are entitled to a decree.

Case No. 8,654.

In re McADAM.

[4 Sawy. 119.] [1]

District Court, D. California. Nov. 10, 1876.

BANKRUPTCY—DEBTS DUE PETITIONING CREDITORS—AGGREGATE INDEBTEDNESS.

Debts under $250 are to be reckoned both in computing the debts represented by the petitioning creditors and the total probable debts of the bankrupt.

[In the matter of Owen McAdam, a bankrupt.]

Edward Myers, for petitioning creditors.

E. B. Drake, for attaching creditors.

HOFFMAN, District Judge. The report of the register shows that of the debts due to the four petitioning creditors, only one, viz.: that due Levinski Bros. exceeds $250. The bankrupt was also indebted to D. Foley in the sum of $550. To enable the latter to bring suit in a justice's court, two notes for $275 each were substituted for the note for $550, and suits were brought and judgments recorded, one in the name of Foley, and the other in that of Harding, his agent. These constituted all the debts due by the bankrupt, $250.

The debt, therefore, to Levinski Bros. for $543.12 constituted more than a third in value of all the provable debts of the bankrupt, amounting to $250, and Levinski Bros. constituted more than a fourth in number of all the creditors holding provable debts of like amount.

To give the court jurisdiction of the case it is necessary that the petition shall be signed by creditors "who shall constitute one-fourth thereof in number, and the aggregate of whose provable debts amounts to one-third" of the total provable debts of the bankrupt. This requirement is limited by a succeeding clause, which provides that in computing the number of creditors who shall join in the petition, creditors whose respective debts do not exceed $250 shall not be reckoned. But if there be no creditors whose debts exceed that sum, or if the requisite number of creditors holding debts exceeding $250 fail to sign the petition, creditors having debts for a less amount shall be reckoned for the purposes aforesaid.

It would seem, from these somewhat obscure provisions, that the petitioning creditors must in all cases represent at least one-third of the aggregate provable debts, but that they need not necessarily constitute one-fourth in number of all the creditors. They must constitute one-fourth in number of only those creditors who hold debts exceeding $250, unless there be none such, or unless the requisite number of such creditors fail to sign, in either of which cases creditors for a less amount are to be reckoned.

In the case at bar the requisite number of creditors holding debts exceeding $250 have signed, viz.: one out of two, or if Harding be deemed a creditor, one out of three. Creditors therefore for a less amount must be excluded from the computation "of the number of creditors who shall join in the petition." The act makes no provision for excluding debts under $250 from the computation either of the amount of indebtedness to be represented by the petitioning creditors or from the aggregate indebtedness of the bankrupt. The amount of the debts due to Levinski Bros. and the three petitioning creditors, A. M. Marks, Thos. E. Nash, and Hobart, Wood & Co., is $1042.12. The total amount of indebtedness of the bankrupt was $2485.10. The petitioning creditors, therefore, represent more than one-third of the total indebtedness of the bankrupt.

The petitioners are thus found to constitute one-fourth in number of the creditors whose debts exceed $250, and they represent one-third of all the provable debts owed by the bankrupt. The requirements of the act thus appear to have been fully satisfied.

The register also reports that the four petitioning creditors constitute one-fourth of the total number of creditors, viz.: six. The exceptions filed by the attaching creditors state the total number of the latter to be nineteen. I have looked over the testimony, and, so far as I can ascertain, the report of the register is correct. But the point is immaterial if I am right in holding that creditors whose debts do not exceed $250 are to be excluded from the computation of the number of creditors who are to join in the petition; but the debts due them, whatever their amount, must be included in the computation of the value of the debts represented by the petitioners, and of the aggregate indebtedness of the debtor. See In re Hadley [Case No. 5,894]; In re Bergeron [Id. 1,342]. Exceptions overruled and adjudication ordered.

Case No. 8,655.

M'AFEE et al. v. The CREOLE.

[8 Leg. Int. 82; 1 Phila. 190.]

District Court, E. D. Pennsylvania. 1851.

PRACTICE IN ADMIRALTY—SUBJECT-MATTER—FORM OF ACTION—PENALTIES—FAILURE TO PROVIDE FOOD.

[1. A contract or tort may be maritime in its subject-matter, and yet the action to be brought thereon is not in admiralty, but at law. It is not the subject-matter, but the suit,—the legal process,—that determines admiralty jurisdiction.]

[2. The act of May 17, 1848 (9 Stat. 220), which provides that passengers on any vessel who are put upon a short allowance of food may recover three dollars per day while on such short allowance, stipulates a penalty which must be sued for not in admiralty, but at law.]

[3. A libel which charges that the owners and master of a ship, in disregard of their duty, deprived the libellants (passengers) of reasonable

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

food and drink, and subjected them to cruelties and indignities, charges a case properly within admiralty jurisdiction.]

In admiralty.

[The ninth article of the libel mentioned in the latter part of the opinion of the court is as follows: "That, by reason of said master and owners of said barque taking on board thereof as passengers for the voyage mentioned in the third article (from Londonderry to Philadelphia) the said libellants, it became and was the duty of said master and owners to furnish to said libellants severally food and drink, comforts, necessaries, and kindnesses, during said voyage; but these libellants, for themselves, and each for himself and herself, saith that the said master and the owners of the said vessel, disregarding their duty in this respect, did oppressively and maliciously deprive the libellants of reasonable food and drink, comforts, necessaries, and kindnesses during the whole of the said voyage, but subjected libellants to many cruelties and wanton indignities, whereby the said master and owners became liable and indebted to each of said libellants in the sum of three hundred and thirty-three dollars."]

KANE, District Judge. This is a proceeding instituted by certain persons, who were recently passengers on board an emigrant ship, to recover damages in consequence of having been put on short allowance during the voyage. The libel presents their claim in three aspects:

1. As founded on the British statute of 5 Vict. c. 107. It appears, however, that this statute was repealed before the contract between these parties was made; and it is unnecessary therefore to consider what might otherwise have been its bearing.

2. As founded on the fourth section of the act of congress of May 17, 1848 (9 Stat. 220). That section enacts "that all vessels employed as aforesaid shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least fifteen pounds of good navy bread, ten pounds of rice, ten pounds of oatmeal, ten pounds of wheat flour, ten pounds of peas and beans, thirty-five pounds of potatoes, one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork, free of bone, all to be of good quality, and a sufficient supply of fuel for cooking; but at places where either rice, oatmeal, wheat flour or peas and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the last named articles may be increased and substituted therefor; and in case potatoes cannot be procured on reasonable terms, one pound of either of said articles may be substituted in lieu of five pounds of potatoes, and the captains of such vessels shall deliver to each passenger at least one tenth part of the aforesaid provisions weekly, commencing on the day of sailing, and daily at least three quarts of water, and sufficient fuel for cooking; and if the passengers on board of any such vessel in which the provisions, fuel and water herein required shall not have been provided as aforesaid, shall at any time be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each and every passenger who shall have been put on short allowance the sum of three dollars for each and every day they may have been on such short allowance, to be recovered in the circuit or district court of the United States: provided, nevertheless, that nothing herein contained shall prevent any passenger, with the consent of the captain, from furnishing for himself the articles herein specified; and, if put on board in good order, it shall fully satisfy the provisions of this act so far as it regards food: and provided further, that any passenger may also, with the consent of the captain, furnish for himself an equivalent for the articles of food required in other and different articles; and if, without waste or neglect on the part of the passenger, or inevitable accident, they prove insufficient, and the captain shall furnish comfortable food to such passengers during the residue of the voyage, this, in regard to food, shall also be a compliance with the terms of this act." Upon this section the question is made by the respondents, whether the case is within the cognizance of this court sitting in admiralty. It must be conceded that there is nothing in the words "to be recovered in the circuit or district court of the United States," which directly imports that the proceeding shall be according to the forms of the admiralty.

The circuit courts have no original admiralty jurisdiction whatsoever; and the district courts have original jurisdiction of a great variety of causes, which are conducted according to the common law. When either of these courts is named, without especial designation of its mode of procedure, the just intendment is in favor of the common-law forms of process and pleading. But it has been argued, that, the subject-matter in the present case being of maritime contract or marine tort, the remedy must be, of course, in the forum, and according to the practice of that court, which has under the judiciary act [1 Stat. 73] exclusive original cognizance of all civil causes of admiralty and marine jurisdiction. The argument, if allowed its full force and effect, would divest the circuit court of the power to adjudicate in the case, which the section gives in terms. But it is fallacious in its logic. A contract may be maritime in its strictest sense, and yet the suit upon it will be brought at common law; and so may the action to recover damages for just such a marine tort as this. No man doubts that indebitatus assumpsit will lie for freight on a bill of lading, or case or trespass according to the circumstances for the breach of a passenger contract. It is not the cause

in the sense of the subject-matter, claim of action, that fixes the jurisdiction, but the cause in its secondary sense, the suit, the legal process. The definition disposes of the argument.

Then a similar question was raised on this section some months ago, in the case of Orr v. The Achsah [Case No. 10,586]. The ingenious counsel who argued for the libellant made me doubt for a time whether they had not sought their remedy under the act of congress rightly in the admiralty. I thought that the $3 a day might perhaps be regarded as in the nature of damages liquidated by statute. It did not at once occur to me that the admiralty, as a court of equity, could not properly hold cognizance of pleas founded on an enactment of such a nature. But the case was not on final hearing, and I had no occasion to decide or discuss the point. I refer to that case because I am not satisfied that the act of congress does not liquidate damages, but stipulates a penalty; and that this penalty must be sued for, as other "penalties incurred under the laws of the United States" are sued for, on the common-law side of the district court, when the trial of the issue of fact must be by jury.

3. The third aspect of the libellant's demand is presented by the ninth article of the libel. This, as it seems to me, presents a case which is clearly within the admiralty jurisdiction of the court. I have looked into the evidence which has been taken into the courts, and I find that the greater part of it is directed to the question of a breach of the fourth section of the act of 1848. As by the decision I have made, that part is now more or less irrelevant, I will hear the counsel of the parties upon the question of fact, so far as they judge it proper to discuss it on the evidence; the two points being as I apprehend: What tort or breach of contract has there been? and what damages have the libellants by reason of it?

Case No. 8,656.

McALISTER et al. v. BARRY et al.

[Brunner, Col. Cas. 24; [1] 2 Hayw. (N. C.) 290.]

Circuit Court, D. North Carolina. Dec. Term, 1803.

EQUITY — FRAUD AS GROUND FOR SETTING ASIDE CONVEYANCE—ALLOWANCE FOR IMPROVEMENTS.

Misrepresentations and obtaining a bargain, in consequence thereof, disadvantageous to the party complaining, is a ground in equity for setting aside a conveyance, although the party imposed on were of sound understanding, and had time enough to detect the falsehood before he made the contract. But the grantee shall be allowed for improvements made on the estate.

In equity.

PER CURIAM. Misrepresentations, and obtaining a bargain in consequence thereof, disadvantageous to the party deceived by them, is a ground in equity for setting aside the conveyance, although the party imposed on were of sound understanding, and had time enough to detect the falsehood before he made the contract. In this case the debts due from the testator were represented to his legatees to be very large, and likely to fall upon the estate in remainder devised to them; and it was concealed from them that a fund was provided by the testator for payment of his debts. The conveyance must be set aside, but the grantee shall be allowed for the improvements made on the estate.

See Boyce v. Grundy, 3 Pet. [28 U. S.] 210; [Thigpen v. Balfour, 2 Murph. 242].[3]

[1] [Reported by Albert Brunner, Esq.]

Case No. 8,657.

McALLISTER v. DOUGLAS et al.

[1 Cranch, C. C. 241.] [1]

Circuit Court, District of Columbia. June Term, 1805.[2]

CONTRACTS—NONDELIVERY—VALUE OF ARTICLE—MEASURE OF DAMAGES.

The value of the article on the day the cause of action accrued, is the true measure of damages for not delivering it according to contract.

Assumpsit on a special contract respecting flour.

Mr. Lee, for defendant, prayed the court to instruct the jury, that they ought to regulate the damages according to the price of flour on the day when the flour ought to have been delivered, and cited the following cases: Groves v. Graves, 1 Wash. [Va.] 1; Dutch v. Warren, 1 Pow. Cont. 137. The contract was as follows, viz.: "Will you receive my flour on the following terms, viz.: Whenever a load of flour is delivered, should any cooperage be wanting, you charge it to the wagoner and deduct it from the carriage; you will credit me with the highest market price at the time of delivery, and note it on the receipt, and any balance of flour that may remain in your hands unpaid, as it is delivered, you will pay me when I send for it, or deliver as much flour as coming to me, at my option. It is understood, that in case the flour is delivered, storage is to be allowed and charged at sixpence per barrel. Agreed: Given under our hands. Alexandria, April 27, 1803. Douglas & Mandeville. John McAllister."

The plaintiff, on the 14th of October, gave notice to the defendants of his option to receive the flour specifically, but gave time to the defendants till the 19th of November, when the flour not being delivered, the plaintiff, on the 21st of November, brought this suit.

Mr. Jones, contra. There was no specific

[3] [From 2 Hayw. (N. C.) 290.]

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

[2] [Affirmed in 3 Cranch (7 U. S.) 298.]

day for the delivery of the flour; when the demand of flour was made, it only showed the plaintiff's option to take flour, and created a duty in Douglas & Mandeville to deliver flour on demand. It was a continuing contract; therefore the damages ought to be the highest price at any time after demand and before verdict. Plaintiff might have sold the flour much higher. Defendants did actually sell much higher.

THE COURT being divided (FITZHUGH, Circuit Judge, absent), the instruction was not given. KILTY, Chief Judge, thought no instruction should be given to the jury. CRANCH, Chief Judge, was of opinion that the jury should be instructed that they ought to make the price of flour on the day of demand and refusal, and interest thereon, the rule of damages for the non-delivery.

The jury gave damages according to the price on the 19th of November, which was the day the cause of action accrued, the negotiation for a compromise having on that day failed.

Judgment affirmed by supreme court, 3 Cranch [7 U. S.] 298.

McALLISTER (POPINO v.). See Case No. 11,277.

Case No. 8,658.

McALLISTER et al. v. The SAM KIRKMAN. CARONDOLET MARINE RAILWAY & DOCK CO. v. SAME. FLORENS v. SAME. BALL v. SAME.

[1 Bond, 369.] [1]

District Court, S. D. Ohio. Oct. Term, 1860.

MARITIME LIEN — SUPPLIES — HOME PORT — SEAMEN'S WAGES — TRANSFERS OF VESSELS — KNOWLEDGE — PLACE OF ENROLLMENT.

1. Credit given for supplies furnished a steamboat in her home port, is presumed by the maritime law to have been given to the owner or master, and not to the boat.

2. A claim for wages being a lien on the boat, under all circumstances is an exception to the general rule. Where persons in good faith have given credit to a steamboat for necessary supplies and repairs, as a foreign boat, such persons are not affected by the fraudulent character of sales or transfers by which the boat was placed in the position of a foreign boat.

3. If such persons were apprised of the real nature and character of the transfers, or are fairly chargeable with such knowledge, they must be viewed as participants of the fraud, and can have no claim to any benefit resulting from it.

4. Whatever may be the character of a transfer of an interest in a steamboat, it vests in the purchaser a legal title in that interest, which those dealing with the boat are justified, in the absence of any knowledge to the contrary, in regarding as prima facie valid and unimpeachable.

5. A collector's office, where bills of sale are made matters of record, is the place where alone it may be presumed persons dealing with a boat would search for information in regard to a title.

6. The place of enrollment is not conclusive as to the home port of a vessel or boat, and evidence is always admissible to prove the actual residence of the owner, and such evidence furnishes the test of the character of the boat as foreign or domestic.

[Cited in The Rapid Transit, 11 Fed. 330.]

7. The supplies of material-men to a ship belonging or represented to belong to owners residing in another state, are to be deemed to be furnished on the credit of the ship and the owners until the contrary is proved.

8. The clerk of a steamboat has no power to bind the boat for a loan of money without the authority of the master for his acts.

9. If the clerk procures money on the credit of the boat without the sanction of the master, and the master directly or impliedly assents to it, it will be regarded as the act of the master, and a lien will be created.

10. A pilot on a steamboat who assents to an arrangement by which another person agrees to account to him for his wages, does not by so doing, waive his maritime lien on the boat.

11. A maritime lien is equivalent to an express hypothecation of the boat, and all subsequent transfers or changes of title are subject to this prior and paramount lien; nothing but payment will discharge the boat from its operation.

12. Under the constitution of the United States and the legislation of congress, jurisdiction in the enforcement of maritime liens is vested exclusively in the national judiciary.

13. Credits given to a boat in the progress of construction are not liens by the general maritime law.

14. The purchaser of a boat sold by order of a state court, takes it subject, in his hands, to any lien or interest existing in favor of other parties prior to his purchase.

In admiralty.

Lincoln, Smith & Warnock, for libellants. Dodd & Huston and Taft & Perry, for respondents.

OPINION OF THE COURT. The above named libellants have set up claims against the steamboat Sam Kirkman, in separate libels filed in this court. The claim of McAllister & Co. is for stores and supplies furnished for the use of the boat at St. Louis, between November 9, 1857, and October 7, 1858, amounting to $1,818.84. The claim of the Carondolet Marine Railway and Dock Company is for repairs to the boat, near St. Louis, in the month of September, 1858, amounting to $710.10. The third claim is that of Bernardino Florens, amounting to $1,500, for money advanced or loaned by him at various times between April 22, 1858, and May 12, 1858, for the use of the boat in payment of wages and the purchase of supplies. The libellants aver, respectively, that the supplies furnished, the repairs done, and the money advanced, were necessary in the navigation and business of said boat; that during the time within which these several claims accrued, the Kirkman was owned by John H. Throop, a resident of the state of Kentucky, William H. Cropper, a resident of the state of Ohio, and John D. Montgomery, a resident of the state of Virginia; that the credits were

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

given to the boat, and not to the owners, and that the supplies, repairs, and money could not have been procured at St. Louis, on the credit of the owners; and that they have an admiralty lien for the same. The libel of Spencer J. Ball asserts a claim for $210.90, for wages due him for services as pilot, rendered in the month of February, 1858. As this claim stands on a different footing from the others, and does not involve the same questions, it will be hereafter separately considered.

In the first three of the foregoing cases the grounds of defense set up are: 1. That the libellants have no maritime liens, which can be asserted and recognized in this court. 2. That the boat, prior to the commencement of the proceedings in this court, had been attached by process from the McCracken county equity and criminal court, being a court of the state of Kentucky, in accordance with the statute of said state, and was not therefore subject to the jurisdiction of this court, as a court of admiralty, at the time of her seizure and arrest. John V. Throop, as master and claimant of the Kirkman, and in behalf of D. A. Givens, as owner, has filed an answer in said cases, averring, in substance, that the boat, during the period within which said claims severally originated, was duly enrolled at the custom-house at St. Louis, and that John H. Throop, a resident of the state of Kentucky, was the owner of an interest of one-third, and Benjamin T. Beasley, a resident of St. Louis, the owner of two-thirds of said boat, and as the managing owner, had the sole control of the boat, at that point; and that during all said period, St. Louis was the home port of the boat; and that therefore the said libellants have no admiralty lien. The answer of Throop also admits the sale or transfer of the interest held by Beasley, first to William H. Cropper, and subsequently to John D. Montgomery, and avers that the same were colorable and fraudulent, and that Beasley continued to be the true and real owner of an interest of two-thirds in said boat, and was so at the times when the claims of the libellants respectively accrued. The answer of Throop further sets up the proceedings in the Kentucky court before referred to, in bar of the jurisdiction of this court. D. A. Givens has also filed an answer, asserting, among other things, that he is the sole and legal owner, by a purchase of the boat at a public sale, under the order of the Kentucky court, prior to her seizure by the process of this court. He adopts, substantially, the answer of Throop, as his defense to the claims of these libellants.

The testimony and exhibits in the case are voluminous, and can not be noticed in detail. The material facts necessary to the consideration of these cases may be summarily stated as follows: The Kirkman was built and equipped at Paducah, in the state of Kentucky, at the cost of about twenty thousand dollars, by the said John H. Throop and Benjamin T. Beasley, during the spring and summer of 1857; and commenced running the latter part of August in that year. Throop was the owner of one-third, and Beasley of two-thirds; Throop residing at Smithland, Kentucky, and Beasley at St. Louis, Missouri. In the progress of the construction and equipment of the boat, the owners incurred debts in Kentucky to the amount of about $10,000, for labor and materials, and loans and advances made, in her construction and equipment. It is admitted that by the statute of Kentucky, on that subject, these creditors had liens on the boat for their respective claims. On December 4, 1857, some three months after the boat had commenced running, a part of the Kentucky creditors applied by petition to the court of McCracken county, under the statute of the state, for an order for the attachment of the boat, and she was seized at Paducah on the same day by the sheriff, under such order. On the 10th of December, by the consent and agreement of the petitioning creditors, the boat was released from the custody of the sheriff, on the bond of J. V. Throop, the master, stipulating for the redelivery of the boat to answer the claims of the creditors at whose suit she was attached. Under the command of Throop, as master, the boat immediately commenced running, making trips to and from St. Louis, on the Tennessee, the Ohio, the Missouri, and Osage rivers, until October, 1858, when, by the order of Throop, the master, and without the consent or knowledge of the owners, she left St. Louis where she had been lying in the night, and was taken to Paducah, and there surrendered to the sheriff of McCracken county. It will not be necessary to refer minutely to all the proceedings in the Kentucky court, as set forth in the long and complicated record, which is in evidence by the respondents. It appears that after the return of the boat to Paducah, probably on October 18, 1858, she was again attached at the suit of certain Kentucky creditors; and being in the custody of the sheriff, on his affidavit that no one had offered to bond the boat, that great expense was incurred in keeping her, and that she was liable to deterioration in being kept in custody, an order was made for the sale of the boat; and on the 6th of November following, pursuant to such order, she was offered at public sale, and sold to the said D. A. Givens for $5,500, he giving his notes for the purchase money, payable on time. These notes are not yet paid; it appearing that Givens has declined payment until a decision shall be had in the libels filed in this court. The boat was enrolled at Paducah, immediately after the sale to Givens, and was run by him as owner until February 10, 1859, when, being at the port of Cincinnati, she was seized by the marshal on process from this court.

The first question to be considered is: Have these libellants a paramount admiralty lien for the claims asserted by them in this court? If St. Louis, the place where these claims origi-

nated, was the home port of the steamboat during the time the credits were given, it is clear there is no such lien. In that case the maritime law goes on the presumption that the credit was to the owner or master, and not to the boat. A claim for wages being a lien on the boat under all circumstances, is an exception to the general rule.

As before stated, the libellants aver that their claims for supplies, repairs, and money loaned, are liens, for the reason that the credits were to a boat, which, as to them was a foreign boat, and were necessary to her successful navigation. It is also averred that these credits could not have been procured, except on the supposition that there was a lien on the boat. And the evidence is entirely conclusive, that the credits were all given on this supposition and belief, and that neither Cropper nor Montgomery could have obtained credit at St. Louis for any considerable amount on their personal responsibility. The witnesses who prove these several claims, state explicitly that Cropper and Montgomery were without credit at St. Louis, and that the necessities of the boat could not have been supplied on their personal pledge or undertaking. This is substantially admitted by the respondents, and it is therefore unnecessary to refer specially to the evidence on the point. But it is insisted by the respondents, that Cropper and Montgomery were not the owners, in fact or in law, during the time these claims originated, and that for the purposes of the present case, Beasley was owner of a two-thirds interest, and being a citizen and resident of St. Louis, that place must be held to be the home port of the boat. That the transfer or sale by Beasley to Cropper, and afterwards to Montgomery, was merely colorable and fictitious, as between the parties, there is no reason to doubt. The design of Beasley clearly was to place the ownership of the boat in persons not residents of Missouri, that credit might be obtained at St. Louis for the Kirkman as a boat foreign to that port. Beasley was laboring under pecuniary embarrassment, and could not have procured credit on his personal responsibility, to meet the wants of the boat, in the prosecution of her business. He therefore transferred his interest to Cropper, a resident of Ohio, and wholly without pecuniary means, for the sum of $14,000, for which his notes were given, payable on time. Beasley executed to him a bill of sale, in due form, which was recorded in the office of the collector, at the port of St. Louis, and an enrollment of the boat there made, on the oath of Cropper, that he was the owner of two-thirds of the boat, and that Throop was the owner of the other third. In February, 1858, at the request of Cropper, and without the payment of any part of the purchase money, this sale was virtually annulled, and John D. Montgomery, also a young man without property, whose residence was in the state of Virginia, was substituted in the place of Cropper, and gave his notes for the purchase money, and Cropper's notes were given up. It appears that Beasley, after parting with his interest in the boat, continued to represent the interests of the boat, and transact business for her at St. Louis. After the transfer to Montgomery, he acted as her agent, under a power of attorney from him.

In the view taken of the question before the court, it seems wholly unnecessary to remark further upon the sale by Beasley. Its real character is too patent to justify discussion. As between Beasley and his creditors, no court would hesitate to pronounce it fraudulent and void. But what shall be its effect on the rights of these libellants, now asserting a lien on the boat as foreign to the port of St. Louis, is a wholly different question. And it would seem not to admit of doubt, that if the libellants in good faith, and acting on the belief that the boat was owned by persons not residents of the state of Missouri, gave her credit for necessary supplies, repairs, etc., as a foreign boat, and with a view to a maritime lien for their security, they are not affected by the fraudulent character of the sales or transfers by which the boat was placed in that position. On the other hand, it is equally clear, that if the evidence fairly warrants the conclusion, that they were apprised of the real nature and character of the transfer of Beasley's interest in the boat, or are fairly chargeable with such knowledge, they must be viewed as participants of the fraud, and can have no claim to any benefit resulting from it. And this presents the only question, involving doubt or difficulty, as to this branch of these cases. This question I have carefully considered, and am obliged to say, as the result of my deliberation, that I see no sufficient ground for finding, that the libellants are implicated in the fraudulent conduct of Beasley. There are facts in the case, which, perhaps, warrant a suspicion that McAllister and the marine railway and dry dock company were cognizant of the real character of the sales by Beasley to Cropper and Montgomery. It is in evidence that there had been long-continued and somewhat intimate business relations between McAllister and Beasley. The firm of McAllister & Co. consisted of one person—McAllister—and was extensively engaged at St. Louis, in the business of supplying stores and necessaries for steamboats; and Beasley, as a steamboat owner and agent, had dealt largely with the firm, and was frequently at its place of business. But there is no tangible or reliable fact in evidence showing that McAllister was advised of the character of the transfer by Beasley, by which his interest was legally vested in Cropper and Montgomery. The same remark applies to the claim of the marine railway and dry dock company. McAllister was a principal stockholder in the company, and one of the active managers of its concerns.

It is in evidence, too, that Beasley used his influence in having the boat taken to the dock of this company, for the purpose of repairs. But this, surely, does not make McAllister a partaker in Beasley's fraud. And there are some facts in the case which repel any unfavorable presumptions in regard to the claims just referred to. In the first place, it may be remarked that there is no controversy about the fairness and justice of the accounts of McAllister and the railway and dry dock company. The stores and supplies charged in the account of the former were furnished to the boat, at fair prices; and these stores and supplies have not been paid for; and there is no pretense that the dry dock company did not make the repairs charged, or that the price charged is not reasonable. But this is not all. As before remarked, the proof is conclusive, that these supplies and repairs were necessary for the boat, and that as to both claims, credit was given to the boat, and not to the owners. It is not readily perceived why these credits could be regarded as imparting a maritime lien on the boat, on any other supposition than that the creditors supposed she was legally foreign in the port of St. Louis. Again: it is very clear that whatever may have been the character of Beasley's transfer of his interest, it vested in the purchaser a legal title in that interest, which those dealing with the boat were justified in the absence of any knowledge to the contrary, in regarding as prima facie valid and unimpeachable. The bills of sale were matters of record in the collector's office, where alone it may be presumed persons dealing with the boat would search for information in regard to title. The bill of sale from Beasley to Cropper is in the usual form, and bears date October 7, 1857. It sets out the residence of Cropper as being at Portsmouth, in the state of Ohio. It appears from Beasley's deposition, that the boat was enrolled at St. Louis by Cropper; and from an authenticated copy of his oath then made at the custom-house at St. Louis, it appears that he swore he was the owner of two-thirds of the boat, and that Throop was the owner of the other third. In this affidavit he also says that he is a resident of Portsmouth.

The facts in relation to the enrollment of the boat do not clearly appear from the evidence before the court. It is probable she was originally enrolled at Paducah, where she was built, but her enrollment there is only made out by inference and not by authoritative testimony. Nor is there any record evidence of an enrollment by Cropper at St. Louis after his purchase from Beasley. But, as before remarked, Beasley swears that she was enrolled there by Cropper, and that is probably the fact. I do not see that the place of her enrollment can have any bearing on the question which was the home port of the boat. The statute requires the enrollment to be at the port "at or near which the husband or acting or managing owner or owners of such ship or vessel, usually reside or resides." 1 Stat. 56, § 4.

But it has been often held, by our courts of admiralty, that the place of enrollment is not conclusive as to the home port of a vessel or boat, and that evidence is always admissible to prove the actual residence of the owners; and that such evidence furnishes the test of the character of the boat as foreign or domestic. In the case of The Nestor [Case No. 10,126], Judge Story says: "Prima facie, the supplies of material to a foreign ship, that is, to a ship belonging or represented to belong, to owners residing in another state or country, are to be deemed to be furnished on the credit of the ship and the owners, until the contrary is proved." And in the very able opinion of Judge Wells, of the United States court for the district of Missouri, Hill v. The Golden Gate [Id. 6,492], it is said: "It is apparent, therefore, that the place of enrollment has nothing to do with the credit that is given, and, therefore, has nothing to do with the question of lien." Such, I may add, has been uniformly the decisions of this court, as to the effect of an enrollment. It is deemed unnecessary to refer to the numerous cases in which this doctrine has been held.

From the views thus indicated, it results: 1. That the supplies furnished by McAllister & Co., and the repairs made by the Carondolet Marine Railway and Dry Dock Company, as charged in their respective accounts, must be deemed on the evidence as necessary to the successful prosecution of the business of the boat. 2. That the boat, during the time these claims originated, must be held to be foreign at the port of St. Louis. 3. That the credits given by said libellants were given to the boat and not to the owners. 4. That although the conduct of Beasley and others connected with the boat, may have been reprehensible or fraudulent, these libellants in the absence of proof that they were cognizant of and participants in such conduct, are not affected by it.

But the claim of Florens, for money advanced for the use of the boat, is presented in a different aspect from those just referred to. In the first place, there are sufficient reasons for the inference that there was collusion between Beasley and Florens for a dishonest purpose. It is clearly proved that Beasley at different times withdrew from the earnings of the boat some $4,000, which was not applied to the payment of her current expenses. Capt. Throop says, in his deposition, that Beasley once proposed that they should draw money from the boat, place it in the hands of some confidential friend, and receive it from him in the form of a loan to the boat, on her credit, and thus create a maritime lien on which proceedings could be instituted, and the boat forced to sale. Throop did not assent to this plan, regarding it as dishonest; but the evidence, I think, shows that Beasley to some extent acted

upon it. It appears, as I understand the proof, that in one instance there is a charge on the boat books of $405, for money received by him from the boat, and on the same day a due bill was given to Florens precisely for the same sum, as for money loaned by him. This is one of the items in the account of Florens. And the same coincidence occurred in relation to an item of $250, also charged in his account. These facts, in connection with the evidence by Throop above referred to, and the further fact that it was upon the advice and suggestion of Beasley that the application for a loan from Florens was made, tend directly to implicate Florens as a participant in the intended fraud of Beasley.

But there is another stringent reason for the rejection of Florens' claim. The loans made by him to the boat were not authorized by or known to the master of the boat. Capt. Throop states not only that he did not authorize these loans, but that he had no knowledge of them until after the institution of the suits in this court. They were made, therefore, by the clerk of the boat, probably at the suggestion of Beasley, but wholly without the sanction of the master. Now, although it is true in reference to steamboats on the western waters, that the clerk is in some sense the financial agent of the boat on which he serves, his acts as such must be under the authority of the master, and he has no power to bind the boat for a loan of money without such authority. It is true, if the clerk procures money on the credit of the boat without the sanction of the master, and the master directly or impliedly assents to it, it will be regarded as the act of the master, and a lien will be created. But where, as in this case, the loan was not known to the master until long after it was made, there can be no presumption that he authorized it or gave his assent to it. On this ground, therefore, I think the claim of Florens must be rejected.

As to the claim of Spencer J. Ball, for wages as pilot, it is admitted by the counsel for the respondents, that it is a valid lien on the boat, irrespective of the question whether St. Louis was her home port. But, it is contended, that he has waived or released his lien by his assent to an arrangement by which Beasley agreed to account to him for the sum due. This applied to a part only of the sum claimed by him. There is no evidence, however, that Beasley has paid or accounted for any part of this claim. Ball is still the creditor of the boat, on her books, for the whole amount of wages claimed by him. It is clear, therefore, that there is no legal waiver or release of his lien on the boat, and that he is entitled to a decree if this court has jurisdiction in this case. The cases are numerous, in the books, in which it has been held that the taking of a promissory note is not a waiver of a maritime lien. It was so ruled by Judge Story, in the case of The Chusan [Case No. 2,717]. And the same doctrine is distinctly affirmed by Judge McLean, in the case of Raymond v. The Ellen Stewart [Id. 11,594]. But it is quite needless to multiply references on this point. The law is too clearly settled to admit of doubt or controversy.

I will now briefly consider the question of jurisdiction, which is presented in this case. It is insisted, by the counsel for the respondents, that the attachment and sale of this boat by the order and authority of the Kentucky court, prior to her seizure under the process of this court, is a bar to any proceeding in admiralty founded on a claim originating before the sale under the state authority. If this position is well taken, this court has no jurisdiction, and these libels must be dismissed. The principle involved in the question has been so frequently considered and passed upon by judges and courts of the highest standing in this country, that it is quite unnecessary that I should discuss it at any length.

The facts necessary to notice, as applicable to the question, have been before sufficiently stated. From these, it appears the boat was attached in Kentucky at the suit of creditors at Paducah, by order of the court of McCracken county, in that state, on December 4, 1857, and held in the custody of the sheriff until the 10th, when, by the consent of the petitioning creditors, on a bond for her delivery to answer their claims, the sheriff gave possession to the master. She was afterward attached at Paducah, by the order of the same court, at the suit of other creditors, and again released from the custody of the sheriff, by giving bond as above stated. In charge of the same master, the boat continued to navigate the western rivers, carrying freight and passengers, making St. Louis her principal stopping place for business purposes, until the beginning of October, 1858, when she was taken to Paducah by the master, and placed in the possession of the sheriff of McCracken county. A few days after, she was, by the order of the Kentucky court, sold at public sale, and the claimant, D. A. Givens, became the purchaser. The claims now prosecuted in this court, as before noticed, originated at St. Louis, between the beginning of November, 1857, and the 18th of October of the next year.

If the court is right in holding that these libellants, with the exception of Florens, have a valid maritime lien on the boat, it is clear that no state legislation can supersede or annul it. By the well-settled principles of the maritime law, such a lien is equivalent to an express hypothecation of the boat, and all subsequent transfers or changes of title are subject to this prior and paramount lien. Nothing but payment will discharge the boat from its operation. And it is equally clear, that under the constitution of the United States and the legislation of congress, the jurisdiction in the enforcement of maritime

liens is vested exclusively in the national judiciary. In the case of The Chusan [supra], Judge Story held, that "the subject of admiralty and maritime jurisdiction is withdrawn from state legislation, and belongs exclusively to the national government and its functionaries." In the same case, the learned judge says: "The constitution of the United States has declared that the judicial power of the national government shall extend to all cases of admiralty and maritime jurisdiction, and it is not competent for the states to enlarge, or limit or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of congress, and in the absence thereof by the general principles of maritime law."

And the supreme court of the United States, in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, say: "The exclusive jurisdiction in admiralty cases was conferred on the national government as closely connected with the grant of commercial power." 6 How. [47 U. S.] 392. But this doctrine has been so often affirmed not only by the supreme court, but by many other courts of the United States, and also by state courts of high position, that it does not require the citation of authorities to sustain it. It is now referred to as sanctioning the conclusion, that the statute of Kentucky can not have the effect of depriving these libellants of the full benefit of their maritime liens. These existed in full force before the purchase of the boat by Givens, and any right he acquired under that purchase was subordinate to them. The court in Kentucky had no power to adjudicate upon the rights of these libellants for the reason that it had no jurisdiction to enforce their liens; and if such power did exist, these libellants were not parties actually or constructively to the proceedings in that court, and their rights could not therefore be affected by its action. It will be apparent, then, that this is not a case of conflict of jurisdiction between the Kentucky court and this court, as courts of concurrent jurisdiction. The purchaser of the boat in the sale made under the order of the court in Kentucky did not acquire, and could not acquire the rights of these libellants in virtue of their paramount liens. This principle is recognized and asserted by Judge McLean in the case of The John Richards [Case No. 7,361] in the circuit court of the United States for the district of Michigan. It was also affirmed by the same learned judge in this circuit, on an appeal from this court, in the case of The N. W. Thomas [Id. 10,386]. See, also, Ashbrook v. The Golden Gate [Id. 574].

The application of this principle to the cases before the court is in no way affected by the fact that the claims of the Kentucky creditors are for money, labor, materials, etc., in the construction of the boat; and, therefore, that their liens, under the state law, are prior to those of the libellants for stores, supplies, and repairs after the boat was completed, and while engaged in navigation. It is well settled, that credits to a boat in the progress of construction are not liens by the general maritime law [People's Ferry Co. v. Beers] 20 How. [61 U. S.] 393; and if they were so, a state court would have no power to enforce them. This boat, after her seizure by the Kentucky creditors, was permitted to engage in carrying on commerce between the ports of different states; and thus engaged, she was undoubtedly subject to the operation of the well-known principles of the national maritime law. For the purposes of successful navigation, she needed credit in a port distant from the place of her construction, and such credit was given to the boat by persons who could not be presumed to know of any prior local liens, and whose rights could not therefore be affected by such liens. It is obvious that any other doctrine would seriously cripple the commerce and navigation of the western waters, and would virtually set aside the maritime law of the land as applicable to those waters.

The case of Taylor v. Carryl, 20 How. [61 U. S.] 583, has been brought to the notice of the court, and it is insisted by the respondents' counsel that it is decisive against the jurisdiction of this court in the cases now under consideration. I do not so understand the opinion of the supreme court in that case. They decided that the district court of the United States for the Eastern district of Pennsylvania never had the legal possession of the vessel which had been sold under its decree; and, therefore, that the purchaser under that decree acquired no title. As in a court of admiralty the possession of the res is the basis on which alone any subsequent proceeding has its warrant, it resulted necessarily in that case that there was a want of jurisdiction, and that the decree of the court was therefore a nullity. The supreme court say, in the conclusion of their opinion: "The view we have taken of this cause renders it unnecessary for us to consider any question relative to the respective liens of the attaching creditors and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them." The court nowhere asserts in the opinion, that the jurisdiction in admiralty by the constitution of the United States is not exclusive in the courts of the United States, or that the legislation of congress has limited that jurisdiction, except in so far as the reservation of the rights of parties to proceed at common law, may be regarded as a limitation. Nor do they reverse the principle often announced by the decisions of that court, that it is not in the competency of state authority to abrogate or supersede a maritime lien created by the national maritime law. The court undoubtedly affirm the well-established rule of law, that as to courts of concurrent jurisdiction, the court first ac-

quiring jurisdiction will retain it free from any interference from any other court. And they also hold, that in admiralty as well as in cases at law, property in the actual custody of an officer under valid process, either from a state or federal court, is not subject to seizure or levy by process emanating from another jurisdiction. It is true, the learned Chief Justice Taney, in his very able dissenting opinion in the case, controverted this principle as applicable to cases where there was a prior admiralty lien. The majority of the court, from a laudable desire to avoid collisions with the state authorities, held that prior legal possession in a state officer withdrew the property from the jurisdiction of the admiralty court. It is not for me to make comments on the opinion of the majority of the court on this point; but it will imply no disrespect to the decision of that high tribunal to remark, what is undoubtedly true, that this doctrine of rigid non-intervention with state jurisdiction was not previously "supposed to apply in cases where its effect would be to deprive a party of a vested right under a clear admiralty lien."

But in my judgment, the decision of the supreme court in Taylor v. Carryl [supra], can not be viewed as having any application to the cases now under consideration. In that case, the vessel was in the actual custody and possession of the state officer under process from a state court when seized in admiralty under process from the district court of the United States. The supreme court held, that the latter process did not give jurisdiction to the district court, and that its subsequent proceedings, including the sale under its decree, was invalid. But in the case before this court, it is to be observed that the steamboat Kirkman, when seized at Cincinnati under the process of this court, was not in the custody of the law or of any officer of the state of Kentucky, but under the control and in the actual possession of Givens, the claimant in these cases, as the purchaser of the boat under the order of the Kentucky court. The boat was then employed in the navigation of the western rivers for the benefit and under the control of Givens. The court in Kentucky had in fact expressed its jurisdiction, so far as the boat was concerned, by its order for the sale of the boat, and her actual sale to Givens. So far as he acquired any interest in the boat under the sale, it was his private property, but was undoubtedly subject in his hands to any lien or interest existing in favor of other parties prior to his purchase. This case does not, therefore, involve any conflict of jurisdiction between the Kentucky court and this court, or any collision between the officers of the two courts. And, therefore, the reasoning of the supreme court of the United States in favor of the expediency of avoiding all occasion of jealousy or hostility between the state and federal authorities does not apply. I concur fully in the soundness of the policy so forcibly and ably vindicated by the supreme court in the case referred to; and have studiously aimed in the performance of my judicial duties to enforce its practical observance. But I am clear that in the cases before the court its application is not called for.

A decree may be entered in favor of the libellants, McAllister & Co., the Carondolet Marine Railway and Dry Dock Company, and Spencer J. Ball, for their respective claims. The libel in the name of Bernardino Florens is dismissed at his costs.

McALPIN (BOYD v.). See Case No. 1,748.

McARDLE (UNITED STATES v.). See Case No. 15,653.

Case No. 8,659.

McARTHUR et al. v. ALLEN et al.

[3 Cin. Law Bul. 471.]

Circuit Court, S. D. Ohio. 1878.

WILLS — DEVISE IN TRUST — FEE TAIL — RULE IN SHELLEY'S CASE—ESTATE TO PERSONS NOT IN ESSE—OHIO STATUTE.

[1. A testator devised real estate to be held until the last-born child of any one of the sons or daughters of the testator should become of age, when it should be divided between all his grandchildren per capita, the issue of such as are dead taking per stirpes, the rents and profits meanwhile to be divided in certain proportions among the devisees. *Held*, that the will does not create an estate in fee tail, and consequently is not within the prohibition of act of legislature of Ohio of December 17, 1812 (1 Swan. & C. Rev. St. p. 550).]

[2. The rule in Shelley's Case will be *held* not to apply in a case where there are qualifying and explanatory expressions in a will showing clearly the intent of the testator otherwise.]

[3. A devise by a testator of an estate which, upon the happening of a certain contingency, is to vest in, and be divided per capita among, all his grandchildren at the time living, and to the issue of the dead, taking per stirpes, is not void as to issue born of a grandchild not in esse at the death of the testator, under a statute which prohibits the granting estates to persons not in esse.]

[This was a bill by Allen Campbell McArthur and others against William Allen and others. Heard on demurrer to the bill.]

SWAYNE, Circuit Justice. This is a case in equity. A part of the defendants have demurred to the bill. The bill is founded upon the will of the late Governor Duncan McArthur of Ohio. The demurrer challenges the validity of certain parts of it which the bill seeks to enforce. The will was executed on the 30th day of October, 1833, and was admitted to probate on the 16th of May, 1839. The testator died a few days before the probate. The provisions of the will thus drawn in question, stripped of unnecessary verbiage and expressed in untechnical language, are as follows:

Item 17.—The testator's lands in Ross and Pickaway counties were not to be sold. Those lands and the lands devised to his

wife, after her death, were to be leased by the executors to the best advantage for improvements or money rents until the youngest or last-born grandchild the testator then had or might thereafter have, being the child of his son Allen C. or James McD., or his daughter Effie Eliza Ann or Mary, who might live to be twenty-one years old, arrive at that age.

Item 18.—After the moneys before devised should have been paid and deducted from the rents, the residue of the rents, and the dividends from all stocks belonging to the estate of the testator at his death or thereafter purchased pursuant to the will, were to be divided annually among his children and grandchildren who were of the age of twenty-one years when such a division was made. Until the youngest grandchildren should arrive at the age, such annual division was to be made between the said Allen C., James McD., Effie Eliza Ann and Mary, and their children, share and share alike, per capita, the grandchildren respectively to have a share as soon as they reached the age of twenty-one, and not before. That in case of the death of either of the sons or daughters named leaving a child or children under the age of twenty-one years, such child or children should take, per stirpes, for their education and maintenance, the dividends which the parent if living would have been entitled to receive. When such child or children should be twenty-one, he, she, or they should no longer take per stirpes, but thereafter per capita. The coming to that age of one of such children was not to prevent those still under it for continuing to take per stirpes the full share of their deceased parent.

Item 19.—After the decease of all the said children of the testator, and as soon as the youngest of said grandchildren arrived at the age of twenty-one years, all the lands in the counties of Ross and Pickaway not otherwise disposed of, and all the other lands of the testator then unsold, if any, were to "be inherited and equally divided between" the said "grandchildren per capita," they being "the lawful issue" of the said "sons and daughters, Allen C., James McD., Effie Eliza Ann and Mary, for them and their heirs forever, to have and to hold or to sell and dispose of the same at their will and pleasure;" and in like manner all the stocks belonging to "the estate, whether invested before or after" the death of the testator, were to be "at the same time equally divided among the said grandchildren share and share alike per capita." In the next paragraph the testator declared, "but it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children, lawfully begotten, such child or children shall take and receive per stirpes (to be equally divided between them) the share of my said estate, both real and personal, which the deceased parent of such child or children would have been entitled to have and receive, if living at the time of such final distribution." All the children and grandchildren were prohibited from assigning, mortgaging, or otherwise transferring or incumbering their respective shares of the annual dividends, and all instruments executed by them for either purpose it was declared should be void. There was a like prohibition and declaration with respect to the lands and stocks before their final distribution, as provided by the will. In making such distribution of the lands, the executors were to execute several deeds in partition to the respective parties, and to no other person whomsoever. The legal title to the lands was so vested in the executors and their heirs in trust for the purpose of the will until final division and partition were made and no longer. In making the final division of the stocks, the executors holding them in trust were required to assign and transfer to each grandchild, or his or her legal representative, the share of such stocks coming and belonging to such grandchild or representative, and the receipt of such grandchild or representative was alone to be a discharge of the executors.

When the bill was filed all the said children had died. Allen C. McArthur, one of the complainants, and the son of said Allen C. deceased, is the youngest grandchild, and arrived at the age of twenty-one years on the fourth of March, 1875. Of the grandchildren two had died before the youngest one came of age. (1) Duncan Coons, son of the testator's daughter Effie. He died a minor and unmarried, several years before the filing of this bill. (2) Nancy Medary, daughter of the testator's daughter Mary. She died about ten years before this bill was filed, intestate, and leaving three children still living. They are the great-grandchildren of the testator, Duncan McArthur, and were born since the making of the will and since his death.

Such are the scheme and portions of the will, and such the facts before us for consideration. The bill is confined to the real estate thus devised. It is silent as to the personalty. The parties demurring rely upon the following statute, passed December 17, 1812 (1 Swan & C. Rev. St. p. 550): "An act to restrict the entailment of real estate. Section 1: Be it enacted by the general assembly of the state of Ohio, that from and after the taking effect of this act, no estate in fee-simple, fee-tail, or any less estate in lands or tenements, lying in this state, shall be given or granted by deed or will to any person or persons but such as are in being at the time of the making of such deed or will. And that all estates given in tail shall be and remain an absolute estate in fee-simple to the issue of the first donee in tail. The act to take effect and be in force from and after the first day of June next." Upon looking into the statute analytically, it will be observed: I. That no estate in

lands can be deeded or devised except (1) to persons in being at the time of making the deed or will, or (2) to the immediate issue, or (3) to the immediate defendants of such persons. II. Every entailed estate is made an absolute estate in fee-simple to the issue of the first donee in tail. In our further remarks we shall give our views touching such of the points made by the opposing counsel as we deem it material to consider without formally restating them. This, without clearness, will conduce to brevity.

The case, as it is presented by the demurrer, turns upon the statute. That statute implies clearly that before its enactment the title to lands might have been transferred in the ways forbidden and thereafter made unlawful. What is thus implied is as effectual as if it were expressed. U. S. v. Babbit, 1 Black [66 U. S.] 61. The act is a restraining and not an enabling statute. 11 Ohio St. 173. An estate tail is one limited to a person and the heirs of his body. The limitation may be to all such heirs, or to certain specified heirs coming within that description, to the exclusion of others. In one case the entail is general and in the other special. The terms "heirs of his body," or their clear equivalent, are indispensable to the creation of such an estate. 2 Cooley, Bl. 113. As there is a remainder over to the specified heirs, and reverter to the donor upon the failure of such heirs, three things are necessary to the creation of such an estate: (1) There must be a particular estate. (2) The remainder must pass out of the grantor at the creation of the particular estate. (3) The remainder must vest in the grantee during the continuance of the particular estate or eo instante that it determines. The destruction of the particular estate before the vesting of the remainder is fatal to the grant. Hence in the cases of entail it was not unusual to interpose trustees for the preservation of the particular estate until the birth of an heir entitled to take per formam doni. Poor v. Considine, 6 Wall. [73 U. S.] 477; Croxall v. Shererd, 5 Wall. [72 U. S.] 284. In the construction of wills the cardinal and controlling consideration is the intent of the testator. If that can be ascertained, and there be no legal impediment, it is conclusive; everything else gives away before it. It is clear this will did not create an estate tail; no such purpose animated the mind of the testator.

Passing by other points of difference between such an estate and those constituted by the will, it is sufficient to note that the testator declared that when the final distribution per capita took place, and the deeds were executed accordingly, the grandchildren being the first donees in each case, should take their estates "for them and their heirs forever, to have and to hold, or to sell or dispose of the same at their will and pleasure." There was no attempt to make any special limitation. It was only in the event of a grandchild being disabled by death from taking that the further provision was made "that if any grandchild aforesaid shall have died before said division is made, leaving a child or children lawfully begotten, such child or children shall take and receive, per stirpes (to be equally divided between them) the share of my said estate, both real and personal, which the deceased parent of such child or children would have been entitled to have and receive if living at the time of such final distribution." Here again it is to be observed there is no attempt to limit the property over to the heirs of the bodies of such children. So much of the statute as relates to estates tail may therefore be laid out of view. It has no application to the case, and cannot, therefore, be a factor of any value in our examination of the subject before us.

The rule in Shelley's Case, as stated by Preston and Chancellor Kent,—the latter modifying the definition of the former,—is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitled the ancestor to the whole estate." Prest. Est. 263, 418; 4 Kent, Comm. 215. The rule is one of property, and not of construction. Whenever it can be fairly inferred from explanatory and qualifying expressions in a will that the import of the technical terms employed is contrary to the real intent of the testator, the latter must prevail. Daniel v. Whartenby, 17 Wall. [84 U. S.] 643. Here neither the language of the devise nor the obvious aim and purpose of the devisor bring the case within the rule. We think the intent was clearly otherwise. The estate of the first devisees, in whom any title was vested, was, by the terms of the will, to be a fee-simple absolute. The estate intended for the deceased parents was given to their children. According to the will, the latter took by purchase and not by descent. The rule therefore has no application.

Nor can we hold that the estates given to the grandchildren were estates in remainder which vested in right as to those in esse at the death of the testator, and in those after-born at their birth, but to take effect in possession when the youngest should arrive at the age of twenty-one,—all the said children of the testator being dead,—the estate to determine as to the grandchildren, if any they had, and, if there were none, then to the grandchildren who should be living at that time. There is nothing in the will which warrants this view. On the

contrary, the will gave the grandchildren no right or interest touching the real estate until the time arrived and the events occurred which required the final division to be made. In the meantime the income of the estate, from both the realty and personalty, was to be divided annually per capita among the said children of the testator and the said grandchildren who were twenty-one at the time of such divisions. Where either of the granchildren was dead, his or her children, if there were any, were to take per stirpes the portion, both of the real and personal estate, which would have belonged to the deceased if living at the time of the final division. In the meantime nothing was given to such children from the income of the estate or from any other source.

A weighty reason for applying the doctrine here in question in many cases is that otherwise, if the devisee died before the time specified, leaving children, they would be wholly cut off from the estate, and left unprovided for, which it was presumed could not be according to the intent of the testator. Poor v. Considine, 6 Wall. [73 U. S.] 478. Here the testator guarded against the influence of this consideration by providing expressly that, while all the grandchildren should take per capita, the children of a grandchild, who could not take by reason of death before the executors were authorized and required to convey, were to receive per stirpes the share to which their parent would have been entitled if living at the time prescribed for vesting the titles in those clothed with the right to receive them. The will seems to have been the work of a careful and accurate legal mind.

Estates legal and equitable, with a few exceptions not necessary to be adverted to in this case, are governed by the same rules. They are alike alienable, descendible, and devisable, and barable by the acts of the parties and by matter of record. Croxell v. Shererd, 5 Wall. [72 U. S.] 284. The general rule is that a trust estate terminates when the purposes of the trust have been answered, "and, notwithstanding the devise to the trustees and their heirs, they take only a chattel interest when the trust does not require an estate of higher quality." Poor v. Considine, 6 Wall. [73 U. S.] 471. In this case the legal title was vested in the executors in trust, to be held until the youngest grandchild reached the age of twenty-one years, and the children named were dead, and then to be conveyed according to the directions of the will. The trust estate was therefore a freehold. An executory devise is such a disposition of real property by will that no estate vests at the death of the devisor, but only on a future contingency. It differs from an estate in remainder in three material points: (1) It needs no particular estate to support it. (2) A fee-simple or other less estate may be limited by it after a fee-simple. (3) A remainder may be limited of a chattel interest after a particular estate for life in the same property. It seems to us entirely clear that the grandchildren, when the youngest one reached the age of twenty-one years,—the children all being dead,—took each an executory devise. The estate so taken was an equitable fee-simple to be turned into a legal fee by the required conveyance from the executors at that time. The same remarks apply with respect to the estate given to the children of a grandchild who died before such conveyance was required to be made. The death of the children, and the arrival of the youngest grandchild at the age specified, were conditions precedent to the vesting of any right or title in either of the devisees. We agree that the final disposition of the estate must be such as will inevitably occur within the sanctions of the statute. If it may possibly be within the prohibitions prescribed, it is void. Potentiality and certainty are in the eye of the law, in such cases, the same thing. Ould v. Washington Hospital for Foundlings, 95 U. S. 303. The facts as they may subsequently occur are, in this view, immaterial. The English law of perpetuities, and the New York statute upon the subject, are so different from the statute of Ohio, that adjudications under the former are of little value as to cases arising under the latter. The limitation in the foreign law in both cases is as to time. Here it is as to persons. There is no difficulty in this case arising from the devises to the grandchildren. Whether they were born before or after the making of this will is immaterial. In the former case they were in being at that time, and in the latter they were the children of persons then in being. Devises to both are expressly sanctioned by the statute. But it is obvious that children might be born to a grandchild not in esse when the will was made, and the grandchild be deceased, leaving such children when all the children named of the testator were dead, and the youngest grandchild attained to the age of twenty-one years. The bill informs us that such were the facts with respect to Mrs. Mary Medary, the testator's grandchild, born of his daughter Mary. Is the will valid as to her children, the great-grandchildren of the testator?

In order to solve properly this question we must recur to the statute other than that part of it which relates to estates tail. The latter has already been considered and held to have no application, there being no such estate created by the will. The other part of the statute, as remarked in our analysis, prohibits deeds and wills except to persons in being when the deed or will is made, or their immediate issue or their immediate descendants. The phrase "persons in being" needs no remark. "Immediate issue" means "children." Turley v. Turley, 11 Ohio St.

173. "Immediate descendants"."includes all to whom under the statute of descents an estate would have descended immediately from the particular persons whose descendants they, by the will are required to be." Turley v. Turley, supra. The children of a deceased grandchild here are next in the line of descent after their parent from the testator's child whose descendants the statute requires them to be. This, according to the authority cited, brings them within the category of the statute touching "immediate descendants," and within the permission given by the statute to deed or devise to persons belonging to that class. A brief analysis of Turley v. Turley will set analogies of that case to the one in hand in a clear light. There the testator devised the real estate to F., an unmarried daughter, for life; remainder at her death to her children then living, and the descendants of those children who might be dead, to be divided equally per stirpes. F. married, and had thirteen children. At her decease ten only were living, two had pre-deceased, leaving issue, and one without issue. It was held that the devise to the children of the pre-deceased children was not in conflict with the statute. That there was an intervening life-estate in one case, and an intervening trust estate in the other, with respect to the grandchildren, is immaterial. The legal position and rights of the children of a deceased grandchild of the testator were identical to both cases. As to them, the point of remoteness arising under each will was exactly the same. The judgment of the court in Turley v. Turley is as binding upon us as if the points decided were a part of the statute. It is our duty to administer the law in this litigation in all respects as if we were sitting here as a local court of the state. Stevenson v. Evans, 10 Ohio St. 306, has also an important bearing upon this case. A testator gave property to two daughters and two grandsons for life, and declared that the portion in which each had a life-estate shall descend, and pass "absolutely, unconditionally and in fee-simple respectively to the children of each lawfully begotten of the body of each, or the children or child lawfully begotten of the body of such child or children." Cross-remainders (not necessary to be particularly adverted to), upon several contingencies were provided for. The last devise was held to be valid. The court said: "The testator had undoubtedly a right to provide for persons who might be in being at the time of the death of the tenants for life. He had the right to give the property to the children of such tenants, living at the time of their death, though not born at the time the will took effect. In the event of the death of any such children before the termination of the life estate, leaving children, he had a right to substitute the latter in the place of their parents. It is not, as appears to be supposed by counsel, a substitution of a remote class of unborn children, but of children whose parents having died before the termination of the life-estate, must under the designation of the child or children of such parents, be then known and determined. Strike out the phrase "life-estate" from the passage we have quoted and insert in its place "particular estate" (we refer to the estate vested in trust in the executors), and its language would be as well applicable to this case as to the one in which it was expressed. It will be observed that in Turley v. Turley, Stevenson v. Evans, and in this case, the ultimate devisees were alike the immediate descendants of the person in being when the will was made—that if no will had been made by the testator or by immediate devises, a portion of the property would have come under the statute of descent directly to them; and that their substitution in place of their deceased parents did not and could not for a moment delay the final disposition of the property under and pursuant to the will. They take by the substitution exactly when and what the parent would take if living. The result as to perpetuity would have been exactly the same if the substitutionary clause had been omitted from the will. To hold it void would involve the sacrifice of substance to form. Here the intention of the testator is indisputably clear. We can see no sufficient reason why it should be defeated. The result of the two cases referred to is that the statute is not to be disjunctively construed. This must be so, or otherwise the solecism would follow that while there could be provision made for those in the last category designated, there could be none at the same time for those in the prior ones. There is no restraint by the statute but what is expressed. We can interpolate none.

Several points not noticed were pressed upon our attention with learning and great ability by the counsel who argued in support of the demurrer. It was our intention fully to discuss them. The length which this opinion has already reached, admonishes us to draw to a close. We have felt the less hesitation in coming to the conclusion we have indicated, because, were it different, and our judgment should be reversed on appeal, the case would have to be remanded for trial in its other aspect, and there might be a second appeal. This would involve a delay of several years in its final determination. As it is, the whole case can go up at the same time. But one appeal will be necessary, and the judgment of the supreme court thereupon will be final and conclusive. The demurrer is overruled, and leave will be given to the defendants who filed it to answer the bill.

McARTHUR (CRAIGIE v.). See Case No. 3,341.

McARTHUR (FALLIS v.). See Case No. 4,627.

McARTHUR (HOBSON v.). See Case No. 6,554.

Case No. 8,659a.

McARTHUR v. HOGAN.

[Hempst. 286.][1]

Superior Court, Territory of Arkansas. July, 1835.

REPLEVIN—AFFIDAVIT—INADEQUATE—JUDGMENT OF RETORNO.

1. Where an affidavit in replevin omits to state that the plaintiff was lawfully possessed of the property, and that it was unlawfully taken from his possession and without his consent, it is fatally defective, and it is proper to dismiss the suit.

2. Judgment of retorno, not technically correct, but substantially good.

[This was a suit by Charles McArthur against Young Hogan. Heard on appeal.]

Before JOHNSON and YELL, JJ.

OPINION OF THE COURT. In this action of replevin, two questions are presented for the consideration of the court. First, the sufficiency of the affidavit of the plaintiff; and second, the legality of the judgment rendered by the court. The affidavit made by the plaintiff in the court below, is manifestly defective and insufficient. It contains no averment that the plaintiff ever was possessed of the property, or that it was unlawfully taken from his possession and without his consent. These averments are required by the statute (Ter. Dig. 457), and the affidavit being thus fatally defective, the suit was properly dismissed by the court. Our statute provides, that if any plaintiff in replevin shall fail to prosecute his suit with effect, the judgment shall be, that he return the property taken. Ter. Dig. 458. Has the circuit court rendered such a judgment? Although the judgment is not in the technical language of the usual forms, yet we think it substantially corresponds with approved precedents. The judgment is as follows: "Therefore, it is considered that the said plaintiff take nothing by the said writ, and that the said defendant have a return of the property so replevied as aforesaid." The judgment rendered in the case is, in our opinion, substantially for a return of the property, and although not formally, is substantially correct. Judgment affirmed.

McAVOY (UNITED STATES v.). See Case No. 15,654.

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

Case No. 8,660.

MACKBEE v. GRIFFITH.

[2 Cranch, C. C. 336.][1]

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

CONTRACTS—BOARD AND LODGING—PROSTITUTES.

A woman who keeps prostitutes for gain cannot recover in an action against them for boarding and lodging.

Indebitatus assumpsit ana quantum meruit, for boarding and lodging.

THE COURT, upon the motion of Mr. Key and Mr. Lear, for defendant, instructed the jury, that if they should be satisfied by the evidence, that the plaintiff kept a bawdy-house, and that the defendant lived with her for the purposes of prostitution, and that the plaintiff was to derive any profit from the prostitution of the defendant, the plaintiff could not recover in that action.

Mr. Jones, for plaintiff, did not object to the instruction.

Case No. 8,661.

McBRATNEY v. USHER.

[1 Dill. 367.][2]

Circuit Court, D. Kansas. 1870.

REMOVAL OF CAUSES—PAPERS TO BE FILED—PROCESS.

1. In a case removed from a state court to the United States court under section 12 of the judiciary act [1 Stat. 79], it is incumbent on the party who applies for the removal, to file in the latter court, not only a copy of the summons, or other process, but also of the declaration, petition, or bill, the petition for the removal, and the order, if any was made, of the state court thereon.

[Cited in Woolridge v. McKenna, 8 Fed. 667; Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 11.]

2. The word "process," used in this section, is equivalent in meaning to the word "proceedings." Arguendo, per Dillon, Circuit Judge.

3. The practice of the court in causes thus removed, stated.

Motion by the plaintiff to remand the cause to the state court from which, on the petition of the defendant, Usher, it was removed into this court. The facts pertaining to the motion are these: On the first day of the present term, Usher entered in this court a certified copy of the summons, or process, by which the action was commenced in the state court, and of the returns thereon. No copy of the declaration, or of the petition for the removal, nor of any other paper, is filed in this court. Although both parties concede in argument that an order for the removal of the cause was made by the state court upon the petition of Usher, yet no certified or other copy of this order is here produced, entered, or filed. In a word, there is noth-

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

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

ing at present on the files of this court but a copy, properly certified, of the summons and the returns of the sheriff thereon. These show that the plaintiff commenced, in one of the state courts of Kansas, an action against the Kansas Pacific Railway Company and John P. Usher, as defendants; and that the railway company was not served with process, but that Usher was. The plaintiff is stated to be a citizen of Kansas. The ground of the present motion to remand is, that the railway company is a corporation created by the state of Kansas, and therefore a citizen thereof, and the defendant, Usher, although a citizen of Indiana, is not entitled to have the cause removed. The right to a removal is based on section 12 of the judiciary act.

Mr. Wheat, for the motion.

Mr. Usher, for himself, contra.

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

DILLON, Circuit Judge. It is conceded that the order for the removal was made under section 12 of the judiciary act. The ground of the motion to dismiss the cause from this court, and to remand it to the state court, is, not that the party procuring the removal has not brought into the court the proper copies of process and proceedings in the court which ordered the transfer, but simply that since there were two defendants, one (the railway company) being a citizen of the state, and the other not, the non-resident defendant was not entitled, under this section of the judiciary act, to have the cause removed. If at the time the order for the removal was made there were two such defendants, it is true, according to the settled construction of the act of 1789, that one of the defendants, though a non-resident, would not have a right to have the cause transferred to the federal court. With the act of July 27, 1866 [14 Stat. 306], giving, under certain circumstances, the non-resident defendant such a right, we have nothing to do. But we do not know from anything now before us that there were two defendants to the cause when the order for the removal was made. Two are named it is true, in the summons, but only the defendant who procured the removal seems to have been served; and the cause may, for aught now appearing, have been dismissed as to the other defendant, the railway company. If it be conceded that this company is a resident corporation, and that the court can judicially notice it to be such, still, for the reason above suggested, there is nothing showing the removal to have been improperly ordered. The motion, on the ground on which it is made, is not well taken, but for the reasons below given, it will be denied, with leave to renew it, if the plaintiff shall be so advised.

The circumstances of the case suggest the inquiry, what is required of the party who procures the removal of a cause to this court under section 12 of the judiciary act, in respect to entering herein copies of the papers filed, and proceedings had in the state court. Assuming the citizenship and amount to be such as to give the right of removal to the non-resident defendant, what must he afterwards do in order to comply with the requirements of the act? It will be recollected that he must apply for the removal before plea or answer, and when there can at most be on file in the state court the summons or other process by which the suit was commenced and the declaration, petition, or bill of complaint. The act requires the defendant to "file a petition for the removal of the cause," and this should state the grounds on which the party rests his right to the removal, and, in connection with the pleadings, should show affirmatively, that such right exists. If the right to a removal is not thus made to appear, the application should be denied by the state court; and if improperly granted, the cause must be dismissed or remanded by the circuit court. Not only is the party to file such a petition, but he must also "offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him;" * * * "and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

In the course of the argument the defendant contended that the act did not require him to cause to be transmitted to this court a copy of the declaration, or of the petition for removal, or of the order of the state court thereon, but it is sufficient to enter, without more, a copy of the summons, and afterwards declare anew under the rules and practice of the court. It is our opinion upon an examination of the whole of section 12 of the judiciary act, that the party who obtained the removal should procure and enter in the circuit court a transcript or certified copy of the summons or other like process, and also of the first pleading filed by the plaintiff, whether a declaration, petition, or bill; and also of the petition for the removal, and any order of the state court thereon.

The language of the act is that if "a suit be commenced in any state court," etc., and the non-resident defendant petitions for the removal, and offers surety for entering in the federal court "copies of said process against him," etc., the state court shall proceed no further in the cause "and the said copies being entered as aforesaid," the cause shall proceed as if brought in the United States court by original process.

It is argued that the word "process" refers to the summons or original writ, and that it is sufficient to enter a copy of this, without more. But our opinion is otherwise. The phrase "said process" refers to the "suit

commenced;" and as here used, the word "process" is equivalent to the word "proceedings." The word "process" is used as synonymous with the word "proceedings" in the first process act of September 29, 1789 (1 Stat. 94, § 2), passed only five days after the judiciary act. This circumstance tends to confirm the view above suggested, but its correctness may, perhaps, be more satisfactorily shown by other considerations.

If it be sufficient, as maintained by the defendant, simply to file or enter a copy of the original process, how, let it be asked, is the United States court to know that any order of removal was ever made or denied by the state court? for such a copy cannot of course, give any information on these points. If a copy of the original declaration or pleading on the part of the plaintiff is not required to be entered in the circuit court, how is that court to know what the "matter in dispute" is, or its value? and if a new declaration, or petition, or bill be filed, how is it to know that it is the same matter which was set up in the like pleadings filed in the state court? If a copy of the petition for removal is not required, how is the court of the United States to know whether it made a case entitling the party to a removal and authorizing it to take jurisdiction? Since, then, it is absolutely necessary that one of the parties should put the United States tribunal in possession of these data, it is reasonable to construe the act to require this to be done by the party who sought the removal, and not by his adversary.

The practice of the court will be conformable to these views. It will also be the practice that when the party applying for the removal shall fail, within the time prescribed by statute, to enter a complete transcript of the papers and proceedings in the state court, to permit the adverse party to file the same or the omitted parts thereof, unless cause be shown to the contrary, and the suit will stand and be proceeded in, the same as if all the papers had been filed by the applicant for removal, or in such manner as may be otherwise ordered by the court.

Guided by these suggestions, the parties may take such further steps as they see fit, and meantime the motion to remand will stand denied, with leave to renew it on other grounds before, or on the same grounds after, a certified copy of the papers and proceedings in the state court shall have been entered or filed herein. Ordered accordingly.

NOTE. See Sweeney v. Coffin [Case No. 7,686], construing other provisions of section 12 of the judiciary act, as to the right to remove, and construction of various statutes on that subject. See, also, Sands v. Smith [Case No. 12,305]; Case v. Douglas [Id. 2,491]; Webster v. Crothers [Id. 17,334]; Garden City Manuf'g Co. v. Smith [Id. 5,217]; Beecher v. Gillett [Id. 1,225]. Under the act of July 27, 1866, defendants claiming the right of removal need not join, but may apply separately as they are served with process or otherwise brought into court. Fisk v. Union Pac. R. Co. [Cases Nos. 4,827, 4,828], South. Dist. N. Y., per Nelson and Blatchford, JJ.

McBRATNEY (USHER v.). See Case No. 16,805.

Case No. 8,662.

In re McBRIDE.

[19 N. B. R. 452.] [1]

District Court, E. D. Michigan. July 1, 1878.

SUBROGATION—CHECK RECEIVED BY REVENUE OFFICER—RIGHTS AGAINST DRAWER.

A United States revenue officer must account to the government, in lawful money, for all sums received by him as such officer. And, if he make good to the government, by payment, the amount of a dishonored check which he had received from a government debtor, he is a guarantor on behalf of such debtor, of a most meritorious character, and will be entitled to be subrogated to all the rights of a guarantor in any proceeding to collect the amount.

The register certified that on the 25th day of January, 1878, Charles R. Wing proved on behalf of, and in the name of the United States of America, a claim against said bankrupts [James G. McBride, Caleb Ives, and Seth L. Carpenter] in the sum of two thousand and ninety dollars and forty cents, for revenue stamps sold by said Wing as the deputy of H. B. Rowlson, collector for the Third revenue district of Michigan; that the assignee instituted proceedings under general order 34 for the re-examination of the claim; pending which, Wing filed a petition to be subrogated to the claim as proved in favor of the United States.

Both proceedings were heard together, testimony was taken, and the parties heard by counsel; the assignee by Mr. T. Romeyn, and Wing by Mr. A. Russell. The register entered an order dismissing the petition for the re-examination of the claim, and that Wing be subrogated to the rights and interests of the United States; which order, at the request of the assignee, the register certified into court for determination by the district judge.

By HOVEY K. CLARKE, Register:

The principle of subrogation is well stated in the article under this title in Johnson's Cyclopedia, thus: "Whenever a person secondarily liable for a debt pays the same, the demand is not thereby absolutely discharged; but he, at once, by the operation of the equitable doctrine, succeeds or becomes subrogated to all the rights, remedies, and securities which the creditor held against the debtor primarily liable, and may enforce the same as a creditor against such debtor in order to reimburse himself for the outlay which he has made on behalf of that party." The illustrations usually given of the application of

[1] [Reprinted by permission.]

this principle are those of mortgagees, sureties, and guarantors.

In this case, Wing, as deputy collector, had sold to the bankrupts revenue stamps to the amount of two thousand and ninety dollars and forty cents. At the time of the sale of one thousand dollars of these stamps, two checks on a firm of bankers in Detroit, drawn by C. Ives, one of the bankrupts, were delivered to Wing, one for five hundred dollars and one for five hundred and ninety dollars and forty cents, both of which were dishonored on presentation. Stamps to the amount of one thousand dollars more were delivered on the day of the failure of the bankrupts, to their shipping clerk, on his statement that Mr. Ives was ready to pay for them. Much of the testimony taken seems to have for its purpose to show some arrangement between the bankrupts, Mr. T. E. Wing, the father and bondsman of the deputy collector, and Mr. C. R. Wing; but, whatever it shows, the fact is left clear that stamps to the value claimed were delivered to the bankrupts, and they have not been paid for. The testimony also shows that the government makes no claim against the bankrupt's estate, because the amount has been assumed and paid by Mr. Wing, the deputy collector, either out of his own money, or by means furnished by his father, who is his bondsman. He made this payment because he had become legally liable for the value of the stamps which he had delivered to the bankrupts, and for which they had not paid. This liability results from his duty as a public officer to take nothing but money. That public officers do constantly take checks upon banks as money, and that their own and the convenience of business men dealing with them is thereby promoted, is, probably, well known. But if they should refuse to take anything but coin, or the currency furnished by the government, and should then be imposed upon by counterfeits, their liability would be the same as it is upon a protested check; and thus whatever they take, they become, as public officers, guarantors to the government, on behalf of the parties with whom they have dealings, that that which they treat as money shall produce money to the government. A collector in the position now occupied by Mr. Wing is a guarantor of the most meritorious character. If the government were now prosecuting this claim, it would be paid in full, and it seems to me inequitable to allow the general creditors of the bankrupts' estate to be benefited at the expense of the deputy collector, who, to make good his guaranty to the government, has assumed and paid the sum owing by the bankrupts' estate.

T. Romeyn, for assignee.

A. Russell, for claimant.

BROWN, District Judge, approved the opinion of the register, and directed an order to be entered subrogating Wing to the rights of the United States as a preferred creditor.

Case No. 8,663.

In re McBRIDE.

[1 Wkly. Notes Cas. 16.]

District Court, E. D. Pennsylvania. Oct. 1, 1874.

BANKRUPTCY PRACTICE—REGISTER'S FEES—NO ASSETS IN HANDS OF ASSIGNEE.

The register reported to the court that he had received no payment for his services, except the deposit fee of $50, no assets having come into the hands of the assignee, and petitioned the court to make an order upon the intervening and petitioning creditors for the payment of his fees, as provided in the 47th section of the bankrupt act [of 1867 (14 Stat. 540)].

THE COURT thereupon ordered the petition to be set down for a hearing, and notice to be given to the intervening and petitioning creditors, as well as to the bankrupt.

Case No. 8,664.

In re McBRIDE.

[1 Wkly. Notes Cas. 42.]

District Court, E. D. Pennsylvania. Oct. 21, 1874.

BANKRUPTCY PRACTICE—COSTS.

Proof of notice to petitioning creditors being made, THE COURT ordered that the clerk tax register's and clerk's costs and fees, and that the bankrupt pay the same.

McBRIDE (OSBORN v.). See Case No. 10,593.

McBRIDE (PROCTER v.). See Case No. 11,441.

Case No. 8,665.

In re McBRIEN.

[2 Ben. 513; [1] 2 N. B. R. 197 (Quarto, 73).]

District Court, S. D. New York. Oct. 27, 1868.

EXAMINATION OF BANKRUPT—ORDER—AFFIDAVIT.

Where the assignee of a bankrupt applied for an order for his examination, which was granted, and, after his examination under it had been commenced, the bankrupt moved to vacate the order because it was not founded on affidavit, which motion the register denied: *Held*, that the register's decision was correct.

[Cited in Re Solis, Case No. 13,165; Re Dole, Id. 3,965.]

[2] [The application of John Sedgwick, assignee, &c., of the above named bankrupt, shows: That he is the assignee of the estate and effects of the above named bankrupt, and that he applies for an order that the above named bankrupt attend before James F. Dwight, register, and submit to the examination required by the twenty-sixth section of

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

[2] [From 2 N. B. R. 197 (Quarto, 73).]

the bankrupt act [of 1867 (14 Stat. 529)]. John Sedgwick, Assignee.

[I, James F. Dwight, the register in charge of this entitled matter, do hereby certify that in the course of proceedings herein, the following question arose pertinent to the proceedings:

[On the 25th day of May, 1868, Charles McBrien was duly adjudged a bankrupt upon his own petition. On the 22d day of July, 1868, John Sedgwick, who had been duly appointed assignee, made an application in writing (which is hereto attached) for an order that the bankrupt attend at the chambers of this court before me, to submit to the examination required by the twenty-sixth section of the act. The order applied for was issued by me, and the bankrupt, in obedience thereto, attended on the third day of September, 1868, made his formal declaration under oath, and his examination was commenced on that day and adjourned to October 9th, and then to October 13th.

[October 13th, pursuant to adjournment, the bankrupt appeared, and, through his counsel, Robert N. Waite, Esq., moved to vacate the order granted on the 29th July, on the ground that the application for the order to examine the bankrupt should be founded upon an affidavit giving some good and sufficient reason why the order should be granted, and cited, in support of his motion, In re Adams [Case No. 39].

[Mr. Sedgwick, the assignee, was heard in opposition.

[The motion to vacate the order was denied, and the bankrupt, through his counsel, prays that the question may be certified to the judge as to whether the register erred in refusing to grant the motion to vacate the order for the bankrupt's examination, which prayer is granted in accordance with the rules of practice, and this certificate made in conformity thereto.

[By the Register:

[I can see no reason for vacating the order, or why the bankrupt is not properly under examination. Section twenty-six of the bankrupt act says: "The court may, upon the application of the assignee, * * * or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination," &c. Neither the law, nor the rules or forms of the supreme court framed under it, have provided that the application shall be under oath; and it would seem, from the use of the word "may," that it is left to the discretion of the court whether to allow the order, and what cause shall be shown for it. The bankrupt is theoretically a ward of the court during the pendency of his case, and may be called upon by the court at all times, without application of any one, to submit to the examination required by the twenty-sixth section, and as the assignee is a quasi officer of the court in each case, it would seem necessary that the court should be satisfied only of the bona fides of the assignee's application to issue an order thereon for the bankrupt's examination. The assignee is entitled to the fullest information concerning the estate under his charge. Furthermore, in this case the bankrupt is actually under oath, and his examination is progressing, being suspended only pending the decision of this question, and it was not till the third sitting that any objection to the form of the assignee's application was made. I have examined the record of the case of Adams referred to. Which above facts and opinion are respectfully submitted to the judge for his opinion.] [3]

In this case the assignee of the bankrupt made application in writing to the register for an order directing the bankrupt to attend and be examined pursuant to the 26th section of the bankruptcy act. The register made the order, and in pursuance of it the bankrupt attended, and his examination was commenced and then adjourned. On the adjourned day, the bankrupt's counsel moved to vacate the order, because the application for it was not made on affidavit. The register refused to vacate it, and, on the bankrupt's request, certified the question to THE COURT (BLATCHFORD, District Judge), which sustained the ruling of the register.

[See Case No. 8,666.]

Case No. 8,666.

In re McBRIEN.

[3 Ben. 481; [1] 3 N. B. R. 344 (Quarto, 90).]

District Court, S. D. New York. Nov. 1869.

EXAMINATION OF BANKRUPT — PROPERTY IN HIS POSSESSION AFTER THE FILING OF HIS PETITION.

Questions put to a bankrupt by the assignee in bankruptcy, tending to show that, within a short time after the filing of his petition, he had an amount of money in his possession, which he had not acquired by the transaction of any business subsequent to such filing, are proper.

[2] [I, James F. Dwight, register of said court in bankruptcy, hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings, and was stated and agreed to by counsel for the opposing parties, Mr. John Sedgwick, assignee, etc., and Mr. Robert N. Waite, attorney for the bankrupt. The bankrupt being under examination declined and refused to answer certain questions propounded by the said assignee who was examining him. The said questions are fully set out in the statement of the assignee hereto annexed. And the said parties requested that the same should be certified to the judge for his opinion thereon, which is hereby done and the statements of the said parties hereto attached. I think the questions should be answered.

[3] [From 2 N. B. R. 197 (Quarto, 73).]

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

[2] [From 3 N. B. R. 344 (Quarto, 90).]

[Statement of Counsel: The counsel for assignee insists that on the examination of the bankrupt, Questions "370: When did you first do any business, if at all, after filing your petition? 371. Have you done any business since you filed your petition? 372. Before going into business, after filing your petition, were you in the possession of any money? 373. Have you had any place of business since filing your petition? 374. Since filing your petition, have there been kept any books of account of your business? 375. Since filing your petition, have you kept in your own name or otherwise any bank account? 376. In the month of April, 1868, were you not in the possession of or control of some hundreds of dollars in money? 377. Since filing your petition, have you not made deposit of some thousands of dollars in money? 378. Since filing your petition herein on the 11th of March, 1868, and before April 6th, 1868, did you not make deposit of some thousands of dollars in money?" were relevant, and bankrupt should answer them. The assignee was entitled to any facts, directly or circumstantially tending to show that the bankrupt, before filing his petition in bankruptcy, was in possession of money, which he had concealed, but which should have gone to the assignee. Now, the questions, if answered, might have exhibited this train of circumstances, that on the 11th of March, 1868, the bankrupt filed his petition, that from that time to April 6th, 1868, he did no business, or if he did any business he made no money in it, but that on the 6th of April, 1868, he was in possession of some hundreds or thousands of dollars in money. The assignee might then claim that the bankrupt was to show affirmatively how (if such was the fact), that being in no business or making no money, he acquired that money subsequent to the adjudication of bankruptcy, or the assignee, knowing by the answer to the questions, that bankrupt was under the exceptional circumstances in possession of money, be able to trace out the occurrences, and show by bankrupt's or other witnesses' testimony that that money had been acquired by bankrupt before the filing of the petition. At any rate, the position taken, that, because the assignee is not entitled to property acquired by him after filing his petition, the bankrupt is not obliged to disclose whether he was in possession of large sums of money soon after bankruptcy, is not sound. The point of inquiry in such cases is, when did the bankrupt acquire it, and how? The assignee will have to show that it was acquired before bankruptcy, and he may also show that, though acquired after, still it was the proceeds of property or effects belonging to the assignee. An investigation may commence by showing means and going to the result, or showing the result, and discovering the means by further examination. The assignee distinctly asserts that the purpose was not to obtain information as to property acquired by bankrupt after filing his petition, but was to show that he had a large sum of money in his possession at the time of going into bankruptcy, which he concealed until April 6th, 1868, when he deposited it for his own purposes. John Sedgwick, of Counsel for Assignee, etc.

[Counsel for bankrupt submit that he was not compellable to answer the questions severally numbered 370, 371, 372, 373, 374, 375, 376, 377, and 378.] [2]

BLATCHFORD, District Judge. The questions were proper and relevant, and must be answered. The clerk will certify this decision to the register, James F. Dwight, Esq.

[See Case No. 8,665.]

McBURNEY (GOODYEAR v.). See Case No. 5,574.

McCABE (DANIELS v.). See Case No. 3,567.

Case No. 8,667.

McCABE v. McKINSTRY.

[5 Dill. 509.] [1]

Circuit Court, D. Minnesota. 1878.

WAREHOUSE GRAIN RECEIPTS—SALE—BAILMENT—EVIDENCE.

1. Criteria of sales and bailments in respect of grain in warehouses and elevators stated.

[Cited in Thorne v. First Nat. Bank, 37 Ohio St. 258.]

2. Parol evidence of the manner in which and the purpose for which the grain was received and the use made of it, is admissible, in connection with the receipt of the warehouseman, to determine whether, as between the immediate parties, the transaction was a sale or bailment.

[Cited in State v. McBride, 81 Mo. 349.]

3. The act of the legislature of Minnesota of March 3d, 1876, "to regulate the storage of grain," construed in connection with Rahilly v. Wilson [Case No. 11,532].

[Error to the district court of the United States for the district of Minnesota.]

The plaintiff is the assignee in bankruptcy of the Winnebago City Mill Company. The action was brought to recover $576.65 alleged to have been received by the defendant of the bankrupt April 20th, 1876, as a fraudulent preference under the bankrupt act [of 1867 (14 Stat. 517)]. On May 1st, 1876, the mill company filed its voluntary petition in bankruptcy, and on the next day was adjudged to be a bankrupt. On March 20th, 1876, the defendant authorized Cussens, the secretary of the mill company, to purchase certain wheat for him, which was done, and the following instrument executed, viz.: "550 bushels. Winnebago City, Minn., March 20th, 1876. Received of Paul McKinstry, five hundred and fifty bushels of No. 1 hard

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[2] [From 3 N. B. R. 344 (Quarto, 90).]

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

wheat, at his risk in case of fire, and free of storage until sold. Winnebago City Mill Co., per J. M. Cussens, secretary." The wheat was delivered to the mill company. What was done with it, or what use was made of it, does not appear from the bill of exceptions. The money value of the wheat was afterwards, April 20th, 1876, paid to the defendant and this receipt surrendered. It does not appear that this wheat, or any wheat, was on hand when this payment was made. This is the payment in respect of which the recovery is sought, on the ground that it was a fraudulent preference. There was a trial by jury and a judgment for the plaintiff. The defendant sues out a writ of error, and relies, to reverse the judgment, upon the following exceptions appearing in the bill of exceptions: "The plaintiff offered to show by the said witness that the wheat specified in said receipt as received from Paul McKinstry (which was the same wheat for which defendant was charged with having received the sum of money alleged in the complaint) was not received for the purpose of being stored or bailed, but was received for the purpose of being ground into flour at the mill of the said bankrupt, and to be paid for in money by said company, and that that was the intention of the parties; to the introduction of which evidence the counsel for the defendant then and there objected, on the ground that the said receipt was in the nature of, and was, a contract in writing, and expressed the intention of the parties, and could not be altered or impeached by parol proof."

After the evidence was concluded, the defendant by his counsel asked the court to charge the jury as follows:

"550 bushels. Winnebago City, Minn., March 20th, 1876. Received of Paul McKinstry, five hundred and fifty bushels of No. 1 hard wheat, at his risk in case of fire, and free of storage until sold. Winnebago City Mill Co., per J. M. Cussens, secretary."

First. "That if the jury believe that the wheat for which McKinstry received the money was receipted for by a receipt similar to the above in form and date, that the same was a bailment of property, and not a sale, and that the assignee cannot impeach the receipt or contract expressed as above by parol proof;" which instruction the court refused to give, and to which refusal so to charge the defendant by his counsel then and there duly excepted.

Second. "That if the jury believe that the paying of McKinstry by Cussens, for the mill company, was upon and for the wheat receipt similar to the above, that the same was not a fraudulent preference in the law."

The court refused so to charge the jury, and to which refusal the defendant by his counsel then and there duly excepted.

The following is the act of the legislature of the state of Minnesota referred to in the opinion of the court:

"An Act to Regulate the Storage of Grain.

"Be it enacted by the legislature of the state of Minnesota:

"Section 1. That whenever any grain shall be delivered for storage to any person, association, or corporation, such delivery shall in all things be deemed and treated as a bailment, and not as a sale of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, and notwithstanding such grain may be shipped or removed from the warehouse, elevator, or other place where the same was stored. And in no case shall the grain so stored, and which such bailee may hereafter be required to keep on hand, be liable to seizure upon any process of any court in an action against such bailee.

"Sec. 2. Whenever any grain shall be deposited in any warehouse, elevator, or other depository for storage, the bailee thereof shall issue and deliver to the person so storing the same a receipt or other written instrument, which shall, in clear terms, state the amount, kind, and grade of the grain stored, the terms of storage, and if advances are made, the words 'advance made;' which receipts shall be prima facie evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt; and any warehouseman, proprietor of an elevator, or bailee who shall issue any receipt or other written instrument for any grain received for storage, which shall be false in any of its statements, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding three hundred dollars, or imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment.

"Sec. 3. It shall be the duty of every person, association, or corporation receiving any grain for storage, upon the demand of the bailor, or his assigns or representatives, and tender of all charges for storage and money advanced by the bailee, and upon the faith and credit of such bailment and offer to surrender the receipt or other written instrument evidencing the receipt of such grain for storage, to deliver to the person entitled thereto a quantity of grain equal in amount and of the kind and grade delivered to such bailee. Every person and every member of any association or corporation who shall, after demand, tender, and offer, as provided in section three (3) of this act, wilfully neglect or refuse to deliver to the person making such demand, the full amount of grain of the kind and grade which such person is entitled to demand of such bailee, shall be deemed guilty of larceny, and shall be punished by fine or imprisonment, or both, as is prescribed by law for the punishment of larceny.

"Sec. 4. Whenever, upon any demand, tender, or offer, as provided in section three (3) of this act, any such bailee shall neglect or

refuse to deliver any grain received for storage, or a quantity of grain equal in amount and of the same kind and grade as received, any such bailor, or his assigns or representatives, may commence, in any court having jurisdiction thereof, an action against such bailee to recover possession of a quantity of grain equal in amount and of the same kind and grade delivered to such bailee; and in every action it shall be the duty of the sheriff, or other proper officer, to take into his possession, from the warehouse of such bailee, or other place where he may have the same, a quantity of grain equal in amount and of the same grade as that specified in the affidavit made or writ issued in such action. Such action shall be commenced and prosecuted, if in district court, in the manner provided in actions for the claim and delivery of personal property; and if in justice court, in the manner provided in actions for replevin.

"Sec. 5. Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, or other commodity stored or deposited with any warehouseman or other person or corporation in this state, or bills of lading or receipts for the same when in transit by cars or vessels to any such warehouseman or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon: provided, that all warehouse receipts or bills of lading which shall have the words 'not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

"Sec. 6. No person receiving or holding grain in store shall sell or otherwise dispose of or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain and the return of the receipt given for the same, except as herein provided.

"Sec. 7. It shall be unlawful for any warehouseman, or owner or keeper of any elevator, or any agent of either, to mix together any grain of different grades so received in store, or to select different qualities thereof of the same grade for the purpose of storing or delivering the same, or attempt to deliver grain of one grade for another, or in any way to tamper with any grain of other persons while in his possession or custody, with a view to securing any profit to himself or any one, without the consent of the owner.

"Sec. 8. Any warehouseman or other person violating any of the provisions of section six (6) or section seven (7) of this act, shall be deemed guilty of a felony, and, upon conviction, shall be fined in a sum of not over one thousand dollars, or imprisonment in the state prison of this state not exceeding five years, or both.

"Sec. 9. This act shall take effect and be in force from and after its passage.

"Approved March 3d, 1876."

Andrew C. Dunn, for plaintiff in error.

Gilman, Clough & Lane, for defendant in error.

DILLON, Circuit Judge. Grain may be disposed of by the owner to a warehouseman, or to an elevator or mill proprietor, either by sale or bailment. In the former the title passes; in the latter it remains with the owner. It is sometimes difficult to determine whether a particular transaction is a sale or bailment. If a specific amount of grain is deposited by the owner, which is not to be changed by the bailee, but retained until called for, when the identical grain is to be restored, this is, of course, a plain case of bailment. Under the Minnesota statute of March 3d, 1876, however it might be in the absence of such an enactment, a specific amount of grain deposited for storage does not cease to be a bailment, and does not become a sale, because it is mingled by the warehouseman, or elevator or mill proprietor, with the grain of other persons, since the statute authorizes the intermixture of grain of the same kind and grade, and recognizes the continued ownership of the depositors to a quantity of grain equal in amount to that by them respectively deposited. Prior to the enactment of the statute just mentioned, it was decided, in Rahilly v. Wilson [Case No. 11,532], where there was an express contract, or an agreement implied from the known and invariable course of business, that the warehouseman or elevator proprietor might mingle specific wheat received with other wheat of like kind and grade, and ship or sell at his pleasure, with the further agreement or understanding that, on demand, he would pay the person from whom the grain was received the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass, that such a transaction was a sale at the time of the delivery, and not a bailment.

There is an inherent difference between bailments and sales. If I deposit my wheat to be stored and safely kept for me, my property remains, and I extend no credit to the bailee. But if I leave my wheat with him with authority to sell it for his own benefit, and not as my agent, and upon his promise to pay me the value of the wheat, or to give me a like quantity of wheat when I shall demand it, the transaction is in essence a sale of my wheat and the extending by me of a personal credit for its value.

I see no satisfactory evidence that the act of the Minnesota legislature of March 3d, 1876, meant to abrogate essential distinctions between bailments and sales, so far, at least, as to place the grain owner who authorized the warehouseman to sell, and the grain owner who only authorized him to store and safely keep, upon the same footing. Let me illustrate. Suppose I deliver one thousand bushels of wheat to a warehouseman, or elevator proprietor, with authority to sell, and it is sold; and the next day you deliver to him one thousand bushels to store, and he does so; the next day he fails with your one thousand bushels on hand, and no more. Was it intended by the Minnesota legislature that I might take the one thousand bushels by replevin, or even share it pro rata with you? It seems to me not. The act, although not carefully drawn, and in many of its provisions far from clear, seems throughout to confine its remedial provisions to persons who deposit grain "for storage" or safe keeping, and not to those who deposit it with authority to sell.

The act is conceded to have been passed in consequence of the decision in Rahilly v. Wilson [supra], and I have felt, in view of the facts of that case, considerable embarrassment in ascertaining the precise scope of the act, although its general purpose is manifest. While it must be admitted to have made important provisions to protect persons who deliver grain for storage, I am inclined to think that it was not intended to embrace the case of persons who deliver grain to the warehouseman with express authority to sell the same on his own account, and upon an understanding that he is to pay the value of a like quantity of grain, or to deliver a like amount, upon demand; nor to embrace the case of one who leaves wheat with a miller with authority, as in Randell's Case, L. R. 3 P. C. 101, to use it as part of his current consumable stock, and upon an agreement to pay the farmer or owner the value, or to deliver a like quantity when demanded.

The 1st section of the Minnesota act, if it stood alone, might be construed to cover cases such as those just mentioned, but the 6th section forbids the warehouseman or other person "receiving or holding grain in store to sell or otherwise dispose of or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain and the return of the receipt given for the same." No more effectual protection can be given to depositors of grain than this requirement that their grain shall not be sold, disposed of, or delivered out of the warehouse or the place where it is stored, without their consent. Unless the depositors otherwise agree, the grain deposited, or, at all events, an equal amount of the same grade, is always kept on hand, and, without their consent, the bailee is not authorized to sell it or to consume it, and substitute other grain in its place. If it is wrongfully sold or disposed of, it may be true that the owner's rights will attach to other grain substituted in its place, or to any grain which the bailee may own, but we have no occasion now to discuss or determine the point. See 2 Kent, Comm. (12th Ed.) 590 (Mr. Holmes' note).

In case of the insolvency of the warehouseman, or mill or elevator proprietor, where the grain on hand does not equal the amount of outstanding receipts, a person who has authorized his wheat to be sold or consumed, and pursuant to which authority it has been sold and removed or consumed, cannot come in competition, as respects grain on hand, with depositors for storage only, who have never authorized any sale, disposition, or removal of their grain.

The act authorizes the depositor of grain for storage to demand and receive a receipt therefor; makes it criminal to issue a fraudulent receipt; makes the receipt negotiable and to stand for the grain, so that whoever owns the receipt owns the grain; makes it larceny wilfully to neglect or refuse to deliver the grain, and criminal to sell, dispose of, or deliver the grain without the authority of the owner and the surrender of the receipt. Under this statute the warehouseman must be careful what kind of receipts he issues. If the contract under which the grain is received is one for storage, this excludes any implied right arising from custom or usage to sell or dispose of or deliver the grain out of the warehouse.

For the protection of the depositor, the authority to sell or ship or remove the grain must be express; and for the protection of the public, the receipt given for the same must be returned.

Difficult questions may arise under this act as to the respective rights of depositors where there has been a wrongful sale or removal of the grain, and where there is not enough grain for all; but this case does not require us to consider them.

The record before the court is meagre in the statement of the facts. Prima facie, the receipt issued is one for storage; but it would appear to be remarkable if the real understanding was that the grain should not be used—that the mill company would be willing, as a business transaction, to store it free of charge for an indefinite time.

In my judgment, the receipt is not of such a nature as necessarily to exclude all parol evidence to show the character of the transaction, and to show by the acts and conduct of the parties that the wheat therein mentioned was bought for the purpose of being manufactured into flour, and was so manufactured, with the knowledge or consent of the defendant, soon after it was received.

The district judge states that his notes show the undisputed evidence was that defendant was the president of the bankrupt mill company; that he bought the wheat to enable the mill to carry on its operations; that the secretary issued to him the receipt; that the wheat was almost immediately made into flour, with the defendant's knowledge, but the receipt was not surrendered until a short time before the bankruptcy, when the money was paid to the defendant. The bill of exceptions rests upon the proposition that, even if such were the facts, it is not competent, in view of the terms of the receipt and the provisions of the statute, to show these facts, or similar facts, by parol evidence. True, it is not competent to allow a witness to state what he intended by the use of the language in which the receipt was couched, but the bill of exceptions, taken as a whole, does not show that this was permitted. The contention of the defendants seems to have been, if such a receipt was given, that no state of case could be shown by parol evidence which would make him liable to the assignee in bankruptcy. Such a proposition is too broad to be sound, and, if adopted, might be the means of not only working a fraud upon the bankrupt act, but upon bona fide grain depositors under the local statute.

Parol evidence to show the circumstances under which the grain was received, the custom and mode of doing business, the use made of the grain with the consent of the depositor, etc., has often been admitted in cases like the present. Rahilly v. Wilson [supra]; Randell's Case, L. R. 3 P. C. 101; Chase v. Washburn, 1 Ohio St. 244; Lonergan v. Stewart, 55 Ill. 44. The only change in this respect made by the local statute is that the authority to sell must be "express," but it need not necessarily be in writing.

I regret that the bill of exceptions is not more full and precise, but, as I construe it, no error is affirmatively disclosed, and the judgment below is affirmed. Affirmed.

[See Case No. 8,668.]

Case No. 8,668.

McCABE v. WINSHIP.

[17 N. B. R. 113.] [1]

District Court, D. Minnesota. Dec., 1877.

BANKRUPTCY—STORAGE RECEIPT—RIGHT TO OFFSET AGAINST ASSIGNEE—TORT.

1. The bankrupt was extensively engaged in manufacturing flour and storing grain in an elevator attached to its mill. Defendant, prior to the bankruptcy, and in ignorance of the insolvency of the corporation, purchased a storage receipt which had been issued by it, and subsequently demanded a delivery of the grain, which was refused. In an action brought by the assignee to recover money of the bankrupt which the defendant had in his possession at the time of adjudication, *held*, that the value of the grain so converted might be set off.

2. Where the set-off is founded on a duty which the plaintiff owes the defendant, the wrongful act can be waived and a set-off is proper; but where the cause of action is a tort, then the wrongful act cannot be waived.

At the time of adjudication in bankruptcy the defendant had in his possession money belonging to the corporation. This suit is brought to recover it. The bankrupt was extensively engaged in manufacturing flour and storing grain in an elevator attached to its mill. Previous to the bankruptcy, and in ignorance of the insolvency of the corporation, defendant purchased a storage receipt issued by it to Paul McKinstry for four hundred bushels of wheat, and had demanded a delivery of the same, which was refused. To maintain the issues on his part, the defendant offered in evidence, under the plea of set-off, this receipt properly assigned to him, which is in the words and figures following: "Winnebago City, March 20, 1877. 400 Bush. Received of Paul McKinstry, four hundred bushels of No. One hard wheat, at his risk in case of fire, and free from storage until sold. Winnebago City Mill Co., Per J. M. Cusson, Sec'y." Endorsed: "I hereby transfer and sell to J. F. Winship all interest, right, and title to the within storage receipt. Paul McKinstry. April 20, 1877." The counsel for plaintiff objected to this evidence for the reason that it was not a proper subject of set-off. It was admitted, and after the value of wheat per bushel had been proved, the jury found a verdict for the defendant. A motion is made for a new trial.

Gilman, Clough & Lane, for plaintiff.

A. C. Dunn, for defendant.

NELSON, District Judge. Where the defendant could waive the tort, and sue for the value of goods converted, he can plead a set-off to an action ex contractu. The bankrupt law recognizes such a claim, which is provable, section 19, Bankruptcy Act [of 1867 (14 Stat. 525)]; and the value of the property is the measure of damages, and is as certain as in any action to recover for the non-payment of a debt. As stated by Mason, Senator, in Butts v. Collins, 13 Wend. 139, the rule is quite general that a demand sounding in tort cannot be set off to a demand in contract; but it is equally true that in a variety of cases there is an election of actions, and the tort can be waived; and it is the better opinion at this day, in such cases a set-off will be allowed. The rule is this: where the set-off is founded in a duty which the plaintiff owes the defendant, as, for instance, the duty to deliver property as bailee, the wrongful act can be waived and a set-off is proper; so in all cases where a price or value is set upon the thing in which the offence is committed; but where the cause of action is a tort ("supposed to be by force against the public peace"), then the wrongful act cannot be waived—instance, actions for assault, false imprisonment, nuisance, etc. To forbid

[1] [Reprinted by permission.]

an election of actions and set-off, "the injury must be of that kind by which the offender gains nothing at the expense of the sufferer, and damages as a reparation for the injury must be assessed by estimates and opinion of the jury." In this case the bankrupt was in duty bound to deliver the wheat when demanded, and a set-off was proper.

Dixon, C. J., reached the same conclusion in an able opinion (33 Wis. 600), and referring to the note of Mr. Hill in the report of Putnam v. Wise, 1 Hill, 234, concurs in the views there expressed. The doctrine of set-off as allowed in this case was recognized by the U. S. supreme court (Allen v. U. S., 17 Wall. [84 U. S.] 207), and by Walworth, Ch., in a very forcible opinion (6 Paige, 227). An examination of the following authorities is profitable: 1 Cowp. 372, 491; 1 Taunt. 112; 3 Taunt. 274; 5 Taunt. 56; 8 Taunt. 21; 3 Term R. 560; 15 Wend. 58; 1 Hill, 234, note; 6 Paige, 227; 13 Wend. 156; 33 Wis. 600.

Motion denied.

[See Case No. 8,667.]

McCAFFREY (SKINNER v.). See Case No. 12,924.

Case No. 8,669.

McCALL'S CASE.

[20 Leg. Int. 108, 292; 5 Phila. 259.]

District Court, E. D. Pennsylvania. March 27, 1863.

HABEAS CORPUS—MILITARY DRAFT—PERSONS LIABLE THERETO—MILITIAMEN—MISNOMER—AGE.

1. When persons who are to render military service have been ascertained by draft or otherwise, and have been lawfully commanded to attend a rendezvous, those who disobey may be subjected by military force to military discipline and organization, where legislation has not substituted a different rule.

2. Where a militiaman of a state, duly called under the act of congress of July 17, 1862, c. 201 [12 Stat. 597], into the military services of the United States, has disobeyed an order to attend at a rendezvous, his subjection to military discipline and organization is compellable by military force.

3. Militiamen of the states who are liable to be called into the service of the United States through enrolment and draft cannot be lawfully drafted unless their names have previously been accurately enrolled. A misnomer in the enrolment prevents the person misnamed from being liable to the draft.

4. Legislation of the United States, both of 1792 [1 Stat. 264] and 1862 [supra], requiring the enrolment in the militia of the states, of all citizens between the ages of eighteen and forty-five years, but intervening legislation of Pennsylvania requiring the enrolment in her militia of only persons between the ages of twenty-one and forty-five years, quaere, whether, in Pennsylvania a draft of militiamen, under a call from the government of the United States, made from an enrolment which omits the names of persons between the ages of eighteen and twenty-one years, is binding upon the persons drafted.

[This was a hearing upon the return of a writ of habeas corpus sued out by Cornelius McCall.]

CADWALADER, District Judge. The petitioner was arrested at his residence in Montgomery county, Pennsylvania, by military officers of the United States, as a deserter from the military service into which he had, as they allege, been drafted, under the act of July 17, 1862. The allegation is that he disobeyed the order to attend at the county-seat within five days of the time of drafting. The arrest was made under the supposed authority of the act of congress of March 3, 1863 [12 Stat. 731], for enrolling and calling out the national forces, and for other purposes. The 13th section of this law enacts that a person drafted under it, failing to report at the place of rendezvous without furnishing a substitute, or paying the authorized equivalent, shall be deemed a deserter, and shall be arrested and sent to the nearest military post for trial by court-martial, unless, upon proper showing that he is not liable to do military duty, the board of enrolment shall relieve him from the draft. The 7th section confers an authority to arrest all deserters, whether regulars, volunteers, militiamen or persons called into the service under this or any other act of congress, wherever they may be found, and send them to the nearest military commander or military post. This section, which is relied on as authorizing the arrest, cannot apply retrospectively to any person drafted under the former act, who was not already, in law, a deserter. The constitutional prohibition to pass an ex post facto law would prevent this. The section must therefore be understood as intended to apply only to such persons drafted under the former act as had been mustered into the service. But, though the officers were mistaken as to the authority under which they supposed that the arrest might be made, the party arrested should not be discharged, if, independently of the latter act of congress, he is subject, under the act July 17, 1862, to military detention, as a person compellable to render military service.

When the inhabitants of a country who are liable to be called into military service have been enrolled, and such of them as are to render the service have been ascertained by draft, and the persons thus drafted have been lawfully required to attend at an appointed time and place of muster, those who disobey are amenable to military discipline and military organization, unless the subject has been otherwise legislatively regulated. Where the government whose authority they have set at naught may by military force compel their subjection to such discipline and organization,—the system is a conscription. But where, though their offence is cognizable by a military

tribunal, their disobedience is punishable only by a certain pecuniary or other penalty, and they cannot be further subjected to military discipline or detention, the system is not a conscription, as the word is now ordinarily understood. Judge Washington said, that under a system of the latter kind, a fine to be paid by the delinquent is deemed an equivalent for his service, and an atonement for his disobedience. [Houston v. Moore] 5 Wheat. [18 U. S.] 20, 21. Under a system of the former kind, the conscript who fails to attend the muster is not a "deserter," unless this word has been made specially applicable to his case by legislation. But his disobedience is a military offence. It is not the less of this character, because it may not be within the ordinary meaning of "desertion," or may be of a less aggravated grade. He is liable not only to military arrest and military compulsion or punishment, but also to ulterior military detention.

The constitution of the United States authorizes congress to raise armies, and also to call forth and organize the militia of the several states. Under this twofold power, both regular national armies, and occasional militia forces from the several states, may be raised, either by conscription or in other modes. [Houston v. Moore] 5 Wheat. [18 U. S.] 17. The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security.

Until after the end of the first year of the present war, no such crisis had ever, in the opinion of congress, occurred in the United States. Regular armies had been raised altogether by voluntary enlistment. Successive acts of congress had authorized occasional calls by the president upon the several states for the services of militiamen for limited periods. Under the acts of 1792 [supra] and 1795 [1 Stat. 424], the militia of the states, when thus called forth, might have been retained in service until the expiration of thirty days after the next session of congress; but no militia man was compellable to serve more than three months in any one year. These two limitations of time were repealed by the act of July 29, 1861 [12 Stat. 281]. The only limitation substituted by it was that the service should not continue beyond sixty days after the commencement of the next session of congress, unless a further continuance should be expressly provided for by law. Judges of the supreme court who differed on some other points, all concurred in the opinion that congress, in framing such acts, might lawfully have designated both the officer and private who should serve, and have called him into service with a complete military subjection to the national government, commencing at the time of such designation, or at that of a draft, or at that of an order to attend a muster, as distinguished from that of reaching the place of muster. [Houston v. Moore] 5 Wheat. [18 U. S.] 36, 37, 16, 17, 18, 20, 56, 64. But, as the laws of 1792 and 1795, and July, 1861, were framed, this military subjection of a drafted militia man did not begin till he was mustered into the national military service. His previous military relation only required that, if he disobeyed the order to attend the muster, he should submit to the imposition of a limited pecuniary penalty, with a limited imprisonment for non-payment, and a liability in the case of an officer to be cashiered and temporarily incapacitated from holding a commission. These penalties were to be adjudged by a court martial. That this was the mode of trial shows that the offence of disobedience to attend the muster was of military cognizance. But no department, or officer of the government or the United States, could, under these laws, compel a drafted militia man to be mustered into the service or to attend a place of muster, or to undergo punishment beyond the prescribed penalties, or to submit to ulterior military detention. Another act of congress of the year of 1792, which continued in force, had prescribed the enrolment of every free-able-bodied white male citizen between the ages of eighteen and forty-five years, in the militia of the several states. But the drafting, and procuring the attendance of drafted men to be mustered in, had, except in the imposition of these limited penalties, been left by congress to the legislation of the states. The act of congress of July 17, 1862, indicates, however, that the former system of legislation was thought inadequate for the exigencies of a second year of the present war. Several hundred thousand volunteer militiamen had, in the interval, been received into the national service. But a prompt reinforcement of at least three hundred thousand men for a service of nine months was thought necessary.

The defects of the former system for such a crisis were, that the enrolments of the militia in some states had been omitted, and in others had not been regularly or uniformly made, so as to prepare proper lists for drafting; and that there was no law of the United States to compel by military force the mustering of those who might be drafted. The laws of the states authorized no such compulsion. They had been framed by men averse to the system of conscription, who never anticipated such a necessity for its adoption as had unfortunately occurred. The act of July, 1862, was intended to meet the exigencies of this crisis, and also to provide for cases of like exigency in time to come. The first section enacts, that whenever the president shall call the militia of the states into the service of the United States, he may specify the period, not exceeding nine months, for which their services will be required; "and the militia so called shall be mustered in, and continue to serve for and during the term so

specified, unless sooner discharged by command of the president. If, by reason of defects in existing laws, or in the execution of them, in the several states, or any of them, it shall be found necessary to provide for enrolling the militia, and otherwise putting this act into execution, the president is authorized in such cases to make all necessary rules and regulations." The provision of the act of May 8, 1792, for the enrolment in the militia of citizens between the ages of eighteen and forty-five was re-enacted in a modified form. On 4th August, 1862, the president, through the war department, issued a call for an immediate draft of 300,000 men from the militia of the several states for a service of nine months unless sooner discharged; and ordered the secretary of war to assign the quotas to the respective states, and establish regulations for the draft. The secretary of war, accordingly, designated the quotas of the states in communications of August 9, 1862, to the respective governors; and by general orders of August 9 and 14, 1862, established administrative regulations for the enrolment and draft, and for an apportionment of the quotas among counties, &c., so that allowances should be made locally for volunteers previously furnished. Under these orders the respective governors were to cause the necessary enrolments to be made in the several counties of all able bodied male citizens between the ages of eighteen and forty-five years; and were to appoint a commissioner to superintend the draft in every county of states in which no provision had been made by law for carrying it into effect, or existing provisions were, in any manner, defective. Regulations for making the enrolment and draft in such cases were prescribed in detail. The respective governors were requested to designate, in the meantime, places of rendezvous in the several states. Written or printed notices were to be served on the persons drafted, who were ordered to assemble within five days at the respective county seats, whence transportation to the place of rendezvous would be furnished. The governor of Pennsylvania carried these directions and requests into execution through commissioners to superintend the draft for their respective counties, &c. In Montgomery county the notices to those drafted, served in October, 1862, informed them that they had been drafted into the military service of the United States, and required them to attend at the rendezvous at the court house in Norristown within five days after service of the notice.

The act of July 17, 1862, does not contain the word conscription; nor is this word in the subsequent act of March 3, 1863. The latter act has established, nevertheless, a system of raising and recruiting for the present war, independently of the states, a regular national army by conscription. The exercise of the powers of compulsory drafting conferred by this law may, possibly, prevent future calls, during the war, upon the states, for bodies of their militia to be obtained for the national service by such drafting. Though this may be not only possible, but probable, the act has not repealed that of July 17, 1862, or necessarily superseded its execution, or substituted—as to the militia of the states—any other system. For the purposes of the present case, the effect of the act of July, 1862, therefore, is precisely the same as if no subsequent law had been passed. The effect of the act of July, 1862, has been, I think, to establish a system for obtaining, from time to time, upon the call of the president, as occasion may require, bodies of militia from the several states by conscription; that is to say, by draft, with a right of compelling the attendance of the men drafted.

In stating the reasons of this opinion, I will, in order to follow the course of the argument, consider first the intended effect of the act, and afterwards the question whether the legislative intention can take effect.

It has been argued that the sole purpose of the act was to obtain militiamen for nine months, instead of the former term of service. For this purpose, however, if no further change of system was intended, a few simple words would have sufficed. These words are contained in the act. But other words which are contained in it would not have been added if another important change of system had not been intended. In another part of the act an altogether distinct provision is made for accepting volunteers if offered for this period of nine months. The intended change of system was therefore as to militiamen to be drafted for the new term of service.

Another argument is, that the object of the act is only to remedy defects and establish uniformity in the enrolment of the militia, and that when this purpose has been effected, the subsequent draft and its consequences are left to the unchanged operation of the former system. The act, however, enables the president, if either the state laws, or their execution, should be defective, to make regulations "for enroling the militia, and otherwise putting this act into execution." The purposes of the act extended, therefore, beyond the mere enrolment. What were these ulterior purposes? The answer is, that they were to provide for a draft, and for one that should be effectual.

The drafting would not have been effectual without a power to compel the attendance of those drafted at a rendezvous or place of muster. Under the former system, their attendance at such a place could not be enforced. The intended change of system was that it should be enforceable. The law, therefore, expressly enacts that the militia called forth "shall be mustered in." It is true that these words are contained in a

clause of the act which designates the term of service. It is argued, but I think inconsequentially, that they have, therefore, no other effect than to fix the period of mustering as that from which the computation of the time of service is to begin. This certainly is not the phraseology; and I think that it is not the intended effect. The act of May 2, 1792, had provided that no militiamen should be compelled to serve more than three months in any one year; and the act of February 28, 1795, that none should be compelled to serve more than three months after his arrival at the place of rendezvous in any one year. The clause in question, after authorizing the president to specify in his call the period of service required, not exceeding nine months, enacts that the militia so called shall be mustered in, and continue to serve for the term specified, unless sooner discharged. If the former system had been continued, the enactment would, according to the former phraseology, have made the time computable from the period of their being mustered in, or from that of their arrival at the place of rendezvous. But in that case, the form of expression "shall be mustered in" would have been avoided. Its adoption, in view of the course of reasoning of the supreme court in [Houston v. Moore] 5 Wheat. [18 U. S.] 20, 21, upon the acts of 1792 and 1795, cannot be regarded as immaterial, or as having been unintentional. The purpose of the act of July, 1862, must, therefore, have been that the men drafted under it should be compellable to serve. The words have this, and no other, fair import.

It is objected in argument, that for the delinquency of not attending, under this act, at the place of muster, the same penalties which were imposed under the former acts may still be inflicted. This being assumed, the argument is that as the act does not expressly subject the delinquents to any other military restraint or discipline, none can be imposed by implication. Assuming for the present that the same specific penalties might, under the former laws, or one of them, be inflicted upon delinquents under the act of July, 1862, the answer to the objection would be, that such a liability to specific military penalties is not in itself inconsistent with an ulterior continuance of subjection to military discipline and military restraint. Therefore, though the same penalties were still specifically enforceable, the consequence that military subjection under the latter act must cease upon their infliction would not follow. The main question under this act is not one of implication. The question is, whether its words do not establish, from the time of notice of the draft, a military relation of which ulterior as well as immediate subjection to military discipline and restraint is a lawful incident. This question has already been considered. If the words have rightly been so understood that due effect cannot be given to them unless the existence of such a military relation is recognized, the objection could not prevail, though its premises were correctly assumed.

But the question is resolvable more simply if the specific penalties of the former acts are to be considered as applicable only to militiamen called upon for service in the mode and for the respective periods prescribed by those acts. If this be so, the immediate subjection of persons drafted under the act now in question to general military law, including their liability to compulsory military restraint and organization, is the only means of enforcing the act than can have been intended by congress. Now, in every one of the three former acts, the section imposing these penalties is repeated, with no change of expression which can here be regarded as material; but it is not re-enacted by the law in question. Moreover, in every one of the former acts, it follows the sections which prescribe the mode of calling the militia forth, and the term of their service, and, in every one of them, is expressed in words of enactment, "that every officer, non-commissioned officer, or private of the militia who shall fail to obey the orders of the president in any of the cases before recited shall forfeit," &c. Independently of differences in the modes of calling into service, the difference in the term of service under the act in question takes the case out of the definition of a case recited in any of the former acts. The only former act in force on this point was that of July of the year preceding the act in question. Both acts, that of July, 1861, and that of July, 1862, are now in force. No man called under the system of the former act into service, after the first week of June in any year, can be required to serve as long as nine months unless an act of congress passed within sixty days after the commencement of the session should prolong his term of service; and the term is shortened as its commencement approaches the commencement of a session of congress. Under the act in question, the term of service, if so defined in the call of the president, is nine months. This case had not been mentioned in the act of 1861, or in any prior act. It is difficult to conceive that congress would, in 1862, have omitted to re-enact the former provision concerning penalties, as was done in 1861, if the purpose of the system was in this respect unchanged.

Here, however, it is objected that, under the system of conscription for the regular army, prescribed by the subsequent act of March 3, 1863, a person drafted may obtain exemption from the military service, either by furnishing an acceptable substitute, or through a pecuniary commutation for one,—the amount not exceeding a certain uniform sum, to be designated by the secretary of war. The argument is that this indicates a continuance of the system of pecuniary equivalents established under the laws prior

to the act of July, 1862, which act should therefore be so interpreted as to maintain, in this respect, a conformity in the entire system of legislation. If this assumed conformity of the act of March, 1863, and the laws prior to the act of July, 1862, could be established, the argument would not have any force unless the words of the act of 1862 were doubtful or obscure. But the supposed conformity does not exist. Under the act of July, 1862, the administrative details of the draft were so regulated by the president, through the war department, that a person drafted might obtain an exemption by offering an acceptable substitute. Such an executive regulation was properly made under the express authority conferred by the act. But, without further legislative authorization, a pecuniary commutation could not have been substituted by the executive organ of the government. Such commutation, unless for the purpose of obtaining with the money a proper person to serve as a substitute, would have been foreign to the purposes of the act of 1862; and that act does not authorize a receipt of commutation money to be used by the executive department as a bounty fund for enlistment. Such a receipt and application of such money through the war department is precisely what the subsequent conscription law for the regular army has authorized by the provision relied on in the argument. The enactment is that any person drafted and notified may furnish an acceptable substitute, or pay "such sum, not exceeding three hundred dollars, as the secretary may determine, for the procuration of such substitute, which sum shall be fixed at a uniform rate by a general order made at the time of ordering a draft, for any state or territory." Thus the rate may vary in different states or territories, with local differences in the bounty money that will obtain a substitute. The commutation money must be fixed by the secretary of war, at an amount sufficiently great to enable him to procure with it a recruit. When paid, it does not, like the penalties under the former system, pass into the treasury; but becomes a fund at the disposal of the war department, not for its general expenses, but for the specifically defined purpose of procuring a substitute for the exempt. The money is neither a penalty for non-attendance, nor an arbitrary equivalent for the military service originally due, but such an absolute equivalent for a military substitute as will afford the sure means of obtaining one in place of the exempt.

The subject of the act of March 3, 1863, is more simple than that of the act of July 17, 1862, which is complicated with relations to the states, and the operation of their existing militia systems. The act of 1862, was passed on a sudden and unexpected emergency. The system of regulations to carry it into effect must have been hastily, and may have been crudely, organized. The system under the act of March 3, 1863, is more matured in its details than any system which could have been organized for the militia under the executive regulations organized by the former act. The interpretation of this former act should not, however, be influenced by the obvious magnitude of the difficulties in carrying the executive regulations under it into effect. Nor should a retrospective effect be given to the subsequent law by comparisons of these regulations with its enactments. The subjects of the two laws are different. Their operation may be, in some respects alike, in others different.

The legislative intention having been ascertained, the remaining inquiry is, whether it can take effect. The counsel for the petitioner contend, that the constitution did not authorize the delegation by congress to the president of the authority to make regulations on the subjects of the act of July 17, 1862; and also that, if the authority was constitutionally conferred upon him, he exceeded it in subdelegating its exercise to the secretary of war. They also contend that there was no authority for the ulterior delegation of powers to the governor of the state, and for his exercise of them through local commissioners, under the rules prescribed by the war department. In considering these points, the above order, in which they were argued, will be inverted. As to whatever may concern existing or expectant relations of militia of a state to the general government, the governor of the state, as her chief executive magistrate and as the commander-in-chief of the militia, may, except under extraordinary circumstances, be properly communicated with by the president through the war department. This is peculiarly the case when bodies of the militia are to be called into the service of the United States. The president, in calling them forth, may address the orders directly to their immediate commanders. But the more proper course must almost always be to communicate his orders through the governor. Ordinarily, the former course had been to make known to him, through the war department, or otherwise, the force required, and leave to him the selection of the bodies of militia who should compose it. The president, having addressed an order to the governor, may, indeed, be unable to enforce the observance of it compulsorily against him, unless he is actually in the field as commander of the militia of the state. [Houston v. Moore] 5 Wheat. [18 U. S.] 15, 16, 17, 37–43, 46; also [Kentucky v. Dennison] 24 How. [65 U. S.] 107. The president must, in such a case, act as the occasion may require, without the intervention of the governor. In the present case nothing of the kind occurred in Pennsylvania. The authority vested in the president by the act of congress to make such regulations as defects in state laws, or in their execution, might render necessary to carry the purposes of the act into effect, could not have

been conveniently exercised independently of the governors of the respective states. The requirements of the president, through the war department, were such as the governors were the most proper officials to execute. They may not have been compellable to execute such requirements, to execute through local commissioners, or in any other specified mode. But, if the governor of a state, in compliance with such requirements, whether communicated in the form of orders, or in any other form, saw fit thus to co-operate in executing the purposes of the act, his intervention was lawful; and nothing could be more proper.

As to the intervention of the secretary of war, if the president had the power to prescribe administrative regulations, this power was exercisable by him through the proper executive organ of the government, which was, in this case, the war department. The head of this department was a proper officer for organizing the draft, so far as the authority of the president extended, and also for making the regulations of the draft public. When they were made known through the secretary of war, they were, therefore, to be considered as acts of the president.

The proper inquiry, therefore, is whether they were such regulations as congress could authorize the president to make. Regulations of some kind were necessary. The details of a compulsory draft could not be simple; and there was no practical experience of such a system. Of course, congress cannot constitutionally delegate to the president legislative powers. But it may in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration; or may specially authorize him to make the rules. When congress neither prescribes them, nor expressly authorizes him to make them, he has the authority inherent in the powers conferred, of making regulations necessarily incidental to their exercise, and of choosing between legitimate alternative modes of their exercise. Whether his authority extends farther, and enables him, without express authority from congress, to make regulations which, though incidental, are not necessarily so, is a different question. When, however, congress, in conferring a power, which it may constitutionally vest in him, not only omits to prescribe regulations of its exercise, but, as in the present case, expressly authorizes him to make them, he may, within the limits of, and consistently with, the legislative purpose declared, make any such regulations incidental, though not necessarily so, to the power conferred, as congress might have specially prescribed.

In 1812, congress, in declaring war against Great Britain, authorized the president to issue letters of marque and reprisal; and a few days afterwards, authorized him to revoke any such as he might afterwards grant, and to establish and order suitable instructions for the better governing and directing the conduct of the vessels so commissioned, their officers and crews. The president thereupon issued such "instructions to private armed vessels" as, independently of this authorization by congress, might, perhaps, have proceeded from him as the constitutional commander-in-chief of the navy. But he issued a second instruction to privateers when information was received that Great Britain had, after the declaration of war, but before knowledge of it, repealed her orders in council; and that, under a belief that the repeal would induce a suspension of hostilities by the United States, large shipments of merchandize had been made from England for this country. Vessels belonging to citizens of the United States, laden with such merchandize, were liable to capture and condemnation for being engaged in trade with enemies. The second instruction prohibited the capture of such vessels as had thus been laden with British merchandise, in consequence of the repeal of the orders in council. The constitution had conferred upon congress, and not upon the president, the power to make rules concerning captures. The question arose, whether such a capture as the president had thus prohibited was made unlawful by his prohibition. The argument for the validity of the capture was, that the authority to give instructions to privateers conferred by congress on the president had been intended only to enable him to regulate the conduct, and prevent the misconduct of privateersmen, and not to limit or diminish their rights of capture, much less to impair the belligerent right of their nation to confiscate captured property of her citizens embarked in trade with her enemies. The president, as commander-in-chief, might regulate the conduct of the captors, but it was contended that he could not, by an executive act, declare what should be lawfully a subject of capture, because this would encroach upon the constitutional power of congress to make rules on that subject. The supreme court thought that the question of the president's authority as commander-in-chief to issue such instructions would have deserved grave consideration, if the decision of it had been required, but that no such decision was necessary, because, under the act of congress, he "had full authority to issue the instruction." [The Thomas Gibbons] 8 Cranch [12 U. S.] 427, 428. The citation of congressional and judicial precedents which sustain legislative grants of authority to make administrative regulations, general and in detail, and to carry them into effect, might be multiplied almost beyond measure. The rules prescribed through the war department under the authority of the act in question did not exceed the proper limits of administrative regulation of their subject.

The petition in this case was for a writ of habeas corpus, to be addressed to persons described as military officers; and alleged in

general words, an illegal restraint by them of the petitioner under a pretended authority of the United States, or of the president. When the petition was presented at chambers, in the afternoon of 24th instant, I doubted the propriety of sanctioning a proceeding in such a form as might enable any soldier under military arrest—or any civilian arrested under military authority when within the lines of a camp, or other place in actual military occupation—to demand, as of course, a writ of habeas corpus to be addressed to any military custodian. The authority of courts of the United States to issue writs of habeas corpus is more limited than that of the state courts; and I am not in the habit of granting the writ in any case without sufficient reason to believe that it may be a case proper for the exercise of the jurisdiction.

I suggested to the counsel of this petitioner that, in the absence of an averment or affidavit that he was not a person in military service, and with no statement of any specific reason for issuing the writ if he was in such service, I would hesitate to grant the writ, unless the case were one in which delay might be injurious. I said that, if it were such a case, I would not regard any defect of mere form, but would issue the writ at once upon the present application, and the statement by counsel of any reason for issuing it that might have been specified in the petition or affidavit. The counsel then stated the case as it has been above detailed; adding that the petitioner had been drafted under a wrong Christian name, and that it was believed that unless the writ were issued, he would be removed from the district early on the next morning. I thought the misnomer, without a denial of the identity of the party, immaterial, but said that an argument might change this impression. As to the other points, my impressions were then such as have already been stated in this opinion. I said to the counsel, that if the probability of the petitioner's early removal had not been mentioned, I would not have issued the writ without first hearing an argument after notice to the law officer of the United States for the district. But, as the removal of the property was apprehended, I would, in a case where personal liberty was in question, grant the writ at once.

These proceedings at chambers have been mentioned in order that the course of practice, in ascertaining whether a habeas corpus can properly issue under the limited statutory jurisdiction of the court, may be understood. Whether a man is lawfully in military service must always be a judicial question. It is peculiarly a question for decision under a habeas corpus. Upon this decision the applicability or inapplicability of military law depends. But even where the principal inquiry is whether military service is due to the United States, important questions more proper for decision by a state court than by a court of the United States may sometimes arise, either incidentally or consequentially.

On the hearing in court it has appeared that the misnomer was not only in the draft, or notice of it, but also in the previous enrolment. This presents a question different from that which was stated at chambers. A partial misnomer in a draft made from a proper enrolment may perhaps be immaterial if the identity of the party is unquestionable. But, without an accurate enrolment, there can be no valid draft. An enrolment which is not an accurate list of names cannot be the proper material for a draft. The person drafted has not been in privity with the enrolment; but it has been the subject of proceedings by strangers to him; and through these proceedings the lot which falls upon him is cast. The supreme court of Massachusetts have decided that a misnomer in a militia enrolment renders it void as to the party misnamed. 3 Pick. 262. In the case in which this was decided, the mistake was of such a kind as perhaps would not, in some other states, have been thought a misnomer. [Keene v. Meade] 3 Pet. [28 U. S.] 5–7; 4 Watts, 329; 5 Johns. 84. See, however, 7 Watts & S. 406. But this rule of decision is not affected because it may, perhaps, have been thus misapplied in a particular case. In the present case the misnomer was unquestionably material. The party's Christian name is Cornelius. By some of his relations and friends, he is familiarly called Nele or Neely. He is of Irish descent, and by some of these persons this familiar name is pronounced Nale or Naly. He was enrolled as Naylor McCall. In consequence of the misnomer, he must be discharged from custody.

A point not mentioned in the argument is that, in Pennsylvania, the enrolment was of persons between the ages of twenty-one and forty-five years. Those between eighteen and twenty-one years of age were not enrolled. A question upon which I have, since the argument, bestowed some thought, is whether the draft from such an enrolment was valid; in other words, whether those upon whom the lot fell were not entitled to the increased chance to escape from the draft of which this omission has deprived them. The reason of the omission was that the militia law of the state required the enrolment in her militia of only persons between the ages of twenty-one and forty-five. The omission from the enrolment of the names of persons between the ages of eighteen and twenty-one years does not appear to have been sanctioned by the president or secretary of war. The authority from congress in the act of July 17, 1862, to make regulations, would not have enabled the president to sanction the omission, because the grant of the authority is followed in the same law by an express reenactment, so far as the present question is concerned, of the provision of the act of 1792, that the enrolment of the militia shall, in all cases include all able-bodied male citizens between the ages of eighteen and forty-five years. This express enactment seems to have

excluded the age of persons liable to render military service from becoming one of the subjects of the exercises of the powers or regulation conferred on the president by congress. The question is whether the intervening state law authorized the disregard, in the state of the enactment of congress. Upon this question, as it has not been argued, no opinion can be expressed. The prisoner is discharged.

Case No. 8,670.

McCALL v. EVE (two cases).

[1 Cranch, C. C. 188.] [1]

Circuit Court, District of Columbia. Nov. Term, 1804.

PENALTIES—CARRYING OFF SLAVE—KNOWLEDGE.

A master of a vessel is not liable to the penalty of the act of Virginia for carrying a slave out of the commonwealth, unless he did it knowingly.

Case, for carrying away a slave whereby the plaintiff lost his service; and debt, under the act of Virginia, of 17th December, 1792 (Rev. Code, P. & P. Ed., p. 195), for three hundred dollars penalty for carrying away the same slave. Both actions were tried at the same time by the same jury.

Question—Whether the master of the vessel is liable to the penalty, if he did not know that the slave was on board at the time he sailed?

The facts were that the slave secreted himself in the forecastle, and was not discovered for five or six hours after the vessel had sailed; the captain landed him at St. Mary's, in Maryland, and lodged him in jail; and wrote to the owners of the vessel requesting that information might be given to the master of the slave.

Mr. Simms, for defendant. No offence can be committed unless the party to be charged has knowledge of the fact constituting the offence. This case is not within the letter or spirit of the law; not within the letter, because the captain did not carry the slave; the vessel carried the slave; and the carrying cannot be attributed to the captain unless it was with his knowledge.

Before KILTY, Chief Judge, and CRANCH and FITZHUGH, Circuit Judges.

FITZHUGH, Circuit Judge, contra. The legislature intended to excite vigilance in captains. Though this subject has been repeatedly before them, and this law has been reënacted, they have never made a knowledge in the exporter necessary to constitute an offence; and yet on the same subject, when speaking about harboring slaves, it is no offence without knowledge. This discrimination shows their intention. The same idea may be collected from acts of congress, which in the enacting part, subject a captain to a penalty for having contraband goods, but there is a provision expressly requiring that he should know, &c. If knowledge was always necessary to constitute an offence, why introduce this protective proviso? The proviso proves that the legislature supposed that the bare finding contraband goods would be conclusive evidence. But another reason why I suppose the act of assembly should be construed literally, is that slaves constitute a large proportion of our property, disposed to escape from our possession; and a disposition having been discovered in captains of vessels to aid them in their attempts, it was found necessary to impose severe penalties.

In expounding statutes, the meaning of the legislature is to be ascertained, if possible, and the mischief defeated. The mischief intended to be remedied, was that seafaring men would secretly remove or countenance the escape of slaves without the knowledge of the owner, when it would be difficult, if not impossible, to prove that the captain took the slave on board, or knew of it. If it was necessary expressly to prove the captain's knowledge, this offence would generally pass unpunished. The defendant, after discovering he was on board, should have landed him in Virginia, where he could not have claimed his freedom by removal. Stafford, King George, or Westmoreland, were as convenient as St. Mary's. The act of assembly makes it necessary that the owner's consent should be had; the captain should therefore have seen to that; he ought not to presume the negro to have been free. Color and law forbid it.

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

Case No. 8,671.

M'CALL et al. v. HARRISON et al.

[1 Brock. 126.] [1]

Circuit Court, D. Virginia. May Term, 1808.

EQUITY—MISTAKE—DEED OF TRUST—PARTIES TO SUIT—REPRESENTATIVES OF TRUSTEE—RES JUDICATA—RIGHTS OF THIRD PARTIES.

1. Where a deed of trust is executed by a debtor, to secure a debt due to A, but by mistake the name of B is inserted, instead of that of A, and A files his bill praying relief, &c.; a court of equity, if the mistake is clearly established, will decree the money to be paid in the first instance to A, who is really and ultimately entitled to it.

2. In such a case, the surviving trustee, having reconveyed the property, under a decree of a court of chancery, to the heirs of the grantor in the deed, and having afterwards died, it is not necessary that the representatives of the trustees should be parties to the suit.

3. A decree is binding and conclusive, with respect to the subject matter on which it acts, but does not affect the rights of third persons, who were not parties to the cause in which the decree was rendered.

[Cited in brief in Dabney v. Kennedy, 7 Grat. 324.]

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

The bill, which was filed in 1802, by George M'Call, and Richard Smilie, surviving partners of M'Call, Smilie & Co., an English firm, states, that prior to the Revolutionary war the firm was largely engaged in business in the then colony of Virginia, and established a house in the town of Dumfries, under the direction of their factor, Henry Mitchell; that a certain Burr Harrison, now deceased, became indebted to them in the course of dealing, to the amount of £237 11s. 10d., and on the 1st of April, 1770, executed a bond, payable to M'Call, Smilie & Co. for that amount: that for the purpose of securing the payment of the bond, Burr Harrison executed a deed of trust, to Gabriel Jones and Peter Hogg, conveying to the trustees a tract of land in the county of Dunmore (now Shenandoah), for the purposes specified in the deed. That the deed was intended to secure the payment of several debts, and among others the above recited debt due to M'Call, Smilie & Co.; but that, through mistake, the firm of John M'Call & Co. was substituted for the real creditors, M'Call, Smilie & Co.: that the deed of trust specified the precise sum for which the bond was given, and carried interest from the same date: and that the parties into whose hands the lands conveyed by the deed had passed, subject to their lien, refused to pay to the complainants their debt, pretending that it was due to John M'Call & Co., according to the literal tenor of the deed. The complainants, therefore, prayed, that the court would decree a sale of the land, and that out of the proceeds their debt be satisfied, and for general relief. The bond, a copy of the account on which it was taken, and a copy of the deed of trust, were filed as exhibits in the cause. The answers of the defendants, and the state of facts, which gave rise to the other questions in the cause, are sufficiently detailed in the following opinion of the chief justice.

MARSHALL, Circuit Justice. This suit is brought to obtain for the plaintiffs the benefit of a deed of trust, which purports on its face to secure a debt due to John M'Call & Co. It is alleged that this debt is in truth due to M'Call, Smilie & Co., and that John M'Call & Co., should they recover the money secured by the deed, must be considered in this court as receiving it for their use. If so, this court, according to its usual course of proceeding, will decree the money to be paid, in the first instance, to the person really and ultimately entitled to it. Of the correctness of this principle no doubt can be entertained. Of consequence, the inquiry is, whether the evidence in this cause is sufficient to satisfy the court that the debt is in truth due to the plaintiff. The bill charges this debt to have been really due to M'Call, Smilie & Co., and the representative of John M'Call, who was the surviving partner of John M'Call & Co., who is a party to the suit, and is brought before the court by that process which the law directs in the case of absent defendants, has failed to put in an answer. It appears that there was a close connexion between John M'Call & Co., and M'Call, Smilie & Co., and that Henry Mitchell was the agent of both firms. By the books kept by Henry Mitchell, it appears that this deed was really taken to secure a debt due to M'Call, Smilie & Co., and a small debt of £18 4s. 0¼d. due to John M'Call & Co. The present keeper of the books of both firms also declares, that the debt is in truth the debt of M'Call, Smilie & Co. To the debtor, it is unimportant which is his creditor, and this testimony is sufficient against an absent defendant, who will have time to set aside the decree, if he complains of it. The debt will therefore be considered as the debt of M'Call, Smilie & Co.

Several other objections have been taken to the rendition of a decree in favour of the plaintiffs.

1st. The first is, that the proper parties are not before the court. The deed of trust was taken to secure, as well a debt due to Joseph White, for which Gabriel Jones, the surviving trustee in the deed, and James Keith, were sureties. One other debt due to James Ritchie, and one other debt due to Glassford & Henderson, as the debt really due to M'Call, Smilie & Co. Both the trustees are dead, and the surviving trustee has been decreed to convey the trust property to the representatives of Burr Harrison, deceased, under which decree sales have been made to purchasers having notice of this claim, who are parties to this suit, and who appear to have retained a part of the purchase money in their hands, subject to the decree of the court. There is therefore, no necessity for making the representatives of the trustees parties. James Ritchie & Co., and Glassford & Henderson, are parties, and are before the court. James Keith, and the representatives of Gabriel Jones, as sureties for Burr Harrison to Joseph White, ought to have been brought before the court. It appears, that in the court for the county of Shenandoah, where the decree was rendered for the reconveyance of the trust property, an exhibit was filed, showing that a suit, instituted by White against Burr Harrison, in his life time, for the recovery of this debt, was dismissed agreed, in the year 1787. This exhibit is verified by the record of the general court. There remains scarcely a possibility, that the sureties can remain liable for this debt, yet their interests must be guarded, as they are not defendants. Under these circumstances, however, the court will not insist on their being made parties, but will require that evidence of their being satisfied, shall be produced from themselves, or that they shall be secured by the plaintiffs.

2dly. It is also objected, that in August, 1794, a decree was rendered in favour of the

heirs of Burr Harrison, which directed Gabriel Jones, the surviving trustee, to re-convey the trust property, because it appeared to the court, that the money the deed was intended to secure, except the debt due to Joseph White, which was settled, had been paid into the treasury of Virginia, under an act of assembly made for that purpose. This decree is considered as a bar to the plaintiff's claim. I will not deny the obligation of a decree, with respect to its subject matter, however erroneous may be the principles on which it may have been rendered.

In the proceedings in this case, there are, however, several concurring circumstances, which save the plaintiffs from the operation the decree was probably intended to have on them. To the original bill, neither John M'Call & Co., whose name was placed in the deed instead of M'Call, Smilie & Co., nor M'Call, Smilie & Co., were parties. They are not made parties to the bill of revivor. Their equitable interests, therefore, could not be bound by a decree in the cause. Leave was afterwards given to make them parties, but no bill making them parties was ever actually filed. It is stated that a subpoena was taken out against them, and that publication was made, but no bill in pursuance of the subpoena appears to have been filed.

The decree is formed upon the opinion, that the debt is discharged. This is the conclusion drawn by the court, and the step taken, is the consequence of supposing the debt to be discharged; but the real object on which the decree acts, is the trust property. The decree is conclusive, so far as respects this property, but does not, under the actual circumstances, affect the plaintiffs.

It is a rule, that a person who accepts a conveyance from a trustee, with notice of the trust, is himself a trustee. In this case, it may well be doubted, whether the purchasers of a trust estate, under a decree to which the cestuis que trust are not parties, are not themselves trustees; but at any rate, the real debtors, who receive the money would, under this decree, which did not act on the debt itself, be trustees for the creditor. The money not being paid, but remaining in the hands of the purchaser, that purchaser holds it for the party having right to it—and may, therefore, be decreed to pay it to the plaintiffs.

There must be a decree nisi, that the defendants, the purchasers, do, after security shall have been given to the absent defendants, according to law, and after security shall have been given to James Keith, surviving surety, of the debt to Joseph White, for his own use, and for the use of the representatives of Gabriel Jones, deceased, to save him and them harmless against the said debt, pay out of the purchase money, by them retained, to the plaintiffs, M'Call, Smilie & Co., the debt mentioned in the deed of trust, to be due to John M'Call & Co.

Case No. 8,672.

McCALL et al. v. LAWRENCE.

[3 Blatchf. 360.] [1]

Circuit Court, S. D. New York. Nov. 30, 1855.

CUSTOMS DUTIES—APPRAISEMENT—NO APPEAL—NO OBJECTION.

1. An appraisement of imported goods by the public appraisers, is, under section 17 of the act of August 30th, 1842 (5 Stat. 564), conclusive as to the dutiable value of the goods unless it is appealed from, when there is no protest as to the regularity of the appraisal. The case of Roller v. Maxwell [Case No. 12,025], cited and approved.

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

2. Where a portion only of the public appraisers act in making an appraisement, their action, when not objected to by protest for that reason, is equivalent to the concurrent action of all the appraisers. It is only necessary that those who certify to the appraisal should have actually made it.

This was an action [by Hamilton McCall and another] against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an excess of duties. The jury found a verdict for the plaintiffs, subject to the opinion of the court on a case.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, for defendant.

BETTS, District Judge. On the 16th of February, 1848, the plaintiffs made an entry of sundry merchandise imported from Liverpool. From the aggregate of the invoice charges and prices of the goods an abatement was stated, on the entry, of thirty-two and one-half per cent., to bring those charges to the market value or price of the merchandise, and, from the quotient, a further discount of three per cent. for cash was made. It is claimed, on the part of the plaintiffs, that the entry so prepared and made exhibited the actual market value and price of the importation, and that alone on which the goods were liable to duties. An appraisement was made upon the entry, and the public appraisers disallowed the three per cent. discount for cash, and also deducted two and one-half per cent. from the thirty-two and one-half per cent. abatement made on the invoice and entry, and appraised the value of the goods entered, at the sums produced by such rectification of the entry—that is, at the price of the invoice, less thirty per cent. reduction. The collector charged and collected duties on such appraised valuation. The excess of duties above those payable on the entry amounted to $60.40, which was paid by the plaintiffs, under a protest in writing; and this action is brought to recover back that sum, as illegally exacted by the defendant.

The goods imported were subjected to an official appraisement at the custom-house, and duties were computed and levied in conformity with the valuation certified on that

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

appraisal; and, to disprove the justness of that valuation, evidence was introduced and received on the trial. In our judgment, the appraisement was conclusive, in law, as to the market price and dutiable value of the merchandise imported. We are not convinced that the evidence produced by the plaintiffs authorized a finding against the valuation made by the appraisers, and supported the invoice as entered; but we hold, that it was not a question open for investigation before a jury, whether the appraisers misjudged in their estimate of the value. Roller v. Maxwell [Case No. 12,025]. The appraisement in this case was made on the 29th of February, 1848, and the certificate of appraisement was signed by some of the principal appraisers of this port, though not by all. No exception is taken in the protest, to the authority or regularity of the appraisal. The objection goes only to the correctness of the valuation, insisting that the entry is of the fair market value of the goods. The 17th section of the act of August 30th, 1842 (5 Stat. 564), declares that an appraisement of value by the public appraisers shall be final and conclusive—reserving, however, to the importer a right of appeal to merchant appraisers.

We must regard the action of a portion of the appraisers to be, in respect to the rights of the owner and consignee who makes no objection thereto in his protest, equivalent to the concurrent action of all the appraisers. The 2d section of the act of March 3d, 1851 (9 Stat. 630), which declares that the certificate of any one of the appraisers shall be deemed and taken to be made by the appraisers, shows what was the meaning of congress in the antecedent acts directing appraisements to be made by the public appraisers, even if the provisions of the previous enactments are equivocal on that point. There is no evidence in the case proving that all of the appraisers who gave the certificate did not personally examine and appraise the goods. We do not think that the case of Greely v. Thompson, 10 How. [51 U. S.] 225, imports that all or any particular proportion of the public appraisers must make an examination and appraisal of entries. It is only necessary that those who certify to the appraisal should have actually made it.

The dutiable value of the goods in question was determined by the appraisement. In a question as to the amount of duties chargeable upon importations, congress has made the appraisers the only tribunal competent to determine that fact, subject now entirely to the provisions of the act of March 3d, 1851 (9 Stat. 629), and, at the time this entry and appraisement were made, subject to an appeal to merchant appraisers. That appeal was the only remedy afforded by law to the plaintiffs against a wrongful appraisal, and, it not having been taken by them, they can have no redress by action against the collector, even if they are able to prove that the estimate made by the appraisers was inaccurate and unjustifiable. The statute renders their certificate final on that question, between the importer and the collector.

The plaintiffs' counsel insists that the decision of this court rendered in the case of Gray v. Lawrence [Case No. 5,722], governs the questions raised in this case, and establishes the right of the plaintiffs to recover the duties protested against and demanded in this suit. That decision is misapprehended or misapplied. It related to an invoice of Irish linens, from the footing of which a deduction of 7½ per cent. was made. The custom-house appraisers certified the entry and invoice to be correct, with that rebate. Notwithstanding that report of the appraisers, the collector, acting under the direct and positive instructions of the secretary of the treasury, refused to allow 7½ per cent. abatement from the invoice and entry, and allowed only 2½ per cent., charging duties on the 5 per cent. difference. The action was brought to recover back the duties exacted on that difference of 5 per cent. The decision of the court was, that the determination and report of the appraisers fixed the value of the invoice, and that the secretary of the treasury had no authority, in law, to establish a different value, or to empower the collector to exact duties upon a different valuation. His instructions to collectors are not conclusive upon the courts, in the construction of revenue laws, although they are entitled to be received and examined with the greatest respect. Marriott v. Brune, 9 How. [50 U. S.] 619, 635; Greely v. Thompson, 10 How. [51 U. S.] 225, 234. There is no principle in Gray v. Lawrence [supra], that is in conflict with the ruling in this case.

Judgment for defendant.

Case No. 8,673.

McCALL v. McDOWELL et al.

[Deady, 233; 1 Abb. (U. S.) 212; 1 Pac. Law Mag. 360.] [1]

Circuit Court, D. California. April 25, 1867.

DAMAGES—LIABILITY OF MILITARY OFFICERS—SUSPENSION OF THE HABEAS CORPUS—FALSE IMPRISONMENT.

1. In an action for false imprisonment, where the arrest complained of was illegal, but was caused by the defendant, while acting as commanding officer of a military department of the United States, without malice or intention to injure or oppress the plaintiff, but from good motives and considerations, involving the public peace and safety, the plaintiff is only entitled to recover compensatory damages.

2. The defendant having caused the arrest and imprisonment of the plaintiff, who was a civilian, and not amenable to military law, it was his duty to make provision against his be-

[1] [Reported by Hon. Matthew P. Deady, District Judge, and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission.]

ing treated with undue harshness and severity, or subjected to any treatment or discipline not necessary and proper to restrain him of his liberty for the time being; and having failed to do so, and suffered the plaintiff to be confined in the guard house with drunken soldiers, and to be compelled to labor in common with military culprits, the damages for the false imprisonment must be enhanced on account of such treatment.

3. In an action for false imprisonment, the defendant, by his gross and incendiary language on the news of the assassination of Abraham Lincoln, the president of the United States, having provoked his arrest, though the same was illegal, such provocation must be taken into account in mitigation of damages.

[Cited in Beckwith v. Bean, 98 U. S. 278.]

4. A military subordinate is not liable in damages for making an illegal arrest if he acted in pursuance of an order from his superior, which was legal on its face; the liability for the false imprisonment is confined to the officer who gave the order.

[Cited in U. S. v. Clark, 31 Fed. 716.]

5. Congress is the exclusive judge of "when in cases of rebellion or invasion" the public service requires the suspension of "the privilege of the writ of habeas corpus." In such case it may suspend the privilege of the writ generally or in particular cases; and it may suspend it directly, or it may commit the matter within the proper limits, to the judgment of the president of the United States.

6. The practical object of suspending the privilege of the writ of habeas corpus being to permit and authorize the arbitrary arrest and imprisonment of persons against whom no legal crime can be proved, but who may nevertheless be actively engaged in fomenting the rebellion or inviting the invasion to the imminent danger of the republic, it follows as a necessary consequence, that under the power "to make all laws which shall be necessary and proper to carry into execution" the power of suspension, congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the constitution itself.

7. Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority or in pursuance of an act suspending the writ of habeas corpus, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof, or declaring that they shall not be liable to an action or other legal proceeding therefor.

8. Semble, that an act suspending the privilege of the writ of habeas corpus, is itself a protection to the officers or persons engaged in making arrests and imprisonments thereunder, against any action or proceeding therefor by the party arrested or imprisoned.

9. The president of the United States has no power to suspend the privilege of the writ of habeas corpus, except as authorized and directed by congress, and therefore the proclamation of September 24, 1862 (13 Stat. 730), so far as it undertakes to suspend such privilege, was unauthorized and void.

10. The act of congress of March 3, 1863 (12 Stat. 755), authorizing the president to suspend the privilege of the writ of habeas corpus, and the proclamation of September 15, 1863 (13 Stat. 134), suspending the same in certain cases in pursuance of said act, do not justify or protect the defendant in causing the arbitrary arrest and imprisonment of the plaintiff, because not done in pursuance of the special authority or order of the president, as by said act provided, but by the defendant of his own will and judgment, as a matter necessary as he conceived to preserve the public peace in his department.

11. Neither does the act of May 11, 1866 (14 Stat. 46), furnish a defence to the action for the false imprisonment by the plaintiff, because in causing the arrest and imprisonment of the plaintiff, the defendant did not act under the order of "the president or secretary of war" or other person, but in obedience to what was deemed public necessity.

This was an action for false imprisonment, and by the stipulation of the parties was tried by the court without the intervention of a jury. The facts in the case are fully stated in the following findings of the court:

First. That on June 1, 1865, the defendant, Charles D. Douglas, was a captain in the army of the United States, then serving in the state of California, and that such defendant, as such captain, was then acting as commander at a military post, called Fort Wright, in the county of Mendocino, and state aforesaid.

Second. That on the day and year aforesaid, at Potter Valley, in the day time, on the public highway, in the county and state aforesaid, the defendant Douglas did order and cause the arrest and imprisonment of the plaintiff, John McCall, for the space of thirteen days; and that said defendant during the term of said imprisonment, did convey and transport the said plaintiff, in close custody, under a military guard, by the usual means of transportation, by land and sea, to the city of San Francisco, in the state aforesaid, a distance of one hundred and fifty miles.

Third. That the defendant, Douglas, on June 13, 1865, at San Francisco aforesaid, did deliver the plaintiff into the custody of the provost marshal of the United States, where his hands were confined and manacled, and from whence the said plaintiff was, by order of said provost marshal, transported in close custody, under a military guard, to a military post and fort, called Fort Alcatraz, situate upon Alcatraz Island, in the county of San Francisco, and state aforesaid.

Fourth. That said plaintiff was kept a prisoner in close custody, without manacles, under a military guard, in said Fort Alcatraz, for the space of six days, and during such imprisonment was compelled and required by the persons having him in custody at said Fort Alcatraz to perform manual labor, in common with prisoners belonging to the military forces of the United States then confined at said fort, as a punishment for military offenses.

Fifth. That during the years 1864 and 1865 the defendant, Irvin McDowell, was a brigadier-general in the regular army of the United States and a major-general of volunteers in the military service of the United States; and that during such years such defendant was the commander of the military department of the United States, known as the department of the Pacific, which department included the states of California, Ore-

gon, and Nevada and the territory of Washington, and that said state of California was a separate district of said department, and under the immediate supervision of a district commander—General Wright.

Sixth. That on April 17, 1865, the defendant, McDowell, caused to be issued the following order: "Headquarters Department of the Pacific, San Francisco, Cal., April 17, 1865. General Order, No. 27. It has come to the knowledge of the major-general commanding that there have been found within the department, persons so utterly infamous as to exult over the assassination of the president. Such persons become virtually accessories after the fact, and will at once be arrested by any officer or provost marshal or member of the police having knowledge of the case. Any paper so offending or expressing any sympathy in any way whatever with the act, will be at once seized and suppressed. By command of Major-General McDowell. R. C. Drum, Assist. Adj. General."

Seventh. That at the date of such general order No. 27, the populace of San Francisco was in a highly excited and tumultuous condition, on account of the assassination therein referred to, and had already proceeded to commit acts of violence upon the property of persons known to sympathize or suspected of sympathizing with the then existing rebellion by the "Confederate States," against the United States, and still threatened in large numbers and with imposing force to continue such violence against both the persons and property of such sympathizers. That it seemed highly probable that such excitement and disorder would extend throughout the department, and result in unlawful strife and violence, destructive to the lives and property of the people, unless the military authority (which alone possessed the physical power) should summarily interfere to remove and restrain persons who should make themselves obnoxious to the popular sentiment by such exultations; and that such order was made and issued by the defendant, McDowell, reluctantly, and at the solicitation and upon the urgent request and advice of prominent and responsible citizens of San Francisco, for the reasons and causes above stated, as a means of preventing popular tumult and violence, and of preserving the public peace and order, and not from any desire or purpose upon the part of the defendant, McDowell, to molest, injure, or oppress the plaintiff herein, or any other person, and without any malice or ill will towards the said plaintiff, or any other person whomsoever.

Eighth. That during the progress and existence of the rebellion aforesaid, and at the date of order No. 27, it had been and was deemed necessary by the proper authorities, to maintain and keep an organized military force throughout such department, to discourage and prevent acts of hostility therein, against the authority and power of the United States, and in aid of the rebellion aforesaid; and that the defendant, McDowell, when he issued order No. 27, as aforesaid, had good reason to believe, and did believe that the peace and security of the department aforesaid would be seriously endangered, unless public disturbances, growing out of the conflicting sympathies and antipathies engendered by the rebellion aforesaid and the war for its suppression, were prevented or promptly put down, and all causes or pretexts therefor removed.

Ninth. That the plaintiff herein was a native born American citizen, and that during the month of April, 1865, and prior thereto, and at the date of the arrest aforesaid, was a resident of Potter Valley aforesaid, and was then and there engaged in farming and stock rearing, and that said plaintiff, on the public highway, in the day time, at Potter Valley aforesaid, on April 20, 1865, did publicly declare and say—"That Lincoln (thereby meaning the late president of the United States) was shot, and that the damned old son of a bitch should have been shot long ago, and that some more of his kind would go the same way shortly." And that the said plaintiff on the public highway, in the day time, at Potter Valley aforesaid, on April 29, 1865, did publicly declare and say: "That he did not believe that General Lee had surrendered, and believed that General Lee was still carrying on the war; and that he did not believe for a long time after hearing of the president's assassination that it was true; and said, I am only afraid that it is not so—if three or four more of the leaders of the abolition party were killed it would be a good thing, as it would be the downfall of that party."

Tenth. That the defendant, Douglas, arrested and imprisoned the plaintiff, as above stated, in obedience to general order No. 27, aforesaid; and because, before making such arrest, the said defendant had information upon oath that the plaintiff herein had uttered the words above mentioned, as spoken by him on April 29, 1865; and also that said defendant had information upon oath, upon the day of making such arrest, but some hours thereafter, that the plaintiff herein had uttered the words above mentioned, as spoken by him on April 20, 1865; and not from any desire or purpose upon the part of the said defendant, Douglas, to molest, injure, or oppress the plaintiff herein, and without any malice or ill will towards the said plaintiff whatever.

Eleventh. That the defendant, McDowell, did not procure, advise, or cause the arrest, imprisonment, or detention of the plaintiff, otherwise than as above stated; and that said defendant subsequently issued an order, in obedience to which the said plaintiff was removed and discharged from Fort Alcatraz, as above stated, and turned over to the civil authority, to wit, the United States

marshal for the district of California, and that said plaintiff was then and there by said marshal taken before the district court of the United States for the district aforesaid, when and where said plaintiff was, by the order of said court, set at liberty, he first taking the oath of allegiance to the United States government, as by act of congress provided, entitled, "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3, 1863 [12 Stat. 755].

Twelfth. That the plaintiff during his arrest and imprisonment as aforesaid, and on account thereof, was obliged to expend the sum of one hundred and ten dollars in money, of which said sum he paid twenty-five dollars to an attorney for services rendered to him in and about the matter of his discharge from such imprisonment; and that the said plaintiff did not sustain any special injury to his person or property by reason of such arrest and imprisonment.

Thirteenth. That for and on account of the loss of time and absence from home caused to the plaintiff by reason of such arrest and imprisonment, and for aid on account of the injury to his feelings and bodily suffering and anxiety of mind necessarily resulting therefrom, the court assesses the damages of the plaintiff, in addition to the sum above mentioned, at the sum of five hundred dollars.

And the court finds, as a conclusion of law from the premises, that the defendant, Douglas, is not liable to the plaintiff as he hath complained against him, and that such defendant is entitled to judgment against the plaintiff in bar of this action, and for his costs and expenses in this behalf sustained. And the court further finds, as aforesaid, that the defendant, Irvin McDowell, is liable to the plaintiff as he hath complained against him, and that the plaintiff is entitled to have judgment against said last named defendant for the sum of six hundred and thirty-five dollars damages, and his costs and expenses in this behalf sustained.

Henry P. Irving and George Pierce, for plaintiff.

Delos Lake, for defendants.

DEADY, District Judge. On the trial of the issue in this action, by the court, the defendants were allowed to give evidence of the circumstances attending the promulgation of order No. 27, supra, and the consequent arrest and imprisonment of the plaintiff; not as a justification, but in mitigation of damages. From the evidence the court has found the fact to be, that the defendant, McDowell, issued the order which led to the arrest and imprisonment complained of, without malice or any intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety; and also, that the defendant, Douglas, acted in the premises without malice or evil intention, but in obedience to the order of his superior, and upon satisfactory information that the plaintiff's conduct had brought him within the purview of the order. These facts, although not sufficient to constitute a legal justification of the conduct of the defendants, are to be considered in estimating the amount of damages which the plaintiff is entitled to recover. The acts complained of, being done without the authority of law, the plaintiff, as a matter of law, is entitled to recover some damages therefor. But vindictive or exemplary damages are only given where it appears that the wrong complained of was done with an evil intention or from a bad motive. In the present case, no such intention or motive can be attributed or imputed to either of the defendants. It follows that the plaintiff is only entitled to recover damages for the necessary consequences of the act complained of—what the law calls compensatory damages.

Still what are merely compensatory damages, in a case like this, is difficult of determination, and is, after all, a matter of opinion, not to say conjecture, rather than direct proof. The only loss which the plaintiff sustained, that can be at all accurately computed and compensated in money, is his loss of time and expenses. What his time was worth does not directly appear, and can only be inferred from his occupation and position in life. Allowing him for this, at the rate of five dollars per day for twenty-one days, which includes the two days that he was in the custody of the civil authorities, would make the sum of one hundred and five dollars, which, added to his expenses and counsel fees, would amount to two hundred and fifteen dollars. In estimating the damages of the plaintiff, beyond this amount, there is no guide but the judgment, and the rule that they are to be given as a compensation to the plaintiff and not as a punishment of the defendants or an example to others. In estimating the damages of the plaintiff beyond his expenses and loss of time, I have been materially influenced by the facts, that while in the custody of the provost marshal in San Francisco he was confined one night in the common guard house in company with drunken soldiers, and that while he was in custody at Fort Alcatraz he was compelled to labor in common with military culprits. The treatment of the plaintiff in these respects, was, to say the least, oppressive and uncalled for. True, it does not appear that this was done with the knowledge or approbation of defendant, McDowell, but so far as appears, it would seem that he did not expect or intend that "political prisoners" should be required to labor while at Fort Alcatraz. The plaintiff was not in the actual custody of the defendant, McDowell, but of his subordinates, and his treatment in these respects was the direct act of the latter and not the former. Yet,

McDowell, having caused the arrest and imprisonment, ought to be held responsible for whatever injuries and indignities the plaintiff suffered thereby, in consequence of his neglect or omission to provide against the same. The provost marshal's office and Alcatraz were within the command and under the authority of McDowell, and having caused the imprisonment of the plaintiff, he should have taken some precaution to prevent his being treated with undue harshness and severity while in custody at these places. In Dinsman v. Wilkes, 12 How. [53 U. S.] 405, which was an action brought by a marine against Commodore Wilkes, for illegal imprisonment in a jail at Honolulu, the supreme court say, that "it was his duty, through proper and trustworthy officers, to inquire into his situation and treatment, and to see that it was not cruel or barbarous in any respect." It is proper to add that the court held Wilkes to something more than the ordinary responsibility of a commanding officer in that respect, because "he had placed him out of the protection which the ordinary place of confinement on shipboard afforded, in a prison belonging to and under the control of an uncivilized people." So it appears to me in this case, the plaintiff being a private citizen not belonging to the military forces, nor under condemnation as a criminal, when the defendant, McDowell, caused him to be imprisoned with military culprits and persons subject to military law and discipline, it was his duty to provide that the plaintiff should not be confounded with them and treated like them. And although, as I have said, I am satisfied that the defendant, McDowell, neither expected or intended that the plaintiff should be subject to any treatment or discipline beyond what was necessary and proper to restrain him of his liberty for the time being, yet as such treatment and discipline were among the probable consequences of the plaintiff's confinement, when and where it took place, if not provided against by the department commander, I think he must be held responsible for it.

In considering the question of damages, I have also taken into account the conduct of the plaintiff, which directly provoked his arrest. I refer to the gross and incendiary language uttered by him on the public highway, on April 20 and 29. Of course I do not mean to assert that the utterance of these words by the plaintiff, as the law then stood and still stands, was technically a crime. Such utterance did not constitute a crime, and therefore was not a legal cause of arrest. Yet in actions for injuries to the person, the misconduct of the plaintiff by which such injury is provoked is always considered in mitigation of damages. 2 Greenl. Ev. § 267. Mere words do not constitute an assault, and therefore will not justify a battery, yet when the words are calculated to provoke and do provoke the battery, they may be given in evidence to mitigate the damages. If one calls another a liar, this does not justify an assault by the insulted party; yet if an assault follow in consequence of the insult, the provocation must be considered in estimating the damages. This rule, it seems to me, may be properly applied in this case. If the plaintiff had uttered these words in the immediate presence of General McDowell, and the latter had knocked him down on the instant, the law would have allowed the provocation to be shown in mitigation of the damages resulting from the illegal blow. In this case the arrest and imprisonment of the plaintiff, although without authority of law, was, I may say, procured and provoked by conduct on his part at once dangerous and disgraceful, and well calculated at that moment of intense public feeling and anxiety, to have brought harm on himself and trouble to the community. Talk and reason as we will about the liberty of speech, something is due to society from every reasonable being who enjoys its protection and privileges. At least, in such an hour of public sorrow and alarm as that which followed the assassination of the president of the republic, during the dangers of a civil war, the plaintiff, whatever his political prejudices or opinions, should have bridled his tongue so far as not to exult at the calamity of the nation, or mock at its fear.

I do not forget that on the trial the learned counsel for the plaintiff questioned the fact, whether the plaintiff used the language attributed to him by the witnesses, Purcell and Hale. The affidavits of these persons, upon which the arrest was made, have been read in evidence, and Hale, the witness to the words uttered on April 20, comes upon the stand, in the presence of the plaintiff, and testifies to the same effect as in his affidavit. There was nothing in the appearance or manner of the witness calculated to detract from his credibility. There was no contradictory testimony upon the point, either direct or circumstantial, and the court, sitting as a trier of the fact, could not have found it otherwise. But another circumstance makes it absolutely certain that the plaintiff substantially uttered the words imputed to him by these witnesses, as the court has found. On the trial, the plaintiff was in court, and was examined as a witness in his own behalf, yet his counsel forbore to interrogate him upon this point. The natural and irresistible inference from this omission is, that the plaintiff was conscious of the truth of the charge, and was too honest to deny it if he had been examined concerning it.

In a case of so much importance as this, and being tried without a jury, I have deemed it proper and due to myself to submit the following suggestions concerning the conclusions of fact found, before proceeding to consider the questions of law arising thereon.

This action has been tried upon the assumption, that Douglas is equally liable with

McDowell, for the arrest of the plaintiff. Granting this, his liability cannot be extended beyond the time when he delivered him to the provost marshal in San Francisco. The imprisonment, so far as Douglas is concerned, then terminated. He did no further act in the premises, and he had no authority over those who did, nor is he in any sense responsible for what happened to the plaintiff thereafter. If the plaintiff had been killed by the guard while at Alcatraz, the defendant, Douglas, could as well be held liable for it, as for the imprisonment which the plaintiff suffered there. But I am not satisfied that Douglas ought to be held liable to the plaintiff at all. He acted not as a volunteer, but as a subordinate in obedience to the order of his superior. Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest unstanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. If Douglas is liable to the plaintiff, so is every private soldier who constituted his guard from Potter Valley to San Francisco, and even the almost unconscious sentry who stood guard at the prison of Alcatraz. Yet there was no alternative for either Douglas or these soldiers, but to do as they did, or refuse obedience to their lawful superiors, in a matter of which they were incapable of judging correctly, at the peril of disgrace and punishment to themselves. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

In Martin v. Mott, 12 Wheat. [25 U. S.] 19, a question arose as to whether the president had authority to call out the militia in a particular exigency. A drafted militia man had refused to be mustered into the service of the United States, because, as he alleged, the president had made the order in a case not contemplated by the act of congress under which he professed to act. The supreme court held, "that the authority to decide whether the exigency had arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons." The reasoning of the court in support of this conclusion is peculiarly in point upon this branch of the case at bar:

"The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to a complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If a superior officer has a right to contest the orders of the president upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defense must finally rest upon his ability to re-establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the president might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment."

The difference between that case and this is, that there the legality of the order depended mainly upon a question of fact, while here it depends upon a question of law. But the reasoning of the court is equally applicable to both, for the same disasters and disorders may be expected, if subordinates and soldiers are allowed to disobey the orders of their superiors upon a difference of opinion upon a question of law. Again, how often would this difference of opinion be a mere pretext to escape the demands of duty? In the war of 1812, the constitutional scruples of the militia men, as to the power of the president to order them out of the United States, led to their refusing to march across the Canada line to the aid of the regulars, when the latter were seriously engaged with the enemy, and thus a well planned enterterprise failed, with serious loss to the American forces.

Nor is it necessary to the ends of justice that the subordinate or soldier should be responsible for obedience to the illegal order of a superior. In any case, the party injured can have but one satisfaction, and that may and should be obtained from the really responsible party—the officer who gave the illegal order. I am aware that in civil life the rule is well settled otherwise, and that a person committing an illegal act cannot justify his conduct upon the ground of a command from another. But the circumstances

of the two cases are entirely different. In the latter case, the party giving the command and the one obeying it are equal in the eye of the law. The latter does not act upon compulsion. He is a free agent, and at liberty to exercise his judgment in the premises.

Personal responsibility should be commensurate with freedom of action—to do or refrain from doing. For acts done under what is deemed compulsion or duress, the law holds no one liable. In contemplation of law, the wife is under the power and authority of the husband. Therefore, for even criminal acts, when done in the presence of the latter, she is not held responsible. The law presumes that she acted under coercion of her husband, and excuses her.

If the law excuses the wife on the presumption of coercion, for what reason should it refuse a like protection to the subordinate and soldier when acting in obedience to the command of his lawful superior? The latter may be said to act—particularly in time of war—under actual coercion. As a matter of abstract law, it may be admitted, that ultimately the law will justify a refusal to obey an illegal order. But this involves litigation and controversy alike injurious to the best interests of the inferior, and the efficiency of the public service. The certain vexation and annoyance, together with the risk of professional disgrace and punishment which usually attend the disobedience of orders by an inferior, may safely be deemed sufficient to constrain his judgment and action, and to excuse him for yielding obedience to those upon whom the law has devolved both the duty and responsibility of controlling his conduct in the premises. True, cases can be imagined, where the order is so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed, by whomever given. But there is no rule without its exception. This one is practical and just, and the possibility of extreme cases ought not to prevent its recognition and application by the courts.

Between an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands, and the necessities and efficiency of the publice service require, that the order of the superior should protect the inferior; leaving the responsibility to rest where it properly belongs—upon the officer who gave the command.

The all important question in this case yet remains to be considered.

The defendants maintain that the acts complained of in this action are within the purview of the act of congress, entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March 3, 1863 [12 Stat. 755], and the act supplementary thereof, approved May 11, 1866 [14 Stat. 46], and that these acts furnish a complete defense to this action.

On the other hand, it is contended for the plaintiff, that the acts of the defendants are not within the purview of these statutes, and that each of said statutes, in so far as they purport to indemnify officers and soldiers for an arrest or imprisonment made during the suspension of the habeas corpus, by the president in pursuance thereof, is unconstitutional and therefore void.

A question of greater importance, both to the government and the citizen—to the maintenance of the authority of the people on the one hand, and the preservation of individual liberty on the other,—was probably never submitted to the determination of a court. Without further apology or preface, and without fear, favor, or affection, I proceed to examine and decide it.

Const. art. 1, § 9, subd. 2, declares: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public service may require it." And also (article 1, § 8, subd. 19), that: "The congress shall have power, ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

By section 1 of the act of March 3, 1863, congress authorized the president, during the rebellion, "to suspend the privilege of the writ of habeas corpus in any case, throughout the United States or any part thereof." The constitutionality of the section must be admitted without argument. The clause of the constitution first quoted is a recognition of this power in congress, as well as a limitation upon its exercise, to the occasions, "when," by reason of the existence of "rebellion or invasion, the public service may require it." When the occasion arises—a rebellion or invasion—whether "the public service" requires the suspension of the writ or not, is confided to the judgment of congress, and their action in the premises is conclusive upon all courts and persons. Ex parte Merryman [Case No. 9,487]; 2 Story, Const. § 1342. In the exercise of this power, congress may suspend the writ generally, or may limit the suspension to particular cases. They may suspend the writ directly, or commit the matter, within the properly described limits, to the judgment of the president.

Section 4 of the act of March 3, 1863, enacts: "That any order of the president, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by

virtue of such order, or under color of any law of congress; and such defense may be made by special plea or under the general issue."

On September 15, 1863 [13 Stat. 734], the president, in pursuance of the authority conferred upon him by section 1 of the act of March 3, 1863, issued a proclamation, wherein it was declared that "the public safety does require that the privilege of the said writ" (of habeas corpus) "shall now be suspended throughout the United States in the cases where, by the authority of the president of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled or drafted or mustered or enlisted in or belonging to the land or naval forces of the United States, or as deserters therefrom, or otherwise amenable to military law or the rules and articles of war or the rules or regulations prescribed for the military or naval services by authority of the president of the United States, or for resisting a draft, or for any other offense against the military or naval service:

"Now, therefore, I, Abraham Lincoln, president of the United States, do hereby proclaim and make known to all whom it may concern, that the privilege of the writ of habeas corpus is suspended throughout the United States, in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion, or until this proclamation shall, by a subsequent one to be issued by the president of the United States, be modified or revoked."

Section 1 of the act of May 11, 1866 [14 Stat. 46], enacts: "That any search, seizure, arrest, or imprisonment made, or any acts done or omitted to be done during the said rebellion, by any officer or person, under and by virtue of any order, written or verbal, general or special, issued by the president or secretary of war, or by any military officer of the United States holding the command of the department, district, or place within which such seizure, search, arrest or imprisonment was made, done or committed, or any acts were so done, or omitted to be done, either by the person or officer to whom the order was addressed, or for whom it was intended, or by any other person aiding or assisting him therein, shall be held, and are hereby declared, to come within the purview of the act to which this is amendatory, and within the purview of the fourth . . . section of the said act of March 3, 1863, for all the purposes of defense . . . . provided therein. But no such order shall, by force of this act, or the act to which this is an amendment, be a defense to any suit or action for any act done or omitted to be done after the passage of this act."

Admitting the constitutional power of congress to suspend the privilege of the writ of habeas corpus, as was done by the act of March 3, 1863, can they in any case go further, and pass acts to indemnify or protect persons, who without legal cause or warrant, have been instrumental in imprisoning others, during such suspension?

Before answering this question, it is well to consider what is the purpose and practical effect of suspending the privilege of the writ. Personal liberty, unless forfeited by due course of law, is the right of every citizen of the republic. The writ of habeas corpus is the remedy by which a party is enabled to obtain deliverance from a false imprisonment. Ordinarily, every one imprisoned without legal cause or warrant is entitled to this remedy—this privilege. The power to suspend this privilege includes, and is in fact identical, with the power to take away or withhold this remedy from the individual during the period of such suspension. The suspension of the privilege of the writ and the denial of the remedy for false imprisonment are indentical in effect, if not in terms. It follows that the power of congress to suspend the privilege of the writ of habeas corpus is equivalent to the power to take away from all persons, during the suspension, the right to the ordinary and only remedy for deliverance from false imprisonment. This is the effect of the suspension. What is the purpose of it —the object to be accomplished by it? The occasion and necessity to which the constitution limits the power of suspension clearly denote the purpose and end for which the suspension is made. The occasion is the existence of "rebellion or invasion," and the necessity is the fact that "the public service"—safety, requires it. The public safety is the end to be secured or obtained by the suspension. The danger to the public safety arises from the "rebellion or invasion;" and the writ is suspended to enable the executive to prevent harm to the republic from those who are or may be suspected of assisting the cause of the "rebellion or invasion." The suspension enables the executive, without interference from the courts or the law, to arrest and imprison persons against whom no legal crime can be proved, but who may, nevertheless, be effectively engaged in forming the rebellion or inviting the invasion, to the imminent danger of the public safety.

Plainly expressed, the suspension of the privilege of the writ is an express permission and direction from congress to the executive, to arrest and imprison all persons for the time being, whom he has reason to believe or suspect of intention or conduct, in relation to the rebellion or invasion, which is or may be dangerous to the common weal.

That at the time of the formation and adoption of the constitution, such was the understanding, as to the purpose and practical effect of suspending the privilege of the writ, is apparent from the elementary com-

mon law treatises of the time. Blackstone, in his Commentaries (book 1, p. 136), says: "Of great importance to the public is this personal liberty; for if once it were left in the power of any, the highest magistrate, to imprison arbitrarily whoever he or his officers thought proper (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in great danger, even this may be a necessary measure. But the happiness of our constitution, is that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown by suspending the habeas corpus act for a short and limited term, to imprison suspected persons without giving any reason for so doing, as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. . . . In like manner, this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever."

It is evident, from the language of this passage, that the commentator was not disposed to undervalue the importance of personal liberty, nor to overstate the purpose and practical effect of the suspension of the habeas corpus act.

At the era of the constitution, this was the acknowledged doctrine of the common law concerning personal liberty and the suspension of the privilege of the writ, whereby that liberty was left at the discretion of the government for the time being. The provision in our constitution was adopted with that understanding of its effect. It in no wise changed the common law as laid down by Blackstone, except that, instead of leaving congress at liberty to suspend the privilege "whenever it sees proper," it limited and confined the exercise of such power to times of "rebellion and invasion."

This is also evident, from the nature of things. If the suspension of the privilege of the writ is not intended to authorize and permit arrests without the ordinary legal cause or warrant, for what is it intended? The very limitation in the constitution upon the power of suspension is strong evidence that it was not understood to be a mere form, but something of serious import and effect. An arrest upon a warrant describing an offense defined by law, can be made and maintained, with the privilege of the writ in force. Unless the suspension changes the law, so to speak, for the time being, in regard to arrests and imprisonments, I am at a loss to conceive how the republic can be thereby preserved from imminent danger, or the public safety conserved. The powers granted to congress must be construed and applied with reference to the purposes for which the constitution was made. It is not a mere abstraction to sharpen men's wits upon, but a practical scheme of a government, having all necessary power to maintain its existence and authority during peace and war, rebellion or invasion. As was well said long ago, "The instrument was not intended as a thesis for the logician to exercise his ingenuity on. It ought to be construed with plain good sense. The uniform sense of congress and the country furnishes better evidence of the true interpretation of the constitution than the most refined and subtle arguments."

The purpose of the express power to suspend the privilege of the writ of habeas corpus—the object to be obtained being to authorize, for the time being, the imprisonment of persons "without giving any reason for so doing," and without legal cause or warrant, as a means of preserving the republic from imminent danger, it follows as a necessary consequence, that, under the clause giving power "to make all laws which shall be necessary and proper for carrying into execution" the power of suspension, congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the constitution itself.

Without further legislation than the suspension of the privilege of the writ, every person imprisoned without legal cause or warrant, might maintain an action for damages therefor. To enable the power of suspension to be executed—the purpose of it to be accomplished—it becomes necessary to provide in some way for the protection of the officers and persons required to make arrests and imprisonments. To accomplish this, congress has passed the indemnity clauses in the acts of March 3, 1863, and May 11, 1866, being section 4 of the one act and section 1 of the other. Were these provisions in these acts necessary and proper means to secure the end in question? Let the supreme court answer the question. In McCullough v. State [4 Wheat. (17 U. S.) 415], Chief Justice Marshall says: "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This

could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." [McCullough v. State] 4 Wheat. [17 U. S.] 415. And again: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id. 421.

It is not necessary to repeat what has been said to show the legitimacy of the end proposed by congress in this legislation. Waiving the question of the propriety of the means for the moment, if this end is not legitimate, then the clause in the constitution authorizing the suspension of the privilege of the writ is merely nugatory, and the power might as well have been absolutely denied.

As has been shown, the power to suspend the habeas corpus, in the cases specified, being practically the power to authorize and provide for the imprisonment of persons for the time being without legal cause or warrant, and "without giving any reason for so doing," it must follow, that to secure this end, congress must have power to protect or indemnify the officers and persons whom, mediately or immediately, it thus requires to do any act concerning such imprisonments.

The argument for the plaintiff may be briefly stated thus: "The suspension of the writ 'creates a despotism,' and therefore the end is not legitimate." Let it be admitted, for the purposes of argument, that the suspension does "create a despotism." What then? Does the conclusion follow? By no means; because, as we have seen, the constitution expressly authorizes the suspension, and history teaches, and so the fathers understood it, that such suspension was allowed, so as to authorize and permit imprisonments without the ordinary cause or process, for the safety of the republic.

Such an argument might have been proper as against the adoption of the constitution by the people, but in a court which must recognize that instrument—the suspending clause inclusive—as the supreme law of the land, it becomes a mere waste of opprobrious epithets.

Nor does this power as now construed merit such epithets. A despotism in any sense or form always implies the idea of irresponsible as well as unlimited power. The people of the United States made the constitution for themselves, and can change it when they will, to suit their altered condition or change of opinions. While yielding obedience to their government, exercising the powers conferred by that instrument, whether ordinary or extraordinary, they cannot be said to be living under a despotism. When their representatives in congress assembled, suspended the privilege of the writ of habeas corpus for the public safety, they only exercised a delegated power, for the proper use of which they are responsible to their constituents at short intervals. To call such a state of things a despotism is an abuse of language and a confusion of ideas. At most, it is but a voluntary and temporary surrender by the people of the ordinary safeguards of personal liberty in an "extreme emergency," whereby, as Blackstone says, "the nation parts with its liberty for a while, in order to preserve it forever."

As a means to secure the purpose and practical end of suspending the privilege of this writ, does the constitution anywhere prohibit congress from passing the laws in question? He who asserts that it does, must show it. I have been unable to find such a provision, and the counsel for the plaintiff, notwithstanding his learning and zeal, has failed to point it out.

It is not enough to show that the constitution prohibits unreasonable searches and seizures, and the issuing of warrants without probable cause, supported by oath or affirmation. These provisions of the constitution are qualified by the express power to suspend the privilege of the writ. The former furnish the general rule, while the latter takes effect in the excepted case of public danger in time of rebellion or invasion.

But these indemnity laws do not conflict with the constitution in any of these provisions. They do not authorize any imprisonment with or without cause, but are enacted to protect an officer or person from an action for damages, on account of acts done in the defense of the public safety during the suspension of the writ, for imprisonments

already made in pursuance of a law authorized by the constitution.

It is admitted that the legislature of a state, by virtue of its general legislative power, unless specially prohibited therefrom, could pass laws barring the right of any of its citizens to maintain an action for an alleged assault and battery or false imprisonment. In the choice of means to carry out an express power, as the suspension of the writ, congress may also exercise its discretion, and adopt any measure not specially prohibited by the constitution. These means are necessarily the passage of laws, and one of the most appropriate for the purpose is to provide that the officer shall not be liable to an action. Another, and probably the only other, is to provide by law for the payment out of the public treasury of all judgments that may be recovered against officers by reason of any act done by them pending the suspension of the writ, and in pursuance of the law authorizing or providing for such suspension. But congress may adopt either of these means, as they may deem best. The constitution commits the choice of means to them, and their decision in that respect is conclusive. In England, as I am advised, it has always been the practice to pass indemnifying acts to protect the executive officers from actions for damages, on occasion of suspending the habeas corpus act. 1 Wend. Bl. 137, note.

But I am inclined to put the decision of this question upon higher and simpler grounds. It appears to me that these acts of congress are merely declaratory of the law, as it resulted from the passage of the act suspending the privilege of the writ, and therefore necessarily constitutional. The suspension being the virtual authorization of arrest without the ordinary legal cause or warrant, it follows that such arrests, pending the suspension, and when made in obedience to the order or authority of the officer to whom that power is committed, are practically legal. They are made in pursuance of law—the law suspending the privilege of the writ. The municipal law declares in advance that homicide is justifiable when committed by an officer in obedience to the judgment of a competent court. In the absence of such a statute provision, what court would hold that such a homicide was illegal and criminal? It seems to result from the nature of things, that what the law commands or permits, so far as the law is concerned, is legal and justifiable.

It only remains to determine whether the defendants are within the provision of the indemnifying acts. If they are, judgment must be given in bar of the action, and if not it must go against them for the damages found.

Section 4 of the act of March 3, 1863, makes any order or authority of the president, made at any time during the existence of the present rebellion, a defense to any action for arrest and imprisonment, made under and by virtue of such order.

In the case at bar, no authority or order of the president is shown for the imprisonment of the plaintiff. It is the order or authority of the president which the act makes a defense to the action. Such order or authority cannot be presumed, but must be proved.

Counsel for the defendants seek to invoke the proclamation of September 24, 1862 [13 Stat. 735], in aid of the defendants in this respect. It may be admitted generally that a proclamation by the president is an order or authority to all whom it may concern or to whom it may be addressed. Is this proclamation within the act of March 3, 1863?

The act declares that "any order of the president . . . made at any time during the existence of the present rebellion, shall be a defense, etc." Does this include orders made during the existence of the rebellion—as the proclamation of September 24, 1862—but prior to the date of the enactment? It must be admitted that the language of the statute, taken literally, is broad enough for that purpose. But I do not think it was so intended or should be so construed, and for this reason: Congress was by that act first authorizing the suspension of the privilege of the writ of habeas corpus. It was only as an appropriate means to this end that congress could have made such orders a defense to an action for imprisonment. Where an act of congress is equally susceptible of two constructions, the court is bound to adopt that one which will make the act harmonize with the constitution.

But, if I am mistaken in this, there is another answer to the proposition that the proclamation is a defense to the action. That proclamation professes to suspend the writ of habeas corpus and to declare martial law. The expression martial law may be passed over as merely cumulative. It means nothing but the absence of law. But the president of the United States has no authority to suspend the privilege of the writ, except as authorized and directed by congress, and at the date of this proclamation no such authority existed. I do not propose to argue the question. There are some things too plain for argument, and one of these is, that by the constitution of the United States the president has not the power to suspend the privilege of the writ, and that congress has. The power of the president is executive power—a power to execute the laws, but not to suspend them. The latter is a legislative function, and so far as it exists, belongs naturally and by force of the constitution exclusively to congress. See opinion of Chief Justice Taney, in Ex parte Merryman [Case No. 9,487], and authorities there cited.

Whatever may have been the public necessities and motives which led the president to

issue this proclamation—and I neither question nor impugn them—I cannot hold that it constitutes a defense to this action, because judicially I know that it was unauthorized and void.

Except as a means to secure the end and purpose of suspending the writ, congress itself could not have authorized the president to make this proclamation, nor do I think they could afterwards sanction it, so as to make it operate as a defense in a private action for an imprisonment made under it.

What is now said applies only to this action or similar ones. The proclamation of September 24, 1862, embraces many subjects and classes of persons. As to some of them or many of them, the president may have been authorized as commander-in-chief of the army and navy, to make the orders and directions therein. It declared that all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States, shall be "subject to martial law and liable to trial and punishment by courts martial or military commissions." "The writ of habeas corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court martial or military commission."

But if it were admitted that this proclamation was authorized by law, and that it contained sufficient matter to justify the defendant McDowell in causing the arrest of the plaintiff as he did, still I do not think it would be a defense to this action, because long before this arrest, it was superseded and practically revoked by the proclamation of September 15, 1863—the one authorized by the act of March 3, 1863.

The latter carefully defines the class of persons in relation to which the privilege of the writ was thereby suspended, and who might therefore be arrested and imprisoned without legal warrant or cause. In the absence of particular proof the only general order that the court can take judicial notice of is the proclamation of September 15, 1863. In this I do not find any order directing the arrest of the plaintiff, or that would justify his arrest. It is true that the proclamation suspends the writ as to "aiders and abettors of the enemy." And it is apparent that this language was intended to apply to and include a class of persons whose conduct fell short of that "aid and comfort" to the enemy, which the constitution declares to be treason, and which is legally punishable as such.

It is this class of persons that the suspension of the writ is intended to bring within the power of arbitrary arrest for the time being—persons who may be reasonably suspected of complicity with the rebellion or invasion, or who may be known to give it that moral aid and support which is often more effectual than a soldier in arms, particularly in a country governed by public opinion. But while the proclamation suspends the privilege of the writ as to such "aiders and abettors" as a class, does it authorize or order any officer, military or civil, to arrest and imprison any particular person whom he may believe to be such an "aider or abettor," without the special and further order or authority of the president for so doing? I think not.

The language of the proclamation is, that, "in the judgment of the president, the public safety does require that the privilege of the said writ shall be suspended throughout the United States in the cases where by the authority of the president of the United States, military, naval, and civil officers of the United States, or any of them, hold persons under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, etc." This proclamation is in the nature of a law—it has the force of a law—and by it an important provision of the constitution is suspended. It should then be construed and treated as a law—a rule of action. It prescribes the limits within which the writ shall be suspended. As to any of the persons included within these limits, when in the custody of an officer of the United States, by the authority of the president, the privilege of the writ is taken away. But I do not see how a person can be said to be in the custody of an officer by authority of the president, unless the latter has directed or ordered the officer to take him into custody or to keep him in custody after having been arrested in any way. I admit that there is some room for argument upon the language of the proclamation, as to whether the instrument itself is to be construed as a general order to every officer of the United States, military, naval, and civil, high or low, great or small, to arrest and imprison whomsoever they may believe to be "aiders and abettors of the enemy," or merely a declaration in advance, that whenever such a person is arrested or kept in custody by such officer, upon the order of the president—not the order of the subordinate—that as to him the privilege of the writ is suspended. But I think the latter construction altogether the most reasonable, and in accordance with the general spirit and purpose of the instrument. So upon general considerations outside of the language of the proclamation, there are many cogent reasons why it should be thus construed and applied. The power of arbitrary arrest and imprisonment, though sometimes absolutely necessary to the public safety, is a dangerous and delicate one. In the hands of im-

proper persons it would be liable to great abuse. If every officer in the United States, during the suspension of the habeas corpus, is authorized to arrest and imprison whom he will, as "aiders and abettors of the enemy," without further orders from the president, or those to whom he has specially committed such authority, the state of things that would follow can be better imagined than expressed.

It only remains to consider what is the effect of section 1 of the act of May 11, 1866. That act, as we have seen, makes the order of "the president or secretary of war," or of "any military officer of the United States holding the command of the department, district, or place within which" an "arrest or imprisonment was made," a defense to the action.

Under this section there can be no doubt but that the order of General McDowell to Captain Douglas protects the latter for acting in obedience to it, and is a complete defense to the action, so far as he is concerned.

At the same time it is equally apparent that it does not furnish a defense for General McDowell. He is not shown to have acted upon the order of any one. The section proceeds upon the principle, which I have already attempted to show ought to be the law independent of the statute, that a military officer, when acting in obedience to the order of his superior, should not be liable to these persons therefor.

As it nowhere appears that General McDowell was acting under the order of his superior, but rather in obedience to what was deemed public necessity, I must hold him liable to the plaintiff for the damages which the latter has sustained by reason of his unauthorized act.

The good motives of General McDowell, and the necessities of the public, when he issued order No. 27, as well as the gross misconduct of the plaintiff, have been duly considered by the court in estimating the damages of the plaintiff. But these alone, however worthy or imperative, do not constitute a defense to the action. The act itself being unauthorized by any order or authority of the president, does not come within the scope of the proclamation of September 15, 1863, suspending the privilege of the writ, or the act of March 3, 1863, authorizing such suspension. Neither does it come within the province of the act of May 11, 1866, as it was not done in obedience to the order of a superior.

Congress may relieve a meritorious officer against a loss incurred while in the discharge of his duty to the public; but in this tribunal, whose only function is to administer the law, the defendant must be held liable for the legal consequences of his act.

Judgment, that the plaintiff recover of the defendant, McDowell, the damages found by the court, and his costs and disbursements, and in bar of the action as against the defendant, Douglas.

[Afterwards a motion for a new trial was argued before Justice FIELD and Judge HOFFMAN; and was denied.] [1]

McCALL (PHILLIPS v.). See Case No. 11,104.

Case No. 8,674.

M'CALL v. TOWERS.

[1 Cranch, C. C. 41.] [2]

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

WRITS—NOTICE TO TAKE DEPOSITION—AFFIDAVIT.

The affidavit of service of a notice by leaving it with the defendant's wife, need not state that the wife was informed of the purport of the notice.

The notice to take a deposition was delivered to the defendant's wife, at his dwelling-house. It was objected that the affidavit of service did not state that the wife was informed of the purport of the notice.

THE COURT adjudged the notice to be good. Laws Va. (Rev. Code, 230, c. 141).

McCALL (VEACOCK v.). See Case No. 16,904.

Case No. 8,675.

McCALLON v. WATERMAN.

[1 Flip. 651; 4 N. Y. Wkly. Dig. 382; 4 Cent. Law J. 413.] [3]

Circuit Court, E. D. Michigan. March, 1877.

REMOVAL OF CAUSES—DEFAULT ENTERED.

A case cannot be removed to a federal court after default has been entered, and before the same has been set aside.

[Cited in Chester v. Wellford, Case No. 2,662; Deford v. Mehaffy, 13 Fed. 484; Detroit v. Detroit City Ry. Co., 54 Fed. 8.]

On motion to remand. Suit was commenced by plaintiff in the circuit court of Marquette county by attachment. This was on January 31, 1876. The sheriff levied on certain lands, and as the defendant was a non-resident, publication was made under the state statute. Plaintiff's attorney entered the appearance of defendant July 6, 1876, and on the 22d of same month took his default for not pleading to the declaration. The default was, by order, made absolute on the 12th of August, and the usual reference made to assess damages. After the entry of the default (on the 23d day of July), but

[1] [From 1 Abb. (U. S.) 212.]

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

[3] [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 4 N. Y. Wkly. Dig. 382, gives only a partial report.]

prior to its being made absolute, a petition and bond was filed for the removal of the cause. The motion now made is to remand, on the ground that the petition could not be filed till the default was set aside.

Mr. Canfield, for the motion.
Mr. Holbrook, oppposed.

BROWN, District Judge. By section 3 of the act of 1875 [18 Stat. 470], the petition for removal must be filed "before or at the term at which said cause could be first tried, and before the trial thereof." Probably no question connected with the removal of causes from the state courts has given rise to more discussion than the time at which such removal must be made. Under the 12th section of the judiciary act [1 Stat. 79], defendant was compelled to file his petition "at the time of entering his appearance at the state court." Under this act it was held that defendant waived a removal by demurring, pleading, answering, or otherwise submitting himself to the jurisdiction of the state court. By the act of July 27, 1866 [14 Stat. 306], the time was enlarged, and the defendant was allowed to file his petition "at any time before the trial or final hearing of the cause;" and by act of March 2, 1867 [14 Stat. 558], giving the right of removal upon filing an affidavit of prejudice or local influence, the words "trial or final hearing" were changed to "final hearing or trial." Finally, the new act of 1875 omitted the words "final hearing," and used simply the word "trial." Under the acts of 1866 and 1867, the word trial was held to refer to cases at law; hearing, to suits in equity. The word trial, as used in the act of 1875, undoubtedly extends to both classes of cases, and means, according to Bouvier (2 Law Dict. 602), "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause for the purpose of determining such issue." In the case of U. S. v. Curtis [Case No. 14,905], under a statute requiring a copy of an indictment to be delivered to the prisoner two days before the trial, it was held the word trial meant the trying of the cause by jury, and not the arraignment and pleading preparatory thereto. In Stevenson v. Williams, 19 Wall. [86 U. S.] 572, it was held that the act of 1867 did not authorize a removal after an appeal had been taken from a final judgment of the court of original jurisdiction to the supreme court of the state. In delivering the opinion, Mr. Justice Field remarked: "The act of congress of March 2, 1867, under which the removal was asked, only authorized a removal where an application is made 'before the final hearing or trial of the suit;' and this clearly means before final judgment in the court of original jurisdiction where the suit is brought. Whether it does not mean still more, before the trial or hearing of the suit has commenced, which is followed by such judgment, may be questioned, but it is unnecessary to determine that question in this case." In the case of Insurance Co. v. Dunn, in the same volume (page 214), it is said that the words "at any time before the final hearing or trial of the suit," used in the act of 1867, are not of the same import as the language of the act of 1866 on the same subject. "At any time before the trial or final hearing," and where, under a state statute, giving the party as of right a second trial, it was held that the first trial was not final within the meaning of the act, and that a petition might be filed after the verdict had been set aside and the new trial granted under the statute. In the case of Vannevar v. Bryant, 21 Wall. [88 U. S.] 41, a transfer was held to have been properly refused after one trial, but before the right to the second had been perfected. The petition was filed under the act of 1867, and the court observed, with somewhat more definite language than was used in the case of Stevenson v. Williams [supra], "the hearing or trial here referred to is the examination of the facts in issue; hearing applied to suits in chancery, and trial to actions at law." It seems now to be settled, at least in federal courts, that if a trial has been had, the verdict set aside, and a new trial granted, the cause is still in a condition to be removed. Kellogg v. Hughes [Case No. 7,662]; Johnson v. Monell [Id. 7,399]; Akerly v. Vilas [Id. 119]; Dart v. McKinney [Id. 3,583]; Minnett v. Milwaukee & St. P. Ry. Co. [Id. 9,636].

In a defaulted case there is no trial in the ordinary sense in which that word is used; but at the same time there is undoubtedly a limit to the time within which such a case may be removed to this court. Clearly it cannot be removed after judgment. I deem it equally clear that a litigated case could not be removed after verdict and before judgment. The verdict is the conclusion of the trial. It is an adjudication of the questions put in issue by the pleadings, and unless a motion in arrest, or for a new trial is made, the entry of a judgment follows as a matter of course, except so far as the assessment of damages is concerned. A default has practically the same effect as a verdict. Until set aside, it is a final determination of the matters set up in the declaration. The defendant can take no step in the cause until the default is vacated, and can be heard only to question the amount of damages. "Default," says Tidd, "is an admission of the cause of action." In Johnson v. Pierce, 12 Ark. 599, it is said: "By failing to defend, the defendant admitted the truth of the allegations contained in the declaration; that is, he admitted the existence of every fact which the plaintiff would have been called to prove in order to maintain his action; because, by refusing to make an issue with the plaintiffs upon the facts set forth by them, he deprives them of the opportunity of making such proof, and therefore from necessity the facts must

stand admitted upon the same principle that whatever is not traversed in the pleadings is admitted." In Cook v. Skelton, 20 Ill. 107, it is said: "The default admitted every material allegation in the plaintiff's declaration, and left nothing but the assessment of damages to be determined. The defendant has no right to give any evidence which would defeat the action, but only such as tends to reduce the damages."

The default, which is an admission of the plaintiff's case, stands in the place of a trial in a litigated action, which is only a determination of the issues made by the pleadings of both parties. As vacating a default is a matter of discretion, it seems proper that the discretion of the court, which caused the default to be entered, should be invoked to set it aside.

I think the petition for removal was prematurely filed, and the case must be remanded to the circuit court for the county of Marquette for further proceedings.

McCALLY (CLAY v.). See Case No. 2,869.

Case No. 8,676.

McCALMONT et al. v. LAWRENCE et al.

[1 Blatchf. 232;[1] 5 N. Y. Leg. Obs. 205.]

Circuit Court, S. D. New York. April 5, 1847.

CREDITORS' BILL—CONVEYANCE OF LAND—EXECUTION—PRIORITY—UPON WHAT RELIEF FOUNDED—HOW GRANTED — DECREE — TITLE PURSUANT THERETO.

1. Chancery has jurisdiction of a bill filed by a judgment creditor, for relief against a conveyance of land by his debtor, made with intent to defeat the lien of the judgment, or to hinder or delay its satisfaction, whether execution has been issued on it or not.

[Cited in The Holladay Case, 27 Fed. 845.]

[Cited in National Tradesmen's Bank v. Wetmore, 124 N. Y. 250, 26 N. E. 550.]

2. The creditor who first institutes a suit in equity to avoid such a conveyance as fraudulent, is entitled to relief, without regard to other creditors standing in the same right, but who have not made themselves joint parties with him.

[Cited in brief in Johnston v. Straus, 26 Fed. 67.]

3. The relief awarded in such a case is founded upon the fraud attempted against a lien already attached, or to prevent its attaching, and equity gives the full remedy which could have been obtained through the lien by execution, but without referring the matter to the action or process of a court of law.

4. Chancery, having acquired jurisdiction of the subject matter because of the fraud, will apply the property to the satisfaction of the prosecuting creditor according to its own method of proceeding.

5. The action of chancery on the fraudulent grantor or assignee, is only to the extent of supplying a remedy to the suitor creditor; as to all other persons the assignment remains as if no proceedings had been taken.

6. It is competent for chancery to order the assignee of real estate fraudulently conveyed to him, to re-convey it to the assignor, in order that execution may act upon it; or to order him to convey it to the proper officer of the court, or otherwise, so as best to appropriate it to satisfy the judgment debt.

7. In a case where a fraudulent conveyance of land was made before the judgment was recovered, and to prevent its lien attaching, a decree that the debtor and his fraudulent assignee join with the receiver in the suit in executing a conveyance to the purchaser on a sale of the land directed by the decree, is appropriate and valid.

8. The title given pursuant to such a decree is full and perfect, as to all the interest the debtor and his assignee had in the land, and is discharged of all right on the part of the debtor and other judgment creditors of his to redeem the land.

This was an application to compel a purchaser of land sold by a receiver under a decree in this cause, to complete his purchase, or for a re-sale of the property and an order that the purchaser pay the deficiency. The bill in this suit was filed by the plaintiffs [Robert McCalmont and others] as judgment creditors of the defendant Susan Lawrence, to set aside, as fraudulent, a conveyance and assignment of lands made by her immediately before they obtained their judgment. See Lawrence v. McCalmont, 2 How. [43 U. S.] 426. The judgment debtor and her assignees were the only defendants. On a hearing on pleadings and proofs a decree[2] was made in favor of the plaintiffs, declaring the assignment void, and ordering the unsold property in the hands of the assignees to be sold by the receiver theretofore appointed in the cause, the proceeds of the sale to be applied on the plaintiffs' judgment, and the defendants to join in conveying the real estate.

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

[2] Decree: 1. That the assignment made by Susan Lawrence to Martinus Bergen and William Lawrence, under date of the 13th of May, 1842, and which is set forth in the pleadings, be declared fraudulent and void. 2. That the real estate, and all other property conveyed by the above assignment from the said Susan Lawrence to the said assignees, and unsold by them, be sold by and under the direction of the receiver heretofore appointed in this cause, he giving such notice of the time and place of sale, as is required on sales by a master of this court; the defendants to unite in the conveyances of the real estate, and in the acknowledgments of the deeds. 3. That the proceeds of the sales, and other funds that may be in the hands of the receiver, be paid over to the plaintiffs, in satisfaction of their judgment set forth in the pleadings, with interest, and costs of this suit to be taxed. 4. If the said monies shall be insufficient to satisfy the judgment and costs, then that the assignees be charged jointly with the value of the assigned property, real and personal, sold or disposed of by them, and with the rents and income thereof, which they received or might have received with ordinary care and diligence, after the date of the assignment and before the property came into the possession of the receiver; the assignees to be allowed all payments of principal and interest on incumbrances upon the property, existing prior to the judgment, all sums paid for taxes, assessments, needful repairs, insurance against fire, and other charges and expenses in the proper care and management of the property, but no commissions or costs of this suit to be allowed. 5. A reference to John W. Nelson, one of the masters of this court, to take an account upon the principles of this decree, before whom

At the sale a piece of real estate was sold to one Davenport, who made a deposit and signed a contract to complete the sale. The sale had been announced as one which was to give a perfect title. Davenport, on ascertaining that there were judgments against Susan Lawrence, subsequent in date, however, to the assignment and to the plaintiffs' judgment, objected to the title, and refused to complete his purchase.

William C. Wetmore, for Davenport, insisted, that the assignment, being declared void, could not be a source of title, and the title could not be conveyed by the deed tendered; that as the decree impeached the assignment under which title was taken, the subsequent judgment creditors might also assail the assignment, and the purchaser could not, as against them, insist that he was a bona fide purchaser, without notice; that title could only be made by a sale on execution under the judgment, in which case the subsequent judgment creditors could have an opportunity to redeem; that the purpose of a bill to set aside a fraudulent conveyance, was only to remove obstructions to the legal remedy, a sale on execution, which was fully adequate; and that if the attempted mode of conveyance would give a title, a subsequent judgment creditor, if the first to file his bill and obtain a decree, would cut off a prior judgment. He cited Conard v. Atlantic Ins. Co., 1 Pet. [26 U. S.] 386, 443; Thelusson v. Smith, 2 Wheat. [15 U. S.] 396; Le Roy v. Rogers, 3 Paige, 234; Boyd v. Dunlap, 1 Johns. Ch. 478.

Daniel Lord, for plaintiffs, contended that the assignment was void only as to the plaintiffs; that the deed by the assignees, under the decree, passed the title as to all persons but the plaintiffs, and their right was enforced by the decree; that in declaring the assignment void as to the plaintiffs, the court had power to order the assignees to apply the estate in such manner as to prevent the fraud intended by the assignment, and relieve the plaintiffs, as in the cases of trusts implied by a court of equity out of fraudulent acts and deeds; that the legal title as to all but assailing creditors was in the assignees, and a purchaser from them, under the decree of the court, was a bona fide purchaser, and his purchase valid, if made before the title was attacked by any other creditor. He cited Butler v. Stoddard, 7 Paige, 163; Bank of U. S. v. Housman, 6 Paige, 526; Bean v. Smith [Case No. 1,174]; Ames v. Blunt, 5 Paige, 13; Grover v. Wakeman, 11 Wend. 187.

NELSON, Circuit Justice, stated that the following points had been ruled in the case:

1. Chancery has jurisdiction, on a bill filed by a judgment creditor for relief against a conveyance of lands by his debtor, made with intent to defeat the judgment lien, or to hinder or delay satisfaction of the judgment, whether execution has been issued thereon or not.

2. The creditor who first institutes a suit in chancery to avoid a fraudulent conveyance, is entitled to relief, without regard to other creditors standing in the same right, but who have not made themselves joint parties with him.

3. The relief awarded in these cases, is founded upon the fraud attempted against a lien already attached to land, or because of the assignment with fraudulent intent to prevent the lien from attaching; and equity consequently gives the full remedy which could have been obtained through the lien by execution, but without referring the matter to the action or process of a court of law.

4. For chancery, having acquired jurisdiction of the subject matter, because of the fraud, will apply the property fraudulently conveyed, to the satisfaction of the prosecuting creditor, pursuant to its own methods of proceeding.

5. The action of chancery upon the fraudulent grantor or assignee, is only to the extent of supplying a remedy to the suitor creditor; as to all other parties, the assignment remains as if no proceedings had been taken.

6. It is competent for chancery to order the assignee of real estate fraudulently conveyed to him to reconvey it to the assignor in order that an execution may act upon it; or to order him to convey it to the proper officer of the court of chancery, or otherwise, so as best to effect its appropriation in satisfaction of the judgment debt.

7. To that end, the order heretofore made by this court, that the assignees and assignor in this case, join with the receiver in executing conveyances to the purchasers under the sale directed by the court, is appropriate and valid.

8. The title made pursuant to the decree of this court in that behalf, is full and perfect for all the interest the assignees and the judgment debtor had in the lands transferred by the assignment, and is discharged of all right of redemption by her or by other judgment creditors.

9. The purchaser, upon the facts before the court, is bound to accept the title offered him.

[Mr. Lord suggested that where the objection was held unfounded, it was usual to give

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all the defendants shall appear upon summons served upon them, and produce all deeds, papers, books, and documents, and be examined on oath, on application of the plaintiffs, touching any of the matters embraced in the reference; the master to approve the form of the conveyances to be executed; the plaintiffs to be allowed their taxed costs of this suit out of the funds; and if the same shall be insufficient to pay the judgment and interest, such costs to be paid by the assignees; and execution to issue, on confirmation of the master's report, for the balance, if any, which the master shall report to be due on such accounting, and for the costs of the plaintiffs; the receiver to pass his accounts before the master, who is to report a proper allowance for him, to be by him retained out of the funds in his hands.

costs, which was deemed advantageous to the purchaser as showing a court's opinion of his title.

[THE COURT said they had so made the order granting the motion, with costs.] [3]

Motion granted, with costs.

Case No. 8,677.

McCAN v. NORTON.

[Cited in Re Steadman, Case No. 13 330. Nowhere reported; opinion not now accessible.]

Case No. 8,678.

McCANDLESS v. McCORD.

[4 Cranch, C. C. 533.] [1]

Circuit Court, District of Columbia. March Term, 1835.

JUDGMENT — MOTION TO SET ASIDE — JOINT DEFENDANTS—CAPIAS—NON EST AS TO ONE—RENEWAL.

In a joint action against two defendants, after judgment confessed by one of the defendants, it is too late for him to move to set aside the judgment because the capias ad respondendum was not renewed and regularly returned non est inventus, at every term until the trial term of the case against the defendant taken. The practice in such cases is unsettled.

[See Nicholls v. Fearson, Case No. 10,226.]

This was a motion by Mr. Key, for defendant, to quash the ca. sa. against McCord, and to set aside the judgment, which had been confessed by him, saving his equity. The original capias ad respondendum was against McCord and Salady. McCord was taken but Salady was returned non est; and the writ was not renewed against him; nor does the declaration state that the first writ was returned non est as to him. Upon examination of the records of this court, it appeared that the practice was unsettled. Of 117 cases, from 1801 to 1814, in 56 cases the writ was not renewed against the absent defendant; and in 61 it was renewed.

Mr. Key, for defendant, cited the case of Nicholls v. Fearson [Case No. 10,226], in this court at December term, 1824, in which the court decided, (nem. con.) "that the capias must be continued by alias and pluries up to the trial court," and that for want of such continuance the cause was discontinued, and ordered to be stricken off the docket; but, at the suggestion of Mr. Key, that in Harris's Entries one non est only is mentioned, the court agreed to hear a motion to reinstate the cause, if Mr. Key should think he could sustain the motion, but nothing further appears to have been said upon that point; the cause, however, was afterwards tried and was carried to the supreme court upon a question of usury. [7 Pet. (32 U. S.) 103.]

[3] [From 5 N. Y. Leg. Obs. 205.]

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

Mr. Redin, for plaintiff, contrà, contended that after a confession of judgment by the defendant taken, it is too late for him to object to the want of a renewal of the capias ad respondendum, against the other defendant.

And of that opinion was THE COURT (THRUSTON, Circuit Judge, absent), and the motion to set aside the judgment was overruled.

McCANDLESS, The GENERAL WILLIAM. See Cases Nos. 5,321 and 5,322.

Case No. 8,679.

Ex parte McCANN.

[5 Am. Law Reg. (N. S.) 158, note.]

District Court, E. D. Tennessee. 1865.

HABEAS CORPUS — UNDER STATE INDICTMENT—COLOR OF AUTHORITY OF UNITED STATES—FOREIGNERS.

[1. A federal judge has no power to issue a writ of habeas corpus for a prisoner in jail under an indictment found in a state court, and who is not held "under or by color of the authority of the United States," nor "committed for trial before any court of the same."]

[2. The act of congress of August 23, 1842 (5 Stat. 539), empowering federal judges to issue writs of habeas corpus in certain cases, applies only to "subjects or citizens of a foreign state."]

This was an application for a habeas corpus The petitioner was an officer in the army of the late so-called Confederate States, and, as such, surrendered and was paroled under the agreement made between the authorities of the United States and the commanders of the armies of the so-called Confederacy, after which he took the oath prescribed in the amnesty proclamation of the president of May 29th, 1865, but was subsequently arrested and confined in jail in Knox county, Tennessee, to answer an indictment in the circuit court of said county, for the murder of one A. C. Haun, who during the war was tried by a court martial of which the petitioner was a member, and executed for being a secret active enemy of the so-called Confederate States, and as such having engaged in acts not of regular warfare. The petition proceeded that the war between the United States and the so-called Confederate States was a civil war, and the parties engaged therein belligerents, and therefore the petitioner was a quasi judicial officer in the act for which he was indicted, and not responsible therefor.

THE COURT (TRIGG, District Judge), after expressing an opinion that the late rebellion had assumed the status of a civil war, quoting the opinion of the supreme court of the United States in the Prize Cases, 2 Black [67 U. S.] 635, and that upon the facts stated in the petition, which, for the purposes of the present inquiry, must be taken to be true, the court martial of which

the petitioner was a member was a regularly constituted judicial tribunal, recognized by the law of nations, and therefore by the laws of the United States, proceeded as follows: "The 14th section of the judiciary act of 1789 [1 Stat. 81] provides 'that the courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: Provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.' This law is so plain that it cannot be misapprehended, and it admits of no comment. The petitioner, according to his own showing, is a prisoner in jail, upon the charge of murder preferred against him by indictment in the state court, and he is not 'in custody under or by color of the authority of the United States, or committed for trial before any court of the same.' I have, therefore, no power or jurisdiction, under the law, to grant the prayer of the petitioner in this case, and consequently the writ must be denied. See the cases Ex parte Door, 7 How. [48 U. S.] 104; Ex parte Cabrera [Case No. 2,278]. The provisions of the act of congress passed in 1842 [5 Stat. 539], and which were so earnestly pressed by the counsel, I am satisfied, have no application to this case, but are applicable alone to subjects or citizens of a foreign state." The petition was therefore dismissed.

[This case is published as a note to Hughes v. Litsey (state court, Ky.) 5 Am. Law Reg. (N. S.) 148.]

McCANN (UNITED STATES v.). See Case No. 15,655.

McCARTER v. LAKE SUPERIOR SHIP, ETC., CO. See Case No. 13,643.

McCARTEY v. The SENATOR. See Case No. 8,686.

Case No. 8,680.

In re McCARTHY.

[15 Alb. Law J. 293.]

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

BANKRUPTCY — TRADESMAN'S BOOKS—ACCOUNTS—BUSINESS—PERSONAL.

A bankrupt kept a true account of his business, but not of his personal expenses. *Held*, all that a tradesman is bound to do is to keep the accounts of his business as a tradesman; and, if his books show how much he has drawn out for personal expenses, it is sufficient.

Case No. 8,681.

McCARTHY v. EGGERS et al.

[10 Ben. 688.] [1]

District Court, E. D. New York. Dec., 1879.

SHIPPING—CHARTER—REPAIRS BY OWNER PRO HAC VICE—ADMIRALTY—PLEADING—PRACTICE—AMENDMENT OF ANSWER.

1. Where a vessel was repaired in the port of New York, upon the order of D. & R., to whom she was consigned, proceeded on a voyage, and was sold abroad on a claim for bottomry, and thereafter the ship-carpenter, who did the repairs in New York, brought suit against the owners, who resided in New York and Brooklyn, and they answered separately—E. setting up that the consignees, D. & R., were owners pro hac vice under an agreement to manage and control the vessel, receive all earnings and pay for all repairs and supplies, for a specified money consideration; and J. setting up the same agreement and also that libellant had knowledge of it: *Held*, that it was not open to the defendants to dispute the authority of D. & R. to order the repairs; and having admitted their ownership and accepted the repairs in the increased value of their vessel, they are prima facie liable to pay therefor.

2. D. & R. were not proved to be owners pro hac vice, and this defence set up in the answers was not established.

3. While it appeared from the proofs that defendants were actually mortgagees out of possession, no such defence was set up in their answers and no question of their liability as such could therefore be considered.

4. At the trial, the defendant J. asked leave to amend answer and set up that he was mortgagee out of possession: *Held*, that having pleaded ownership, and set up an agreement only consistent with ownership, and having stood by at the trial and applied to amend only after the effort to prove charter by the other owner had failed, he cannot now be allowed to amend.

[This was a libel in personam by D. McCarthy against Emilia Eggers and John Janssen, owners of the D. H. Bills, for repairs.]

E. S. Hubbe, for libellant.

H. D. Hotchkiss and A. W. Hall, for defendants.

BENEDICT, District Judge. This is an action in personam to recover of the defendants the value of certain repairs done by the libellant to the bark D. H. Bills, in the port of New York.

The libel avers that "at all times when these said repairs were made and the said labor and materials were furnished by the libellant, the said respondents were the owners of said bark." The defendants answer separately.

The defendant Eggers in her answer does not deny the averment of the libel in regard to her ownership of the bark, but sets up by way of defence that prior to the doing of these repairs she had entered into an agreement with the firm of Dill & Radmann, whereby said Dill & Radmann were to take

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

possession and assume entire control and management of said bark, receive all her earnings, select her master, her voyages and her cargoes, man and equip her and pay all the expense attending the same, and also furnish and pay for all supplies or repairs required by said bark during the period of said agreement; that in consideration of the matters aforesaid, Dill & Radmann were to pay respondent certain sums of money; that thereafter said Dill & Radmann entered into and took possession of said bark under the agreement aforesaid, and were in such possession at and after the time in the libel set forth.

The defendant Janssen in his separate answer "admits that at the time mentioned in the libel he was the owner of one-sixteenth of the bark," and for a separate and distinct defence sets up the same agreement set up by the defendant Eggers, but in addition avers knowledge of such agreement on the part of the libellant.

The defence thus set up by these defendants is that the vessel, at the time of these repairs, was under charter to the firm of Dill & Radmann by virtue of an agreement between that firm and the general owners of the vessel, whereby Dill & Radmann became owners pro hac vice, and therefore alone responsible for the repairs sued for.

The evidence establishes the following facts: The repairs sued for were necessary. They were ordered by Radmann of the firm of Dill & Radmann. They were furnished by the libellant upon the credit of the vessel and her owners, without knowledge on his part by whom the vessel was owned. The vessel was an American vessel and the defendants resided at the time in New York and Brooklyn respectively. They were the registered owners and their respective oaths of ownership were on file in the New York custom house, where the vessel was registered. Just previous to these repairs the vessel had come from a foreign port consigned to Dill & Radmann, and they did her business. After these repairs the vessel proceeded to a foreign port and was there sold under a bottomry bond at a judicial sale. The defendants had no personal knowledge in respect to these repairs; were never consulted as to their necessity, and gave no direct authority to Dill & Radmann to cause them to be done.

These facts make out a prima facie case of liability on the part of the defendants. Having in their pleadings admitted themselves to be the general owners of the vessel, the vessel having been consigned to Dill & Radmann and they permitted to do her business, it is not open to the defendants to dispute the authority of Dill & Radmann to order necessary repairs, and, besides, the defendants having accepted the repairs in the increased value of their vessel, must be presumed to have requested the repairs to be done.

The libellant is therefore entitled to a decree unless the defendants have proved the defence set up, viz: that although they were the general owners of the vessel, Dill & Radmann were owners pro hac vice, by virtue of a charter of the vessel to them by the general owners. This defence the defendants have failed to establish.

An effort was made to prove the charter set forth in the answer by the testimony of the husband of the defendant Eggers, and his testimony on the direct tended to show the existence of such an agreement; but from the cross-examination of this witness as well as from the testimony of Radmann, it is plain that no such agreement was ever made, and that no such relation as is stated in the answer ever existed between Dill & Radmann and the defendants.

What the relation of the defendants to the vessel really was appears by the testimony of the witness Eggers, on his cross-examination, and the testimony of Radmann, taken subject to the libellant's objection. The defendants were mortgagees out of possession. Dill & Radmann were the owners in possession. Dill & Radmann did not hire and were not to pay for the hire of the vessel, as the answer avers, but were to pay interest on money they had borrowed, and to secure which the title of the vessel had been taken by the defendants.

Whether under such a state of facts the defendants would be liable for these repairs, cannot be considered here because no such defence is set up in the answer.

Upon the pleadings, no question as to the liability of a mortgagee out of possession is before the court, but only the question whether these defendants, one of whom expressly, and the other by implication, admits being the owner of this vessel, had chartered her to Dill & Radmann under an agreement which rendered Dill & Radmann owners pro hac vice, and relieved the general owners from responsibility for repairs. That question must be decided in the negative upon the evidence.

At the trial the defendant Janssen asked leave to amend his answer so as to set up the defence that he was mortgagee out of possession at the time of these repairs. That application was reserved and is now to be disposed of. No application to amend was made in behalf of the defendant Eggers.

In regard to this application of the defendant Janssen, I am of the opinion that it cannot with propriety be granted.

In the first place, this defendant, having full knowledge that he held the title to one-sixteenth of this vessel, simply by way of security for $750 previously loaned to Dill & Radmann, has in his answer expressly averred that he was an owner of the vessel, and set up an agreement consistent with that statement and inconsistent with the statement he now desires to insert. There being no room for surprise or mistake, he should

now be held to the position he saw fit deliberately to assume in his answer.

In the second place, he stood by at the trial while the effort was made to prove by the husband of the defendant Eggers the charter set up in his answer, and it was only after that effort had failed that he made application to conform his answer to the fact.

These are circumstances that forbid the granting of the favor sought at so late a stage of the case.

Let a decree be entered in favor of the libellant for the amount claimed in the libel, with interest and costs.

[On appeal to the circuit court the libel was dismissed, with costs to the respondent in both courts. 1 Fed. 478.]

McCARTHY (FINLEY v.). See Case No. 4,794.

Case No. 8,682.

McCARTHY v. TRAVELERS' INS. CO.

[8 Biss. 362; 8 Ins. Law J. 208; 7 Reporter, 486.] [1]

Circuit Court, E. D. Wisconsin. Dec., 1878.

ACCIDENT INSURANCE POLICY—TERM "ACCIDENTAL" CONSTRUED—PROXIMATE AND REMOTE CAUSE—BURDEN OF PROOF.

1. On an accident policy of insurance, where the death was alleged to have occurred by reason of the rupture of a blood vessel, sustained while exercising with Indian clubs: *Held*, that if the deceased used the clubs for exercise in the ordinary way, and without the interference of any unusual circumstances, the injury was not accidental; but if there occurred any unforeseen accident or involuntary movement of the body which, in connection with the use of the clubs, brought about the injury, then such means were accidental and within the terms of the policy.

2. By the terms of the policy it was provided that the injury must be the proximate and sole cause of the death: *Held*, that if death ensued as a consequence of inflammation, and the formation of abscesses and the accumulation of injurious substances in the lungs, and these were the necessary results of a rupture of the blood vessel, then such injury was the proximate cause of the death. But if an independent disease supervened upon the injury, or a slumbering disease was brought into activity by the injury, then such injury was not the proximate cause.

3. "Proximate cause" defined.

4. Testimony showing the health of the insured from infancy to his last sickness is admissible.

5. In such case the burden of proving that the death was the result of disease is upon the party alleging it.

Action on an accident insurance policy. The policy provided that in case of injuries effected through external, violent or accidental means, the company should be liable; but that the liability should not extend to any bodily injury of which there should be no external or visible sign, nor to any injury happening directly or indirectly in consequence of disease, nor to any case except where the injury was the proximate and sole cause of the disability or death. It was claimed for the plaintiff that the deceased, while exercising with Indian clubs, ruptured a blood vessel in his lungs, and that his subsequent death was the result of such injury. There was evidence tending to show that one of the clubs struck against a stove, thus causing the injury. It was claimed for the defendant that if there was a rupture as alleged, it happened in consequence of a then weak and actually diseased condition of the lung or lungs, so that indirectly, if not directly, the injury happened as a consequence of such condition, and that no rupture would have occurred if there had been no unsoundness or disease. Evidence was also given bearing upon the question whether any disease supervened between the time of the injury and the death of the deceased, and there was evidence tending to show that deceased suffered from pulmonary consumption after the time of the injury.

[2] [By a policy of insurance issued and dated February 1, 1877, the defendant, the Travelers' Insurance Company, of Hartford, Conn., insured J. J. McCarthy in the sum of three thousand dollars for the term of twelve months, ending February 1, 1878; the sum insured to be paid as provided by the policy to the plaintiff, Honora McCarthy, within ninety days after proof that the insured at any time during the continuance of the policy had sustained bodily injuries, effected through external, violent and accidental means, within the intent and meaning of the contract of insurance and its conditions; and that such injuries alone had occasioned death within ninety days from the happening thereof. By the terms of the policy it was further provided that such insurance should not extend to any bodily injury of which there should be no external and visible sign, nor to any injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the policy; nor to any case except where the injury was a proximate and sole cause of the disability or death.

[It is alleged on the part of the plaintiff that on the 25th day of May, 1877, the deceased sustained a bodily injury, effected through such means as were within the meaning and intent of the policy, which occasioned his death, and which was the proximate and sole cause of his death; and this action is brought by the beneficiary in the policy, the plaintiff, to recover the amount of the insurance, viz., three thousand dollars and interest. There is no question here as to the issuance of the policy,

[1] [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 7 Reporter, 486, contains only a condensed report.]

[2] [From 8 Ins. Law. J. 208.]

the payment of the premium, nor that the death occurred within ninety days from the happening of the alleged injury. The real issue between the parties lies within narrow compass. Stating the issue in general terms, it is claimed by the plaintiff that the death of the insured was occasioned by an injury effected through such means as are contemplated by the policy, and that such alleged injury was the sole cause of the death. The defendant denies this, and claims that the alleged injury, if sustained, was not the sole or proximate cause of the death of the insured, but that his death was caused by disease.][2]

N. S. Murphey and Goodwin & Mitchell, for plaintiff.

H. M. Finch and Lynde & Miller, for defendant.

DYER, District Judge (charging jury). The policy of insurance in this case is of the form and character known as an accident policy. To entitle the plaintiff to recover, it must be shown by the evidence that the deceased sustained a bodily injury, which was effected through means which were external, violent and accidental, and that such injury was the proximate and sole cause of the death, as I shall hereafter more fully explain to you. If a bodily injury was sustained, and it happened directly or indirectly in consequence of disease, or if the death was caused wholly or in part by bodily infirmities or disease, existing either prior or subsequent to the date of the policy of insurance, then the plaintiff is not entitled to recover.

[2] [Taking up the questions involved in this issue you will naturally first inquire whether the insured sustained an injury as alleged by the plaintiff. It is claimed that in the evening of May 25, 1877, the deceased was exercising his arms and chest by the use of so-called Indian clubs, and that while so exercising, and without fault on his part, he ruptured a blood vessel in his lungs, and that his subsequent death was the result of such injury. Testimony has been given by the witness Young, which, it is claimed by the plaintiff, shows that on the occasion in question the insured sustained an internal injury, and it is urged that further evidence of such injury is found in the alleged fact that the deceased expectorated blood in considerable quantities, and in the fact that thenceforth he became disabled, and so continued until the time of his death in August, 1877. You have heard the testimony of the witness Young bearing upon the occurrence when it is claimed the injury was received, and the circumstances attending and following it, together with testimony touching the subsequent physical condition of the deceased, and you will determine from the evidence whether he did sustain a bodily injury at the time, and as claimed. If you find such to be the fact, the question then is, was such injury effected through the means contemplated by the policy? Such means must have been external, and they must have been violent, and they must have been accidental. In other words, gentlemen, the injury, if one was sustained, must have been the result of accidental means. It is true, the provisions of the policy are to be taken most strongly against the party that issued and delivered it; but when its terms are unmistakable and clear, we must deal with them in their obvious sense and meaning.] [2]

A question of considerable nicety has been presented, arising in connection with the evidence under the clause in the policy, which describes the means through which the injury must be effected in order to create a liability. It is a question concerning which my mind has not been free from doubt; but in view of the language of this policy, which requires that the means through which the injury is effected must be accidental, I instruct you that if the deceased voluntarily took in his hands the clubs for exercise, and used them for such exercise in the way and precisely as he intended to do, and without anything occurring to interfere with his intended and usual movements in such exercise; that is, if he voluntarily used them in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental or involuntary movement of the body, and in such use of the clubs there occurred the rupture of a blood vessel and consequent injury as claimed, I do not think it could then be said that the means through which the injury was effected were accidental. But, if while engaged in such exercise there occurred any unforeseen, accidental or involuntary movement of the body of the deceased, which, in connection with the use of the clubs, brought about the injury; or, if there occurred any unforeseen or any unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain or wrenching, by means of which the injury was occasioned, that would be an accident within the spirit of this policy; that is, the means by which the injury was effected would in such case be accidental.

[Now, keeping in mind the distinction thus stated between accidental means and those not accidental, you will look into the testimony, and consider whether, if at the time in question a bodily injury was sustained, it was effected through means that were accidental, external and violent. The plaintiff claims, and has given evidence tending to show, that while the deceased was using these clubs in muscular exercise, one of the

[2] [From 8 Ins. Law J. 208.]

[2] [From 8 Ins. Law J. 208.]

clubs struck the stove in the room where he was exercising, and that thereby there was occasioned a sudden and violent movement of his body from its ordinary position in such exercise, and that in consequence there resulted the alleged injury. If this be so, gentlemen, then you would be justified in finding that the injury was effected by accidental means, and upon the evidence you will determine what the fact is upon this branch of the case.

[Though it should be your conclusion that the deceased sustained bodily injury at the time claimed, and while exercising with the clubs, if you should nevertheless find that it was not effected through external, violent, and accidental means, within the meaning of the terms as I have endeavored to state it, then your verdict should be for the defendant.][2]

If you find that an injury was sustained, and through the operation of such means, you will then proceed to inquire whether the injury happened directly or indirectly in consequence of disease then existing in the lungs of the deceased.

This brings us to the affirmative matter set up as a defense to the action. And first, I call your attention to this clause in the policy, namely, that the insurance shall not extend to any injury happening directly or indirectly in consequence of disease. Here is presented to you the question whether, at the time the alleged injury was sustained, the lungs of the deceased, or either of them, were or was diseased.

[On the contrary, it is claimed that disease of the lungs was then in progress, and if there was a rupture of a blood vessel as alleged, it happened in consequence of a then weak and actually diseased condition of the lung or lungs, so that indirectly, if not directly, the injury happened because and as a consequence of such condition, and, if there had been no unsoundness or disease, there would have been no rupture of a blood vessel.

[Now you should look into the claims thus argued by the respective parties upon this point, and determine which is sustained by the evidence. And in doing so you will keep in mind that testimony has been given tending to show that such a condition of the lungs as is claimed to have existed at the time of the autopsy could have begun and proceeded to its culmination after the alleged injury, and as a consequence of it, and that there were no indications of disease apparent before the injury; while, on the other hand, testimony has been given tending to show that such a state of the case was improbable, and that the condition of the lungs, as it is claimed such condition was developed by examinations both before and after death, indicated presence of disease for a long time previous, and that such disease might exist and be in progress without external symptoms and without the knowledge of the deceased.][2]

You will inquire upon this point, in the light of all the evidence, whether the injury, if one was sustained, happened either directly or indirectly in consequence of disease in the lungs of the deceased; and if you so find, that would necessarily require a disposition of the case by you adverse to the plaintiff. But if you do not so find, then you will proceed to inquire whether the death was caused wholly or in part by disease existing prior or subsequent to the date of the policy of insurance. And this is another important question arising upon this branch of the case.

The clauses of the policy bearing upon this question are, that the insurance shall not extend to any death which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the policy, nor to any case except where the injury is the proximate and sole cause of the death.

This policy of insurance is a contract made between the insurance company and the assured. As such, we must construe and enforce it according to its letter and spirit. It is to be interpreted as the parties made it and as we find it. We have no right to import into it that which it does not contain. We must interpret it fairly and properly, giving to each party equally the benefit of its provisions.

So interpreting and enforcing it, it must be held that if any other cause than the alleged injury, in whole or in part, produced the death of the deceased, there can be no recovery. In other words, to entitle the plaintiff to recover, you must be satisfied that the injury, in the language of the contract, was the proximate and only cause of the death. By proximate cause is meant that cause which directly precedes and produces the effect, as distinguished from the remote cause.

The question is, what was it that caused death? Did the injury, as the proximate and sole cause, produce it, or did other causes supervene and produce death?

[The solution of this question may not be free from difficulty, but you will bring to bear upon it your best judgment in the light of the evidence and of such instructions as I give you on the subject. If a person sustains such an injury as the rupture of a blood vessel in the lungs, and hemorrhage instantaneously follows, and death results from such hemorrhage, the case is free from difficulty, because then the hemorrhage is part and parcel of the injury itself, and death is the direct result of the injury, though it happens because of the loss of an element of the system indispensable to life. But if the hemorrhage be followed by inflammation, and that by the accumulation of deleterious matter in the lungs, and the formation of

[2] [From 8 Ins. Law J. 208.]

[2] [From 8 Ins. Law J. 208.]

abscesses, and so a distinct disease comes into existence, and prosecutes its work until the organs can no longer perform their functions, and consequently the person dies, the question is whether the original injury is the sole and proximate cause of death, or whether it is the remote, and the disease the proximate cause.

[This policy of insurance is, as I have just said, a contract, and as such we must fairly construe it,—i. e. so that it shall be a protection to the insurer against unjust liability, and at the same time so that it shall not be a snare to the insured.] [2]

I have stated to you, generally, the definition of proximate cause. And it must be remembered that whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. Cunningham v. Lyness, 22 Wis. 245. In other words, the application of the principle relating to proximate cause is not necessarily "controlled by time or distance, nor by the succession of events. An efficient, adequate cause being found must be deemed the true cause unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result." Kellogg v. Chicago & N. W. Ry. Co., 26 Wis. 223. Now, applying this principle to this case, I instruct you that if the deceased sustained injury by the rupture of a blood vessel in his lungs, and that necessarily produced inflammation, and that necessarily produced a disordered condition of the injured organ, which was in consequence followed by the formation of abscesses and the accumulation of injurious substances or matter in the lungs, and so there resulted a diseased state of the lungs, whereby they could no longer perform their functions, and in consequence the insured died; that is, if all these results followed the injury as its necessary consequence, and would not have taken place if it had not been for the injury, then I think the injury could be said to be the proximate cause of death. But if an independent disease supervened upon the injury, one not necessarily produced by the injury, or if the alleged injury merely brought into activity a then existing though slumbering disease, and the death of the deceased was caused wholly or in part by such disease, then it could not be said that the injury was the sole and proximate cause of the death. The question for you to determine is, was or was not the diseased condition of the lungs of the deceased which preceded death the necessary consequence of the injury? Was it the injury alone that brought such condition into life and fatal activity?

[Now, it is claimed on the part of the defendant that disease was present in the lungs of the deceased at the time when the alleged injury was sustained; and, if that be not so, disease of the lungs supervened, and that he died, not from that injury, but from the disease known as "pulmonary consumption."] [2]

Testimony has been adduced on the part of the plaintiff to show the state of health of the deceased from his infancy to the time of his last sickness, and witnesses have testified as to the health of his parents, and to the effect that so far as external observation by persons familiar with him and his family could disclose, he was, in his boyhood and to the time of the injury, in sound and vigorous health; all of which testimony it is proper and important that you should consider.

[You have also heard the testimony of physicians who attended him in his sickness, who testify that they made the examination of his lungs which they have described to you, and whose opinions, which they say they then formed, as to the condition of his lungs, have been stated in their testimony. You have further the testimony of physicians concerning the post mortem examination of the body of the deceased, and the condition in which, as it is claimed, his lungs were then found to be.] [2]

It becomes important that you carefully inquire whether the alleged injury was sufficient, in its inevitable consequence, to cause death. It is material to ask whether such a condition of the lungs as was disclosed by the autopsy was produced by the injury and could have come into existence in the time that elapsed between the injury and the death. If there was a diseased condition of the lungs when the injury was sustained and it merely facilitated the progress of the disease, or if a disease such as pulmonary consumption supervened, not as the necessary consequence of the injury, then you cannot say that the injury caused the death. The contrary should be your conclusion if you are satisfied from the evidence that the alleged diseased conditions were wholly dependent for their existence, upon the injury.

[2] [There have been offered in evidence the proofs of death cause to be delivered to the company by the plaintiff, and there has been some discussion as to the effect that should be given to them upon the trial of this cause. The proofs include the certificates of the agent of the company, of the identity of the deceased as the person insured; the certificates of the clergyman and sexton present at the interment; a sworn statement of Frederick Young, as an eye-witness of the alleged injury; also the certificates of the attending surgeon and of the company's surgeon, and the warranty of the plaintiff as to the truth of certain of these statements, certificates and affidavits.

[These proofs of death were admitted in evidence as documents furnished to the company by the plaintiff, and as to certain extent equivalent to her own declarations as the party in interest. I have been asked to

[2] [From 8 Ins. Law J. 208.]

[2] [From 8 Ins. Law J. 208.]

instruct you, by counsel for defendant, that the affidavit of Frederick Young should be taken as conclusive evidence of the circumstances, occasion and manner of the alleged injury. This I must decline to do, but I say to you that you have the right to consider the affidavit in connection with the testimony of the witness Young, given on the trial, and as bearing upon his credibility, to see whether any, and if so, what, variances exist between the statements in the affidavit and the present testimony of the witness. To that extent, and as bearing upon the circumstances of the alleged injury, you may take into consideration the contents of the affidavit.

[In view of the qualification at the end of the warranty signed by Mrs. McCarthy, I do not think the statements contained in the affidavit and certificates of the surgeons, which are part of these proofs of loss, are to be regarded as declarations or admissions by her or on her part, and they will not be so considered by you. There is a clause in this policy to the effect that the insurance shall not extend to any bodily injury of which there shall be no external and visible sign. If the alleged injury in this case was sustained as claimed, namely the rupture of a blood vessel, and as a consequence blood was expectorated or thrown off by the deceased, that of course would be an external and visible sign of the injury.] [2]

I have been asked to instruct you concerning the burden of proof in this case. Upon that subject I say to you that neither party is bound to prove negatives. Upon each rests the burden of proving the affirmative matter which he alleges and upon which issue is taken. The plaintiff is bound in the first instance to prove that the deceased sustained injury; that such injury was effected through the means specified in the policy and was sufficient to cause death, and that death ensued. The defendant company, alleging as it does that death was caused by disease and not by the injury, then assumes the burden of proving what it thus affirmatively alleges.

[You ought not, gentlemen, to adopt theories without proof; nor is the jury at liberty to disregard positive uncontradicted evidence of facts testified to by credible witnesses, and substitute therefor bare possibilities. In other words, the jury ought not to disregard, but on the contrary should believe, the testimony of credible witnesses as to facts coming to their personal knowledge, and which are not improbable nor in conflict with or uncontradicted by other evidence in the case, as against what may be bare possibility, on conjecture, or theory.] [2]

Now, to sum up the case in brief: if you find from the evidence, that the deceased, J. J. McCarthy, on the 25th day of May, 1877, sustained the bodily injury which is alleged, and that such injury was effected wholly through means which were external, violent and accidental, and that the injury was the proximate and sole cause of his death, then the plaintiff would be entitled to recover and should have a verdict.

But if you find, either that the alleged injury was not sustained, or that, if sustained, it was not effected through external, violent and accidental means, or that it happened directly or indirectly in consequence of disease then actually existing, or that death was caused wholly or in part by bodily infirmities or disease existing either prior or subsequent to the date of the policy of insurance, then your verdict should be for the defendant.

Verdict for plaintiff.

[2] [From 8 Ins. Law J. 208.]

McCARTHY (UNITED STATES v.). See Case No. 15,656.

McCARTNEY (ABBOTT v.). See Case No. 12.

McCARTNEY (BLAKE v.). See Case No. 1,498.

McCARTNEY (MERCHANTS' INS. CO. v.). See Case No. 9,443.

Case No. 8,683.

In re McCARTY.

[Nowhere reported; opinion not now accessible.]

Case No. 8,684.

In re McCARTY.

[5 Law Rep. 322.]

District Court, S. D. New York. Aug., 1842.

BANKRUPTCY—FALSE INVENTORY—EVIDENCE—PRACTICE.

[In the matter of John Q. McCarty, a bankrupt.]

The case was heard on objections and proofs reported by a commissioner.

A. G. Rogers, for bankrupt.

H. Holden, for creditor.

THE COURT decided, that the only matter involved in the objections that the bankrupt had not made a true inventory of his property was the fact of his actual condition at the time his application was made. That evidence falsifying his allegation, that he casually lost $3,300 in the year 1839, would not be sufficient to disprove the verity of his petition and inventory, without facts or circumstances connecting his possession of the money more directly with the time of his application. Quaere, whether if the creditor examines the bankrupt on oath, to a fact to which he directly testifies, and afterwards discredits his testimony as to particulars bearing upon the fact, he has a right to infer the fact to be contrary to the express assertion of the bankrupt.

THE COURT further decided, that an assertion of a fact made by the bankrupt's wife in his presence, and denied by him, could not be given in evidence to impeach the testimony of the bankrupt.

THE COURT further decided, that a voluntary conveyance of property by an insolvent before the passage of the bankrupt act [of 1841 (5 Stat. 440)] to his mother and son-in-law, under circumstances rendering the conveyance void as to creditors, divested all his personal right and interest therein, so that he could not represent it as owned by him, and need not accordingly set it forth in his inventory.

McCARTY (McCLANAGHAN v.). See Case No. 8,690.

Case No. 8,685.

McCARTY v. MANN et al.

[2 Dill. 441.] [1]

Circuit Court, D. Minnesota. 1873.[2]

PUBLIC LANDS — POWER OF CONGRESS — RE-INSTATEMENT OF CANCELLED ENTRY BY CONGRESS —EFFECT—ACT JULY 27, 1854, CONSTRUED.

1. Congress has power to re-instate an entry of public lands which has been cancelled by the commissioner of the general land office, and to provide that this shall be done as of the date of the original entry, so that it shall inure to the benefit of the grantees of the person who originally made the entry.[2]

2. Under such a provision the re-instated entry of the land inures to the benefit of such grantees, irrespective of the fact whether they were grantees with or without warranty.[2]

[Cited in Dunn v. Barnum, 2 C. C. A. 265, 51 Fed. 358.]

This is a bill in equity to quiet title [by William M. McCarty against Charles A. Mann and others], and involves the validity and construction of an act of congress approved July 27th, 1854 (10 Stat. 798). This act is as follows: "Be it enacted, &c., that the entry by Peter Poncin of the north half of the south-east quarter, &c., sec. 36, &c., cancelled by the commissioner of the general land office, be and the same is hereby allowed and reinstated as of the date of the said entry, so that the title to the said lands may inure to the benefit of his grantees as far as he may have conveyed the same;" then follows a proviso that Poncin shall make payment therefor at the land office, and "thereupon a patent shall issue in the name of the said Peter Poncin for said lands." On the 13th of February, 1850, Peter Poncin located a land warrant on the land described in the act. On March 28th, 1850, he conveyed the same by warranty, for the consideration of $150, to one Pepin, and Pepin, on March 29th, 1850, conveyed by warranty to French, and French, in consideration of $500, on March 29th, 1851, conveyed by quit claim to Elfelt. On the 10th day of March, 1852, the commissioner of the general land office cancelled the location of Poncin. On the 13th day of October, 1853, Elfelt conveyed to Van Etten. The title then stood in Van Etten at the date of the afore-mentioned act of July 27th, 1854. On the 31st day of October, 1854, Poncin paid for the land at the land office, and on the 24th day of March, 1855, received a patent under and reciting the said act of July 27th, 1854. The defendants claim under the said deed of March 29th, 1851, from French to Elfelt. After the patent to Poncin was issued, viz., on the 14th day of January, 1856, French made another deed by quit claim to one Furber, and it is under this deed that the plaintiff claims title. Neither party is in possession. The land was laid out in July, 1855, as "Robinson & Van Etten's addition to St. Paul," and is now of great value.

W. H. McCarty and Gilman, Clough & Wilde, for plaintiff.

Geo. L. Otis, for defendants.

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

DILLON, Circuit Judge. The location of Poncin was cancelled by the commissioner because it was made on land which had been duly reserved from sale as school land, and the government, by the second section of the act of July 27th, 1854, granted to the territory of Minnesota for school purposes other lands in the place of those which by that act it authorized to be patented to Poncin. The act of July 27th, 1854, validated, on condition of payment, the entry of Poncin which had been cancelled, and declared that the said entry should be "allowed and reinstated as the date of the said entry," which was February 13th, 1850. The act declared one purpose for which this was done to be "that the title to the said land should inure to the benefit of the grantees of Poncin as far as he may have conveyed the same." The condition of payment to the government was subsequently complied with.

It is, in our opinion, too plain to admit of fair controversy that congress had the power to reinstate the entry, and to declare the terms on which it would do so. It was the land of the general government, and under the absolute disposal of congress. It saw fit to dispose of it for the benefit of Poncin and his grantees, one of whom was Van Etten. French having before that time conveyed to Elfelt, the grantor of Van Etten, had no longer any interest in the land, and could derive no benefit from the act. In 1856, when he made the quit claim to Furber, under which the plaintiff claims he had no interest in the land, and consequently conveyed none. We are unable to see any ground on which the plaintiff can rest. He claims under a deed made long

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

[2] [Affirmed in 19 Wall. (86 U. S.) 20.]

after the act of 1854. Neither he nor French, under whom he claims, had any interest in the land when that act was passed. He insists that the land was solely that of the government, and how he can question the right of the sovereign to dispose of its land as it may see fit, and its action in recognizing equities in the grantees of Poncin, we confess we have been unable to discover. His counsel's argument rests upon the assumption that Poncin became the absolute owner in his own right by the patent in 1855; that no precedent equities existed, or could by congress be recognized to exist, and that the title under the act inured only to the grantees of Poncin, who held by deeds of warranty. Such a construction would defeat the manifest intention of the act.

By the construction for which the plaintiff contends the act was passed for, or inured to, the benefit of French, although he had on the 19th day of April, 1850, made a bond for a deed to Elfelt, which was recorded, and although he had on March 19th, 1851, for a valuable consideration, conveyed by a deed which was also on record, all his interest in said lands to Elfelt. It is utterly inconceivable that congress intended the act for the benefit of French. It was intended for the benefit of the owners under Poncin, and the owner at the time of its passage was Van Etten, the grantee of Elfelt. The bill must be dismissed. Bill dismissed.

[Subsequently this case was taken on appeal to the supreme court, where the decree of the circuit court was affirmed. 19 Wall. (86 U. S.) 20.]

Case No. 8,686.

McCARTY v. The SENATOR.

[See 21 Fed. 191.]

McCARTY (UNITED STATES v.). See Cases Nos. 15,657 and 15,658.

Case No. 8,687.

McCASKEY v. The COAL BLUFF NO. 2.

[26 Pittsb. Leg. J. 185.]

District Court, W. D. Pennsylvania. 1879.

MARITIME LIENS—BUILDERS—WORK AND MATERIAL—CONTRACT ON LAND.

McCaskey and Kerr filed a claim against "Coal Bluff No. 2," in the U. S. district court, for building a new hull and furnishing materials for the same. The commissioner refused to allow the claim to participate in the fund for distribution arising from the sale of said boat, on the ground that said claim could not be enforced by the admiralty courts of the United States. *Held*, that the admiralty jurisdiction of the United States courts does not extend to cases, and cannot be enforced, where a lien is claimed by the builders of a vessel for work done and materials found in its construction.

An important and interesting question arose before Thos. M. McFarland, Esq., commissioner, in the case of "Coal Bluff No. 2," as to the jurisdiction of the admiralty courts of the United States. Exceptions were taken to the commissioner's ruling, and ably argued by the proctors for the libellants.

The exceptions were overruled. Following we give in full the commissioner's opinion on the question of jurisdiction: Having decided that "Coal Bluff No. 2," is a new boat, under the law, in this connection it will be more convenient and appropriate to consider next the claim of McCaskey & Kerr for building said new hull and furnishing materials for the same. There can be no doubt as to McCaskey & Kerr's lien before said boat passed within the dominion of the maritime law, but, after she entered her appropriate element, what is the position of said claimants in the federal court? It is well known that district courts recognize admiralty jurisdiction in rem against a vessel where certain liens are created by the local law of the state. The proctors in behalf of McCaskey & Kerr contend that this claim is entitled to participate in this distribution on the ground that the statutes of our state, relative to attachment of vessels, provide "for all debts contracted by the owner or owners, agent, consignee, master, clerk or clerks of such ship, steam or other boats, or vessels of whatever kind, character, or description, for and on account of labor done, or materials furnished, by boat builders," &c. [Laws 1858, p. 363], and that, as the supreme court has decided liens granted by the laws of a state in favor of material men for supplies furnished to a vessel in her home port can be, and are enforced, by proceedings in rem in the district courts of the United States. The Lottawanna, 21 Wall. [88 U. S. 558]. Therefore, said claim should share in this distribution. The proctors for said libellants do not contend, it will be observed, that a contract to build a ship is a maritime contract, but vest their case on said statutory provisions in connection with the decision in the case of The Lottawanna [supra] and other similar decisions to which it is unnecessary to refer, as the case cited in 21 Wall. answers the purpose of stating their position. On the other hand, it is contended that a contract to build a vessel is a contract to be performed on land, and falling within the common law belongs to state jurisdiction, and a state has a right to give a lien against a vessel for work and materials entering into her construction, but that it cannot be enforced in the federal courts. There is no doubt but that proceedings are allowed in rem against domestic ships for repairs and supplies furnished in the home port, but does it follow that a lien for building a vessel can be enforced the same as the lien for repairs and supplies? While the proctors for the libellants may claim the question of maritime contract is not involved in the question I think it necessarily is. Suppose we were to admit that said statutory

provision is recognized by the United States courts, does not that recognition in the several decisions, relate to repairs and supplies furnished a vessel at the home port, and not to a contract "made on land, to be performed on land?" I am of this opinion.

The case of The Lottawanna being referred to, what does this case really decide? The Hon. Judge Johnson, late of the Second circuit, in rendering an opinion in the case of The John Farron [Case No. 7,341], says: "The case of The Lottawanna, 21 Wall. [88 U. S.] 558, decides that a material man furnishing repairs and supplies to a vessel in her home port, does not thereby acquire any lien upon the vessel, by the general maritime law, as received in the United States, but that so long as congress does not interfere to regulate the subject the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation; that such contracts are maritime, and fall within the dominion of the admiralty jurisdiction, and that when in such cases a lien is given by the state laws, such lien may be enforced by the district courts of the United States, under the 12th rule, as modified by the supreme court of the United States, May 6th, 1872." But a contract for building a boat or vessel, or furnishing materials for the construction of the same, is "a contract on land, to be performed on land." "Contractors of the kind," says an eminent judge, "collect their materials very largely from the forests and the mines, and until the ship is launched, there is no necessary connection between the subject matter of the contract and her subsequent employment as a vehicle of commerce and navigation."

It has been decided that admiralty jurisdiction of the courts of the United States, does not extend to cases where a lien is claimed by the builders of a vessel, for work done and materials furnished in its construction. People's Ferry Co. v. Beers, 20 How. [61 U. S.] 393. And further, it has been held that a contract for building a ship is not a maritime contract, and, therefore, the federal courts will not take jurisdiction under the state laws, giving a lien in such cases. Roach v. Chapman, 22 How. [63 U. S.] 129. In a very recent case, the foregoing views were held in this district. Lauderbach v. The J. M. B. Kehlor [Case No. 8,119]. The defense raised the point, that the suit could not be maintained in the admiralty court. The claim was for work done and materials furnished, in the construction of a new boat. This honorable court decided that the work so done, and the materials so furnished failed to constitute such a case in admiralty as would confer jurisdiction on the United States district court, and thereupon dismissed the libel.

Upon examination of various decisions on this question, I find that the views of some of the best authorities are not as clear as desirable, but I have concluded, as already intimated, and for the reason that this question has recently been decided by this honorable court ruling as above stated, to disallow said claim for building said new hull.

[See Case No. 6,172.]

McCAULEY v. CLINTON. See Case No. 8,688.

Case No. 8,688.

McCAULEY v. KELLOGG et al.

[2 Woods, 13; 1 Cent. Law J. 164.] [1]

Circuit Court, D. Louisiana. March 21, 1874.

CONSTITUTIONAL LAW — STATE BONDS — AMENDMENT 11—LEVY TAX—MANDATE—EXECUTIVE OFFICERS OF STATE.

1. The fact that holders of bonds issued by a state are prohibited, by the eleventh amendment to the constitution of the United States, from obtaining judgment on their bonds by suit against the state, in a court of the United States, does not authorize a court of equity, by decree, to compel the state officers to levy and collect a tax for the payment of principal and interest of the bonds.

[Cited in Chaffraix v. Board of Liquidation, 11 Fed. 644.]

2. A court of equity will not grant a mandatory injunction upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court.

3. A court of the United States will not compel, by injunction, the officers of a state to execute the laws of the state. To do so would be an attempt by the court to administer the state government.

4. An action in a court of the United States against the executive officers of a state, in their official capacity, to compel them to comply with a contract of the state by the enforcement of its laws, is, to all intents and purposes, an action against the state, and prohibited by the eleventh amendment to the constitution of the United States.

[Compare Bancroft v. Thayer, Case No. 835.]

This was a bill in equity, which was heard upon the motion of complainants for a preliminary injunction. The defendants filed neither answer nor affidavits denying the averments of the bill. The bill was filed by John L. McCauley, of the state of New York, on behalf of himself and all others who were similarly situated, and who were willing to make themselves parties complainant against W. P. Kellogg, who was governor of the state of Louisiana, Charles Clinton, who was auditor of public accounts of the state of Louisiana, Antoine Dubuclet, who was treasurer of the state of Louisiana, and the Louisiana National Bank, all of the defendants being citizens of the state of Louisiana. The bill averred, in substance:

That complainant was the holder and owner of bonds of the state of Louisiana,

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission. 1 Cent. Law J. 164, contains only a partial report.]

amounting in the aggregate to $71,000, which were issued under three different acts of the legislature, authorizing their issue and providing for the levy of a tax for the payment of principal and interest thereof, and appropriating the means raised by such tax to that purpose and no other. That complainant purchased his bonds upon the faith of the contracts contained in the acts referred to, and especially upon the faith of the provisions of the general act of March 16, 1870, by which it was provided that the auditor of public accounts should, at the end of each year, estimate what sum, levied upon the entire taxable property of the state, would be sufficient to pay the interest on all bonds issued by the state, and that the sum so ascertained was thereby annually levied upon the taxable property of the state; that the tax so levied should be collected as other taxes, and should be known as the "interest tax," and when paid into the treasury should be credited to a fund to be called the "interest tax fund," and should be held sacred for the payment of the interest upon the bonds of the state. That complainant purchased all of said bonds on the faith of article 114 of the constitution of the state of Louisiana, adopted in 1864, and of article 111 of the constitution adopted in 1868, which provide, "that whenever the legislature shall contract a debt exceeding in amount $100,000, unless in case of war, to repel invasion, or suppress insurrection, they shall, in the law creating the debt, provide adequate ways and means for the payment of current interest and of the principal when the same shall become due, and the said law shall be irrepealable until principal and interest are fully discharged, unless the repealing law contain some other adequate provision for payment of principal and interest of the debt;" and also on the faith of article 110 of the constitution of 1868, forbidding the passage of any law impairing the obligation of a contract or divesting vested rights; and upon the faith of the provision of the constitution of the United States prohibiting a state to pass any law impairing the obligation of contracts; that more than $100,000 of bonds had been issued under each of the laws under which the bonds held by complainant had been put forth. That none of the foregoing contracts had been performed, but, on the contrary, defendants Kellogg, Clinton and Dubuclet, had given out, that no interest maturing after December 31, 1873, on the bonds of the state, issued before that date, should be paid, nor should any principal of said bonds be redeemed; and had given out and declared, that they would not levy and collect the taxes provided by the aforesaid special contracts of the state, and would not set apart the special and sacred funds therein agreed to be set apart, and would not redeem any principal of said bonds. That said Kellogg, Clinton and Dubuclet had given out, that their past and proposed violation of the contracts of the state, as above set forth, had been and were to be carried out under a plan to fund the state debt. That in pursuance of this plan, they had persuaded the legislature to pass an act known as the "Funding Bill," being Act No. 3, approved January 24, 1874.

This act provided in substance for the issue of bonds of the state, to be known as consolidated bonds, to the amount of $15,000,000, which should be used for the purpose of taking up the bonds and warrants of the state, issued previous to its passage, at the rate of 60 cents of the new bonds to one dollar of the outstanding bonds and warrants, and for a tax of five and a half mills to pay the principal and interest of the new bonds, and declared that the total tax for interest and all other state purposes, except public schools, should never exceed twelve and a half mills. This act, the bill of complaint alleged, the defendants proposed to execute, and pretended it was their duty so to do, whereas the said act was a nullity, because it was in violation of the constitution of the state of Louisiana, and of the constitution of the United States, in that it impaired the obligation of the said contracts made by the state of Louisiana with complainant and other holders of the bonds of the state; that said Act No. 3 of the year 1874 purported at once to do away with all taxes theretofore levied and which it was agreed should be collected for interest and principal of complainant's bonds and other bonds theretofore issued, and to substitute a tax of five and a half mills only for the payment of the principal and interest of said consolidated bonds, whereas the bonds of the state theretofore issued amounted to the sum of $22,433,800, and to comply with the contracts under which they have been issued would require an annual tax of eleven and a half mills on the dollar. That it was the unlawful purpose of said act, and the defendants so construed and were about to execute it, to repudiate all of said contracts made with complainant and other holders of the bonds of the state with reference to the levy and collection of taxes for the principal and interest of said bonds, to nullify and hold for naught the said laws under which the outstanding bonds have been issued, to collect in future only five and a half mills of interest tax, which was less than half what was required to fulfill all the contracts under which the bonds outstanding had been issued, and to apply the proceeds of this inadequate tax, not to the bonds held by complainant and others, but to the so-called new consolidated bonds to be thereafter issued to the extent of $15,000,000.

The bill further alleged that there were in the treasury $500,000 interest-tax funds, and large additional amounts belonging to said tax funds should be received monthly and quarterly; but defendants had given out and declared that they would have no further use for said special funds, as they would pay no

more interest maturing after December 31, 1873, on the outstanding bonds of the state. That these acts and declarations of the defendants were with the intent to coerce complainant and other holders of the bonds of the state to acquiesce in the said "funding" scheme; that unless restrained, they would actually and positively violate the obligations of the several contracts herein set forth, and would refuse payment of all coupons maturing after December 31, 1873, on outstanding bonds, and suspend and refuse the redemption of said bonds.

The bill prayed that defendants might be restrained from executing said Act No. 3 of 1874, from reducing the interest tax, which it was heretofore agreed should be collected for the present and future years, for the interest and principal of the state bonds now outstanding, in anywise except in strict accordance with the laws under which they were issued; from hindering or delaying the estimate and collection of taxes for interest and sinking funds, under the said laws of the general assembly, from in anywise hindering or delaying the payment of any interest coupons of any of the said outstanding bonds of the state under any of the pretenses or devices of said Act No. 3, and from in any way hindering or delaying the estimate and collection of interest and sinking funds provided for by law prior to the adoption of said Act No. 3 of 1874, the payment of the interest thereunder, or the redemption of the principal of said bonds.

The bill further prayed that the defendants might be decreed to comply with and specifically perform the contracts of the state, by setting apart the funds agreed therein to be set apart, by estimating the amount of tax required to comply with said contracts; by collecting the same as provided by said contracts; by depositing and holding the proceeds of the same according to said agreements, and by paying the interest on said bonds as it should mature, and redeeming the principal thereof according to said agreements.

An amended bill set out the provisions of an act, No. 55, passed by the general assembly of Louisiana, and approved March 14, 1874, the general purpose and effect of which was to forbid and prevent any officer of the state from assessing, collecting or enforcing the payment of any tax for the payment of the principal and interest of the state debt, the assessment and collection of which were not specially provided for by some act of the general assembly passed since the first day of January, 1874, and to forbid the governor, auditor and treasurer from setting apart any funds for the payment of the principal or interest of any bonds issued prior to January 1, 1874.

Several persons holding bonds of the state of Louisiana filed petitions, praying to be made parties complainant, which it is unnecessary particularly to notice. Upon these bills, original and amended, the complainant moved the court to issue the injunction prayed for in the original bill.

W. W. Howe and J. H. Kennard, for complainants.

W. H. Hunt, T. J. Semmes, and E. C. Billings, for defendants.

WOODS, Circuit Judge. It is obvious to remark that there are insuperable objections to so much of the prayer for relief as asks that the defendants may be decreed to comply with and specifically perform the contracts of the state by estimating and collecting the interest and sinking fund tax, and applying it to the payment of the principal and interest of the bonds. The objection is, that if there is a remedy at all, it is a remedy at law, namely, by the issuance of the writ of mandamus. If this suit were brought against a municipal corporation and its officers, to compel the collection of a tax to pay the interest on its bonds, the plain, adequate and complete remedy would be the legal writ of mandamus. It is true that before the writ could issue, the bondholders must have recovered a judgment at law on their bonds. Bath County v. Amy, 13 Wall. [80 U. S.] 247; Graham v. Norton, 15 Wall. [82 U. S.] 427. It may be replied to this that the bondholders cannot lay the necessary foundation for the writ of mandamus in the United States courts because they are prohibited from suing the state, by the 11th amendment to the constitution of the United States. But this fact may prove that there is no remedy for the complainants in the United States courts. It certainly does not follow that because there are obstacles to the adoption of the plain legal remedy, therefore the remedy is in equity. It might as well be claimed that because the bondholder could not go into a court of law and secure a judgment against the state upon his bonds, he might therefore go into equity and seek a decree against the officers of the state for the amount due on his bonds. When the 11th amendment to the constitution declares, "that the judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or subjects of any foreign state," the purpose is clear to exempt states from suits upon their contracts, either at law or in equity, and the fact that this amendment interposes an obstacle to a suit at law against a state does not give a court of equity jurisdiction to enforce the same contract on the pretext that there is no remedy at law. Suits in both forums against a state are prohibited. It is evident, therefore, that should this bill come on for final hearing, the decree prayed for could not be granted.

We may, however, consider the bill as one for injunction only, and the question now presented is, can and ought the court to al-

low the injunction to go as prayed for? It is claimed by the bill and conceded by counsel for defendants that the bonds of the state of Louisiana held by the complainants are contracts, that the laws under which these bonds were issued, and which provide for the levy and collection of taxes to pay the interest and reduce the principal, and which declared that the same should be annually continued until the principal and interest of said bonds were fully paid; that these provisions of law entered into and formed a part of the contract between the state and the bondholder, just as completely as if the terms themselves were inserted in the body of the bonds. The state has therefore contracted that at a certain date named in the bonds she will pay the principal, that in the meantime she will pay the interest semi-annually to the holder of the bonds, and as an assurance that this part of her contract will be performed, she promises further that she will levy and collect an annual tax to make these payments, and that the revenue raised by this tax shall be set apart for the purpose of paying said interest and principal. It is conceded that the state has made this contract with the complainant in this case. Now to what end is the injunction sought in this case? It is: To compel the officers of the state to execute the contracts of the state by estimating, levying, collecting and applying to the payment of the bonds the tax originally provided by law for the payment of the interest and the redemption of the principal. It is true the prayer for injunction is that the officers of the state may be restrained from hindering or delaying the estimate, levy and collection of the tax, etc. But as the defendants are the officers whose duty it is to estimate, levy and collect, it is clear that such an injunction from this court would be mandatory and compel the performance of affirmative acts. [Second, to restrain the state officers from receiving delinquent taxes in auditor's warrants instead of lawful money of the United States.] [2]

The first question presented by the prayer for injunction is, can the officers of the state be compelled by injunction to do an affirmative act? The complainant claims that the funding bill and the act of March 14, 1874, which in effect prohibit the collection of taxes for the payment of the principal and interest of the outstanding bonds of the state, are unconstitutional and therefore void. If this be conceded, then the case is in the same plight as if these acts just named had never been passed, and as if the officers of the state, without pretense of warrant of law, were refusing to levy and collect the taxes which the state had agreed should be levied and collected and applied to the payment of these bonds. Has this court the power to compel them by mandatory injunction to do an affirmative act? The authorities are adverse. The case of Walkley v. City of Muscatine, 6 Wall. [73 U. S.] 483, was a bill in equity to compel the authorities of the city of Muscatine to levy a tax upon the property of the inhabitants for the purpose of paying the interest on certain bonds issued by the city. It appeared that a judgment had been recovered in the same court against the city for $7,666, interest due on the bonds held by plaintiff; that execution had been issued and returned unsatisfied, no property being found liable to execution; that the mayor and aldermen had been requested to levy a tax to pay the judgment, but had refused; that the city authorities possessed the power under their charter to levy a tax of one per cent. on the valuation of the city property, and had made a levy annually, but had appropriated the proceeds to other purposes, and had wholly neglected to pay the interest upon the bonds. The bill prayed that the mayor and aldermen might be decreed to levy the tax and appropriate so much of the proceeds as might be sufficient to pay the judgment, interest and costs. Upon this case the supreme court says: "We are of opinion that complainant has mistaken the appropriate remedy in the case, which was by writ of mandamus from the circuit court." We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive writ, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases when it is used by the court to carry into effect its own decrees, as in putting the purchaser under a decree of foreclosure of a mortgage into possession of the premises. Even the exercise of this power was doubted till the case of Kershaw v. Thompson, 4 Johns. Ch. 609, in which the learned chancellor, after an examination of the cases in England on the subject, came to the conclusion he possessed it, not, however, by the writ of injunction, but by the writ of assistance.

[A consideration of the second branch of the injunction asked, namely, to restrain the state officers from receiving delinquent taxes in auditor's warrants, will show that this is an indirect way of praying for an injunction to compel the state officers to receive the delinquent taxes in lawful money of the United States, according to the contract of the state as claimed by complainants. The complainant would not be satisfied should the state officers suspend the receipt of state warrants. The evident purpose of this part of the injunction is to compel them to receive lawful money; for, unless the officers, after declining to receive auditor's warrants, proceed to collect the taxes in lawful money, the complainant would take no advantage from his motion.] [2]

In Rogers Locomotive Works v. Erie Railway Co., 20 N. J. Eq. 379, the court, after a learned review of all the cases, both English and American, bearing upon the sub-

[2] [From 1 Cent. Law J. 164.]

[2] [From 1 Cent. Law J. 164.]

ject, announced the conclusion that a mandatory injunction will not be ordered upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. It is only in cases of obstruction to easements or rights of like nature, that maintaining a structure as a means of preventing their enjoyment will be restrained, and the structure ordered to be removed as part of the means of restraining the defendant from interrupting the enjoyment of the right. To the same effect is the case of Audenreid v. Philadelphia & Reading R. Co., 68 Pa. St. 370.

It is clear to my mind that the injunction asked for falls within the category of mandatory injunctions, and cannot therefore be granted on motion. But the fatal objection to the motion of complainant is found in the character of his bill. It is either a suit in effect against the state of Louisiana, or if not, the parties defendant are merely nominal parties, having no real interest in the controversy. In either case, no decree can be made in the cause. This case is clearly distinguishable from the cases of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, and Davis v. Gray, 16 Wall. [83 U. S.] 203, and other cases cited by complainant. In the case of Osborn v. Bank [supra], the bill was filed by the bank to restrain Osborn, who was auditor of the state of Ohio, from acting under a void law of a state in the collection of a tax levied upon the bank, and for a decree against Curry, the late treasurer, and Sullivan, the incumbent treasurer, and Osborn, the auditor, for money illegally collected by them from the bank. It was alleged in the bill that neither Curry nor Sullivan held the money as officers, but individuals. The court in this case held that the suit was well brought, because the state was not nominally a party to the record, and the parties made defendant had a real interest in the cause, since their personal responsibility was acknowledged, and if denied, could be demonstrated. In the case of Davis v. Gray [supra], Davis, who was defendant in the court below, and who was named upon the record as governor of Texas, was sought to be enjoined from casting a cloud upon the title of complainant to certain lands in Texas, by locating warrants thereon in pursuance of a void and unconstitutional enactment of the state. Although he professed to act as governor, he was impairing the rights of complainant without the authority of any valid law; he was acting in his own wrong and upon his own responsibility, and was personally liable. In both these cases the object was to restrain individuals holding public offices from doing acts to the injury of complainant, for which there was no legal warrant, and by the doing of which they incurred a personal liability. How different is the case under consideration. Here is an attempt to compel the public officers of a state to do positive and affirmative acts as such, to compel them to carry out what the complainant conceives to be the law of the state, not in accordance with their own sense of duty, and their own interpretation of the law. In the case of Kentucky v. Dennison, Governor, 24 How. [65 U. S.] 109, it was held that neither the congress nor the courts of the United States could coerce a state officer, as such, to perform any duty imposed upon him by act of congress. Does it not follow, a fortiori, that a court of the United States cannot compel the governor of a state to execute a law passed by the state? In Osborn v. Bank, and Davis v. Gray [supra], it was held that a United States circuit court might, in a proper case in equity, enjoin a state officer from executing a state law in conflict with the constitution, or a statute of the United States, when such execution would violate the rights of complainant. But no case has yet decided that a circuit court of the United States can compel the executive and administrative officers of a state to execute the laws of the state. The dilemma is this: If the suit is against the defendants in their official character, and the claims made upon them are in their official character, the state may be considered a party to the record. Madrazo v. Governor of Georgia, 1 Pet. [26 U. S.] 110. If the suit is against the officers as individuals merely, and the offices they hold are given merely to describe their persons, they have no interest in the subject matter, and no decree should go against them.

In the view I have taken of the case, I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to-wit, a bill to compel the defendants, officers of the state, to execute its laws. This may be done in the case of the officers of municipal corporations, but the sovereign power of a state cannot be so coerced. To do so would be to substitute this court for the executive officers of the state, to supplant their views of duty and the obligations imposed upon them by their official oath, by the discretion of this court and its official oath. In other words, it would be an undertaking upon the part of this court to administer the state government. This the court has no power and no inclination to do. In my judgment, this is to all intents and purposes a suit against the state. The officers of the state, including the chief executive, are sued in their official capacity to compel them to execute the laws of the state. It is a suit to enforce a contract of the state to pay money. The officers are not sued as individuals who happen to be in public office, to prevent them from doing some act to the prejudice of complainant not warranted by law, as was the case in Osborn v. Bank of U. S. and Davis v. Gray. If a suit like this can be sustained, then the 11th amendment

to the constitution of the United States is waste paper. For the reasons stated, the motion for injunction is overruled.

Case No. 8,689.

McCAULEY v. McCAULEY et al.

[1 Hayw. & H. 1.] [1]

Circuit Court, District of Columbia. Nov. 28, 1840.

EQUITY—REAL PROPERTY—IMPROVEMENTS—ACTION AT LAW.

On the death of a father who has died intestate, a lien will not arise on land of which he died seized in favor of a son who had improved it in his father's lifetime, nor where he had paid certain debts incurred by his father. He must proceed at law against the personal representatives of the deceased.

This is a bill [by William M. McCauley against Mary McCauley and others, heirs of George McCauley] claiming a specific and distinct lien on premises on account of improvements made on the property and debts paid by the complainant. The cause was set for hearing on bill, exhibits and demurrer. The facts appearing in the complainant's bill are as follows: That the father of William M. McCauley died intestate, seized of a lot in the city of Washington; that an application had been made to the circuit court of the District of Columbia for a division of the estate, and that the commissioners appointed had determined that the said lot could not be divided without loss, and that they had returned the value in current money. That the complainant, with the consent of his father, made improvements on said lot for their joint benefit to the amount of $853.65. That after the death of the intestate the widow occupied the premises until her death. That since the death of the widow the rents of the premises were received, to be devoted and were devoted, to the support of the unmarried sisters of the complainant. That the complainant paid certain of his father's notes. The suit was brought for the purpose of getting a conveyance of the premises on paying the difference between the assessed value of the property, and the amount advanced on the notes and improvements.

James Hoban, for complainant.

Mr. Marbury, for defendants, demurred:

(1) That there is no equity in the bill.

(2) That if the claims of the complainant be well founded, he has a remedy at law against the personal representatives of the deceased.

On hearing the arguments of the counsel in the case, THE COURT decreed that the bill be dismissed with costs.

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

McCAULEY (ODORLESS EXCAVATING APPARATUS CO. v.). See Case No. 10,436.

McCHESNEY, The E. M. See Cases Nos. 4,463 and 4,464.

Case No. 8,690.

M'CLANAGHAN v. M'CARTY.

[Cited in Fisher v. Consequa, Case No. 4,816. Nowhere reported; opinion not now accessible.]

McCLARE (UNITED STATES v.). See Case No. 15,659.

McCLAY (UNITED STATES v.). See Case No. 15,660.

Case No. 8,691.

M'CLEAN v. FOWLE.

[2 Cranch, C. C. 118.] [1]

Circuit Court, District of Columbia. Nov. Term, 1816.

LIBEL—ILLEGAL VOTING—DECLARATION — PROPER AVERMENTS.

A declaration for a libel charging the plaintiff with an attempt to put two votes into the ballot-box at a corporate election, must contain an averment of the by-law under which the election was held.

Action upon the case for a libel charging that a neighbor of the printers had been detected in an attempt to put two votes into the ballot-box, and that "the name and the proof are left with the printer." Verdict for the plaintiff, $271.75.

Mr. Swann, for defendant, moved in arrest of judgment, and contended, that the publication contained no libellous matter, no reflection on the plaintiff's moral character, no charge of turpitude, nor does it set forth the election law so as to make it appear that the plaintiff had not a right to put in two votes. This cannot be aided by innuendo. Holt v. Scholefield, 6 Term R. 691. The court cannot judicially notice a by-law not pleaded. 6 Bac. Abr. 375; Rex v. Horne, Cowp. 683; 2 Chit. Pl. 256; 1 Saund. 243; 9 Bac. Abr. "Slander," 2. There is nothing in the libel to designate the plaintiff as the object of it; and this cannot be aided by innuendo. 4 Coke, 17 b. And the averment in the declaration, that the libel was written of and concerning the plaintiff, does not authorize him to prove by evidence dehors the libel, that the plaintiff was the person meant.

Mr. Mason and E. J. Lee, for plaintiff, contended that the whole tenor of the libel showed that it meant to charge the plaintiff with an illegal act, an act of turpitude; and this is sufficient to maintain the action. J'Anson v. Stuart, 1 Term R. 748; Bell v. Stone, 1 Bos. & P. 331; Savile v. Jardine, 2 H. Bl. 531; 5 Coke, 125; King v. Lake, Hardr. 470; King v. Philipps, 6 East, 471.

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

THE COURT (THRUSTON, Circuit Judge, absent,) took time to consider, and arrested the judgment for want of an averment of the by-law respecting the election.

McCLEAN (HUIDEKOPER v.). See Case No. 6,852.

McCLEAN (MARSTELLER v.). See Cases Nos. 9,138, 9,139, and 9,140.

Case No. 8,692.

McCLEAN v. MILLER.

[2 Cranch, C. C. 620.] [1]

Circuit Court, District of Columbia. Nov. Term, 1825.

PARTNERSHIP—DISSOLUTION — DEBTS — EFFECTS—CREDITOR—NEW ADVANCES—GOOD FAITH.

Upon the dissolution of a mercantile firm, if it be agreed that the acting partner shall take the effects and pay all the debts of the firm, and this be known to the creditor of the firm, he cannot, with a good conscience, take a lien on the joint effects for new advances made by him to the acting partner on his own individual account, so as to exhaust the joint effects, and leave the retiring partner liable for the old joint debt.

This was a bill in equity, filed on the 31st of January, 1818, by Daniel McClean, in his lifetime, to enjoin proceedings on a judgment at law obtained against him by the defendant, Mordecai Miller, for $259.55, with interest from the 1st of July, 1816, and costs. An injunction was granted by one of the judges in vacation, and upon the filing of the answer, and upon hearing a motion to dissolve the injunction, the court refused to dissolve it, and continued it until final hearing, and the cause was returned to the rules for further proceedings. At April term, 1819, it was set for hearing on bill, answer, and exhibits, and at April term, 1820, the court decreed a perpetual injunction, but on the defendant's motion gave him leave to move at the next term for a reconsideration of the cause. At November term, 1820, the court ordered the decree to be set aside, the cause to be redocketed, and leave to both parties to take depositions. At the May term, 1823, the complainant's death was suggested, and his executors, Norman R. Fitzhugh and Jacob Douglass, were made parties. At November term, 1825, the cause came on to be heard on the bill, answer, general replication, and depositions, and the court decreed a perpetual injunction.

CRANCH, Chief Judge. By the terms of the dissolution of the partnership between Cawood and McClean, the whole joint effects were transferred to Cawood, who undertook to pay the joint debts. These facts were known, at the time, by the defendant, Miller, who then had a joint claim against the copartners. With this knowledge he could not, with a good conscience, collude with Cawood, in applying the joint funds to a new debt contracted with Cawood, leaving McClean liable to pay the joint debt out of his separate estate. He knew that McClean had deposited those funds in the hands of Cawood, to pay the joint debt, and that Cawood had undertaken so to apply them. If the joint funds were transferred to Cawood, so was the debt. Mr. Miller had no right to separate them. The same act, which made Cawood master of the funds, made him debtor for the debt. It is like a trust. A party obtaining possession of the trust-fund, with a knowledge of the trust, is bound to see it executed to the extent of the funds which come to his hands. If Mr. Miller, knowing the facts, took the funds as security for new advances made to Cawood, it was so far to be considered in equity, as a fraud upon McClean, as to postpone his (Mr. Miller's) security upon the new contract with Cawood, to that upon his old claim against Cawood and McClean.

This is the view which the court has always taken of the case, and there is nothing in the affidavit or deposition of Cawood, to which the attention of the court was called at the last term, to vary that view. Mr. Miller, in his answer, fully admits his knowledge of the terms of the dissolution, as they are alleged in the bill. That knowledge is decisive of the case. Independent, however, of that view of the subject, the account rendered by Mr. Miller to Mr. McClean, and exhibited with the bill, shows (when the several items are arranged according to the natural order of their dates,) that the joint debt was paid. It appears that on the 5th of April, 1816, Mr. Miller had received from the joint funds, more than enough to discharge the whole of his joint claim against Daniel Cawood & Co., and of his separate claim against Daniel Cawood; so that the joint debt was in fact paid. It is not, however, necessary to reply on this ground, as we consider the former view of the case conclusive against the defendant. The former decree of the court, perpetuating the injunction, must stand confirmed.

THE COURT (THRUSTON, Circuit Judge, absent,) decreed a perpetual injunction.

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

Case No. 8,693.

McCLEAN v. PLUMSELL.

[4 Cranch, C. C. 86.] [1]

Circuit Court, District of Columbia. May Term, 1830.

IMPRISONMENT FOR DEBT — PRISON-BOUNDS BOND —CLOSE CUSTODY.

An insolvent debtor, found guilty upon allegations filed under the 7th section of the insolvent act of the District of Columbia [2 Stat.

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

237], will not be ordered into close custody if he is out upon a prison-bounds bond.

[Cited in Eckle v. Fitzgerald, Case No. 4,267.]

Allegations were filed by Cornelius McClean, a creditor, against Thomas Plumsell, a petitioner for the benefit of the "Act for the relief of insolvent debtors within the District of Columbia," upon which he was found guilty.

Mr. Morfit, for creditor, prayed that the debtor might be committed to close custody, although he was out upon a prison-bounds bond.

But THE COURT refused, and directed that the entry of the judgment of the court be, "that the said Thomas Plumsell be precluded from any benefit under the act," &c., according to the precedent in Newton's Case [Case No. 10,188], at April term, 1824.

See the case of Keirll v. McIntire [Case No. 7,651], at May term, 1826, and Eckle v. Fitzgerald [Id. 4,267], at this term.

McCLEAN (WILSON v.). See Case No. 17,819.

Case No. 8,694.

In re McCLELLAN.

[1 N. B. R. 389 (Quarto, 91); 1 Am. Law T. Rep. Bankr. 48.] [1]

District Court, D. Kentucky. 1868.

BANKRUPTCY—ASSIGNEE—POWER TO SELL—INCUMBRANCE—NOT AGREED ON.

1. The 20th section of the bankrupt act [of 1867 (14 Stat. 526)] confers authority on the assignee to make a sale of incumbered property without any order of court.

[Cited in Re Brinkman, Case No. 1,884; Sutherland v. Lake Superior Ship Canal Railroad & Iron Co., Id. 13,643; Re Cooper, Id. 3,190.]

[Cited in Clifton v. Foster, 103 Mass. 236; Markson v. Haney, 47 Ind. 35.]

2. When, however, the debt claimed by the creditor is not admitted by the assignee, and cannot be agreed between them, then the assignee should resort to the proper court to ascertain it, and for a sale of the property at the same time.

[In the matter of J. McClellan, a bankrupt.]

BALLARD, District Judge. This is an application to the court by the assignee for authority to sell one hundred and twenty-seven and three quarters acres of land, part of the etstate of the bankrupt, subject to a lien thereon for "about two thousand dollars." The note to form No. 34, prescribed by the justices of the supreme court, contemplates that such a petition may be presented to the court by the assignee; but in my opinion the assignee may make such sale without any order of court, and therefore the order prayed for will not be made. It may be difficult to derive the authority from either the 14th or the 15th sections of the bankrupt act; but surely it cannot be doubted that the 20th section expressly confers it. This section, among other things, provides that "if the value of the property (covered by mortgage, pledge, or lien) exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon." This language is too explicit to admit of any doubt in construction. But, clear as is the authority of the assignee to sell mortgaged property subject to the mortgage, I think it is an authority which should not always be exercised. Ordinarily persons prefer to purchase property free from incumbrance. They fear that questions may arise in respect to the amount of the incumbrance, and that they may have difficulty in obtaining a clear title. Therefore, when the debt for which the property is bound as security is due, the interest of creditors will, I suppose, generally be promoted by a sale of the whole property. This may be effected by sale made by the assignee and mortgagee jointly or in pursuance to the judgment of some court of competent jurisdiction. When the amount of the debt claimed by the creditor is not admitted by the assignee, and cannot be agreed between them, of course the assignee should resort to the proper court to ascertain it, and for a sale at the same time. In all cases the assignee will consider the interest of creditors, and should sell property subject to the incumbrance upon it, or seek to have it sold free from incumbrance, accordingly as he thinks the interest of the creditors of the bankrupt will be promoted by the one or the other mode of sale. The clerk will send a copy of this opinion to the assignee.

[1] [Reprinted from 1 N. B. R. 389 (Quarto, 91), by permission. 1 Am. Law T. Rep. Bankr. 48, contains only a partial report.]

Case No. 8,695.

McCLELLAN v. FOSBENDER et al.

[4 Chi. Leg. News, 406.]

District Court, N. D. Illinois. July Term, 1872.

JUDGMENT — DEFAULT — EXCUSE—MOTION TO SET ASIDE—CLOSE OF TERM—ATTORNEY —VIGILANCE.

1. Where the attorneys for the defendants had the files of the papers in their possession, and had mailed them from an interior city on the 7th of October preceding the great fire at Chicago, and afterwards supposing them to have been destroyed, paid no further attention to the case, and the plaintiffs accordingly obtained judgment by default, the papers not having been lost, but being delivered to the clerk after the fire, *held*, the court will not at a subsequent term set aside the judgment.

2. On the authority of Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591, and McMicken v. Perrin, 3 How. [44 U. S.] 507; Cook v. Wood, 24 Ill. 295; and Smith v. Wilson, 26 Ill. 186,—the court has no power to set aside a judgment or decree after the close of the term at which it was rendered.

3. The attorneys for the defendants were not absolved from their responsibility by the mere supposed destruction of the records, but should have exercised increased vigilance to know what steps it was necessary to take to protect the rights of their clients.

[This was an action at law by Edward C. McClellan, assignee, etc., against Philip Fosbender and others.]

Tenney, McClellan & Tenney, for plaintiff.
Ingersoll & McCune, for defendants.

BLODGETT, District Judge. This suit was commenced by summons in this court on the 14th day of July, 1871, against Philip Fosbender, Henry Schwabacher, Jacob Schwabacher, Max Newman, and Henry Ullman. All the defendants, except Fosbender, were served with process, and, the case set for trial at the October term, 1871. It was placed upon the trial docket at the March term, 1872, and no defense being interposed, the default of the defendants served with process was rendered, and the damages assessed and judgment rendered by a jury in accordance with the verdict, for the sum of six hundred and ninety-nine dollars and eighty cents, on the first day of April, 1872. A motion is now made to set aside this judgment, upon substantially the following grounds:

It appears from the affidavits filed in the case, that one of the attorneys for the defendant came to this city from Peoria, where he resides, on or about the 4th of October last, with the intention of putting in a plea in this case, and for that purpose obtained the papers from the clerk of this court, and, inadvertently, put the papers in his pocket and took them away from the court house. On arriving at Peoria, on Saturday, the 7th of October, he found he had the papers with him, and immediately mailed them to the clerk. On Monday, the 9th of October, he learned that a fire had occurred in this city, which had destroyed the entire records of the federal courts, and assumed that the papers in this case were destroyed with the papers in the other cases pending in the court. It seems, however, that the papers in this case did not come to the hands of the clerk through the post-office until several days after the fire, and were, therefore, preserved intact. The March term being the first term for the trial of causes after the fire, this case was placed on the trial calendar by the plaintiff's attorneys, as the defendants' attorneys swear, without any knowledge on their part that the case was placed on the trial calendar. The defendants' attorneys seem to have contented themselves with the assumption that the papers in this case must have been destroyed. They made no inquiries, and, therefore, received no information as to the status of their case after the fire.

It will be observed that the judgment in this case was rendered in what is technically known as the "December Term," which commenced on the third Monday in December last, and certainly ended before the first Monday in July, there being by statute but two terms of this court, one commencing the third Monday of December, and the other the first Monday in July, although, by a rule or order entered some years since, it is provided that there shall be several terms, known as adjourned terms, intermediate between the regular statutory July and December terms, and the judgment in this case was rendered at the adjourned term, known as the "March Term"; and this motion not having been made until after the July term had commenced, it is objected on the part of the plaintiff that the court cannot now entertain this motion, inasmuch as the term at which the judgment was rendered has elapsed; and the only question in my mind is whether the court now has such control over its records as will allow us to grant the prayer of the motion.

The supreme court of the United States, in the case of Cameron v. McRoberts, 3 Wheat. [16 U. S.] 591, held, that a circuit court in an equity case had not power over its decree so as to set the same aside, on motion, after the expiration of the term in which the decree or judgment was rendered. This ruling was followed again by the supreme court, and the case just cited quoted approvingly in the case of McMicken v. Perin, 18 How. [59 U. S.] 507; so that the law seems abundantly settled by the supreme court of the United States, to the effect that after the lapse of the term at which a judgment or decree is entered the court has no power over its records to set aside a judgment or decree. If there has been any error in the proceedings it must be corrected by a writ of error or by appeal. In the case of Cook v. Wood, 24 Ill. 295, the supreme court of this state reviews quite at length some of the earlier decisions of our state court, and finally come to the conclusion that the power to set aside a default is a discretionary power, but hold that it must be exercised during the term at which the default was taken, and whilst the record, in legal contemplation, is still under the control of the court. "The judgments during the term," says the court, "are then in fieri, and are amendable at common law. When the judgment is perfected by the solemn consideration of the court, and duly entered on the records of the court, and the term closed, and the court adjourned, the same court which rendered the judgment cannot have, and ought not to have, any supervisory power over it at a subsequent term, except to amend it in mere matter of form on notice to the opposite party." The rule thus laid down by the supreme court of Illinois is followed in the case of Smith v. Wilson, 26 Ill. 186.

It would then seem clearly established by the authorities which I have cited, and numerous others which might be cited, from the reports of the adjudged cases in the circuit and district courts of the United States, that the rule is inflexible that after the term has elapsed the court has no power over its record to set aside the judgment, and grant the defendant leave to plead. If

the term had not expired, the court might, in view of the defense set up in this case, or which is said to have existed by the affidavits which are filed, allow the defendants to come in and plead upon terms. But that discretion is now gone from the court, and the defendants must abide by the results. I do not fully indorse the argument made by the defendants' counsel that they were absolved from all responsibility touching this case by the mere fact that it was understood that the records were destroyed. The case was still in court, and it was the defendants' duty to have kept advised of what was done. Their duty required them, notwithstanding the destruction of the record, or the supposed destruction of the record, to watch the proceedings of the court, and instead of the fact that the records were destroyed being an excuse for want of vigilance, it seems to me to have called for increased vigilance on their part, in order that they might know what steps it was necessary to take in order to protect their rights. They had no right to rest upon the assumption that the records were destroyed, and therefore they had nothing more to do. They were bound in the first place to make inquiry to ascertain whether these papers which had been mailed on the 7th of October, actually came to hand before the time of the fire. If the attorney had considered the subject he must have known, or, at least, the suggestion must have occurred to him that it was doubtful whether a letter mailed at Peoria on Saturday morning would have been delivered to the clerk before the fire occurred, which was on Sunday night. He might have assumed that these papers with the mail matter were burned, but it was almost equally as notorious that the mail matter of the post office was saved as it was that the records of the court were burned. The motion, therefore, must be overruled.

Case No. 8,696.

McCLELLAN v. WITHERS.

[4 Cranch, C. C. 668.] [1]

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

MECHANICS' LIEN—CLAIM FILED—ACTION BEGUN—WORK PERFORMED.

A person furnishing materials and labor in the erection of a building in the city of Washington in the District of Columbia, cannot claim the benefit of the lien given by the act of congress of March 2, 1833, c. 80 [4 Stat. 659], after the expiration of two years from the commencement of the building, unless an action shall have been instituted or the claim filed in the clerk's office within three months after performing the work and furnishing the materials.

The plaintiff, on the 25th of June, 1835, filed in the clerk's office his claim against the defendant, amounting to $1,711.98, and dated November 6th, 1833, and on the 29th of July, 1835, sued out a writ of scire facias, stating the filing of his claim "in pursuance of the act of congress entitled," &c., "to be enrolled among the records of the said court, and which was so enrolled, as by the record thereof in the office of the clerk of the said court remaining, manifestly appears. And whereas the said Gustavus A. McClellan alleges that the said sum of $1,711.98 is still due to him and unpaid, and asks for a scire facias against the said John Withers for the recovery of the same; and because it is right that those things which are rightly done and transacted should be brought to a due execution: You are therefore hereby commanded that by good and lawful men of your bailiwick you give notice to the said J. W. that he be and appear before the said circuit court to be held at the city of Washington on the fourth Monday of November next, to show if he hath or can say any thing for himself why the said G. A. M. ought not to have his execution against him for the said sum of $1,711.98 according to the force, form, and effect of the law aforesaid, if he shall think fit, and further to do and receive what the said court shall then and there consider concerning him in this behalf; and have you then and there the names of those by whom you shall give him notice, and this writ. Witness," &c. The defendant having appeared at the return of the scire facias, the usual judgment was entered, that the plaintiff should have his execution; whereupon a special fieri facias was issued, reciting that in pursuance of the act of congress entitled, &c., a scire facias "was sued out by a certain G. A. M. against a certain J. W. for the recovery of the sum of $1,711.98 for 179,500 bricks laid in walls by the said G. A. M. for the said J. W. in erecting or constructing the building on the south part of lots one and two," &c., (describing the situation of the houses,) "belonging to him the said J. W. And whereas afterwards, in the said circuit court begun and held," &c., "on the 4th Monday of November, 1835, the said G. A. M. by consideration of the said court had leave to issue execution against the said building erected on the said lots No. one and two," &c., "towards satisfying unto the said G. A. M. as well the said sum of $1,711.98 as also the sum of $10.53 for his costs and charges by him in that behalf laid out and expended. You are therefore hereby commanded, that, of the said building erected on the said lots, one and two," &c., "you cause to be made and levied the sums of money aforesaid, and have the same before the said circuit court, &c., on the fourth Monday of March next, to render unto the said G. A. M. the debts, costs, and damages aforesaid. Hereof fail not at your peril, and have you then and there this writ. Witness," &c. Issued 25th February, 1836.

The act of congress of March 2, 1833, c. 80

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

(4 Stat. 659), entitled "An act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia," after giving a lien upon all buildings, thereafter erected, for all debts contracted for labor and materials done and furnished in erecting the same, provides "that no such debt for work and materials shall remain a lien on the said houses or other buildings, longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted, or the claim filed, within three months after performing the work or furnishing the materials, in the office of the clerk of the court for the county in which the building shall be situated."

R. S. Coxe, moved the court to quash this execution because irregularly issued and irregularly awarded. The claim filed, upon which the scire facias was issued, shows that the work was done and the materials furnished before the 6th of November, 1833, and the claim was not filed until the 25th of June, 1835; and it is shown that the building was commenced thirty days before the 29th of June, 1833, so that the two years had expired since the commencement of the building and no suit was instituted, nor claim filed within three months after the work was done and the materials furnished. The scire facias ought to have been to show cause why judgment should not be rendered against the defendant, not to show cause why execution should not issue. There was no judgment upon which an execution could issue, and the act does not authorize an execution to be issued without a judgment. The second section only authorizes the court to render judgment, as in the case of a summons.

Z. C. Lee, for plaintiff, contended that the motion to quash the proceedings is now too late. The defendant ought to have appeared at the last term; and he cited Smith v. Woodward [Case No. 13,129], at April term, 1821, in this court; Nichols v. Fearson [Id. 10,226], in Mr. Redin's notes; Johnson v. Glover, at May term, 1825 [Id. 7,385]; and Union Bank of Georgetown v. Crittenden [Id. 14,354], at April term, 1821; Tidd, Prac. 434, 452, 470, 476.

THE COURT stopped Mr. Coxe in reply, and said that, as the plaintiff had not brought his suit, nor filed his claim within three months after the materials furnished, and two years had elapsed after the commencement of the building, (which was thirty days before the 29th of June, 1833,) and before the filing of the claim, (which was on the 25th of June, 1835,) the lien had expired before the issuing of the scire facias. Fieri facias and proceedings quashed.

McCLELLAND (BLACK v.). See Case No. 1,462.

McCLELLAND (PEASE v.). See Case No. 10,882.

Case No. 8,697.

McCLEOD v. GLOYD.

[2 Cranch, C. C. 264.] [1]

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

CLERK OF COURT—MISTAKE—FAILURE TO ENTER APPEARANCE—CASE DISMISSED—AFFIDAVIT—REINSTATEMENT.

The court will permit an action of replevin which has been discontinued at a former term, by reason of the non-appearance of the defendant, to be re-instated, and the continuances entered up, upon affidavit, that the defendant's counsel, or attorney, on a day during the term, directed the clerk to enter his appearance, and that the clerk neglected to make the entry on the docket.

[Cited in Reiling v. Bolier, Case No. 11,671.]

[This was an action at law by John McCleod against George H. Gloyd.]

Replevin, returnable to June term, 1820. Discontinued by the non-appearance of the defendant.

Mr. Ashton, for defendant, upon affidavits of himself and Gloyd, stating, that at June term, 1820, he had directed the clerk, or his deputy, then having charge of the docket, in court, to enter his appearance for the defendant, and that he promised to do so, but neglected it, moved THE COURT to reinstate the cause, and to direct the continuances to be granted up. Granted.

M'CLEOD (SMITH v.). See Case No. 13,073.

McCLERY (LOWE v.). See Case No. 8,566.

Case No. 8,698.

McCLINTICK v. CUMMINS.

[2 McLean, 98.] [2]

Circuit Court, D. Indiana. May Term, 1840.

NOTES — FRAUDULENTLY OBTAINED — ASSIGNEE—FOR VALUE—PRACTICE—GENERAL ISSUE—AFFIDAVIT.

1. If the maker of a note prove that it was fraudulently obtained, the plaintiff, being assignee, is bound to show that the note was assigned to him for a valuable consideration.

[Cited in First Nat. Bank v. Green, 43 N. Y. 301; Hazard v. Spencer, 17 R. I. 563, 23 Atl. 730; Vosburgh v. Diefendorf, 119 N. Y. 365, 23 N. E. 802.]

2. The general issue, which denies the execution of the instrument, must be sworn to, under the statute of Indiana, which is adopted as a rule of practice in this court.

[This was an action at law by John McClintick against David Cummins. The suit was originally before the court upon demurrer in Case No. 8,700.]

Mr. Brice, for plaintiff.

Mr. Stevens, for defendant.

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

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

OPINION OF THE COURT. The plaintiff, as indorsee of a promissory note, brought this action; and the defendant has pleaded the general issue, and annexed a notice that he would prove, on the trial, the note was fraudulently obtained by duress, &c. And the question now submitted to the court is, whether, if fraud shall be proved, the plaintiff shall be required to show that the note was assigned to him for a valuable consideration. The note and the assignment import a valuable consideration, but the consideration of either may be impeached. If a note were given without consideration, and was afterwards assigned for a valuable consideration, the original want of consideration would not be a good plea, by the maker of the note, against the assignee. Hence it is necessary, under the late forms of pleading in the action of assumpsit, adopted in England, for the maker of the note to plead, when the action is brought by the assignee, that the note was given, and also assigned, without consideration; and the plaintiff can then join issue, either on the want of consideration on the giving of the note, or on the assignment of it, but not on both. The same question is substantially presented, in a form somewhat different, by the present notice. Under the notice, the defendant is bound to show that the note was obtained fraudulently, as alleged; and, this being done, the plaintiff is then required to show how he obtained the note. The fraud established, throws suspicion on the note, and devolves on the plaintiff the necessity of proving, that he received the note in the due course of business, and paid for it a valuable consideration. 5 Pick. 412; Chit. Bills, 78, 79; 5 Bin. 469; 1 Camp. 100; 2 Camp. 574.

A question is made before the court, whether the statute of the state of Indiana, which requires a plea that puts in issue the execution of the instrument on which the action is founded, to be sworn to, is regarded by the court. This statute is adopted as a rule of practice; and, unless the truth of the plea be verified by affidavit, the execution of the instrument need not be proved.

[This case was subsequently heard by the court, a jury being waived. The plaintiff was nonsuited. Case No. 8,699.]

Case No. 8,699.

McCLINTICK v. CUMMINS.

[3 McLean, 158.] [1]

Circuit Court, D. Indiana. May Term, 1843.

DURESS—STRANGER—NOTES—LEX FORI—VOID ASSIGNMENT—LEX LOCI.

1. Duress cannot be pleaded by a stranger.

[Cited in Robinson v. Gould, 11 Cush. 58; Griffith v. Sitgreaves, 90 Pa. St. 165; Harris v. Carmody, 131 Mass. 54; McCormick Harvesting-Mach. Co. v. Hamilton, 73 Wis. 494, 41 N. W. 730; Taylor v. Cottrell, 16 Ill. 95; Osborn v. Robbins, 36 N. Y. 372; Schee v. McQuilken, 59 Ind. 279; Patterson v. Gibson, 81 Ga. 802, 10 S. E. 11.]

2. Negotiable notes being executed in Indiana, payable at the Bank of Madison, in that state, if assigned in Pennsylvania, to an unauthorised banking association, the assignee cannot sustain an action in Indiana.

3. The lex loci, governs the contract of assignment, and also the original contract. And as an assignment to an unauthorised banking association is void in Pennsylvania, it gives no right to the assignee in that or any other state.

[This was an action at law by John McClintick against David Cummins. It was first heard upon demurrer (Case No. 8,700), and subsequently upon defendant's notice annexed to his plea of general issue (Case No. 8,698). A jury was waived, and it is now heard upon the pleadings and evidence as before the court.]

Mr. Stevens, for plaintiff.

Mr. Bright, for defendant.

OPINION OF THE COURT. This suit is brought by the plaintiff as assignee of two promissory notes of seven hundred fifteen dollars and five cents each. The defendant pleaded, 1. Non assumpsit, and 2. Duress, &c. The plea of duress is founded on the following facts: J. D. Johnston was indebted to Riley & Van Amrige, of Philadelphia, in the sum of three thousand dollars, for which two notes, signed by himself and Anderson & Shipley, of Ohio, were given. Van Amrige made a charge on oath against Johnston, that he had committed larceny, by stealing a certain number of hogsheads of tobacco, which had been pledged to Riley & Van Amrige, and that the said Johnston was a fugitive from justice. The governor of Pennsylvania demanded Johnston from the governor of Indiana, under the act of congress, and duly authorized Van Amrige, as the agent of the state of Pennsylvania, to act in the premises. On the exhibition of his authority by Van Amrige to the governor of Indiana, he issued his warrant on which the sheriff of Jefferson arrested and imprisoned Johnston. While thus imprisoned, a contract was entered into between Van Amrige and Johnston, and Cummins, the defendant, under which the note sued on was given by Johnston, and Cummins as his security. After this arrangement Johnston was released from imprisonment and permitted to go at large. The excuse for not taking him back to Pennsylvania was, that no provision had been made by that state to pay the expenses.

On these facts it is contended, that the note was given under duress of imprisonment by Johnston the principal, and that if this be so, Cummins, signing as security, under the circumstances, may avail himself of the same plea. In support of this ground, that the surety may take advantage of the duress of the principal, the following authorities were cited: 1 Bac. Abr. 13; 2 Bay, 211; 2 Strange,

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

916; 1 Conn. 356. It is not necessary to decide this point, as from the facts, it does not appear that the imprisonment of Johnston was unlawful, or that he was detained, until he executed the notes. In Bac. Abr. "Duress, B," it is laid down that "the duress which will avoid a deed must be done to the party himself; therefore if A and B enter into an obligation, by reason of duress done to A, B shall not avoid this obligation, though A may, because he shall not avoid it by duress to a stranger." 1 Rolle, Abr. 687, Mantle and Wollington, Cro. Jac. 166, S. P. adjudged, and that the bond may stand good as to one, and be avoided as to the other. The father and son may each avoid his obligation by duress of the other; and so a husband may avoid his deed by duress of his wife. As regards the defendant, he signed the notes deliberately, receiving at the same time an indemnity, by the assignment to him of certain notes, which exceeded the sum for which he became responsible. There is, therefore, no pretence that he acted under duress at the time he signed the notes in question. The fact of the abandonment of the prosecution by Van Amrige, would seem to afford ground for a suspicion, that it was resorted to with the view of compelling Johnston to give security for the debt; but the evidence does not establish this fact. There was no agreement that on executing the notes Johnston should be released, or that the prosecution should be abandoned. A want of funds was the reason assigned why the prisoner was not taken to Pennsylvania. The proceedings under which the arrest was made, were regular, under the act of congress.

The great question in the case is, as to the right of the plaintiff to sustain this action, as assignee of the notes. He is proved to be secretary of the "Saving Institution" of Philadelphia, which is not incorporated. The payees of the notes assigned them to Ellis, and he assigned them to the plaintiff. On one of the assignments, "P. City Saving Institution," is named, but McClintick is not designated as acting for that institution. It is proved that the notes were discounted by that institution. Were these assignments inhibited by the law of Pennsylvania; and if so, could a recovery have been had under them in that state? In the case of Collins v. Smith [6 Whart. 294], decided in 1841, by the supreme court of Pennsylvania, the court held that, "the Schuylkill Savings Institution," an institution similar to the one above named, "was an unincorporated banking association." That the act of 1810, "forbade unincorporated banks to issue their notes; to lend money on business or accommodation paper; to receive it on deposit; or to do any other act which an incorporated bank may do." And the court adjudged that a note given to the treasurer of such an institution was void. Under this decision a note discounted by such an institution, and assigned to its secretary or cashier, must also be void, under the laws of Pennsylvania. And here the question arises, whether the assignment in question is governed by the laws of Pennsylvania.

By the plaintiff's counsel it is earnestly contended, that the notes having been executed in Indiana and payable there, must be considered as Indiana contracts, and governed by the laws of that state. That the assignment of the notes in Pennsylvania was made in reference to the place of payment, and must be governed by the Indiana law. That these contracts in their creation and performance were governed, and are to be decided by, the law of Indiana, is undoubted. But the assignments in Pennsylvania do not come under the same rule. Every assignment of a negotiable instrument is a new contract between the assignor and the assignee, and is governed by the law of the place, where it was made. All the properties given to the bills or notes by the laws of Indiana at the time they were executed, will attach to them, wherever they may be taken or negotiated. As, for instance, if the bills or notes were not negotiable by the laws of Indiana, they would be negotiable no where. The law of the place where the contract is made must determine its character, though suit be brought on it in another state, where the law is different. This principle is illustrated in a case where a negotiable bill of exchange is drawn in Massachusetts, on England, and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland. The bill was dishonored. And the question arose, what amount of damages the respective indorsers were liable for. In Massachusetts, the damages were ten per cent.; in New York and Pennsylvania, twenty per cent.; and in Maryland, fifteen. And the court held that each indorser was liable under the law of the place where the indorsement was made. This is in conformity with the rule above stated, that the lex loci governs the contract. "The drawer and indorsers do not contract to pay the money in the foreign place where the bill is drawn; but only to guaranty its acceptance and payment in that place by the drawee; and in default of such payment, they agree upon due notice to reimburse the holder, in principal and damages, at the place where they entered into the contract." Potter v. Brown, 5 East, 123, 130; Hicks v. Brown, 12 Johns. 142; Powers v. Lynch, 3 Mass. 77; Story, Confl. Laws, §§ 314, 315.

By the laws of France, a blank indorsement of a promissory note does not transfer the property of the note, and is treated as a mere procuration. An indorsement there must state its date, the consideration, and the name of the assignee. A note indorsed in blank in France, was sued on in England, and the court held, as the assignment did not pass the property in the note where it was made, it did not entitle the assignee to bring an action in England; although the assignment, if made in England, would have been good. Trimbey v. Vignier, 1 Bing. N. C.

151, 158. Every assignment of a negotiable instrument, as between the parties to that assignment, is subject to the law of the place where the contract of assignment is made; and if by such law the assignment was void, as against law, the assignee can exercise no right under such a transfer, in the state where it was made, or in any other state or country. The contract of assignment is not, as the counsel supposes, an Indiana contract, nor that the assignor will perform a duty in Indiana; but that if the drawers of the notes there shall fail to pay them, on demand and notice, such being the law of Pennsylvania, he will pay the notes. Now this is a very different contract from that made by the original parties to the notes; and as it was made in a different state, must be subject to the law of that state. And as it appears, by the decision of the supreme court of Pennsylvania, that the assignment to the plaintiff was void, he cannot sue by virtue of it in this court.

These questions having been submitted to the court, and a jury waived, the court think that the plaintiff must suffer a non suit. Non suit entered.

Case No. 8,700.

McCLINTICK v. JOHNSTON et al.

[1 McLean, 414.] [1]

Circuit Court, D. Indiana. May Term, 1839.

PRACTICE AT LAW—INDIANA—AFFIDAVIT TO PLEA—NOTES—FRAUD IN EXECUTION—ASSIGNMENT—CONSIDERATION—DURESS—ISSUE.

1. Under the statute of Indiana which requires a plea that denies the execution of the instrument on which the action is brought, to be sworn to, if the plea be filed without oath, it admits the instrument; but is good for all other legitimate purposes.

[Cited in Magee v. Sanderson, 10 Ind. 263.]

2. A plea of fraud in the execution of the instrument need not state the facts which constitute the fraud.

[Cited in Brickill v. City of Hartford, 57 Fed. 218.]

3. The assignment of a negotiable note, as well as the note itself, purports a consideration.

[Cited in Smith v. Bainbridge, 6 Blackf. 12.]

4. The plea of duress, by the maker of the note, as against the assignee, is bad, unless there be an averment of notice to the assignee.

5. To a plea that the note was given and the assignment made without consideration, the plaintiff should take issue on the want of consideration of the note or of the assignment, and not on both.

6. Where such issue is made, as the note and also the assignment purport a consideration, the proof of want of consideration devolves, in the first instance, on the defendant.

[Cited in Yeatman v. Cullen, 51 Blackf. 247.]

7. An issue must be single, though it may embrace several facts.

8. An issue is formed, generally, of an affirmation and denial; and not of two negatives.

[This was an action at law by John McClintick against Imley D. Johnston and David Cummins. Heard on demurrer.]

Mr. Stevens, for plaintiff.

Mr. Bright, for defendants.

OPINION OF THE COURT. This action is brought on the following promissory note: "$715 08. Madison, Indiana, Aug. 28th, 1837. Nine months after date, we jointly and severally promise to pay at the Branch of the State Bank of Indiana, at Madison, to Riley & Van Amaringe, merchants of Philadelphia, or to their order, seven hundred and fifteen dollars and eight cents, without defalcation, for value received. I. D. Johnston. David Cummins." Indorsed: "For value received, pay the within to John McClintick. Riley & Van Amaringe."

The defendant filed the following pleas: 1. Non assumpsit. 2. "That at the time of making the said supposed note, &c. the said Imley D. Johnston was unlawfully imprisoned by said Riley & Van Amaringe, and others in collusion with them, and then and there detained in prison until the force and duress of imprisonment of him said Johnston, and to obtain the liberation of him said Johnston from such imprisonment, he said Johnston, together with said David Cummins, as his surety, made said note," &c. 3. That said supposed note was made and delivered to said Riley & Van Amaringe without any consideration whatsoever for so doing: and the same was indorsed over by said Riley & Van Amaringe to said plaintiff without any consideration whatsoever, and with full notice to said plaintiff that the same had been made by said defendants without consideration. 4. That said note was obtained from them by fraud, covin, and misrepresentation. 5. That said defendant, Johnston, who is impleaded with the said David Cummins, says he did not undertake and promise in manner and form as said plaintiff has alleged. To the 1, 2, 4, and 5 pleas the plaintiff has filed demurrers, and assigned the following causes of demurrer to the 4th plea: 1. The said 4th plea is double, containing two substantive bars to said action, if the matters pleaded are pleadable in bar; that is to say, 1. Fraud, covin, and false representation, and 2. That the said note declared on was made without any consideration whatever. 2. Fraud, covin, and false representation, cannot be pleaded without setting out the particular facts that constitute the fraud, covin, and false representation, so far as relates to the consideration, but only to the making of the instrument declared on. And in answer to the third plea, the plaintiff filed the following replication: That the defendant ought not, &c. because he saith that said note was not made and delivered to said Riley and Van Amaringe without any consideration whatever, and that the

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

same was not indorsed over by said Riley and Van Amaringe to said plaintiffs without any consideration whatever, and that said plaintiff had not any notice that said note had been made by said defendants without any consideration. To this replication the defendant filed a demurrer, and for cause of demurrer states that said replication is double, &c. And a joinder to the demurrers to the 1, 2, 4, and 5th pleas is filed.

The first question raised by these pleadings, is, whether the plea of non-assumpsit can be filed in this action. It is contended by the plaintiff's counsel that it cannot be pleaded, 1. to a bill of exchange, and 2. that it cannot be pleaded against an indorser. Upon general principles there can exist no doubt that the drawer or acceptor of a bill may put in this plea. It denies the execution of the instrument, and requires the plaintiff to prove it. But it is insisted that under the twenty-first section of the "act to regulate the practice in suits of law" in this state, the plea unless sworn to, cannot have this effect, and that in this case it can be pleaded for no other purpose. The act provides that "no plea in abatement, plea of non est factum, non-assignment, nor any other plea, replication or other pleadings, denying or requiring proof of the execution or assignment of any bond, bill, release, or other instrument of writing, &c. shall be received, unless supported by oath or affirmation." This statute having been passed subsequent to the enactment of the process act of 1828 [4 Stat. 278] by congress, can have no force to regulate the practice of this court, unless the court adopt it as a rule of practice. If not sworn to, the plea does not put the plaintiff to the proof of the instrument; but, no reason is perceived why the plea should not be held good for every other legitimate purpose, though filed without affidavit. Under it the defendant may give payment in evidence, accord and satisfaction, &c., and to let in these defences the plea is not required to be sworn to. And if it may be used for this purpose, without affidavit, the demurrer cannot be sustained. We think the plea admits the execution of the note and the assignment, on which the action is brought, not being sworn to, but that it is good for other purposes, and that the demurrer must be overruled.

The demurrer to the second plea raises the question whether the duress of Johnston can be jointly pleaded with his co-defendants. However this may be, there is a conclusive objection to this plea. This suit is brought by the endorsee of the note, and the plea does in no way by notice or otherwise connect him with the duress so as to affect the validity of the note in his hands. We are clear, therefore, that the plea is bad, and the demurrer to it is sustained. The fourth plea to which there is a demurrer, alleges that the note was obtained by fraud, covin and misrepresentation. The additional allegation in this plea, that the note was given without consideration, has been struck out, and this removes one of the causes of demurrer specially assigned, to this plea. And the only objection to the plea as it now stands is, that fraud, covin and misrepresentation cannot be pleaded on these general grounds. From the remarks of the counsel this plea was principally objected to, as presenting two distinct grounds of defence: fraud and want of consideration. But the plea having been amended, it is unnecessary to consider this objection.

Fraud may be given in evidence in this case under the general issue, but the plea is not demurrable on that ground. The defence it sets up is not a matter of fact which amounts to a denial of the allegation which the plaintiff is bound to prove in support of his declaration. It would seem to follow, if fraud may be given in evidence in this case, under the general issue, that the plea is not objectionable on account of its generality. 1 Chit. Pl. (Ed. 1839) 570; 9 Coke, 110; 2 Maule & S. 378. But it contains no averment that the indorsee participated in the fraud, or had any knowledge of it. In this respect the plea is fatally defective. In the case of Bramah v. Roberts, 27 E. C. L. 724, the chief justice says: "The third plea in this case which is pleaded to an action brought by the indorsees against the acceptors of a bill of exchange is in effect no more than this, that the defendants were defrauded of the bill of exchange, and that the acceptance was given by them without consideration. Now, inasmuch as the indorsee of a bill of exchange, is by law, prima facie, assumed to hold it for consideration, inasmuch as we are not to presume a notice which would make him a fraudulent agent in taking a bill of exchange, and, inasmuch as this plea is silent upon the subject of want of consideration on the part of the indorsees, or of notice of fraud, we are to ask ourselves, whether, upon the transfer of a bill of exchange the circumstance of the acceptor having been defrauded at the time when he gave the acceptance, is an answer against an innocent indorsee for a valuable consideration without notice. It seems to me that it is not a sufficient answer." The demurrer to this plea must be sustained.

In the fifth plea, Johnston pleads non assumpsit, having previously filed the same plea in connection with his co-defendant. This is clearly irregular, and this plea would have been struck out on motion. A defendant cannot encumber the record by a repetition of the same pleas, which can in no respect change the nature of his defence.

We come now to consider the demurrer to the replication to the third plea. This plea averred a want of consideration in the note, and that the indorsee had full notice of it, and that it was assigned without consideration. To this the plaintiff replies that the note was not given without consideration, that it was not assigned without consideration, and

that he had no notice. The defendant demurs to this replication. He alleges it is double and therefore bad. This pleading is in accordance with the rules lately adopted in England. The plea of non assumpsit on bills and notes, and in the action of assumpsit generally, is abolished, and all matters in evidence are required to be specially pleaded by these rules. If this shall produce some perplexity in pleading and no little awkwardness in requiring a party to plead negatively, yet it will give greater point and certainty to the controversy in actions of assumpsit.

Until very recently it is believed not to have been doubted, that the endorsement of a negotiable instrument was prima facie evidence of a consideration. This is the doctrine laid down by Mr. Chitty and other writers on bills of exchange and promissory notes. And the doctrine is abundantly sustained by numerous adjudications. Chit. Bills (Ed. 1839) 79; Phillislkirk v. Pluckwell, 2 Maule & S. 395; 1 Black. 445; 1 Salk. 25; 2 Ld. Raym. 760; 2 Bl. Comm. 446; Selw. N. P. (4th Ed.) 304. But in a late case in the exchequer where the plea alleged that the defendant accepted without consideration, and that the plaintiff (the indorsee) was a holder without consideration, the latter allegation being denied by the replication, which admitted the former; Lord Abinger is represented to have questioned the principle, that the indorsement imported a consideration. And he seems to have expressed surprise that doubts were entertained on the subject. The view of his lordship seems to have been very much influenced by the practice of the London bankers, who receive indorsed bills for collection. If an indorsement on a bill should be held not to import a consideration, it must shake the credit of commercial paper and produce injurious consequences on commercial transactions. And we think the principle has been too long and too beneficially settled to be now questioned.

If it be made to appear that the assignment was without consideration, then the drawer or acceptor of the bill may set up any defence to the bill which he might have done before it was negotiated. For in the language of Mr. Chitty, in such a case the indorser is in privity with the first holder, and will be affected by every thing which would affect him. The title of the plaintiff not being founded on a consideration, he shall not be permitted to enforce it against good faith and conscience. Pearson v. Pearson, 7 Johns. 26; Smith v. Ware, 13 Johns. 259; Ten Eyck v. Vanderpoel, 8 Johns. 93; Denniston v. Bacon, 10 Johns. 198, 199; Bayley v. Taber, 6 Mass. 451; Slade v. Halsted, 7 Cow. 322; Lawrence v. Stonington Bank, 6 Conn. 521; Hill v. Buckminster, 5 Pick. 391. In this case the defendant avers a want of consideration both in the making and assignment of the note. And the plaintiff answers that the note and the assignment were not made without consideration. To this the defendant demurs, and alleges that the replication is multifarious, in traversing the want of consideration of the note and of the assignment; that the issue should be joined on one of these allegations, which would admit the truth of the other. The same principle would seem to apply to this case as to pleas of accord and satisfaction and of arbitrament and award. Mr. Chitty says that the replication to a plea of accord and satisfaction may either deny the delivery of the chattel in satisfaction, or protesting against that fact, may deny the acceptance. And he observes if an award be pleaded, the plaintiff may either deny the submission or the award; but it appears he may not deny both the submission and the award. And yet it is essential to the defence that the allegations of the plea should extend to both these facts; and a denial of the award admits the submission. The precedents are in conformity with this rule.

Now in the present case the averment of want of consideration in making the note and also the assignment was essential to the defence set up; and yet it would seem that the plaintiff must take issue on the one allegation or the other, and that he cannot traverse both. This narrows the plaintiff's right to one of the grounds taken in the defence, both of which were essential to the sufficiency of the plea. But the same thing may be said of the replication to a plea of arbitrament and award. To make that plea good, both the submission and the award must be alleged; but the plaintiff must limit his answer to the denial of one or the other. In the case of Bramah v. Roberts, 27 E. C. L. 724, the second plea alleged that the defendants, the acceptors, had been defrauded of the acceptance; that notice of the fraud was given to the plaintiffs, and that they received the bill by indorsement, without a full and valuable consideration. The replication took issue on the consideration of the assignment. And in the case in the exchequer above referred to, the issue was made up in the same way. An issue consists of a single, certain and material point. But this point may embrace several facts if they be dependent and connected, and go to establish the main point of the plea.

Now the facts alleged in the plea, in this case, are distinct and independent of each other. The facts which go to show a want of consideration in the note, are in no way connected with the consideration of the assignment. No two facts could be more disconnected than the making of the note and the assignment of it, and the consideration on which these acts were done. In the case of Webb v. Weatherby, 27 E. C. L. 738, the defendant pleaded that he paid and the plaintiff received a full satisfaction of the said promise, &c. a certain sum. The plaintiff replied, that the defendant did not pay the said sum in full satisfaction and discharge

of the promise, nor was the said sum accepted in full discharge, &c. It was contended that in an action for damages it may well be stated that the defendant has paid something, and yet the plaintiff has not accepted it in satisfaction of his entire demand, or vice versa. It is necessary, therefore, in such an action, for the defendant to aver acceptance in satisfaction as well as payment. 1 Strange, 573; 3 East, 256. And both the payment and acceptance being material allegations, the plaintiff ought to elect on which of them he will tender an issue. But Tindal, C. J., said, this is not a plea of accord and satisfaction, but of a payment received in satisfaction of the plaintiff's demand; the receipt in satisfaction virtually implies that the payment was made in satisfaction; and I cannot see how the defendant is injured by the plaintiff's taking issue on the entire allegation. In that case the replication was held to be good, on the ground that the receipt of the money in satisfaction, virtually, included the payment of it in satisfaction. The payment and the receipt in satisfaction were connected, and might be included in the same allegation. The plea would have been good, however, had it alleged only the receipt of the money in satisfaction. But there is no such connection and dependence, in the distinct grounds alleged in the plea under consideration. There is another objection to this replication which it may be well to suggest, although the special causes of demurrer do not embrace it, and our opinion is formed on the ground above stated. The replication states in answer to the plea, that the note and the assignment were not made without consideration. This answer is negative, and it seems to us it should be in the positive. Mr. Chitty says (1 Chit. Pl. 629), that an issue should in general be upon an affirmative and a negative, and not upon two affirmatives, &c., nor should the issue be on two negatives: thus, "if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not when so requested, deliver such abstract, but neglected and refused so to do; the plaintiff cannot reply that he did not neglect and refuse to deliver such abstract; but should reply either denying the request, or affirmatively, that he did deliver the abstract."

The pleas in the cases above referred to were all drawn affirmatively, that the note was given and the assignment made for a good and valuable consideration. This averment will not throw the proof of the consideration on the plaintiff, beyond that which the execution of the note and of the assignment import. He may introduce evidence to rebut that given by the defendant, going to show a want of consideration. Upon the whole we think the demurrer of the defendant must be sustained to the replication to the third plea; and that the demurrer of the plaintiff to the second, fourth, and fifth pleas, must be sustained, and the one to the first plea overruled.

[NOTE. This case was subsequently heard upon the question of valuable consideration as raised by the notice annexed by defendant to his plea of the general issue. Case No. 8,698. It was again and finally heard by the court (a jury being waived) upon its merits. Case No. 8,699.]

McCLISH (BROADWELL v.). See Case No. 1,911.

Case No. 8,701.

McCLOSKEY et al. v. The ACHILLES et al.

[34 Leg. Int. 384; 13 Phila. 463; 5 N. Y. Wkly. Dig. 241; 4 Law & Eq. Rep. 676; 23 Int. Rev. Rec. 368; 10 Chi. Leg. News, 73; 25 Pittsb. Leg. J. 49.] [1]

Circuit Court, E. D. Pennsylvania. Oct. 22, 1877.

COLLISION—VESSEL AT ANCHOR—MEASURE OF DAMAGES—VALUE OF VESSEL.

1. A schooner, while at anchor, with the proper lights up, was run into and sunk by a steamship. *Held*, that the steamship was liable for the loss.

2. The measure of damage or value of the vessel is what price a prudent owner, wishing but not compelled to sell, would reasonably expect to get, within a reasonable time, at public or private sale, without forcing the sale, and using proper measures to avoid undue sacrifice.

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

[This was a libel by James McCloskey and others, owners of the schooner Marian Gage, against the steamship Achilles and others, for damages sustained in a collision.]

Henry R. Edmunds, Henry Flander, and George P. Rich, for libellants.

Thomas Hart, Jr., for respondents.

McKENNAN, Circuit Judge. The only issue in this case is one of fact. If the material facts alleged in the libel are sufficiently supported by the proofs, the culpability of the respondent's vessel is clear, and her liability for the loss complained of necessarily follows. It appears from the evidence that on Tuesday, August 24th, 1875, the schooner Marian Gage, of Philadelphia, owned by the libellants, left Philadelphia for Boston, with a cargo of 480 tons of coal. In the evening of that day she came to anchor between Gloucester and Horseshoe buoy, and remained there during the night. On Wednesday she resumed her voyage, and in the evening anchored in about four fathoms of water just below "Miah Maull" buoy, in the Delaware Bay. The weather being threatening, she remained at anchor at the same place until about three o'clock in the morning of Saturday, August 28th, 1875, when she was run into and sunk by the steamer Achilles, the respondent, which was then on

[1] [Reported from 34 Leg. Int. 384, by permission. 5 N. Y. Wkly. Dig. 241, and 4 Law & Eq. Rep. 676, contain only partial reports.]

a return voyage from Newburyport to Philadelphia, and was light. At the time of the collision the wind was about northeast, the tide about slack, and the weather cloudy and hazy, not thick and not clear, but unfavorable for seeing distant objects. The schooner was struck on the starboard side, about the forward part of her fore-rigging, and sunk almost immediately, leaving the men on her, time only to escape with their lives, without any of their personal effects. At the time of the collision the steamer was running at full speed, from eight to ten knots an hour, under steam, and with her sails set, and was approaching Miah Maull shoal to verify her position. A proper anchor light was placed on the schooner, and it was burning until extinguished by the collision. This light was probably seen by a seaman on the steamer when he was coming down from her rigging, but it, as well as the hull of the schooner, ought to have been seen by the steamer's lookout, if he had observed proper vigilance, when the vessels were far enough from each other to avoid collision.

Under this state of facts, which is, I think, fully established by the proofs, it needs no argument to show that the fault of the collision rested solely on the steamer. The schooner was at anchor, and had omitted no duty required of her, under such circumstances, at least nothing that she omitted to do contributed, in any way, to the loss complained of. The steamer was under full headway, had the control of her own course and movements, and ought to have kept out of the schooner's way. This she would doubtless have done if the schooner had been sighted in due time by the steamer's lookout. To the insufficiency of this lookout I think it is clear the collision is attributable, and the fault is, therefore, entirely upon the steamer.

In determining the value of the sunken vessel the court below applied a just and proper standard of estimation. The proofs of the market value of similar vessels vary in amount from $10,000 to $22,000, according to the different circumstances under which they were sold. But as the court said, "the true question is, what price a prudent owner, wishing but not compelled to sell, would reasonably expect to get, and would probably be able to get, within a reasonable time, at public or private sale, without forcing the sale, and using proper measures to avoid undue sacrifice." Thus measured the value of the vessel was fixed at $17,500, which, with interest to the date of the decree, and the nett freight, amounted to $18,657.45. Deducting from this $180.56, the nett value of certain materials obtained by the libellants from the Marian Gage, there was left the sum of $18,476.89 to be paid by the respondent. That sum to wit, $18.476.89, with interest from July 11th, 1876, and costs, it is here ordered, adjudged and decreed, be paid by the respondent to the libellants.

Case No. 8,702.

McCLOSKEY v. COBB et al.

[2 Bond, 16.] [1]

Circuit Court, S. D. Ohio. April Term, 1866.

COURTS—FEDERAL JURISDICTION—WANT OF—HOW TAKEN ADVANTAGE OF—VOLUNTARY APPEARANCE—WAIVER.

1. In the courts of the United States, if at any stage of a suit it becomes apparent that the court has not jurisdiction no further proceedings will be had, and the case will be dismissed on that ground as to those parties to whom the objection applies.

2. A suit was brought by a citizen of Illinois in the Southern district of Ohio upon a joint contract against two defendants, one of whom resided in said district and the other in the state of Indiana. The declaration averred the residence of the defendants, and the return of the marshal showed service on both, but the declaration did not aver that the defendant residing in Indiana was served within the Southern district of Ohio: *Held*, that in such case it was not necessary to aver on the record that the defendant, residing in Indiana, was served within said district, and that by virtue of section 1 of the act of February 28, 1839 [5 Stat. 321], jurisdiction was conferred upon the court to proceed to the trial and adjudication of such suit as against all parties regularly served with process.

3. Where a co-defendant, who resides in a district other than the one where suit is brought, voluntarily appears and pleads to the suit jointly with the other defendants, it is a waiver of any exception to the jurisdiction of the court.

[This was a suit by H. F. McCloskey against O. P. Cobb & Co. Heard on a motion by defendants to dismiss the case upon a question of jurisdiction.]

Aaron F. Perry, for plaintiff.

R. M. Corwine and T. D. Lincoln, for defendants.

OPINION OF THE COURT. In this case a motion has been made and fully argued to dismiss this case as to the defendant Cobb, on the ground that as to him this court has no jurisdiction. The suit is brought on a joint contract or liability on the part of the defendants. The declaration avers that the plaintiff is a citizen of the state of Illinois, and that the defendant Christy is a citizen of Ohio, and Cobb a citizen of Indiana. The return of the process shows service on both the defendants, but the declaration does not aver that Cobb was served within this district. The defendants have at a previous term entered their appearance by counsel, and have filed a joint plea of the general issue to the suit, and have also interposed some intermediate motions in the case.

The question for the decision of the court is, whether from the facts averred in the declaration there is jurisdiction as to the defendant Cobb. It is insisted by his counsel, that in a joint action the plaintiff must not only have the right to sue in this court, but that both of the defendants must be liable to be sued here, and that Cobb, being a citi-

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

zen of Indiana, can not be amenable to the jurisdiction of this court. It is a well-settled principle in the courts of the United States, affirmed by repeated decisions of the supreme court, that if at any stage of a suit it becomes apparent that the court has no jurisdiction, no further proceedings will be had, and the case will be dismissed on that ground as to those parties to whom the objection applies.

The present motion presents two questions: 1. Whether the defendant Cobb, having appeared in the action and joined with his co-defendant in a plea of the general issue, can now avail himself of the want of jurisdiction in the court. 2. Whether, if he has not waived his right to object to the jurisdiction, such objection can be sustained on the general ground that it is not conferred by statute.

1. As to the first of these inquiries, upon the authority of the case of Gracie v. Palmer, 8 Wheat. [21 U. S.] 699, there seems to be no reason for doubt. That was a suit brought by alien plaintiffs, in the circuit court of Pennsylvania, against the defendants, citizens of the state of New York. In the supreme court objection was taken to the jurisdiction of the circuit court of Pennsylvania, that the record did not show the defendants were inhabitants of or were found in the district of Pennsylvania at the time of the service of process. Chief Justice Marshall delivered the opinion of the court overruling the objection. He held "that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein;" and "that it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties." It was also held, that "the exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance; that if process was returned by the marshal served upon him within the district, it was sufficient; and that where the defendant voluntarily appeared in the court below without taking the exception, it was an admission of the service, and a waiver of any further inquiry in the matter." This decision was under section 11 of the judiciary act of 1789 [1 Stat. 78], which provides, among other things, that the courts of the United States shall have jurisdiction when the suit is between a citizen of the state where the suit is brought and a citizen of another state; and provides further, "that no civil suit shall be brought in a circuit court against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant, or in which he shall be found at the time of serving the writ."

In the case cited from 8 Wheat. [21 U. S.], as in the case before this court, there was no averment in the declaration that the defendants, not being citizens of the state in which suit was brought, were served with process within that state. The court held that the return of service by the marshal, as to a party not a citizen of the district where the suit was brought, was conclusive evidence that he was found within such district, and therefore liable to process there. And that if he wished to avail himself of the personal privilege of exemption from being sued in such district, he must do so before appearing to the suit; and that having voluntarily appeared, it was an admission of the service and a waiver of all exception to the jurisdiction. It would therefore seem clear, upon the authority of this case, that the voluntary appearance of the defendant Cobb, and pleading to the suit jointly with his co-defendant, was a waiver of any exception to the jurisdiction of the court, and that the present motion might be overruled on that ground.

2. The second point suggested, namely, whether supposing the objection to the jurisdiction is not waived as to the defendant Cobb, is there apparent on the face of the declaration such a clear want of jurisdiction as to require the court to dismiss the case as to him, I shall notice very briefly. The argument in support of the present motion is, that as section 11 of the act of 1789 limits the jurisdiction of the circuit courts, in reference to the citizenship of the parties to suits "between a citizen of the state where the suit is brought and a citizen of another state," and that as the defendant Cobb is a citizen of Indiana, and the plaintiff a citizen of Illinois, the court can not take jurisdiction as to Cobb. And the exception is probably well taken, if the question depends for its solution on the construction of the clause of the act of 1789 just quoted. I do not propose to discuss or decide whether this restrictive clause is in conflict with the provision of the constitution of the United States declaring that the jurisdiction of the courts shall extend "to controversies between citizens of different states." This language is very comprehensive, and certainly affords no intimation of an intention to limit the jurisdiction to cases "between a citizen of the state where the suit is brought and a citizen of another state." It may be competent for congress to impose this restriction, but it is a fair inference that it was not contemplated by the framers of the constitution. That instrument does not make it a requisite of jurisdiction that either party should be a citizen of the state in which the suit is brought; not is it apparent that, in cases of joint liability, it should be required on any principle of public policy. But, if it be conceded that under the act of 1789, jurisdiction as to the defendant Cobb could not be exercised, it is clearly conferred by section 1 of the act of February 28, 1839 [5 Stat. 321]. It provides "that where in any suit at law or equity, commenced in any court of the United States, there shall be several defendants, any one or

more of whom shall not be inhabitants of, or found within the district where suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to trial and adjudication of such suit between the parties properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer." The scope and intention of this section has been often considered by the supreme court, as well as by the circuit courts, and it is not necessary to reproduce their views in regard to it. Under the restrictive clause of section 11 of the judiciary act of 1789, before adverted to, great inconvenience and difficulties had been experienced in joint actions where some of the defendants were not inhabitants of the state or district in which suit was brought, or were not served with process within it. Acting under the doctrine of the common law, that all the parties to a joint contract must be sued, the courts held that they could not render judgment against those within the district where suit was brought, unless the other parties to the contract were made parties to the suit, and were brought within the jurisdiction of the court by the service of proper process. As to parties in regard to whom there was no jurisdiction given by law, it was properly held by the courts that consent could not give it. The act of 1839 obviously conferred jurisdiction in a class of cases in which it did not previously exist. And it barred a joint contractor, not a party to the judgment, from asserting as a defense that the debt was extinguished by a judgment against one or more of the joint debtors.

In the case of Louisville, C. & C. R. Co. v. Letson, 2 How. [43 U. S.] 497, the court held distinctly that the act of 1839 enlarged the jurisdiction of the courts; and under the authority of that case there is no doubt that this court has jurisdiction of the defendant Cobb. The railroad company in that case was a corporation created by a law of South Carolina, and Letson, a citizen of the state of New York, sued the corporation, in the circuit court of South Carolina, for an alleged violation of a contract with him. The railroad company interposed a plea to the jurisdiction of the court, on the ground that certain persons were stockholders in the company who were citizens of North Carolina and not subject to the jurisdiction of the court in that suit. The plea was demurred to, and was sustained by the circuit court. The case was taken to the supreme court by writ of error, and the judgment of the court below was sustained. Now, although that was a suit against a corporation, one of the questions arising in the case, and decided by the court, was the same as that involved in the present motion. The plaintiff Letson was a citizen of New York, and sued the railroad company in South Carolina. The court held that the residence of some of the corporators in another state did not take away the jurisdiction of the court. In their opinion the supreme court, as one ground of their judgment, hold that under the act of 1839 the court below had jurisdiction of the case. The court say, in reference to that act, "that it enlarges the jurisdiction of the courts, comprehends the case before us, and embraces the entire result of the opinion we shall now give." And again: "If the act, in fact, did no more than to make a change by empowering the courts to take cognizance of cases other than such as were permitted in that clause of section 11 (of the act of 1789) which we have just cited, it would be an enlargement of the jurisdiction as to the character of the parties." . . . . "The general words (act of 1839) embrace every suit at law or in equity in which there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or who shall not voluntarily appear thereto." The result of the doctrine affirmed by the supreme court, as I understand, is, that the act of 1839 modifies or supersedes the clause in section 11 of the act of 1789, limiting the jurisdiction of the courts to suits "between a citizen of the state where the suit is brought and a citizen of another state," and enlarges the jurisdiction so as to embrace all suits against two or more persons involving a joint liability, although the plaintiff and one or more of the defendants are not citizens of the state in which suit is brought. This conclusion obviously presupposes, as necessary to the exercise of jurisdiction, that the parties, not citizens of the district where suit is brought, have been served with process within the district or have voluntarily appeared to the action.

In the present case these last requirements are both fulfilled. The defendant Cobb was served within the district, and also voluntarily appeared to the action. The latter proposition—the voluntary appearance of the defendant—I think is clearly sustainable as a legal conclusion. He made no objection to the jurisdiction of the court until after he had appeared and filed his plea to the action. The case of Taylor v. Cook [Case No. 13,789] involved substantially the same question presented in the present motion. The plaintiffs were citizens of New York; Cook was a citizen of Illinois, where the suit was brought, and Spalding the other defendant, was a citizen of Missouri. The writ was served on Cook, and Spalding entered a voluntary appearance. It was objected in that case, that as the plaintiffs were citizens of New York, and Spalding a citizen of a state other than that in which the suit was brought, the court had no jurisdiction. Judge McLean held—properly, as I think—that under the act of 1839, the voluntary appearance of Spalding gave the court jurisdiction as to both the defendants. It seems clear, therefore, that in

the present case the service of process upon Cobb within the district gives jurisdiction as to him. This brings the case within the purview and intention of the act of 1839, and if the service of process within the district had not this effect, his voluntary appearance and putting in a plea to the action was a waiver of all exception to the jurisdiction of the court.

I have not thought it necessary to refer to the numerous cases cited by the learned counsel for the defendants. I am well aware that up to the time of the decision in 2 Howard, before referred to, the law on the question raised on this motion had been placed on a different footing from the decision in that case. But so far as that case touches the construction of the act of 1839, it has been received as authorative. There was no dissent from the opinion of Judge Wayne on that part of the case, nor has it in any way been overruled or disaffirmed by the supreme court.

The motion to dismiss the suit as to Cobb is overruled.

Case No. 8,703.

McCLOUD v. COLTMAN.

[Cited in Ten Broeck v. Pendleton, Case No. 13,827. Nowhere reported; opinion not now accessible.]

McCLURE (PLATT v.). See Case No. 11,218.

Case No. 8,704.

McCOBB v. LINDSAY et al.

[2 Cranch, C. C. 215.] [1]

Circuit Court, District of Columbia. Nov. Term, 1820.

FACTORS—LIEN—GENERAL BALANCE—SALE BY—SECRET PRINCIPAL—SET-OFF.

1. A factor may retain for a general balance due from his principal.

2. If a factor sell in his own name, the vendee cannot set off a claim against the factor's principal, not yet payable.

Assumpsit for salt sold 16th December, 1818. It was known that the salt belonged to Henop & Co., of Norfolk, it having been consigned by them, to the plaintiff, for sale. The defendants [Lindsay & Hill] paid half in cash, and promised to pay the balance in ten days to the plaintiff. On the 16th of October, 1818, the defendants, by their factor at Norfolk, had sold flour to Henop & Co. payable on the 22d of February, 1819; and the plaintiff had, on the 28th of November, 1818, drawn a bill on Henop & Co., payable in sixty days, which they had accepted, but failed before it became payable. The defendants now claimed to set off against the plaintiff's claim for the balance due for the salt, their claim against Henop & Co. for the amount due for the flour.

Mr. Taylor, for plaintiff. The plaintiff has a right, at law, to maintain this suit in his own name, and has a right to retain the money, when recovered, as against Henop & Co. A factor has a right to retain for a general balance due from his principal. He has a legal right to recover, and has, at least, equal equity with the defendants.

Mr. Mason, contra. It makes no difference that the debt of Henop & Co. to the defendants was not payable when the money became payable for the salt. The plaintiff acted as consignee of Henop & Co., and the defendants having possession of the money, have a right to retain it.

Mr. Taylor, in reply. The contract was made with the defendants, by the plaintiff, in his own right. When the money became due from the defendants to the plaintiff, the defendants had no right to retain it; and if the forms of law would then have permitted the plaintiff to obtain judgment, the defendants could not have availed themselves of the set-off.

THE COURT (THRUSTON, Circuit Judge, absent,) was of opinion that the defendants could not set off against the plaintiff, in this action, their claim against Henop & Co.

Case No. 8,705.

McCOBB v. TYLER.

[2 Cranch, C. C. 199.] [1]

Circuit Court, District of Columbia. April Term, 1820.

ATTACHMENT—GARNISHEE—EFFECT.

The attachment first served on the garnishee binds the effects in his hands, although the marshal had other and prior attachments in his hands at the time of such service.

This was an attachment served by summoning John Wheelwright as garnishee, by order of the plaintiff. The marshal had in his hands a prior writ of attachment upon which he was not required to summon Mr. Wheelwright as garnishee.

Mr. Mason, for the prior attachment. The general rule is that the marshal must first serve that writ which comes to his hands, and upon any property upon which he has any knowledge.

Mr. Taylor, contra. The attachment only binds from and by the levying of it.

THE COURT (nem. con.) was of opinion that the prior attachment did not affect the money in the hands of Mr. Wheelwright.

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

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

Case No. 8,706.

McCOMB v. BEARD.

[10 Blatchf. 350; 6 Fish. Pat. Cas. 254; 3 O. G. 33.] [1]

Circuit Court, S. D. New York. Jan. 9, 1873.

PATENTS—COTTON TIES—NOVELTY—VALIDITY—INFRINGEMENT.

1. The invention described in the letters patent granted to Frederic Cook, March 2d, 1858, for an "improvement in metallic ties for cotton bales," explained.

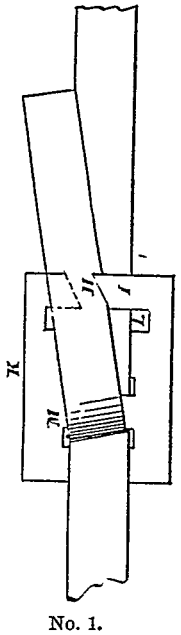
2. The third claim of said patent, namely, "The herein described slot, cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise," defined.

3. Such claim is infringed by the tie described in letters patent granted to George N. Beard, December 27th, 1870, for an "improvement in cotton-bale ties."

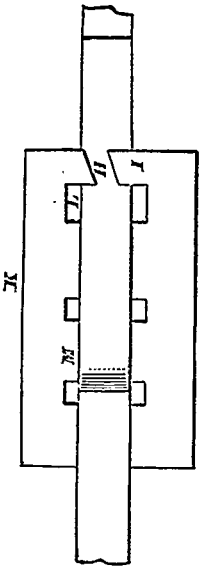
4. Such claim is new and valid.

[Cited in Atwood v. Portland Co., 10 Fed. 284.]

[2] [This was a suit in equity [by Mary F. McComb against Ira Beard] under letters patent [No. 19,490] for "an improvement in metallic ties for cotton-bales," granted to Frederic Cook, March 2, 1858, and duly assigned to complainant. The infringement charged was under the third claim of the patent. The accompanying engravings represent the form of the Cook tie, upon which the third claim is based. The mode of use described in the patent was as follows:



No. 1.



No. 2.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 10 Blatchf. 350, and the statement is from 6 Fish. Pat. Cas. 254.]

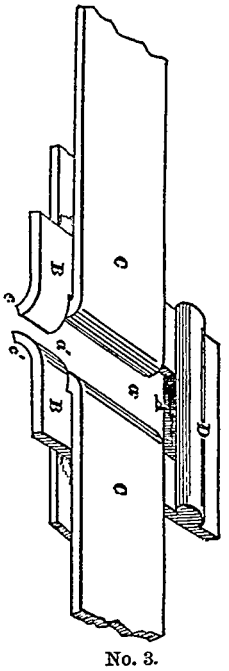
[2] [From 6 Fish. Pat. Cas. 254.]

[One end of the band was passed over the first bar on the left, through the first slot, under the second bar, through the second slot, and around the third bar; it was then brought back under the second bar, and thrust through the first slot, and over the first bar, being thus confined between the first bar and the body of the band. The other end, after being passed around the bale, was passed under the fourth bar, through the third slot, over the third bar, under and around the second bar; thence back over the third bar, through the third slot, and under the fourth bar, being thus confined between the fourth bar and the main body of the band.

[In sheet 1 of his drawings, the patentee shows this fourth bar as solid; a construction that required the end of the band to be thrust endwise under it, which, by reason of the rigidity of the ordinary band-iron, was a difficult manipulation. To obviate this difficulty, Cook introduced a slot into this fourth bar, representing the same in sheet 2 of his drawings. This modification he at first filed in the patent office as an "additional improvement," but subsequently incorporated it in his original application, which was still pending. This part of the Cook invention is set forth in the patent in the following words: "This part of my invention consists in the cutting of a slot, H, through the bar I of the buckle or clasp K, under which bar the end of the tie or hoop is pushed or slipped sidewise easily by hand. After the tie is drawn through the clasp and bent over it, it is slipped underneath the bar I sidewise through the slot H. The hole (through clasp) marked L is longer than the other two holes, for the purpose of pushing the end of the tie enough to one side after it is through the slot H to get it under the bar I. When it is all under, it can again be brought in line with the rest of the tie into the center of the clasp. This slot enables the tie to be fastened much quicker and more easily than by pushing the end of the tie endwise under the bar I, when not cut through by a slot. The slack in the tie, when around the bale before the press is relaxed, can also be taken up and held better by the buckle with a slot in it, for the tie can be bent short over the part of the clasp or buckle marked M, where it is looped on and put under the bar I sidewise, as described, instead of endwise."

[The third claim of the patent is in these words: "The herein described 'slot,' cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise."

[The "Eureka," or Beard tie, charged to be an infringement, was made under letters patent [No. 110,539] granted to George N. Beard, December 27, 1870; and is shown in the accompanying engraving.



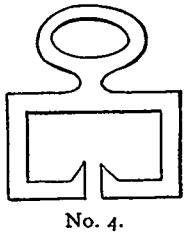
No. 3.

[The slit or slot was in one side of the buckle, and not in one of the bars embraced by the loops of the band. The mode of using this tie was to form the free end of the band into a loop before entering it into the buckle, after which it was simply hooked on to the buckle by passing the loop sidewise through the slot.

[Defendant's counsel contended that the claim in controversy was to be narrowly interpreted, being limited to a clasp having a slot cut in the "outer one of four bars, under which, without the cut, the end would have been slipped endwise;" that the position and the functions of the slot in the Beard tie were wholly different from those in the Cook tie—being in the former in the side-bar, and in the latter in the end-bar; being in the former an opening, through which the loop itself, previously formed in the band, was slipped or inserted, and in the latter an opening, through which the mere end of the band, after the loop had been formed, was to be slipped sidewise; that in the Beard tie the resistance to the strain was met by the strength that was given to one side of the tie by the fillets cast or rolled upon it, the other side being open to admit the loop, while in the Cook tie the strain was received upon a bar, supported on either hand by the sides of the tie or buckle; that the fourth bar of the Cook buckle performed the function of holding down the end of the band, being in this respect analogous to the loop used in connection with the common buckle for fastening the otherwise free end of an ordinary strap, the slot in connection with the "loop" constituting the tie in Beard's arrangement, while in Cook's arrangement the "slot" merely furnished a means of easily disposing of the end after the tie had been made; that the Cook and the Beard ties belonged to distinct categories, and operated upon entirely different principles, the one finding its friction within itself, and the other depending exclusively upon outside friction; and that Cook's tie was an impracticable device, and was abandoned by him as valueless.

[Complainant's counsel contended, on the other hand, that Cook was the first person to make a cotton-tie with an open slot, through which a band of hoop-iron could be introduced sidewise, instead of thrusting it under endwise; that this was in itself an invention distinct from the peculiar form of buckle to which he originally applied it; that he fully understood the advantages connected with the invention of the open slot, independently of the other features of his tie, as set forth in his specification; that these advantages attached to any form of buckle, in which a slot, passing from the outside of the frame to the mortise in which the ends of the band rest, enables the free end of the band to be inserted sidewise; and that the office of the "slot" in the Beard tie was indentically the same as in the Cook tie—i. e., it permitted the easy passage of the band into the clasp sidewise, instead of the cumbrous and tedious method of thrusting it through endwise.

[On the question of novelty it was insisted by the defendant that the buckle shown in Hall's English patent of 1801, fig. 16, anticipated the invention covered by Cook's third claim, under the interpretation put upon the claim by the complainant. The accompanying engraving shows the Hall buckle referred to. Reliance was also placed by the defendant upon the prior use of open rings for fastening trace-chains to the hames of harness-collars, and kindred devices.][2]



No. 4.

Fisher & Duncan and Keller & Blake, for complainant.

J. H. Latrope and S. J. Gordon, for defendant.

BLATCHFORD, District Judge. This suit is brought on letters patent, owned by the plaintiff, granted to Frederic Cook, March 2d, 1858, for an "improvement in metallic ties for cotton bales." The patent was, on the 17th of February, 1872, extended, for seven years from the 2d of March, 1872, but

[2] [From 6 Fish. Pat. Cas. 254.]

this suit is not brought on the extended term. Cook's invention is a friction buckle or clasp, to be used with an iron hoop or tie. The drawing of the patent represents the buckle as a flat rectangular plate, in length a little more than double its width, with three closed slots in it, parallel to each other, running crosswise of the plate, thus making four cross-bars, which bars are set off from the plane of the body of the plate, in alternation, the first and third bulging from one face of the plate, and the second and fourth from the other. Approaching the plate from either end of it, the end of the hoop is passed over the first bar, then under the second bar, then over the third bar, then around the further side of the third bar, then back again under the third bar, then under the hoop that is beneath the second bar, and then over the first bar, and between it and the hoop that is above it, such end of the hoop being left to project. The buckle, with the hoop thus arranged in it, being laid on the cotton bale, with the long body of the hoop uppermost, and such body being cut off at the desired length for the bale. the hoop is brought around the bale, and the unconfined end is then passed under the fourth bar, then over the hoop that is above the third bar, then under the second bar and between it and the hoop that is beneath it, then around the side of the second bar, then back again over the second bar, then over the two hoops that are above the third bar, and then under the fourth bar, and between it and the hoop that is beneath it, such end of the hoop being left to project. There are, thus, two loops in the hoop, one around the second bar and one around the third bar, the first and fourth bars serving as friction bars, to prevent the loops from slipping, by tightly confining, between such friction bars and the main body of the hoop, the parts of the hoop which are in contact with such friction bars. The parts of the hoop which form the loops pass by each other, so that when the loops, by the strain of pulling on the hoop, are brought to pull against the bars, the tendency is to turn the buckle over, end for end, and such turning over is prevented only by the action, before mentioned, of the first and fourth, or outer, or end, bars, as friction bars. The hoop is arranged in the buckle while the bale is under compression in a press, and, when the strain comes on the hoop, by the relaxation of the press, the greater the strain the greater is the action of the friction bars in holding the loops from slipping.

In addition to showing a buckle with four solid bars, the patent shows the fourth bar with a slot or slit cut through it, crosswise of its length, but at an angle, and a little to one side of the centre of its length, and with the adjacent slot in the plate made longer than the other two slots, so as to enable the hoop to be put under the fourth bar, when put under it the second time, by slipping it through the slit, and so under the fourth bar, and to be so arranged as to bear, with its upper side, against the under side of such bar, on each side of the slit. This dispenses with the necessity of putting the end of the hoop, the second time, under the fourth bar, and drawing the hoop through to its proper position, and enables the operation of completing the fastening to be effected more quickly. By the use of the slit, the slack in the hoop before the press is relaxed can be taken up and held better, as a short bend can be made at once to make the loop around the second bar, without leaving such loop to be made by drawing the hoop through under the fourth bar.

The patent has three claims: (1) "The friction clasp or buckle, for attaching the ends of iron ties or hoops, for fastening cotton bales and other packages, so that the ties are prevented slipping by the friction against a certain portion of the buckle." (2) "The looping of the ends of iron ties or hoops for bales into a buckle, by the form of which they are prevented slipping by friction, when the strain of the expansion of the bale comes on the ties, the ends of the hoops or ties not being attached together in any way, the connection being formed by a distinct buckle or friction clasp." (3) "The herein-described slot, cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise." The application for Cook's patent was filed in October, 1857.

Advantages in compressing cotton, and other articles, tightly in bales are, in greater facility of handling equal weights, occupation of less room in transportation, and diminution of liability to loss by burning or wetting. Advantages in using iron ties over rope ties are in cheapness, durability, strength, resistance to the expansive force of the bale, and less liability in the tie to be severed by cutting or burning. Iron ties for compressed bales have come to supersede all others, since efficient modes have been devised of securing the ends of the iron ties. At first, such ends were fastened together by riveting. This was too slow a process. On the 17th of June, 1856, David McComb obtained a patent, in the United States, for an "improvement in non-elastic bands for bales of cotton and other fibrous materials." He cut the hoop of the proper length, and then formed each end of it into a hook, and hooked the two hooks into each other, the end of each hook fitting closely into the bend of the other hook, the piece bent over to form each hook being about as long as the width of the hoop. Over these hooks, when put together, he placed a flat link or slide, which secured the hooks from opening when the pressure of the bale was applied, on the removal of the compressing power.

In September, 1856, Charles Swett applied, in the United States, for a patent for an "im-

provement in cotton bale ties." Swett's application was twice rejected, was then rejected again, on appeal, by the commissioner of patents, in April, 1857, and afterwards, in October, 1866, on appeal to the chief justice of the supreme court of the District of Columbia, a patent was ordered to issue. It was issued October 23d, 1866, to Charles G. Johnsen, as assignee of Swett, and antedated to April 23d, 1866. The invention of Swett consisted in so securing the metallic bands on the bales, that the elasticity of the cotton becomes an active means of fastening the band. Swett employs a metal plate, in which are two slots, parallel with each other, across the plate, the length of the slots being equal to the width of the band. From the lower and inner edges of the slots, projections extend out obliquely beneath the slots, nearly covering their lower openings. One end of the band is passed through one slot, and bent back against and under the band. The band is then passed around the bale while under pressure, and its other end is put through the other slot, and drawn tight, lapping beyond the first slot, so as to lie up against the first end of the band, out to its end. When the bale is relieved from pressure, the cotton, by its elasticity, presses the ends of the band so firmly, that they cannot be withdrawn from under the body of the band.

On the 24th of September, 1858, George Brodie applied, in the United States, for a patent for an "improvement in metallic bands for baling." The patent was granted to him March 22d, 1859. The general idea of this patent is to bend the ends of the hoop, and insert within the bend a metallic pin longer than the width of the hoop, and have a connecting link to join the two ends of the hoop. Figure 6 of his drawings shows a connecting link made by bending metallic wire into such shape that the opening in the middle of the link is wider than at its ends, the ends of the wire which forms the link meeting at or near one end of the link, where, as the specification says, its ends may be jointed and fastened together or it may be used without any such fastening. Figure 13 shows how the connecting link in figure 6 may be used without any pin in the bend of the hoop, by slipping the ends of the link into the bent ends of the hoop. In the course of Brodie's application, the patent office, in a letter to him, suggested that Cook's patent showed "the plate or link split, for more readily slipping in the end of the band."

On the 19th of September, 1859, Rollin M. Taylor applied, in the United States, for a patent for an "improvement in iron ties for cotton bales." He had a link or buckle of metal, with a rectangular hole cut in its centre to receive the loops of the hoop, and an inclined slit or slot cut in one of its sides, the slit being adapted to the thickness of the iron used for the hoop. The ends of the hoop were bent over, so as to form loops. The buckle could open laterally at the slit, to facilitate the hooking or locking of the loops. The bent ends of the hoop were to be hooked over the two sides of the frame that were next to the side in which the slit was, and the bent ends of the hoop were to be placed next to the bale. Taylor's claim, as applied for, was, the use of the buckle, formed with a slit and opened laterally, in combination with loops, to form the tie. Taylor's application was rejected, in September, 1859, on the strength of figures Nos. 6 and 13 in the drawings of Brodie's patent, and was withdrawn in December, 1860. Taylor's invention, as applied for, had been assigned to James J. McComb, the husband of the plaintiff. He had unsuccessfully attempted to introduce into use the tie of David McComb, as patented. Taylor's tie attracted his attention. After the application for a patent for that was rejected, James J. McComb modified the Taylor tie into the "arrow tie" hereafter mentioned.

On the 19th of November, 1859, John T. Butler obtained, in the United States, a patent for an "improvement in fastening metal hoops on cotton bales." His device is a plate of metal with a rectangular hole cut in it, and no slit in its frame, with hooks formed of the ends of the hoop, and hooked around opposite sides of the plate, so that the ends will lie against the bale, and be held in place by the pressure of the bale against them. His claim is to such combination, and is, in fact, like Taylor's, except as to the slit in the frame.

On the 29th of January, 1861, James J. McComb obtained, in the United States, a patent for an "improvement in iron ties for cotton bales." He takes a plate of metal, with a five-sided hole in it, whose two longest sides are opposite each other and equal and parallel, and equal in length to the width of the hoop to be used. From one of such longest sides, through the frame, to the outside, a slit or slot is cut, one side of which is turned outward a little, to facilitate the insertion of the end of the hoop. The hole is lengthened, in the shape of an arrow, or in the form of two sides of an equilateral triangle, from the ends of its two longest sides, so that the point of the arrow and the side opposite to it are about equidistant from the outside of the frame. The slit is nearer to the side opposite the point of the arrow, than it is to the place where the arrow shape commences. One hook of the hoop covers the slot, and the other is hooked around the opposite side. The claim is to the arrow-shaped hole. The specification says, that the design of the arrow-shaped end is not only to force the hoop over the slot, which it does with certainty, when the bale expands after being released from the press, but also to secure an equal bearing on the separate parts of the slit side. James J. McComb put this "arrow tie" into the market, and, being threatened by Cook with a suit for infringing

the third claim of his patent, in respect of the slit, a purchase of Cook's patent was made, and it was assigned to the plaintiff. Since the close of the war, in 1865, James J. McComb has kept the market at the South fully supplied with the "arrow tie" constructed under his own and Cook's patents, and being what is called an "open slot" tie. Open slot ties made by other persons began to appear in 1869.

In March, 1872, a suit at law, brought by the plaintiff and her husband, in the circuit court for the district of Louisiana, against George Brodie, for an infringement of the third claim of the Cook patent, by making and selling an open slot tie, was tried before a jury. There was a verdict, and a judgment, for the plaintiffs. In the same month, provisional injunctions were granted by the same court, in six suits, founded on the Cook patent, against six different forms of the open slot tie—the Gooch tie, the Wallis tie, the Alligator tie, the Dunn tie, the tie proceeded against in the suit at law against Brodie, and the tie known as the Beard tie, which is the one involved in the present suit. The suit at law, and these suits in equity, were before Judge Woods, the circuit judge. The extension of the Cook patent was opposed by the proprietors of the Beard tie and of the Alligator tie, and others.

The control of the use of the open slot tie is very valuable pecuniarily, as that tie has practically superseded the closed slot tie. Hence, the zeal and ability with which this suit has been prosecuted and defended, and the importance of the questions involved to the parties and to the public. The Beard tie, (known also as the "Eureka tie,") which is the one sold by the defendant, is described in a patent granted, in the United States, to George N. Beard, December 27th, 1870, for an "improvement in cotton bale ties." It is a plate with a rectangular oblong central hole in it, the two long sides of the hole being intended to receive and lie in the bends of the hooks formed by bending the ends of the hoop. The edges of such two long sides, instead of being straight lines, are slightly convex from end to end. The plate outside of the hole is made thicker and wider on one of the two sides which do not receive the hooks, than on the other side, and through the latter a slit or slot is cut from the outside into the central hole, to admit of the slipping of the bend of the hook through the slit into the central hole. The lips of the slit are turned down so as to bite into the bale. The tie is sold with one hook set in place. The other is readily slipped into its place, through the slit. The ends of the hoop lie next the bale. The tie is an effective one. It differs but little from the Taylor tie. As in that tie, there is no hook, in the Beard tie, pulling against the side in which the slit is cut, which is a feature of the "arrow tie." The Swett tie and the Butler tie had closed slots and no slit.

It cannot be doubted, that the form of tie with the slit so arranged that all there is to be done, of manipulation, to make the connection of the second end of the hoop with the tie-plate, after the hoop is brought around the bale, is to slip the hook, made by bending down the second end, through the slit, and into its place of bearing, is a great improvement over the complicated form of tie devised by Cook, and which, as the evidence shows, has gone wholly out of use. Nevertheless, it is claimed that the Beard tie, in common with all the other slit or open slot ties, embodies, by reason of the use of the slit to slip the bend of the hook in the hoop over the arm, the invention claimed in the third claim of the Cook patent. A determination of this question involves the construction and meaning of such third claim.

It is urged, for the defense, that what Cook does is to cut a slit or slot in the loop of a buckle, so as to slip the hoop through the slit sidewise and flatwise, instead of pushing the end under an unslit loop, endwise, and then pulling the hoop through till it becomes flat; that, in the Beard tie, the slot is in one of the walls of the quadrangle which forms the clasp itself, of which arrangement Cook gives no hint; that Beard uses such slot to dispense with passing the end of the hoop through a buckle, of which arrangement Cook gives no suggestion; and that Cook must pass both ends of the hoop through his buckle, and then uses the slit to get the projecting bit of hoop under the loop, which is not the buckle or clasp, but merely an appurtenance to it. It is true, that the Beard tie has no such loop as Cook has, and no slit in any such loop, and uses a quadrangle with a slit through one of its walls, as a clasp. But, these points of difference are, by no means, decisive of the question. Cook, in his third claim, speaks of slipping the end of the hoop sidewise underneath the bar, in contradistinction to passing such end through endwise. When there is no slit, the end of the hoop is passed through under the bar endwise; but, when there is a slit, such end is slipped sidewise underneath the bar. The use of the slit enables the part of the hoop which is required to lie against the bar, to receive the pressure of the bar above it from the pressure of the bale below, to reach its proper place by being slipped through the slit, instead of reaching such place by following the drawing or pushing of the part of the hoop intervening to the end, through underneath such bar. It is necessary for Cook to put the hoop in such place. If he did not, the strain of the compressed cotton would be likely to pull the hoop so as to destroy the loop around the second bar, and ultimately pull the second end of the hoop entirely out of the buckle. Therefore, the bar through which Cook cuts the slit, to enable the otherwise free portion near the second end of the hoop to reach its proper place, is a part of the clasp or buckle, as

much so as any other necessary part of it. Cook completes his tie, of hoop and clasp, more readily and quickly, by the slipping operation through the slit. It is true, he has previously done something towards securing the hoop to the buckle, after bringing the hoop around the bale, but what he has done is ineffective, unless the fourth bar is made to surmount the otherwise free part of the hoop. He, therefore, invented and has claimed cutting the slit or slot through such bar, (which covers the cutting it through an equivalent bar or part of the clasp,) so as to enable the part of the hoop which is to rest under a bar of the clasp to be slipped sidewise through the slit or slot, and avoid putting the end of the hoop endwise through beneath such last named bar. There is no connection between this claim and what is previously done with any other part of the hoop, or any other part of the clasp. The claim is, distinctly, to the use of the slit or slot, so cut, to effect the result indicated, for the object indicated. It would make no difference, in Cook's arrangement, if, instead of lengthening the open space adjacent to his fourth bar, and cutting a slit in such fourth bar, he had left such open space as it was, and not slit the fourth bar, but made a slit through to the outside from one end of such open space. Such arrangement would have embodied his invention, and its use now would infringe his third claim, because it would effect the result indicated, for the object indicated, by substantially the same means and mode of operation.

With this view of Cook's invention and third claim, it is very clear, that it is infringed by the Beard tie. Beard, by using his slit, enables the part of the hoop which is required to lie against the bar, to receive the pressure of the bar above it from the pressure of the bale below, to reach its proper place, by being slipped through the slit. But for that, it would have to reach such place by being brought over the top of the bar and through the open central space, all the while following the drawing or pushing of the part of the hoop intervening to the end, through underneath such bar. Beard must put the hoop in such place. If he did not, he would have no loop around such bar, and no tie. Such bar is a part of his clasp, and the bar through which his slit is cut is a part of his clasp; and it makes no difference, in the essential use of Cook's invention, that the bend of the hoop, in the Beard tie, does not embrace the side in which the slit is cut. Nor does it make any difference, that, in the Beard tie, the part of the hoop which is slipped under the arm is nearer to the bend of the loop than is the part which is slipped under the bar in the Cook tie; nor any difference, that, in the Beard tie, the bend of the loop is slipped through the slit. The part to be necessarily put in place is put in place by the same means.

In the drawings of the English patent granted to George Hall, November 28th, 1801, for an invention of "elastic fastenings for the shoes, and also for bands, garters, or ornaments for the knees, waist, arms, neck and head," there is an open slit or slot in the body of a quadrangular buckle, with four walls, to enable the bend of a loop to be passed through the open slot into the space within, so as to make the loop embrace the walls adjacent to the open slot. But, rising from within, and pointing in the same direction as the entrance through the slit, and close to the gateway, on each side, is a sharp spike. On these two spikes the elastic fabric is to be impaled, and only through them is it to reach and embrace the walls on each side of the gateway. The apparatus was not to be used with a metallic band or hoop, nor with a rigid band, but with elastic bandages or strings. The spikes are made, by the specification and drawings, an indispensable accompaniment of the open slot. It is impossible to say, with truth, that Hall's arrangement would suggest, or contains, either Cook's arrangement or Beard's. Notwithstanding the open slot of Hall, the application of the principle of looping over a hook, or slipping under a bar, by means of an opening beyond the end of the hook, or of the bar, or in the bar, to making a cotton tie to be used with rigid metallic hoops, required experiment and involved the exercise of invention.

As to the English provisional specification of Frederic James Pilliner, dated July 7th, 1856, for "improvements in clasps or fastenings for waistbands, and other descriptions of bands or straps," the counsel for the defendant conceded, on the hearing, that Pilliner's clasp had no open slot.

The link testified to by M. W. Smith, as used in New Orleans as early as 1848, to connect the hames on a harness collar with the trace chains, and enable the two to be rapidly united, the link being stationary on the hames, and the trace being slipped sidewise, in loop, into the link, is an elongated split ring, wholly unadapted to make a cotton bale tie, and not suggestive of Cook's arrangement or of Beard's.

Being satisfied of the clear right of the plaintiff in the premises, I must decree to her an account of profits and damages, in respect to the third claim of the Cook patent. As the present suit it not on the extended term, and the first term has expired, there can be no injunction in this suit.

[For other cases involving this patent, see note to McComb v. Brodie, Case No. 8,708.]

Case No. 8,707.

McCOMB v. BOARD OF LIQUIDATION et al.

[2 Woods, 48;[1] 7 Chi. Leg. News, 251.]

Circuit Court, D. Louisiana. Nov. Term, 1874.[2]

BONDS—STATE—PARTICULAR PURPOSE OF ISSUE—SUBSEQUENT DIVERSION — SUIT AGAINST STATE OFFICERS — AMENDMENT 11 TO CONSTITUTION — OBLIGATION OF CONTRACTS.

1. An act of the legislature of a state authorized the issue of fifteen millions of dollars in new consolidated bonds, to be exchanged for old bonds of the state, at the rate of sixty cents of consolidated bonds for one dollar of the old bonds, and declared that the consolidated bonds should be used for no other purpose than to take up the old bonds on the terms aforesaid, and levied an annual tax for the payment of the principal and interest of the consolidated bonds, and declared that every provision of the act should be considered a contract between the state and the holders of consolidated bonds, and the terms of the act were accepted by many holders of old bonds, and the exchange of bonds made: *Held*, that a subsequent act of the legislature which authorized the payment of consolidated bonds to general creditors of the state, dollar for dollar, was a violation of said legislative contract with the holders of the consolidated bonds, and was null and void.

2. A bill in equity brought in a United States court by the holder of such consolidated bonds against certain state officers to enjoin them from issuing consolidated bonds to the general creditors of the state, dollar for dollar, is not a suit against the state, and is not prohibited by the eleventh amendment to the constitution of the United States.

[Cited in Chaffraix v. Board of Liquidation, 11 Fed. 639, 644.]

3. The courts of the United States may entertain such a suit, and restrain the state officers from violating, under color of a void and unconstitutional law, the contract of the state with the complainants.

This was a bill in equity, which was heard upon the motion of complainant [Henry S. McComb,] for a preliminary injunction. At the same time was heard a demurrer to the bill filed by defendants. The bill was filed against William P. Kellogg, C. C. Antoine, Charles Clinton, Antoine Dubuclet, P. G. Deslonde and Michael Hahn, who, it is averred, constitute the board of liquidation of the state of Louisiana, and against the "Louisiana Levee Company." It alleges in substance that complainant is the owner of three consolidated bonds of the state of Louisiana for one thousand dollars each, issued by virtue of the provisions of an act of the general assembly, approved January 24, 1874, entitled "An act to provide for funding obligations of the state by exchanging for bonds," etc.; that by the provisions of said act, the natural persons above named as defendants, who were respectively the governor, lieutenant governor, auditor of public accounts, treasurer, secretary of state, and speaker of the house of representatives of the state of Louisiana, were constituted a board of liquidation, which was empowered to exchange the consolidated bonds, which they were authorized to issue by the act for all valid bonds and warrants outstanding at the passage of the act, at the rate of sixty cents on the dollar. The bill further alleged that under and by virtue of an act of the general assembly passed February 20, 1875, the board of liquidation was authorized and required to issue to the defendant, the Louisiana Levee Company, consolidated bonds at par, for such sums as might be found due for work done by the company up to the first day of October, 1873, after deducting credits and payments, and that unless restrained, the board of liquidation would issue the bonds accordingly. The complaint of the bill is that this action of the board will be in violation of the contract of the state, and will necessarily decrease the value of the bonds held by complainant; that the act of the legislature authorizing the issue of the bonds to the levee company is unconstitutional and void, and the bill therefore prays that the defendants, who constitute the board of liquidation, may be enjoined from issuing consolidated bonds to the levee company.

For a better understanding of the case made by the bill, it will be necessary to recite more fully the provisions of the constitutional and statute laws of Louisiana referred to in the bill. Section 1 of the act of January 24, 1875, popularly known as "the funding bill," provides that for the purpose of consolidating and reducing the floating and bonded debt of the state, the governor, lieutenant governor, auditor, treasurer, secretary of state, and speaker of the house of representatives, are authorized to prepare and issue bonds to be known as "consolidated bonds of the state of Louisiana," * * * to the amount of fifteen million dollars, or so much thereof as may be necessary. Section 2 declares that the officers designated shall constitute a board of liquidation. Section 3 provides that the consolidated bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the state, and all valid warrants drawn previous to the passage of the act * * * at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants. Section 5 provides that "the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this act," and imposes penalties on any member of the board of liquidation using or attempting to use them for any other purpose. Section 7 of the act declares that "a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the state is hereby annually levied, and shall be collected for

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

[2] [Affirmed in part and reversed in part in 92 U. S. 531.]

the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other. And it shall be deemed a felony for the fiscal agent, or any officer of the state, or board of liquidators, to divert said fund from its legitimate channel as provided. * * * If there shall during any year be a surplus arising from said tax after paying all interest due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act." Section 11 of the act declares, "that each provision of this act shall be and is hereby declared to be a contract between the state of Louisiana and each and every holder of the bonds issued under this act."

Amendments to the constitution of the state of Louisiana were proposed by the legislature on the 24th of January, 1874, and adopted at the general election in November, 1874. These declare; among other things, that "The issue of consolidated bonds authorized by the general assembly of the state, at its regular session in the year 1874, is hereby declared to create a valid contract between the state and each and every holder of said bonds which the state shall by no means and in no wise impair." The act of February 4, 1875, of which the bill complains as passed in defiance of the rights of complainant, constitutes the standing committees on lands and levees of the two houses of the legislature, a joint committee which is required to ascertain the amount due the Louisiana Levee Company for work done up to the first of October, 1873, after deducting all payments. The act further provides that it shall be the duty of the board of liquidation, upon the presentation to them of a report and certificate from said joint committee of the amount due the levee company, to issue and deliver to said company a sufficient number of the consolidated bonds of the state of Louisiana to cover the indebtedness of the state to said levee company, as ascertained as aforesaid. [Of all these provisions of the public law the court takes judicial notice.] [3]

The Louisiana Levee Company has filed a demurrer to the bill, based on two grounds: 1. That the bill did not show sufficient matter of equity to authorize a decree for the relief prayed for; and 2. That this court had no jurisdiction over the acts and doings of the board of liquidation, or to prevent or hinder the general assembly of the state to acknowledge and adjust a debt due the defendant, and that the said parties are exempt from the jurisdiction and authority of the court in the premises. The demurrer and the motion for the injunction were dependent the one upon the other, and were so considered and argued by counsel.

[3] [From 7 Chi. Leg. News, 251.]

T. J. Semmes, for complainant.
J. A. Campbell, for defendants.

WOODS, Circuit Judge: 1. It is apparent to the most careless reader, that by the passage of the so-called "Funding Act" the state of Louisiana undertook to make a contract with the holders of all valid outstanding bonds of the state and all valid warrants drawn previous to the passage of the act, who should accept its terms. What that contract was is not difficult to determine. On the one hand the holders of the outstanding bonds and warrants drawn before the passage of the act were to surrender their evidences of debt, and receive in full satisfaction therefor sixty cents on the dollar, to be paid in the consolidated bonds of the state authorized by this act. On her part the state agreed to issue consolidated bonds to the amount of fifteen millions of dollars, "or so much thereof as might be necessary," to take up the bonds and warrants at the rate just mentioned, and to pay the consolidated bonds over to the holders of the outstanding bonds and warrants, on the surrender of their evidences of debt to the board of liquidation. As an inducement to the holders of the bonds and warrants, to take sixty per cent. of their claims, not in cash, but in other evidences of debt, the state agreed that the consolidated bonds, which were to be paid to these creditors of the state, should be held and used by the board of liquidation, "only for the purpose of exchange as aforesaid," that "said bonds should be used for no other purpose or purposes than as authorized by the funding act, and that a tax of five and a half mills on the dollar should be levied annually on all the taxable property of the state, to pay the principal and interest on the consolidated bonds, and the revenue derived therefrom should be set apart for that purpose and no other." These are the express provisions of the act, and the act itself in terms declares that each provision shall be a contract between the state and each and every holder of consolidated bonds. Now what is it that the state, after entering into this solemn contract, proposes, by the act of February 20, 1875, to do? To take a portion of the consolidated bonds which were to be issued only to an amount sufficient to pay off the outstanding bonds and warrants at sixty cents on the dollar; which were authorized only for the purpose of being exchanged for bonds and warrants at that rate, which the state promised should be used for no other purpose or purposes, and any other use of which she declared shall be a felony; these bonds she proposes to give to a general creditor, dollar for dollar. This, it seems to me, would be a most palpable violation of a solemn public contract.

The suggestion that the legislature has reserved the right to use such of the consolidated bonds as may not be necessary to

take up the old bonds or warrants for the purpose of satisfying other creditors is a misconception of the funding act. In the first place, the contract is (section 1), that the state will only issue so many consolidated bonds as may be necessary to take up the outstanding bonds and warrants; (section 3) that they shall be exchanged for all valid outstanding bonds and valid warrants drawn previous to the passage of the act, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and warrants; and (section 5) that the consolidated bonds shall be used for no other purpose or purposes than as authorized by this act. Section 7 provides for a levy of a tax of five and a half mills to pay the consolidated bonds, principal and interest, and scrupulously devotes the proceeds of the tax to that purpose. Placing these provisions of the funding bill side by side, it is impossible to see where the state has reserved either an express or implied right to use the consolidated bonds to pay general creditors at par. The assumption appears to be at war, not only with the spirit and purpose of the funding act, but with its express declarations, and the attempt so to use the bonds is a flagrant breach of a contract, to which the honor and good faith of the state were pledged in the most explicit terms. An act of the general assembly which authorizes and directs such a violation of the contract of the state clearly impairs the obligation of the contract, and is therefore unconstitutional, null and void.

2. Has a holder of the consolidated bonds any remedy against this threatened breach of his contract? and if he has, what is it? "When a state becomes a party to a contract, the same rules of law are applicable to her as to private parties. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty." Davis v. Gray, 16 Wall. [83 U. S.] 232; Curran v. Arkansas, 15 How. [56 U. S.] 308. It is objected to this bill, that in effect the state of Louisiana is a party, and that the 11th amendment to the constitution of the United States forbids such a suit. This objection is answered by a reference to the cases of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738, and Davis v. Gray, 16 Wall. [83 U. S.] 220. In the latter case the court says the cause of Osborn v. Bank, decided: (1) That a circuit court of the United States may enjoin a state officer from executing a state law in conflict with the constitution of the United States, when such execution will violate the rights of complainants; (2) that when the state cannot be made a party, the court may decree against the officers of the state, in all respects as if the state were a party to the record; and (3) in deciding who are parties to the suit, the court will not look beyond the record. This authority seems to answer the objection made to the jurisdiction of the court. The case is this: The state of Louisiana has entered into a contract with certain of her creditors. Certain officers of the state, without authority of any valid law, but presuming to act under a law of the legislature, which is unconstitutional, and therefore void and no law, are about to violate the contract of the state and inflict irreparable injury upon the complainant. The authorities cited sustain the jurisdiction of the court, and justify it in interfering to prevent the mischief threatened.

It is insisted for the defense, that the attorney general of the United States is the only proper person to bring suit to have an act of the legislature declared unconstitutional and void. The authorities cited to sustain this proposition (Doolittle v. Supervisors, 18 N. Y. 155; Roosevelt v. Draper, 23 N. Y. 318; 1 Joyce, Prac. Inj. 746) concede that this may be done by a private person, when the act complained of involves some peculiar damage to his individual interests. This case falls clearly within this exception. My conviction is, therefore, that the demurrer to the bill is not well taken, and that the prayer for injunction pendente lite ought to be sustained. Ordered accordingly.

[NOTE. On appeal to the supreme court, the decree of the circuit court was affirmed in respect to prohibiting the funding of the debt of the Louisiana Levee Company in the consolidated bonds issued under the act of 1874, and reversed so far as it ruled that the said debts should not be liquidated by any other issue of bonds. 92 U. S. 531.]

Case No. 8,708.

McCOMB et al. v. BRODIE.

[1 Woods, 153; 5 Fish. Pat. Cas. 384; 2 O. G. 117.] [1]

Circuit Court, D. Louisiana. March 8, 1872.

PATENTS — THREE INVENTIONS — SUIT ON ONE — SAME PROCESS — ALL THE USES — COTTON TIES — SAME PRINCIPLE.

1. There may be a claim for two inventions in the same patent if they both relate to the same machine or structure; and an action can be sustained for the infringement of either one of these separate inventions when claimed as separate and distinct in their character.

2. Where plaintiff's patent covered three different features of invention, but suit was brought on one claim only, the jury were instructed to consider the case precisely as if the patent covered that claim alone.

3. The third claim of letters patent for cotton-bale tie, granted Frederic Cook, March 2, 1858, construed to be for the right to use an open slot cut in a buckle, which, without the cut, would be a closed buckle, so as to allow the end of the

[1] [Reported by Hon. William B. Woods, Circuit Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 1 Woods, 153, and the statement is from 5 Fish. Pat. Cas. 384.]

tie or hoop to be slipped sidewise underneath the bar through which the slot is cut.

4. If a party uses the open slot for passing the end of a cotton-tie sidewise under the slotted bar, it makes no difference whether such end is in the form of a loop or not, if the result attained is, that the end of the tie has been "slipped sidewise through the slot underneath the bar, so as to effect the fastening with greater rapidity than by passing the tie through endwise."

5. A man can not have two patents for the same process, because for different purposes.

6. When the means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device, or means, for all the uses and purposes to which it can be applied, without regard to the purposes to which he supposed, originally, it was most applicable.

7. To constitute infringement, the contrivances must be substantially identical, and that is substantially identity which comprehends the application of the principle of the invention.

8. If a party adopts a different mode of carrying the same principle into effect, and the principle admits of different forms, there is an identity of principle though not of mode; and it makes no difference what additions to, or modification of, a patentee's invention a defendant may have made: if he has taken what belongs to the patentee, he has infringed, although, with his improvement, the original machine or device may be much more useful.

9. All modes, however changed in form, but which act on the same principle and effect the same end, are within the patent; otherwise, a patent might be avoided by any one who possessed ordinary mechanical skill.

[Cited in Burke v. Partridge, 58 N. H. 353.]

10. The rule of damages at law is not what the defendant has made, or what he might have made, but it is the loss sustained by the plaintiff by reason of the infringement.

[Cited in Yale Lock Manuf'g Co. v. Sargent, 117 U. S. 536, 6 Sup. Ct. Ct. 943.]

11. If plaintiff was ready to supply the market with his patented goods, and his business was hindered or interfered with by the competition of defendant, plaintiff's damage will be the amount of profit which he has lost by reason of such interference.

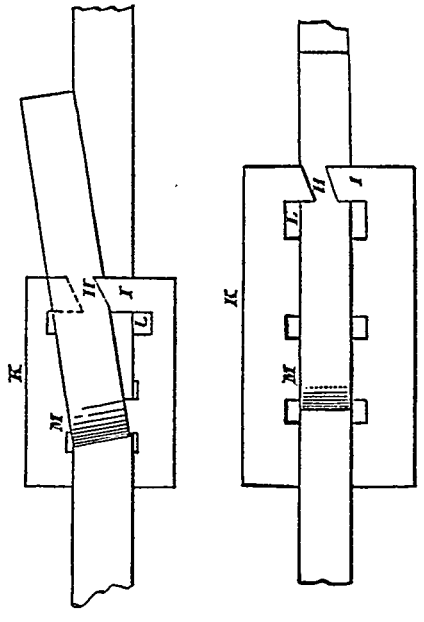
[Cited in Bigelow Carpet Co. v. Dobson, 10 Fed. 387.]

12. If a plaintiff neglects to prove that his patented article was stamped, or that he gave to the infringer the notice required by section 38 of act of July 8, 1870 [16 Stat. 203], a jury can not award him more than nominal damages.

[Cited in Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 578.]

[2] [Suit brought upon letters patent [No. 19,490] for an "improvement in metallic ties for cotton-bales," granted to Frederic Cook, March 2, 1858, and assigned to plaintiffs. The defendant, by way of reconvention, under the code of Louisiana, in addition to the denial of infringement, claimed that the plaintiffs were infringing patent for "improvement in cotton-bale ties," granted to him, March 22, 1859, and reissued April 27, 1869, and prayed judgment for damages against them. The two actions were tried together.

[In the accompanying engravings, K represents the Cook tie, having three slots and four bars. One end of the band was passed over the first bar on the left, through the first slot, under the second bar, through the second slot, and around the third bar. The end was then brought back under the second bar, and thrust through the first slot and over the first bar. The other end of the hoop having passed around the bale, was thrust under the fourth bar, through the third slot, over the third bar, through the second slot, around the second bar, thence back over the third bar, through the third slot, and under the fourth bar. To avoid the necessity of thrusting the end of the band under the fourth bar, the patentee cut a slit or opening, H, through the fourth bar, I, into the third slot, L, so that the band, when the slack was fully taken up and the end was bent over to form the

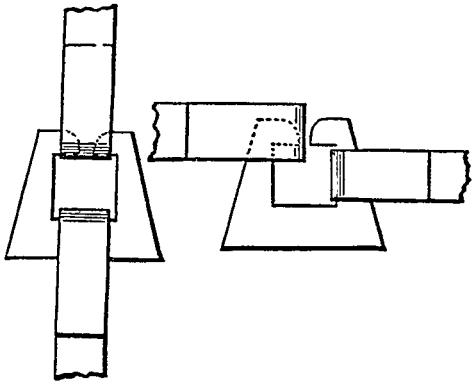


final fastening, could be passed sidewise through the opening into the slot and under the fourth bar, so as to effect the fastening with greater facility and rapidity. In the first engraving, the band is represented as passing through this opening; while in the second, it is shown in place. The claim of the patent upon which the whole controversy turned, was as follows: "The hereindescribed 'slot' cut through one bar of clasp, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in clasp, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise."

[The accompanying engravings represent the tie made and sold by the defendant. The ends of the band were bent into the form of loops, and slipped through the opening into the slot. The tie was then turned so as to bring the bar through which the slit

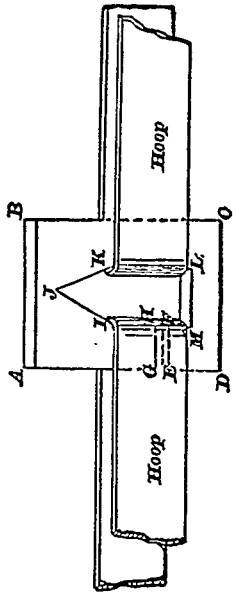
[2] [From 5 Fish. Pat. Cas. 384.]

was cut into the line of draft, the hoop embracing the bar on both sides of the slit, and the ends of the hoop being kept from open-



ing or slipping by the expansion of the cotton when the bale was released from the press.

[The patent of the defendant contained the following claim: "The connecting link of a bale-tie, having a slit or opening through its side or end, through which the hoop can be introduced into the link, as herein described, and as represented in figures 6, 7, 13, and 14."



[The "arrow" tie, manufactured and sold by the plaintiffs, and the subject of the suit in reconvention, is illustrated by the above engraving, which gives a bottom view of the tie, with the inserted hooks or ends of the band. The end of the band, by which the fastening is effected, is bent into hook form, and the hooks slipped sidewise through the opening, E, F, G, H, into the triangular space, I, J, K. The strain upon the band causes the loop to slip back into the rectangular portion of the slot, I, K, L, M, and to cover the opening by embracing the bar on each side of it. The ends of the band are held by the pressure of the bale, as in the Brodie tie.] [2]

W. M. Randolph, C. Roselius, F. A. Campbell, and S. S. Fisher, for plaintiffs.

Semmes & Mott, for defendant.

WOODS, Circuit Judge (charging jury). The plaintiffs, Mary Frances McComb and her husband, James Jennings McComb, who sues for himself and to assist his said wife, allege that Frederic Cook, March 2, 1858, obtained from the United States patent office letters patent of that date for an improvement in metallic ties for cotton-bales, issued to him as the original and first inventor; and that said Cook, for a legal consideration, afterwards assigned to the plaintiff, Mary Frances McComb, the full and exclusive right to his said improvement and invention covered by said patent, whereby, under the laws of the state of Louisiana, both the said plaintiffs have the same rights and to the same extent that were granted to said Cook; that they have, since said assignment, and the said Cook before said assignment, and immediately after the issuance of the patent, put upon the market and sold to the public said invention and ties made on the principle described in said patent; and that the defendant, George Brodie, knowing the rights of plaintiffs, and that they were making large profits by the sale of cotton-ties made according to the plan covered by said patent, and with the purpose of invading the rights of said plaintiffs, did, in the year 1868, and after the date of said patent and the assignment, make and use, and vend to others to be used, the invention aforesaid, without license from plaintiffs, or either of them, to the amount of two hundred tons of cotton-ties, to the damage of plaintiffs in the sum of ten thousand dollars.

The answer of defendant to this, the plaintiffs' cause of action, is substantially a denial of the averment that he has in any manner violated the rights of petitioners by the manufacture, use, or sale of ties made on the mechanical principle secured by said letters patent; or that he has at any time made, used, or vended to others to be used, the invention described in the letters patent aforesaid.

The defendant, by way of reconvention, also alleges, that on March 22, 1859, he obtained from the United States patent office letters patent of that date for an improvement in cotton-bale ties, which said letters patent were surrendered April 27, 1869, and, on that date, a patent with amended specifications and claims was reissued to him; and that since April 27, 1869, plaintiffs have infringed on his said invention, by making, using, and vending to others to be used, large numbers

[2] [From 5 Fish. Pat. Cas. 384.]

of said ties, made according to the plan patented by him, and without his license, to his damage four hundred thousand dollars, for which amount he, assuming the character of plaintiff in reconvention, prays judgment. Under the practice in this state, the denial of plaintiff of the reconventional demand of defendant is presumed, and no formal written denial is required. This abstract of the pleadings presents the issues of fact submitted for your decision.

Your first inquiry will therefore be, has the defendant invaded the rights of the plaintiffs by making, using, or vending, without their permission, the device or contrivance secured to them by the letters patent issued to Cook? To maintain the issue on their part, plaintiffs introduced the letters patent granted to Cook, with the accompanying model, draughts, and schedule, showing the claims of the patentee and the assignment to them of all the rights secured by said letters patent. Whatever invention, therefore, Cook had secured to him by his patent is now the property of plaintiffs. The schedule referred to in Cook's patent, and making part of the same, and which is in evidence, discloses that the patent was intended to cover three separate and distinct inventions: 1. A friction-buckle or clasp, represented by figures 1, 2, and 3, showing the different views of it, for attaching the ends of iron ties or hoops for fastening cotton-bales or other packages. 2. The manner of looping the ends of the iron ties or hoops into a buckle, by the form of which they are prevented from slipping by friction when the strain of the expansion of the bale comes on the ties. 3. The slot cut through one bar of the clasp or buckle, as shown in the diagram, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise. On this trial plaintiffs say that they complain only of the infringement of the device last above named. Independent things, separable and separate things, where any combination arises, provided they are cognate, relate to the same invention and have relation to the same subject matter, the same object to be accomplished; undoubtedly these separate claims can be made in the same patent. Densmore v. Schofield [Case No. 3,809].

There can be no question that there may be a claim for two inventions in the same patent, if they both relate to the same machine or structure, and an action can be sustained for the infringement of either one or the other of these separate inventions, when claimed as separate and distinct in their character. Lee v. Blandy [Id. 8,182]; Electric Tel. Co. v. Brett, 4 Law & Eq. Rep. 358; Norm. Pat. 108, 109. So the patent of Cook covering, as we have said, three separate and distinct inventions, and these inventions all being cognate and relating to the same subject matter, the plaintiffs may well prosecute for the infringement of any one of them. They have elected to do this in the case on trial, and they only demand damages for the infringement of the last claim set out in the schedule. This claim, as already stated, is for a slot cut through one bar of the buckle or clasp for uniting cotton-ties, which enables the end of the tie or hoop to be slipped sidewise underneath the bar in the clasp or buckle, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise. You are authorized to consider this case precisely as if Cook's patent covered only the last claim just set out; in other words, as if the patent secured the right to a slot cut through the clasp or buckle for uniting cotton-ties, so as to enable the end of the tie to be slipped sidewise under the bar of the buckle instead of endwise, and nothing else.

The production of the patent is prima facie evidence that the several grants of right contained in it are valid, and that the several things, matters, and devices covered by it were new; that they were useful; that they were the invention of Cook. Potter v. Holland [Case No. 11,330].

It was competent for defendant, by giving thirty days' notice thereof to plaintiffs, to show, if he could, either, first, that the invention had been patented or described in some printed publication prior to Cook's supposed invention; or, second, that Cook was not the original inventor or discoverer of any material or substantial part of the thing patented; or, third, that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. Act Cong. July 8, 1870, § 61 [16 Stat. 208]. This notice was not given, and these matters are not at issue; nor is there any denial that the device described in Cook's third or last claim is useful. You may then take it as established that this invention was, when patented, new; that it is useful; that Cook was the first inventor; and that, by assignment, plaintiffs are invested with all the rights of Cook in the patent. In other words, there has been no attempt to overthrow the prima facie case made by the production of the patent and its assignment.

But the question is made, was the device or invention described in Cook's third claim a patentable device or invention? The patent itself is prima facie evidence that it was. A patent can not be granted for a principle or an idea, or for any abstraction whatever; for instance, for the naked idea of a slit, slot, or aperture, disconnected from any application. But when the idea is applied to a material thing, so as to produce a new and useful effect or result, it ceases to be abstract, and becomes a proper subject to be covered by a patent. For instance, the idea of bending the end of a cotton-tie in a particular manner, would not be the subject of a patent; but when the idea is applied

to the fastening of the tie to a clasp or buckle, so as to produce a new and useful result, then it becomes patentable. So the abstract idea of a slot in a buckle is not of itself patentable; but when the idea is applied to a buckle, so that the result is new and useful, or so that an end is accomplished in a novel and useful manner, then the idea ceases to be abstract, and becomes the proper subject of a patent. I, therefore, instruct you, that the open slot cut through one bar of a buckle in a cotton-tie, for the purpose set forth in Cook's third claim, is patentable; and, considered as separate and distinct from the other inventions covered by his patent, is a valid and patentable subject matter.

The court having thus disposed of the foregoing questions, it will be your duty to decide whether the defendant has, as alleged by the plaintiffs, infringed their rights under the Cook patent. In order that you may reach an intelligent conclusion on the subject, it is proper for the court to construe for you the third claim of Cook's patent, which is the only one alleged to be infringed by the defendant. What is secured by this claim is the right to use an open cut in a buckle, which, without the cut, would be a closed buckle, so as to allow the end of the tie or hoop to be slipped sidewise underneath the bar through which the slot is cut, and thereby to effect the fastening with greater ease, and obviate the necessity of the difficult process of pushing the end of the tie endwise under the bar. The specification and model are both in evidence, and you will have no difficulty in comprehending the idea of the inventor. The patent covers all the modes and processes by which the principle of the invention is made operative in practice. Tilghman v. Werk [Case No. 14,046]. The man who has made the first invention has it for all the uses to which it is applicable. Woodman v. Stimpson [Id. 17,979]. A man can not even have two patents for the same process, because for different purposes. When the means, devices, and organization are patented, the patentee is entitled to the exclusive use of this mechanical organization, device, or means for all the uses and purposes to which it can be applied —to every function, power, and capacity of his patented machine or device—without regard to the purposes to which he supposed originally it was most applicable. Conover v. Roach [Id. 3,125].

The plaintiffs claim the open slot in a buckle to facilitate the passage of the end of a cotton-tie under the bar of the buckle sidewise and not endwise. Now, he is entitled to the benefit of that device when that purpose is accomplished by the means provided, and substantially in the manner provided. If a party uses the open slot described in the third claim of this patent for passing the end of a cotton-tie sidewise under the slotted bar, it makes no difference whether such end is in the form of a loop or not, if the result attained is that the end of a tie has been "slipped sidewise through the slot underneath the bar, so as to effect the fastening with greater rapidity than by passing the end of the tie through endwise." Then the result is the result claimed by the patent, and it is accomplished substantially by the means set forth in the patent. I say to you, therefore, that the third claim of the Cook patent covers the open slot in a cotton-tie buckle used for the purpose of passing the end of the tie sidewise through the slot under the bar, no matter by what other manipulation of the tie that result is attained; and I say to you, further, that it is not necessarily connected with the remainder of the Cook tie, and it covers the open slot used on other forms of buckle for substantially the same purpose, and in substantially the same way.

With these instructions in mind, you will decide the issue whether or not defendant has infringed upon the third claim of plaintiff's patent. The defendant contends that the tie sold by him, and which has been exhibited to you, is not an infringement upon the patent of the plaintiffs; that the principle of the two is not identical, but different. Whether this is the fact, you must determine from the weight of the evidence, under the instructions of the court. If the device on the buckle sold by defendant for the purpose of passing the end of the tie under the slotted bar is substantially the same as the device claimed by plaintiffs' patent, then defendant has infringed upon plaintiffs' invention. The contrivances for the purpose in view must be substantially identical, and that is substantial identity which comprehends the application of the principle of the invention. If a party adopts a different mode of carrying the same principle into effect, and the principle admits of different forms, there is an identity of principle, though not of mode. Page v. Ferry [Id. 10,662]. And it makes no matter what additions to or modifications of a patentee's invention a defendant may have made: if he has taken what belongs to the patentee he has infringed, although with his improvement the original machine or device may be much more useful. Howe v. Morton [Id. 6,769]. All modes, however changed in form, but which act on the same principle and effect the same end, are within the patent; otherwise a patent might be avoided by any one who possessed ordinary mechanical skill. If you shall reach the conclusion that defendant has not infringed the patent of plaintiffs, that will conclude your duties on this branch of the case; but if you find he has infringed, it will then be your duty to pass upon the question of damages. The amount of damages is a question solely for your consideration; but it is the duty of the court to instruct you as to the rules of law by which the damages are to be estimated.

This rule is not what defendant made by

the infringement, or what he might have made, but it is the loss sustained by plaintiffs by reason of the infringement. The amount of this loss you must gather from the evidence. It is proper to inquire how many customers were diverted from plaintiffs by the wrongful conduct of defendant, and what loss plaintiffs have sustained in profits by reason of such diversions. If plaintiffs were ready to supply the market with their patented goods, and their business was hindered or interfered with by the competition of defendant, plaintiffs' damages will be the amount of profit which they have lost by reason of such interference.

It now remains to consider the other branch of the case—to wit, the defendant's claim in reconvention. This claim of defendant has already been stated in giving the substance of his answer, and you are to consider and determine from the proofs whether plaintiffs have infringed upon the patent of defendant. To assist you in this inquiry, it is the duty of the court to construe the letters patent under which defendant claims. The third claim in defendant's reissued patent covers a link made with an open slot, of such a construction that the tie can be introduced in the manner shown in figures 6, 7, 13, and 14, which permits the link to be turned after the hoop has been inserted. This patent of defendant does not cover the open slot, as claimed by plaintiffs. It is in proof, and there seems to be no controversy upon the point, that the plaintiff, J. J. McComb, has sold what is known to be the arrow-tie, and it is the sale of this tie which the defendant claims to be an infringement upon his patent. I instruct you, if the arrow-tie is so constructed that it can not be turned after the tie is passed through the slot in substantially the same way as described in Brodie's patent, it will not infringe that patent. But if it can be so turned, and is intended to be used in that way, or is so used by plaintiffs, then it is an infringement. The principles of law laid down in reference to the plaintiffs' branch of the case apply to and will govern the branch now under consideration. If, however, you should be of the opinion that plaintiffs have infringed on defendant's patent, you will not be authorized to return any damages for him if he failed to show that he has so complied with the law as to entitle him to recover damages.

The act of congress, approved July 8, 1870, § 38 (16 Stat. 203), requires that every patented article sold shall be stamped with the word "patented," and the day and year the patent was granted; and, in any suits for infringement by the party failing so to mark, no damages shall be recovered by plaintiff, except on proof that the defendant was duly notified of such infringement, and continued, after such notice, to make, use, and vend the article patented. So that, if defendant has neglected to prove that his patented article was stamped, or that he gave the notice required by the statute, you can not award him more than nominal damages. My recollection is that no such proof was offered; and, if this be so, you can return nominal damages only for defendant. This comprises all that I deem necessary to say, except to add that your duty is to approach the consideration of the case with minds unbiased and uninfluenced, save by the testimony, the arguments of counsel, and the charge of the court.

It is your duty to dismiss from your minds all preconceived opinions of the merits of this controversy, if any such you have, and decide the case as it has been submitted to you. Your function is to pass upon the issues of fact, applying the law as given you in charge by the court. Such is the rule for the administration of justice, and such is the obligation of your oath.

[The jury found a verdict for plaintiffs, and rejected the claim of defendant in reconvention. Upon the verdict, the court rendered judgment for plaintiffs, with costs.] [2]

[Patent No. 19,490 was granted to F. Cook March 2, 1858. For other cases involving this patent, see McComb v. Beard, Case No. 8,706; Cook v. Ernest, Id. 3,155; American Cotton Tie Co. v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52.]

Case No. 8,709.

McCOMB v. CREDIT MOBILIER et al.

[5 Reporter, 390; [1] 35 Leg. Int. 29; 13 Phila. 468; 5 Wkly. Notes Cas. 80; 24 Int. Rev. Rec. 223; 25 Pittsb. Leg. J. 188.]

Circuit Court, E. D. Pennsylvania. Jan. 8, 1878.

CORPORATIONS—SHARES—SALE TO ALLEGED AGENT—PAYMENT BY DRAFT ON PURCHASER—REFUSAL TO ACCEPT DRAFT — SHARES NOT DELIVERED—CONTRACT.

The sale of the shares of a corporation by the officers thereof to an alleged agent, and the receipt of a draft from him, for the purchase-money, on the alleged purchaser, is a sale for cash. And the refusal of the alleged purchaser to pay the draft, the shares not having been delivered, ends any claim of the alleged purchaser, or of the alleged agent, on or for the shares.

In equity. The bill set forth that in March, 1866, the complainant [Henry S.] McComb agreed with Crane, the treasurer of the Credit Mobilier, to take two hundred and fifty shares of the capital stock of the corporation, and draw for that amount on Fant, for whom the shares were taken. Fant declined paying the draft and taking the stock. McComb then agreed to take up the draft, and Fant transferred his right to the stock to him. McComb tendered $25,000, the agreed price of the shares in May, 1866, but refused to allow Crane to have the money, unless he would then issue him a certificate. Crane offered a receipt, and promised a certificate on the return of the president, who was then

[2] [From 5 Fish. Pat. Cas. 384.]

[1] [Reprinted from 5 Reporter, 390, by permission.]

in Omaha. McComb refused to pay on these terms. In June, 1866, the entry of the receipt of the $25,000 for the stock by the draft on Fant was cancelled by a cross entry. The bill prayed that the stock should be issued to McComb with all dividends paid in the interval. Under the ruling of the court, the only material point on the present hearing was whether an ownership of shares by contract was shown.

Jas. E. Gowen and Jeremiah S. Black, for complainant.

The contract passed the title. The books showed that the draft on Fant was accepted as payment. While the stock was below par the plaintiff was given no reason to suppose his right would be denied, and the remedy of the company was to sue on the draft.

R. E. McMurtrie, contra.

The contract was for cash, the draft being taken as cash. When that was returned unpaid—no shares having been issued—the situation of the parties was precisely that of a seller for cash who receives a check on a bank where there are no funds, and the goods have not been delivered. The purchaser cannot keep the seller forever in the position of one who retains goods, as security for the price. The act of the company in cancelling the credit by the cross entry in June, 1866, showed they had abandoned the contract. After that the position of McComb was that of any other buyer for cash, where nothing had been paid and no delivery made. No title ever passed. It was merely contractual, and that ended by the neglect to pay within a reasonable time.

McKENNAN, Circuit Judge. The Credit Mobilier of America is a corporation established by the laws of the state of Pennsylvania, and its officers, who represented it in the transaction upon which the complainant founds his title to relief, appear to have been authorized to receive subscriptions to its capital stock, and to issue such stock to subscribers on payment of its par value in cash, and they may have had incidental authority to allow a reasonable time for such payment. But they had no power to give an indefinite extension of credit, and the complainant could not by any arrangement or combination with them obtain it. Dealing with the ministerial officers of a corporation touching a subject over which they had only such control as was clearly conceded to them, it was his duty to inquire into the source and extent of their authority, and he is, therefore, chargeable with knowledge of its limitations, and of the necessary conditions under which they could bind their constituent. Upon the admitted facts in the case, there was no payment or authorized waiver of payment of the stock for which the complainant seeks to make the defendants accountable. He did not, therefore, acquire any title to the stock. This view of the case renders it unnecessary to consider whether the complainant's inaction, or imputed acts of disclaimer on his part, or his alleged assent to other dispositions of the stock, may have induced or sanctioned the issue of the stock of the whole capital to other persons, so that it would be against equity to sustain his present contention. Irrespective of these considerations, the court is of opinion that he is not entitled to relief, and his bill is therefore dismissed with costs..

McCOMB (CHICAGO, ST. L. & N. O. R. CO. v.). See Case No. 2,670.

Case No. 8,710.

McCOMB v. ERNEST.

[The case reported under above title in 1 Woods, 195, is the same as Case No. 3,155.]

Case No. 8,711.

McCOMBER v. CLARKE.

[3 Cranch, C. C. 6.] [1]

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

NOTES—VOLUNTARY INDORSER—PRESUMPTION—RIGHTS.

If a man writes his name in blank on the back of a note to which he is not a party either as payee or indorsee, before the note comes into the hands of the plaintiff, the presumption is that he did so for the purpose of making himself liable as the indorser of an ordinary negotiable note, and as if it had been made payable to himself or order, and not otherwise; and he is entitled to all the rights of an indorser.

[Cited in Buck v. Hutchins (Minn.) 47 N. W. 809.]

Assumpsit, on a note made by one Mozart, payable to the plaintiff, or order, and indorsed in blank by the defendant. The first count charged the defendant as maker of a note, of similar import as that signed by Mozart. The second count was upon an express guaranty of payment of the note of Mozart. The third count also was upon the guaranty. The fourth count was upon a promise in writing to pay the debt due by Mozart to the plaintiff.

Mr. Randall and R. S. Coxe, for plaintiff, contended that they have a right to write a promissory note over the name of the defendant, similar to that signed by Mozart; and cited Am. Prec. 49, 149; Collis v. Emett, 1 H. Bl. 313; Russel v. Langstaffe, 2 Doug. 514; Josselyn v. Ames, 3 Mass. 274; Moies v. Bird, 11 Mass. 436; Violett v. Patton, 5 Cranch [9 U. S.] 142.

Mr. Moffit, contra. The Massachusetts cases are under the peculiar law of that state.

Mr. Swann, on the same side. If the pa-

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

per is blank when issued with the name upon it, it may be filled up with an absolute promise; but when the note is made payable by A to B, or order, and it be afterwards indorsed by C, you can only fill it up with such an engagement as that of an indorser. 1 Chit. Prom. Notes, 64; Bishop v. Hayward, 4 Term R. 470; Mainwaring v. Newman, 2 Bos. & P. 125.

Mr. Coxe, in reply. If the defendant intended to limit his liability to that of an indorser, he would have taken care that the note should be made payable to himself in the usual form.

THE COURT, on the next day, having examined the authorities cited; and having also referred to the cases of Vowell v. Lyles [Case No. 17,021], in this court at Alexandria in July term, 1807; Cooke v. Weightman [Id. 3,180], at the same term; Janney v. Geiger [Id. 7,212], at July term, 1809; and Offutt v. Hall [Id. 10,449], at July term, 1808,—the latter of which cases is precisely like the present,—was of opinion, that from the appearance of the note itself, the presumption is that it was written on the paper before the indorsement by the defendant; and that the indorsement was written before the note came into the hands of the plaintiff, and on the day of the date of the note; that if such were the facts, it is natural to presume that the defendant wrote his name on the back of the note for the purpose of making himself liable as the indorser of an ordinary negotiable note, and as if it had been made payable to himself or order, and not otherwise; and that he was entitled to all the rights of an indorser. The plaintiff then asked leave to amend, which was granted; a juror was withdrawn, and the cause continued. At a subsequent term the plaintiff became nonsuit.

McCONE (COOLIDGE v.). See Case No. 3,186.

McCONICO (HOPKIRK v.). See Case No. 6,696.

Case No. 8,712.

In re McCONNELL.

[9 N. B. R. 387; [1] 10 Phila. 287; 31 Leg. Int. 61; 21 Pittsb. Leg. J. 107.]

District Court, D. New Jersey. Feb. 3, 1874.

BANKRUPTCY—AMENDING PROOF—SECURITY—RENT—WAGES—PRIORITY.

1. A sale of the goods of a manufacturer who had been declared a bankrupt was made by order of court at the manufactory, and the proceeds paid to the assignee, which amounted to two thousand one hundred and sixty-six dollars and seventy-four cents. The landlord claimed two thousand seven hundred dollars for one year's rent; there was also due to operatives fifteen hundred dollars. The laws of New Jersey secure to the landlord a preference over other creditors, for one year's rent, from the proceeds of the sale of personal property on the demised premises; the same privilege to operatives in manufactories, for one month's wages. The landlord proved his claim for rent as an unsecured creditor, but afterwards asked leave to amend the proof by setting forth his security. To this the assignee objected, and claimed further that the operatives were entitled to be paid for one month's wages in preference to the claim of the landlord. *Held*, that a creditor having security, and proving his demand in ignorance of his privilege, and omitting to mention his security, should be allowed in the absence of fraud to amend his proof.

2. The twenty-eighth section of the bankrupt act [of 1867 (14 Stat. 530)] does not give to the five classes of creditors therein enumerated, any priority over secured creditors. By the laws of New Jersey, landlords and operatives, in cases of this nature, are entitled to the payment of their preferred claims, pro rata.

[In the matter of William McConnell, a bankrupt.]

E. Mercer Shreve, for landlord.

John H. Voorhees, for assignee and operatives.

NIXON, District Judge. A petition in bankruptcy in this case was filed by creditors against the bankrupt, May 10th, 1873. After adjudication, but before the appointment of the assignee, to wit, May 22d, 1873, upon representation made to the court, on behalf of the creditors, that the personal property of the bankrupt was of a perishable nature, and deteriorating in value, an order was entered directing the marshal in charge to make sale of the same, and to pay over the proceeds thereof to the assignee, when he should be appointed. The assignee has received from the marshal, and holds for distribution, the sum of two thousand one hundred and sixty-six dollars and seventy-four cents, which is claimed by T. Edgar Hunt, the landlord of the bankrupt, for rent due to him from the bankrupt, at the date of adjudication, for the premises on which was the personal property, at the time of the sale. By the contract between the parties the amount of rent for one year to May 1st, 1873, due to the claimant, was two thousand seven hundred dollars and seventy-seven cents, for the payment of which he claims a lien and preference upon the fund in the hands of the assignee. The bankrupt at the date of the adjudication occupied the premises as a manufacturer, and was engaged in the manufacturing business. He had in his employ a number of operatives, to whom he was indebted in various sums for labor. It is also claimed that these operatives are entitled to a preference in the payment of their demands against the estate. First, by virtue of the first section of the act, entitled, "An act to secure to operatives in manufactories, and other employees, their wages," approved March 13th, 1856; and, second, by the provisions of the twenty-eighth section of the bankrupt act, subject, however, to the limitations in both of these acts.

[1] [Reprinted from 9 N. B. R. 387, by permission.]

First. In regard to the claim of the landlord. The bankrupt act makes no provision for a preference in favor of the landlord; but, in its administration, it is undoubtedly the duty of the court to recognize and enforce any lien which he may have by virtue of the state law. In re Wynne [Case No. 18,117]. By the fourth section of the act concerning landlords and tenants (Nix. Dig. 490), no goods and chattels are liable to be taken from demised premises by virtue of any execution, attachment, or other process, unless the party at whose suit the process is sued out, before the removal of the goods from the premises, shall pay to the landlord all rent due, not exceeding, however, one year's rent. The warrant by which the marshal seized the goods and chattels in question being a process, the landlord's lien existed at the time of the seizure, and, in the theory upon which the bankrupt law is administered, still exists upon the fund in court, unless he has done something to waive or avoid his preference. But it is insisted, in behalf of the assignee, that the landlord has waived his lien or security, by making proof of his whole demand against the estate, as an unsecured claim. It appears that the 9th day of June, 1873, was the time appointed for the first meeting of the creditors for the election of an assignee; that the claimant made proof of his debt before E. R. Bullock, Esq., United States commissioner, on the 6th day of June, for three thousand one hundred and sixty-four dollars and thirteen cents, in which was included his claim for rent and interest thereon, amounting to two thousand nine hundred and seventy-five dollars and eighty-six cents; that he claimed the whole sum as unsecured creditor, alleging in his proof, that he had not received any satisfaction or security whatever, for any portion thereof, and that he filed this proof with the register, at the time of the election of the assignee, and participated as an unsecured creditor in the said election.

It also appears in the evidence that the claimant has had conversations, not only with the marshal at the time of the sale, but with the assignee at various times since his appointment, in reference to a lien which he had, or ought to have upon the goods, for the payment of this rent; that these conversations, however, were rather suggestions on his part that he should have a lien, than a claim that he had such right. He testified, that except these general talks on the subject, he never claimed of the assignee any preference as landlord, until after he employed Mr. Shreve, as counsel, in October, 1873. It further appears that there is nothing in the case which in the slightest degree impeaches the good faith of Dr. Hunt. He seems to have acted throughout, in ignorance of his privilege, as landlord, and this ignorance arose either from his not making the proper inquiries in regard to his rights, or from being misled by those upon whom he relied for information. Under the circumstances, it becomes an interesting question, whether, in deference to the claims of the unsecured creditors, the court must hold these acts, or omissions, of the claimant to be a waiver of his security, or whether he should now be permitted to withdraw or amend his proof, and take the fund in satisfaction of his claim, as the landlord of the bankrupt.

The general rule of law unquestionably is, that a proof of debt by a secured creditor, without reference to the security, and without apprising the court of its existence, is a waiver and relinquishment of the security. Stewart v. Isidor, 5 Abb. Prac. (U. S.) 68; In re Bloss [Case No. 1,562]; Wallace v. Conrad, 3 N. B. R. 10; In re Stansell [Case No. 13,293]. This result is supposed to spring necessarily from the nature of the transaction, and because the creditor, by such proof, perpetrates a fraud upon the rights of the general creditors. The object of the proof is to enable him to have a voice in the selection of an assignee, and to participate in the dividends of the estate. A secured creditor cannot vote, nor can he share in the dividends, until the value of his security or lien has been ascertained, and he has proved for any excess of his demand above its value. By proving for his whole debt, and concealing his security, he puts himself in a position to have equal dividends with the other creditors, although he may also receive payments, in whole or in part, from the property on which he has his lien. But it is a familiar principle that, when the reason of a rule ceases, the rule itself does not apply. Was any such fraud intended, or could it result in the present case? The claimant does not insist upon his lien, and at the same time asks that his proof may stand. As soon as he is advised that a mistake has been committed in putting in his proof, he asks to withdraw or amend it, in accordance with the requirements of the act. Why should he not be allowed to do so? Who has lost any rights by his mistake, or been misled by it? His lien existed when the petition in bankruptcy was filed, and the petitioning creditor knew, or ought to have known, that the interests of the general creditor in the estate were in subordination to his claim for rent, as the landlord of the premises. The only privilege resulting to the claimant, by filing his proof without referring to the lien, was, that he took part in the election of an assignee. My first impression was, that this ought to preclude him from being allowed to amend his proof. But there is no evidence that he gained any advantage thereby, or that the other creditors have been in any wise prejudiced in consequence of it, or that the claimant was influenced by any fraudulent intent in thus proceeding. In the absence of proof, it is the duty of the court to presume that none existed.

The general rule above stated that a proof of claim, without naming the security, is an implied waiver or relinquishment of the security, has long been recognized in the ad-

ministration of bankruptcy estates in England, and it is founded upon the presumption of fraud in the creditor. The cases of Ex parte Solomon, 1 Glyn & J. 25; Ex parte Downes, 1 Rose, 96; and Ex parte Hornby, Buck, 351,—are generally relied on to sustain the rule. But in a subsequent case pending in the exchequer (Grugeon v. Gerrard, 4 Young & C. 119), where this broad position was urged by the counsel in the argument, Maule, J., in delivering the opinion of the court, said: "Whether, on application to the court of review, the assignees (in bankruptcy) may be able to make out a case, which may induce that court to order the bank to deliver up their securities, is a matter on which it is not for us to speculate. Great jealousy is properly felt, on the part of those who exercise jurisdiction in bankruptcy, against permitting parties who have proved on the footing of holding no security, afterwards to withdraw their proof and set up a security. But where, as in this case, the proof has obviously been made in ignorance of the existence of the security, it is highly probable that the court would grant relief." Under the bankruptcy act of 1841 [5 Stat. 440], Judge Randall, of the district court for the Eastern district of Pennsylvania, in Ex parte Harwood [Case No. 6,185], allowed a creditor to withdraw the proof of his debt, it appearing that under a mistake of the law, he had proved for the full amount of his demand, without deducting the value of his security. In delivering his opinion, he said: "In this case there was no concealment, and there is no allegation of fraud. Nor is it pretended that the creditor elected to surrender his securities, and come in on the estate for a dividend of the general assets. * * * The proof having been made for the full amount of the creditor's demand, without deducting the value of the security, as should have been done, and this appearing to be through mistake, the creditor has leave to withdraw his proof of debt." And under the present bankruptcy law, Judge Jackson, of the district court of West Virginia, in Re Brand [Id. 1,809], reached the same result. "The action of the creditor in the case," he said, "presents the naked question, whether, being ignorant of his legal rights, he shall be held to intend what his acts would seem to imply. I think not. It is manifest from his affidavit, that his object was to give the assignee notice of his claim, and it evidently did not occur to him, that in doing so, he would waive any legal right. His action merely showed a want of familiarity with the provisions of the law. This fact should not operate to his prejudice, when we know that much diversity of opinion exists in the courts as to the true construction of some of its most important provisions. For the reasons assigned, I am not disposed to require a creditor, who inadvertently or ignorantly proves his debt, unaccompanied with fraud, to surrender his lien and participate in the general distribution of assets, but feel inclined to permit a creditor, under such circumstances, if he elect to do so, to withdraw the proof of his debt and rely upon his security."

Without multiplying authorities, I am of the opinion, that there is no proof of fraud on the part of the claimant, that should constrain the court to refuse to allow him to amend his proof in conformity with his rights in the estate at the time of the adjudication, and that his mistake in the premises ought not to be held to discharge his lien. But the case does not end here. The net proceeds of the sale of the goods and chattels amounted to two thousand one hundred and sixty-six dollars and seventy-four cents. The rent due to the claimant is ascertained to be two thousand seven hundred dollars and seventy-eight cents, which will more than absorb the fund in the hands of the assignee. It appears that there is also due to the laborers and operatives, for work and labor in the manufacturing establishment of the bankrupt, about eighteen hundred dollars; and the counsel of the assignee insists that by the twenty-eighth section of the bankrupt act they are entitled to a preference over the landlord. But I think he has misapprehended the provisions and intent of the section. It creates preferences in the distribution of the bankrupt's assets, and states the order of payment to be observed by the assignee. It does not refer to any part of the estate derived, as in the present case, from the sale of property, on which creditors may have a specific lien. If the assignee has any distribution to make to the general unsecured creditors, he must take notice that this section enumerates five classes of creditors, who are to receive their claims in full, in the order stated, before any dividend is declared; the fourth class being to operatives, clerks, or house-servants, who are to be paid an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of the proceedings in bankruptcy.

It is further insisted that the operatives and employees are entitled to be paid out of this fund, to the extent of one month's wages, in preference to the landlord, by the provisions of the first section of "the act to secure to operatives in manufactories, and other employees, their wages," passed by the legislature of New Jersey, and approved March 13th, 1856. The first section provides, that no goods or personal property, belonging to any manufacturer, or other person or corporation, shall be liable to be removed by virtue of any execution, attachment, or other process, unless the party at whose suit the process was issued, shall first cause to be paid to the operatives, mechanics, and other employees, of the manufacturer, person, or corporation, the wages then owing

to them, provided the same shall not exceed one month's wages. The second and only remaining section, makes provision for their subsequent payment, if the officer holding the writ should in fact remove the goods without first making the payment required in the first section. The phraseology of the two sections is so strikingly similar to the fourth and fifth sections of the act concerning landlords and tenants, that the conclusion is irresistible, that the former was copied from the latter. What was the intention of the legislature in passing the latter act? Did they mean to give to operatives and employees a preference over the landlord, in the payment of a month's wages, or did they mean to put them upon the same footing? If the former, then the last enactment must be held to repeal pro tanto the sections which secure to the landlords a privilege over other creditors. But no repealing clause occurs, and repeals of statutes, by implication, are not favored by the courts. It was said by the supreme court, in McCool v. Smith, 1 Black [66 U. S.] 459, that one statute is not to be construed as a repeal of another if it be possible to reconcile the two together. And Dwarris, in his Treatise on Statutes, 154, of the American edition, says: "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter, and the repugnancy such, that the two acts cannot be reconciled; for then, 'leges posteriores, priores contrarias abrogant.' The leaning of the courts is so strong against repealing the positive provisions of a former statute by construction as almost to establish the doctrine of no repeal by implication."

In the absence of repealing words, and where an apparent conflict arises between the new law and the old, it is the duty of the court, if possible, to give such a construction to their provisions, that both may stand. This can only be done in the present case by holding that the legislature intended to give to the operatives and the landlord a preference over all other creditors, and at the same time to put them on an equal footing as to each other; and where the goods and chattels are not of sufficient value to pay both of these classes in full, to allow them to share the proceeds pro rata.

It is therefore ordered that a reference be made to the register to ascertain the amounts due to the operatives, not exceeding in any case one month's wages, and not allowing interest after the date of adjudication, and that the assignee distribute pro rata the fund in hand to the claimant and to them, according to the proof of their respective demands. As no diligence has been manifested, either by the landlord or the workmen, to assert their lien upon the goods and chattels in question, and as the bankruptcy proceedings have been carried on by the assignee, in ignorance of their intention to claim a preference, it may be proper to first deduct from the fund, at least a portion of the costs and expenses of the proceedings. But no order can be made in the matter until the court is better advised respecting the condition and assets of the bankrupt estate.

McCONNELL (DAVIS v.). See Case No. 3,640.

McCONNELL (HOMAS v.). See Case No. 6,656.

McCONNELL (SPOONER v.). See Case No. 13,245.

Case No. 8,713.

In re McCOPPIN.

[5 Sawy. 630.] [1]

Circuit Court, D. California. July 14, 1869.

NATURALIZATION — INACCURATE STATEMENTS — NO DECEPTION INTENDED — RE-NATURALIZATION.

1. The validity and efficacy of a judgment admitting a person to citizenship, are not impaired by an inaccurate statement in its recitals; they constitute no part of the judgment.

2. Accordingly, where the record of naturalization of an applicant for citizenship of the United States was perfect, but inaccurately recited that the applicant had resided within the United States for three years preceding his arrival at the age of twenty-one years, no deception being intended, the applicant being entitled to be admitted on other grounds, and these facts appearing on an application for re-naturalization, it was *held*, that there was no occasion for further proceedings, and the application was denied.

Application was made by Frank McCoppin to be re-naturalized.

FIELD, Circuit Justice. This is an application on the part of Mr. McCoppin to this court "to re-naturalize him if, in its judgment, his former naturalization is defective or open to question." It appears that on the twelfth of December, 1864, the applicant was admitted as a citizen by the district court of the United States for this district. The record of the proceeding recites, that the applicant at the time made a declaration of his intention to become a citizen, and proved by the oaths of P. H. Cannavan and Lafayette Maynard, citizens of the United States, his residence within the United States, for the previous five years, and for the three years next preceding his arrival at the age of twenty-one years, and his residence in California for one year, and that during that time he had behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same, and that he took the customary oath to support the constitution and re-

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

nounced all allegiance and fidelity to every foreign power.

The applicant states that he was born in Ireland on the fourth of July, 1834, and at the time he made his application to be admitted as a citizen he was under the impression that he had arrived in the United States in 1852; but in this respect he is now satisfied he was mistaken, and that he arrived in 1853; that his father arrived at the same time, and afterwards became a citizen; that he himself declared his intention to become a citizen in the court of common pleas for the city and county of New York on the eighteenth of June, 1857, and produces a certified copy of the declaration; that subsequently he was advised, and for some years believed, that he was entitled to citizenship by reason of his nonage at the time of his arrival in the United States, and the subsequent naturalization of his father; and that when informed of his error in this particular, he made formal application for admission to the district court.

The application in this case is an unusual one but, under the circumstances, a very proper one, though, we think, if the district court were in session, that it might with more propriety have been made to that court. The applicant is the mayor of the city of San Francisco, and his citizenship is, therefore, a matter of public interest. The law implies that the officers of the municipality are citizens of the United States, and it was certainly under the belief that the applicant was a citizen that he received the suffrages of the people of the city and was installed into office. If, therefore, the proceeding by which he claims his citizenship is invalid or open to question, it is quite natural that he should desire that a new proceeding may be taken to establish his citizenship beyond a doubt. No such proceeding, however, is necessary. The record of naturalization in his case is perfect, and the judgment valid. Its validity and efficacy are in no respect impaired by the inaccurate statement in the recitals respecting the three years residence in the United States of the applicant previous to his attaining the age of twenty-one. The recitals constitute no part of the judgment, and whether correct or otherwise, is immaterial. The court was satisfied at the time of the sufficiency of the evidence presented to justify the admission of the applicant, and pronounced its judgment accordingly.

Undoubtedly, the court might, in a proper case, set aside its judgment admitting a party to citizenship, if the party was not at the time entitled to admission, and the court had reason to believe that it had been intentionally deceived. But in this case there is no ground to suppose any deception was intended, or for any imputation upon the motives of the applicant. He was at the time entitled to be admitted as a citizen on other grounds. He had declared his intention to become a citizen in one of the courts of record in the city of New York, seven years before, and had resided in the United States for five years. This latter fact was established at the time before the district court, and is stated in the record. Upon these facts and the other matters as to character, and attachment to the principles of the constitution, proved by the witnesses present, he could have been as readily admitted as upon the grounds stated. There is no occasion for any further proceedings in the matter. The application for re-naturalization is, therefore, denied.

McCORD (COPPERTHWAIT v.). See Case No. 3,216.

McCORD (McCANDLESS v.). See Case No. 8,678.

Case No. 8,714.

McCORD et al. v. McNEIL.

[4 Dill. 173;[1] 17 Am. Law Reg. (N. S.) 52.]

Circuit Court, W. D. Missouri. 1877.

BANKRUPTCY — DISSOLUTION OF ATTACHMENT IN STATE COURT BY BANKRUPTCY PROCEEDINGS —REV. ST. § 5044, CONSTRUED.

1. An attachment of the property of a debtor on mesne process is ipso facto dissolved by a deed of assignment made in bankruptcy if the proceedings in bankruptcy were commenced within four months after such attachment. Rev. St. § 5044; section 14 of original act.

[See In re Hazens, Case No. 6,285.]

2. In such a case the assignee's right is superior to the right of the attaching creditor, although the attached property had been sold before the commencement of the bankruptcy proceedings, and the proceeds paid over to the creditor after the adjudication, but prior to the date of the deed of assignment.

3. Such a sale of the attached property and payment of the proceeds to the creditor, do not distinguish the case in principle from Bracken v. Johnston [Case No. 1,761].

Error to the district court of the United States for the Western district of Missouri.

This was a suit brought in the district court of the United States by [Marvin B.] McNeil, as assignee of Broughton & Co., bankrupts, against [James] McCord, Nave & Co., to recover certain moneys received by them from the sheriff of Clay county, Kansas, the same being the proceeds of the sale of certain personal property of Broughton & Co., which had been attached by McCord, Nave & Co. (the plaintiffs in error), in a suit brought by them against Broughton & Co. in the district court of said Clay county, and which, pending the suit, had been sold by the sheriff under an order of said state court.

It is agreed that the facts are as follows: (1) On the 2d day of September, 1874, F. Delves Broughton and D. N. Fulton were copartners in trade as merchants, under the firm name of F. Delves Broughton & Co., at Clay Center, Kansas. They were indebted to

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

the defendants, merchants at Kansas City, Missouri, under the firm name of McCord, Nave & Co., in the sum of $1,072.39 and interest, for merchandise. On the 2d day of September, 1874, the defendants instituted suit against Broughton & Co., on their demand, in the district court of Clay county, Kansas, caused an attachment to issue, and the property of Broughton & Co. to be seized under the attachment. In the month of September, the attaching creditors procured from the district court, under the provisions of the statutes of Kansas, an order for the sale of the property attached, and on the 6th day of October, under this order, the property was sold by the sheriff of Clay county for $908. The summons in the civil action was personally served upon the defendants, Broughton and Fulton, on the day it was issued, September 2d, and was returnable September 12th. The defendants, Broughton and Fulton, wholly made default, and never answered. (2) On the 9th day of October, 1874, certain creditors of Broughton & Co., constituting the requisite number, filed in the district court of the United States for the district of Kansas a petition to have Broughton and Fulton declared bankrupts, and under this petition, on the 28th day of October, the adjudication of bankruptcy regularly passed. (3) On the 18th day of November, 1874, at the regular term of the district court for Clay county, final judgment in the civil action and on the attachment was rendered in favor of McCord, Nave & Co., against Broughton & Co., for $1,107.24, and an order made by the court to pay proceeds of attached property to the plaintiffs in the judgment. Under this order the sheriff, on December 15th, 1874, after deducting $90 for costs, paid over to the judgment creditors, the defendants in this action, $818. (4) On the 28th day of December, 1874, the plaintiff in this suit was appointed assignee in bankruptcy of Broughton & Co., and on same day the regular assignment was made by the register in charge; the plaintiff is the present and sole assignee in bankruptcy of Broughton & Co. (5) The proceeding by attachment was not collusive between McCord, Nave & Co. and the bankrupts, nor was it in any way procured by the bankrupts. (6) The proceeding in bankruptcy was not suggested in the civil action, nor in the attachment proceedings. The assignee has never intervened in the district court of Clay county to claim the proceeds of the attached property. The petitioning creditors in the bankruptcy proceedings had knowledge of the civil action and proceeding by attachment, but made no suggestion of the bankruptcy proceedings to the court. (7) The defendants had actual notice of the pendency of the proceedings in bankruptcy a few days prior to the adjudication. (8) The plaintiff, on the 8th of February, 1875, demanded of defendants the payment of $1,008.00, which defendants refused to pay. On these facts the district court rendered judgment for the assignee for the sum of $818 and interest from February 8, 1875, to reverse which the defendants prosecute this writ of error.

John K. Cravens, for plaintiffs in error.

Gage & Ladd and Karnes & Ess, for defendant in error (the assignee).

DILLON, Circuit Judge. In the case of Bracken v. Johnston [Case No. 1,761], it was decided by Mr. Justice Miller that a creditor who proceeds in the state court by a writ of attachment on which he seizes the property of his debtor and collects the judgment obtained in such suit by a sale of the property attached, is liable to the assignee in bankruptcy of the debtor appointed under proceedings commenced in the bankruptcy court within four months of the levy of the attachment, although the assignee did not appear or defend the attachment suit or make any attempt to arrest the attachment proceedings.

The case just cited was deliberately considered, and it may not be improper to state, as illustrating the difficulty of the question involved, that the record in that case was informally laid before the judges of the supreme court, and that they were equally divided in opinion. I had decided the same principle in Bradley v. Frost [Id. 1,780]. In the argument of the present case the learned counsel for the plaintiffs in error admitted that those cases were within section 5044 of the Revised Statutes, and decisive against him unless this case can be distinguished. He insists that this case can be distinguished from those on the ground that under section 5044 it is the deed of assignment which relates back to the commencement of the proceedings in bankruptcy, and which has the effect to dissolve any attachment of property on mesne process made within four months next preceding the commencement of the bankruptcy proceedings.

In this case the property attached had been sold pending the suit in the state court, three days before the petition in bankruptcy was filed, and the money, which was the proceeds of the attached property, was actually paid over to the creditor by order of the state court before the assignment was made, although the date of such payment was after the institution of the bankruptcy proceedings, and after the adjudication of bankruptcy had passed. It is admitted by the counsel for the creditor that if the property attached had not been sold prior to the filing of the petition in bankruptcy, the case would fall within Bracken v. Johnston [supra], and that the assignee in bankruptcy would be entitled to recover. But he claims that, having been sold before the commencement of the proceedings in bankruptcy, it was not "then attached" (section 5044), that is, was not under attachment at the time the bankruptcy proceedings were instituted, and that the order of the state court to pay the proceeds to the cred-

itor on his judgment is valid and effectual as against the assignee. It is my opinion that this narrow distinction cannot be maintained. The proceeds of the attached property stand in the place of the property attached, and these proceeds, or the right to them, passed to the assignee by virtue of the assignment, which related back to the commencement of the proceedings in bankruptcy, at which last mentioned time the money was in the custody of the state court, the same as the property had been out of which the money arose.

I may add that I submitted to Mr. Justice Miller the point here made by the counsel for the creditor, and that he was of opinion that no solid distinction in this respect could be found between the present case and that of Bracken v. Johnston. Affirmed.

McCORD (RUSSELL v.). See Case No. 12,157.

Case No. 8,715.

McCORD v. The TIBER.

[6 Biss. 409;[1] 7 Chi. Leg. News, 363.]

District Court, W. D. Wisconsin. July 20, 1875.

PERSONAL INJURIES—NEGLIGENCE—DAMAGES—AT COMMON LAW — IN ADMIRALTY — OBSTRUCTING NAVIGATION — CONTRIBUTORY NEGLIGENCE — ELECTION OF REMEDY.

1. A vessel has no right to obstruct the channel by stretching a line across it, and if she does, is liable for damages sustained thereby by passing raft or vessel. A raft is under no obligation to look out for such an obstruction.

[Cited in The Swan, 19 Fed. 457.]

2. The common law doctrines of contributory negligence do not apply to admiralty law.

[Cited in Ladd v. Foster, 31 Fed. 831.]

3. The sufferer has his election to sue at common law or in admiralty, and in either case the law of the forum must prevail.

4. Damages for personal injuries for permanent spinal injuries to a pilot, disabling him from following his profession, fixed at $2,500.

[This was a suit in admiralty by David McCord against the steamboat Tiber to recover damages for personal injuries sustained in an accident.]

G. C. Hazelton and O. B. Thomas, for libellant.

Wm. Hull and Cameron & Losey, for respondent.

HOPKINS, District Judge. The libel charges that on the 4th of August, 1873, the libellant was a pilot in charge of a raft of lumber floating down and navigating the Mississippi river, in this state, and that the respondent, a steamboat duly licensed and navigated as a tow-boat, was aground at a point west of the main channel of the river, opposite Grant county, at a distance of about six hundred feet from the Wisconsin shore; and that while she was so aground she stretched a line from the boat to a tree on the Wisconsin shore and across the main channel of the river, the part which the libellant was then and there navigating with his raft; and that the line was left and permitted to remain so near the water as to not allow the raft to pass safely under it, and that as the raft approached it, floating with the current, the line caught upon a pin on the raft, and by means thereof, it was drawn so tight that it broke the pin and swept across the raft with great force, striking the libellant who was standing thereon, on the back, and throwing him down with great violence upon the raft, by means of which he was bruised and injured in his legs, back, hips and neck, from the effects of which he suffered great pain, and was unable, and still is unable, to pursue the business of a pilot, and is permanently disabled from doing hard manual labor as he was before accustomed to do.

The evidence substantially sustains these allegations. The respondent had no right to obstruct the channel with a line across it in that manner, and the doing of such an act renders her liable for the damages sustained thereby by a passing vessel or raft. If it was for the safety of the boat to make a line fast to the shore, or to use a line attached to the shore as a necessary assistance in getting off the bar, she should have taken care to get it out of the way of all passing vessels, either by dropping it, so that they could pass over it safely, or by casting off one end. The obstruction not being removed so as to let this raft pass over or under it in safety, was manifestly illegal, and renders her liable for all injury to the raft or the persons on board of her, unless the respondent's claim of negligence on the part of the pilot of the raft (the libellant) is sustained.

The respondent's counsel claimed that if the libellant was guilty of negligence, which directly contributed to the accident, he cannot recover, even if the court should find that the injury was mainly attributable to negligence of the respondents. This is the common law rule, but it is not the rule of the civil or admiralty law, according to which this case is to be determined. The question has recently been authoritatively settled by the supreme court in Atlee v. Packet Co., 21 Wall. [88 U. S.] 389.

The libellant had his election to sue the party obstructing the stream, either at law or to proceed in admiralty; and having adopted the latter, the case must be tried and determined according to rules of law prevailing in courts of admiralty, and neither party can invoke the rules and decisions of the common law courts in its determination. The law of the forum must prevail.

At common law any negligence of the plaintiff contributing to the accident or injury defeats a recovery; but not so in ad-

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

miralty. There, when both parties are at fault, the court apportions the damages between them according to justice and equity, having due regard to the decree of negligence imputable to each; so that in admiralty, a party in fault may recover of another party, whose negligence contributed to cause the injury, a portion of the damages, while at common law a defendant must pay all damages or none.

But in admiralty there is no apportionment, except in cases of mutual neglect or fault, so that it is as necessary to inquire and ascertain the conduct of both parties in reference to the alleged injury in admiralty as at law, not for the purpose of defeating any recovery, but in order to see whether the damages should be divided, and if so, to properly divide them, having reference to the degree of fault by each in the particular occurrence.

In this case the respondent insisted that the libellant should have kept near the Wisconsin shore, where there was good water, and where the line was high enough to have allowed the raft to pass under in safety, instead of having kept in the main current, and where the sag of the line brought it the nearest to the water.

If by the exercise of ordinary care and foresight he might have done so, this position of the respondent is well taken, but I do not think the evidence supports it. It is true the witnesses on the boat say the line was a white one, and could have been seen for half a mile if the crew on the raft had looked for it. As they had no reason to expect such an obstruction across the navigable part of the river, they had no reason to look sharp for it. There was nothing to put them on special watch therefor. The crew on the raft say they did not see it until within one hundred and fifty or two hundred yards of it, and that it was then too late to change the course of the raft so as to avoid going under where they did; that as soon as they saw it they commenced taking down the shanty on the raft, so that they could go under safely, and that they thought by so doing they could do so; but that the line was either lowered just as they reached it, or was lower than they previously supposed, so that it would not clear the raft and pins upon it; that when the line caught upon the pin and was becoming very tight the pilot or some one on the raft was about to cut it, when he was threatened by the captain of the boat with being shot if he did so, and desisted. The captain told them not to cut it and he would pay all damages. That at about that time the pin broke and the line passed over the raft with great force, knocking the libellant down and bruising his knees, shins, ankles and back, and hip, so that he was unable longer to perform his duty as pilot, and was shipped to his home in Boscobel.

The weight of the testimony exculpates the libellant from all contributory fault, and shows that the injury was caused by the negligence and carelessness of the crew in charge of the steamboat, and consequently she must bear the damages occasioned thereby.

I feel very firmly convinced that my conclusions on this branch of the case are well sustained. Indeed, the captain of the steamer settled with the owner of the lumber at the time, for his loss and for the injury to another of the hands without questioning his liability, and the evidence is very clear to my mind that he then justly appreciated the situation and his obligations springing therefrom.

The boat being liable for the injury, the question as to the amount of damages or compensation is by far the most difficult one to determine. The testimony on this point is quite meagre. The respondent offered none on that branch of the case. The libellant stated particularly his injuries and their effect upon him, and called physicians to support his theory that the injury will be permanent; that his spine is affected, and that the muscles about one hip are shrinking away. There being no evidence in contradiction of this theory, I must assume it to be true, although from the general appearance of the man, I should not have supposed his injuries were so serious or of so endurable a character.

The case shows that the plaintiff is a laboring man, forty-seven years old, with a family of five children, and he swears, and his physicians corroborate him, so far as medical testimony can be said to corroborate such facts, that he has been unable, since that injury, to follow his business of raft pilot on the river, on account of his inability to use an oar.

This being the case, the damages sustained by him are serious. Dr. Ward states, he thinks that his disability is equal to about three-fourths—in other words, as I understand him, he is now able to do only one-quarter of the work he was able to do before the injury. The doctor also stated that he thought the disability permanent to that extent.

In view of this testimony, I think the libellant should recover of the respondent and her sureties the sum of $2,500 for the injuries and damages sustained by him by the accident aforesaid, and order judgment against the respondent and her sureties for that sum, and costs to be taxed.

Case No. 8,716.

McCORKER v. The THOMAS WALKER.

[Cited in The E. A. Barnard, 2 Fed. 717. Nowhere reported; opinion not now accessible.]

M'CORMACK (UNITED STATES v.). See Case No. 15,661.

Case No. 8,717.

McCORMICK v. ALLEGHENY CITY.

[1 Leg. Int. 150.]

Circuit Court, W. D. Pennsylvania. 1850.

BILLS AND NOTES—ISSUANCE BY MUNICIPAL CORPORATION—VALIDITY—REPEAL OF STATUTES—LIMITATION.

[1. The Pennsylvania statute of April 12, 1828 [Laws Pa. 1828, p. 323], making it unlawful for any person "or body corporate" to create or put in circulation any bills, notes, checks, etc., for less than $5.00 with intent to create a circulating medium, and which imposes a penalty for violation therefor, but in its third section gives, nevertheless, a right of action on such instruments to persons holding the same, embraces municipal as well as private corporations.]

[2. The section of said act which gives a right of action upon such instruments was not repealed by the joint resolution of June 24, 1841, which is not inconsistent with that section, and contains no reference to it.]

[3. Under the act of April 21, 1841 (Laws Pa. 1841, p. 249), which, in its sixth section, extends the limitation prescribed by the act of March 26, 1785 (2 Smith's Laws Pa. p. 300), to suits brought to recover a greater rate of interest than 6 per cent., or a penalty or forfeiture, one suing upon a note providing for 20 per cent. interest can recover that rate if the suit is brought within one year from the date the note was issued.]

In equity.

We give below the substance of decision of GRIER, Circuit Justice, in the Allegheny Scrip Case. The suit was brought against Allegheny City by William A. McCormick, a citizen of Virginia, for the recovery of five hundred dollars of scrip, together with twenty per cent. penalty:

"First—It is contended that the act of the 12th of April, 1828,[1] does not embrace municipal corporations within its provisions."

"Second—That if it does, it is repealed or supplied by a joint resolution passed on the 24th June, 1841;" and

"Thirdly—That defendants rely on the statute of limitations, as applied to such cases by the act of 21st of April, 1841."

The learned judge then proceeds to cite a portion of the act relative to small notes. "It forbids any person or persons, or body corporate from issuing, making or passing the notes or bills described, under any possible form or device. It makes no distinctions between municipal corporations and banks; public or private corporations."

As to the second point, he says: "There is no contrariety or repugnance in the provision of one (the act of 1828) to the other (the act of 1841). No notice is taken of the former act so as to indicate an intention to repeal it. There is nothing which can be construed, as supplying or altering the remedy conferred on the holders of these notes by the former act. Whether offenders would be liable to the penalties of both, is a question which it is unnecessary to decide. We only say that as regards the section of the act of 1828, conferring the remedy sought by these actions, there is not the least evidence of any intention in the legislature to repeal them. A repeal of them would put it in the power of those who have issued this illegal currency to repudiate it, and defraud at their pleasure, those whose necessities may have compelled them to receive it. I do not mean to impute any such fraudulent and dishonorable intention to the defendants; but I say that I do not see a particle of evidence on the statute book, that the legislature intended to grant them such a privilege, or to encourage the open infraction of the laws by conferring such an immunity on the offenders. This second ground of defence must therefore be overruled."

As to the third point, the judge remarks: "As we have already seen, this action is founded on a contract to pay the sum mentioned in each of these notes with interest at

[1] Act April 12, 1828: Section 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met and it is hereby enacted by the authority of the same, that from and after the first day of January next, it shall not be lawful for any person or persons or body corporate, with the intention to create or put in circulation or continue in circulation a paper circulating medium, to issue, circulate, or directly or indirectly cause to be issued or circulated, any note, bill, check, ticket, or paper, purporting or evidencing or intended to purport or evidence, that any sum less than five dollars will be paid to the order of any person, or to any person receiving or holding such note, bill, check, ticket, or paper, or to the bearer of the same, or that it will be received in payment of any debt or demand, or that the bearer of the same or any person receiving or holding the same, will be entitled to receive any goods or effects of the value of any sum less than five dollars, and that from and after the said first day of January next, it shall not be lawful for any person or persons or body corporate, to make, issue, or pay away, pass, exchange or transfer or cause to be made, issued, paid away, passed, exchanged or transferred, any bank note, bill, ticket or paper, purporting to be a bank note, or of the nature character or appearance of a bank note, or calculated for circulation as a bank note of any less denomination than five dollars.

Sec. 2. And be it further enacted by the authority aforesaid, that any and every person and persons and body corporate, offending against any of the provisions of the first section of this act shall forfeit and pay for every such offence, the sum of five dollars, to be recovered by any person suing for the same, as debts of like amount are by law recoverable, one half for his own use and the other half to be for the use of the overseers, guardians or directors of the poor of the city, county, district or township within which such offence shall have been committed.

Sec. 3. And be it further enacted, &c., that no such note, bill, check or paper mentioned in the first section of this act shall be held or taken to be void, or of null effect, by reason thereof; but all suits and actions may be sustained on such note, bill, check, ticket or paper, any thing herein contained to the contrary notwithstanding; and in such suits or actions, if the same shall be determined in favor of the plaintiff judgment shall be rendered for the principal sum due on such note, bill check ticket or paper together with interest thereon at the rate hereinafter provided for (20% per annum) and full costs.

the rate of twenty per cent. per annum. By the old statute of 1713, the limitation of these actions, both as regards principal and interest, would have been six years, but by the 13th section of an act passed on the 21st of April, 1841, entitled: 'An act to compel the supervisor of the incorporated district of the Northern Liberties to give security,' &c., it is enacted that the 6th section of the act of limitations of the 26th of March, 1785, should be extended to all and every suit brought, or that may be brought to recover a greater rate of interest than six per cent. as a penalty or forfeiture under any of the provisions of the act of the 12th of April, 1828. * * * A holder of these notes who brings his suit two years after their issue, would therefore recover interest on the sum, to be calculated for the first year at the rate of six per cent. per annum, and at the rate of twenty per cent. from the commencement of the last year, till judgment; but as the declarations in these cases state that the notes were issued one year before the bringing of the suit, which is admitted by the case stated, the plaintiff is entitled to recover the principal sum, together with interest, to be calculated on the same, from the 22d day of December, 1848, till judgment. The one per cent., stated in the notes, cannot be added thereto as the law allows but twenty. The contract as interpreted by the law, is to pay twenty per cent., and no more. The statute limits the recovery of twenty per cent. for one year, but never intended to discharge, after one year, from all liability, those who have issued these notes in determined defiance of the laws of the country. Such an intention cannot be imputed to the legislature, unless it be clearly and plainly expressed.

"The clerk will therefore enter judgment accordingly, as agreed by the case stated."

McCORMICK (BELL v.). See Case No. 1,255.

Case No. 8,718.

McCORMICK v. BUCKNER et al.

[2 Wkly. Notes Cas. 480.]

District Court, E. D. Pennsylvania. June 16, 1875.

BILL TO RESTRAIN SHERIFF'S SALE—ACT OF BANKRUPTCY.

This was a bill in equity by Sharpe's assignee to set aside executions at the suit of Buckner, and to restrain the sheriff [Elliott] from making sales, on the ground that Buckner had within the meaning of the bankrupt act [of 1867 (14 Stat. 517)] procured Sharpe's property to be taken on legal process, etc. The executions were issued upon judgments entered by confession on warrants of attorney accompanying bonds, the bonds being given under the following circumstances: Sharpe, the bankrupt, being unable to go on for want of capital, got loans of money from Buckner from time to time, for which he gave the bonds and warrants in question, which, with interest and extra interest of several years, amounted to the sum for which the executions issued. When the first of the loans was made, an agreement was executed between Sharpe and his own son of the one part and Buckner's son of the other part, by which Sharpe agreed to employ the two sons in his factory, paying them each a fixed salary, and as additional compensation giving each a certain percentage of the net profits. This agreement was renewed from year to year, and was in operation when the execution was issued. Buckner's son was bookkeeper, and it was shown that balance sheets had been given from time to time by the son to the father, which showed Sharpe's financial condition.

E. Spencer Miller, for plaintiff, relied on these facts to distinguish the case from those cited by the defendant, arguing that Sharpe had put himself in Buckner's power by owing him all the time more than he was worth, and by giving a bond and warrant by which Buckner might in a moment break him up, and also that in so doing he enabled Buckner, through his son, to inform himself at any time of the condition of the business.

T. Hart, Jr., for defendants, cited: Wilson v. City Bank of St. Paul [17 Wall. (84 U. S.) 473]; Tiffany v. Boatmen's Savings Ins. Co. [18 Wall. (85 U. S.) 375]; In re King [Case No. 7,783]; Sleek v. Turner, 10 N. B. R. 580; Piper v. Baldy [Case No. 11,179]; Clark v. Iselin [21 Wall. (88 U. S.) 360].

THE COURT held that the case of Clark v. Iselin ruled this, and, the testimony relied on not warranting a different decision, bill dismissed with costs.

McCORMICK (HANCE v.). See Case No. 6,009.

Case No. 8,719.

McCORMICK v. HOWARD.

[1 MacA. Pat. Cas. 238; 2 App. Com'r Pat. 217.]

Circuit Court, District of Columbia. May 3, 1853.

PATENTS—INTERFERENCE PROCEEDINGS—ADMISSIBILITY OF DEPOSITIONS—PATENTABILITY—UNSUCCESSFUL EXPERIMENTS—LACHES.

[1. The rule excluding depositions taken in another case does not apply where the objecting party was the real party in interest in that case, and was afforded opportunity for cross-examination, and the subject-matter was the same invention.]

[2. A mere principle or idea, until it becomes properly and practically clothed, is not patentable. Nor will a long course of fruitless experiments to reduce the principle to practice be sufficient to deprive a subsequent original inventor, who had perfected his invention without knowledge thereof, of his right to a patent. But, where a prior inventor has been using reasonable diligence to perfect and adapt the invention to practical use, his right will be preserved and protected, although his success may not have been perfect.]

[This was an appeal by Cyrus H. McCormick from a decision of the commissioner of patents, in interference proceedings, awarding priority to William F. Ketchum, assignor to Rufus L. Howard, in respect to an invention of an improvement relating to mowing machines.]

[1][Reasons of appeal: First. The honorable commissioner erred in deciding that priority of the invention of the said track-clearer is due to said Ketchum, assignor to said Howard, because said Ketchum testifies himself that he never succeeded in perfecting the instrument so as to bring it into public use until more than a year after it had been perfected and introduced into public and successful use by said McCormick, to whom, therefore, priority of invention belongs; for he is not the inventor who discovers that something is wanting in a machine, and makes a mere unsuccessful attempt to supply it, but he who first supplies the want. Second. The honorable commissioner erred in deciding priority of invention of said track-clearer to be due to said Ketchum, assignor to said Howard, because it is not in proof that Ketchum ever constructed a harvester with a track-clearer that worked successfully, or that was more than a mere experiment. Whereas it is clearly proved that in 1849 McCormick had succeeded in constructing a harvester with a track-clearer that worked in every way well and was completely successful, and continues so to this day. Third. The honorable commissioner erred in deciding priority of invention of said track-clearer to be due to said Ketchum, assignor to said Howard, because the parol testimony on which Ketchum relied to show that he had invented a track-clearer is too vague and indefinite to be received in evidence, while as Ketchum testifies the devices themselves with which he experimented, and which are the best evidence, are in existence, and therefore might and ought to have been produced. There is in fact no sufficient legal evidence that Ketchum made a track-clearer; it is only proved that he attempted something for such a purpose, without defining precisely what it was, and the testimony of Ketchum is vague, contradictory, and not entitled to credit. Fourth. The honorable commissioner erred in deciding priority of invention of said track-clearer to be due to said Ketchum, assignor to said Howard, because said Howard being the owner of said Ketchum's and Sheffer's rights to this invention, by electing to claim under Sheffer as the prior inventor, virtually disclaimed priority of invention for Ketchum, and having been defeated under Sheffer, it is not competent now for him to disavow his former acts and claim under Ketchum. Fifth. The honorable commissioner erred in deciding priority of invention of said track-clearer to be due to said Ketchum, assignor to said Howard, because he ought to have decided it to be due to said McCormick, who, by the testimony before the patent office, appears to be the original, first, and only inventor of the track-clearer.][1]

P. H. Watson, for appellant.

W. P. N. Fitzgerald, for appellee.

MORSELL, Circuit Judge. The application was made on the 7th of November, 1851. In his specification the applicant states the improvement more particularly to be for combining with the cutting apparatus at its left-hand end a slide or raking-board, forming with said cutting apparatus an angle less than a right angle, by means of which the cut grass is drawn outwards from the standing grass, by which a pathway is obtained between the standing and cut grass for the driving-wheel to pass on the ground on the return trip of the machine, as well as to prevent the cut grass from getting on the fingers, and thereby clogging the sickle. His claim is for combining with the cutting apparatus a raking-board, forming with the said cutting apparatus an angle less than a right angle, substantially as and for the purpose specified. According to the statement of the commissioner, there were at the time pending applications before him for patents for the same invention, one by Henry Green, made in the month of August, 1851, and another on the part of Rufus L. Howard, appellee, as assignee of George Sheffer, made in the month of October in the same year. An interference was declared between the parties, and the 13th of May, 1852, was appointed for the day of hearing. On the 10th of January, 1850, the above-named William F. Ketchum assigned to Rufus L. Howard all the improvements he might thereafter make to his mowing machine, which assignment referred back to the original deed for its consideration. This assignment was not recorded within three months, and he gave another assignment, dated February 7th, 1852, to renew the same whilst the issue was still pending between the said original parties. On February 7th, 1852, after notice given to H. Green, George Sheffer, and Rufus L. Howard, Cyrus McCormick took his testimony in the case and had the same forwarded to the patent office. On the 27th of February, 1852, the said Ketchum, assignor to the said Rufus L. Howard, filed his petition and specification for a patent for an invention which the commissioner states to be the same as that claimed by McCormick in his specification. He states that his object is to clear the track by removing the cut grass from the standing stubble—turning it out of the way; that he has experimented several years with contrivances essentially the same; that the contrivance he then had in use operates with perfect satisfaction. This consists of a raking-board combined with the

[1] [From 2 App. Com'r Pat. 217.]

[1] [From 2 App. Com'r Pat. 217.]

rack-piece by a joint or hinge, at an angle less than a right angle. The scraper or raking-board, as it trails along on the ground after and in the wake of the cutters, has the effect to remove the cut grass from the standing stubble by rolling and turning it in towards the machine, out of the way, leaving a clear track for the heel of the rack-piece to move in on the return swath. It also keeps the loose cut grass from choking or clogging and retarding the proper action of the cutters. On the 2d of March, 1852, Howard, assignee of Sheffer, by his attorney, requested that Sheffer's application might be rejected pro forma; and on the 1st of April, 1852, Howard himself made a like request, and the commissioner accordingly directed the same to be done. On the 1st of March, 1852, the commissioner declared an interference between the claim of Howard, assignee of Ketchum and McCormick, and Green, and appointed the second Monday in May (10th) for a hearing. Notice was given accordingly, and on the 13th of May, 1852, priority was declared in favor of McCormick. On the 18th day of the same month and year a decision was made declaring priority in favor of W. F. Ketchum, in the following terms: "Whereas, upon the appointed day of hearing, of which due notice had been given to the parties, and upon a careful examination of the testimony and arguments filed in the case, it appears to the undersigned that priority of invention of the side-shield, track-clearer or scraper claimed is due to the said W. F. Ketchum, he is therefore hereby declared to be the first inventor thereof." From this decision McCormick took the present appeal, and filed in the office, within the time directed by the commissioner, his reasons of appeal. In his first reason he says that said Ketchum testifies in his own behalf that he never succeeded in perfecting the instrument so as to bring it into public use until more than a year after it had been perfected and introduced into public and successful use by said McCormick; second, that it is not in proof that Ketchum ever constructed a harvester with a track-clearer that worked successfully, or that it was more than mere experiment; third, because the parol testimony on which Ketchum relies to show that he had invented a track-clearer is too vague and indefinite to be received as evidence, while, as Ketchum testifies, the devices themselves, with which he experimented, which are the best evidence, are in existence, and might and ought to have been produced; fourth, because said Howard, being the owner of said Ketchum's and Sheffer's rights, by electing to claim under Sheffer as the prior inventor, virtually disclaimed priority of invention for Ketchum, and, having been defeated under Sheffer, it is not competent for him to disavow his former acts and claim under Ketchum; fifth, a mere general allegation that from the testimony McCormick, and not Ketchum, is the prior inventor.

The first part of the commissioner's report states particularly the proceedings in the case, which I have already recited, together with some additional facts obtained from the original papers sent up with the appeal. It states as a reason for not admitting McCormick's testimony (taken in a former case) in evidence on the trial of the case that the same is offered in a case not between the same parties nor upon the same subject-matter. This objection is insisted upon by the counsel for the appellee. As this is a preliminary question, I have supposed it would be proper to determine it at this point. The general principle, as stated by the commissioner, is admitted to be true; but the reason of the rule sustaining such an objection is that it would not be mutual, and that an opportunity to cross-examine the witness would not be afforded to the party. Now, in the present case, the real and only party in interest was the assignee, who was the same person in both cases, and the subject-matter was the same invention, and an opportunity was allowed him to cross-examine the witnesses. The law, as laid down in Greenleaf on Evidence, is in the case of depositions taken. It is generally deemed sufficient, if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness. In this case it would be unnecessarily oppressive to require the party, merely to gratify form, to take his testimony over again, as well as uselessly expensive. The objection is, therefore, overruled.

The report, in further answering the reasons of appeal, is confined to the testimony on the part of the appellee, the effect of which the commissioner thinks amounts to proof that the invention by Ketchum was as early as the year 1846, and that it is the same in substance as that for which McCormick claims a patent in this case, whose invention was in the year 1849; that the testimony sufficiently shows, according to established legal principles, that said invention was reduced to practice; that the decision was founded mainly on the testimony of Colligan, confirmed by Field, the substance of which he states; that the decision would have been the same if McCormick's testimony had been admitted into the case and considered; that the apparent inconsistencies in Ketchum's testimony may be reconciled; that the word "instrument" is not the word used by Ketchum, Field, or Colligan when speaking of imperfections; the language refers to the machine as a whole, as in the instances of breaking a cutter-bar, &c. As to the reason defining in what a patentable invention consists, he refers to the law as laid down by Judge Cranch in the case of Perry v. Cornell [Case No. 11,001]; and as to Howard's being estopped to disavow his claim under Sheffer, and set it up under Ketchum, he says a man who pur-

chases under a bad title has surely a right to cure the defect by purchasing and setting up a better title.

On the day appointed for the hearing, according to notice given, the parties appeared by their respective counsel; and the commissioner having laid before the judge the grounds of his decision in writing, with the original papers and the evidence in the cause, and the arguments of the counsel on each side being submitted, it appears that there is no dispute as to the invention for which a patent is asked being patentable; the questions are whether the inventions are the same; if so, whether the appellant, according to the principles of patent law, is the first and original inventor. I think it must be considered clear from McCormick's testimony that in the month of August, 1849, he was the inventor of the improvement as described by him in his specification; that he reduced it to practical use with success in combination with his mowing-machine, and that he has continued to succeed in the use of it; that according to the testimony of the examiner it differs from all others, in having the double inclination of the board in connection with its peculiar shape, enabling it, among other things, to perform the precise function of the crooked stick in Shaffer's instrument. Does it interfere with Ketchum's improvement, under which the appellee claims? The commissioner in his report says they are substantially the same, and that Ketchum is the prior inventor. This must depend upon the evidence on the part of the appellee and the facts and circumstances in the case, taken in connection with it. I will state the substance of it: Ketchum (the assignor) in his deposition states that he made an improvement, known as the side-shield or scraper, to his mowing-machine he thinks in the year 1846. The angle was eighteen or twenty degrees. It was made of iron. After that he made the scraper of wood—board—attached by a hinge. He thinks he used the board in this manner in 1847, 1848, and 1849. He has seen the drawing representing Mr. McCormick's and Green's devices, and he considers them the same in principle as his. He is and has been a practical machinist for twenty-five years. Schedule "A" was shown to him. This, he said, represents his scraper. B represents the sheet-iron scraper better than the one he made of board. It is about two years since he perfected his machine. He says: "It is within that time." He was experimenting from 1846 up to within a year, with a view to perfecting his machine. His machine was so imperfect in other respects that it was impossible to tell whether the device of the track-clearer or scraper was going to answer the purpose when his machine worked well. It answered the purpose. The great difficulty with the machine was that it choked or clogged up. Another difficulty was that the proportions were not sufficient in strength. That he was laboring to overcome all these difficulties. He cannot say that he ever had the machine on sale as perfect as it has been since. It has been exhibited at state fairs; at one state fair with this improvement. This scraper was on the machine at the state fair in Rochester last year (1850). The machine has been exhibited at four state fairs; the improvement at none except at Rochester last year; he had seen it to be necessary to have some device for clearing away the grass. He says: "I have considered this improvement the thing to answer the purpose." He was cross-examined by Mr. Green's counsel, and testified that he made the assignment to Howard the 10th February, 1852; was not then aware of the improvement of Green or any other person; was not positive but that he began to experiment in 1845 in the use of this device. He made the improvement as it appears in the schedule or drawing "B" in June, 1846. He does not know when he attached the bottom board; thinks he discovered the angle of eighteen or twenty degrees immediately upon the experiments. He used the machine with that device in 1846, but is not positive about the bottom board. This improvement of itself is not sufficient to overcome every difficulty. The cutter-bar was too weak at first, and prevented the machine from working well. He was further cross-examined by McCormick's counsel, and testified that a machine was built in 1839 or 1840 by his instructions. It had not the side-shield or scraper as in schedule "A." He had no device attached to it similar to that in the diagram in 1839 and 1840. He used it in the harvest of 1836; no one besides himself used this in 1846; others saw it work; the machine worked so little at that time that he could not tell whether the machine was effectual or not, i. e., the whole machine combined; it was the sheet-iron "6" he used in the machine of 1846; the angle of the scraper was inside or less than a right angle; he did not consider this a perfect machine. After the harvest of 1846 he could not use it on account of the defects in all parts of the machine; he could not tell from the experiments in 1846 whether the scraper was going to answer the purpose or not. He experimented in 1847 with the same machine; he is not positive; they were made openly; machine of 1847 had upon it a scraper similar to the one in schedule "A;" he thinks it had a bottom board attached, but is not certain; he thinks he used the machine in 1846 and 1847 without the scraper in some of the trials; the experiments in the fall of 1848 were on the same principles as the former ones; in his improvements in 1848 he strengthened the machine somewhat; there was no great change, chiefly in strength; the machines of 1846 and 1847 were broken up and scattered; does not know what became of the scraper; he left the machine on the Dibble farm, where the experiments were

made; he does not know what became of the machine of 1848; he thinks Mr. Hawes, his partner, took a couple of the machines of 1848 out west; it was in July, 1848, he used the machine with the side-shield or scraper, as represented in the diagram at Fig. "b," and some with the portion marked "A," off; the bottom board was of no benefit; Hawes took the machines out west, partly made by witness and partly by himself; at the time Mr. Hawes went west the scraper was not, in his opinion, in a state of perfection; Hawes took away machines; he does not know what he did with them; he experimented at different times in 1849, but does not recollect whether he made the experiments with the same machine of 1848; he thinks he did; there were some alterations made, but he does not recollect that he made any change in the scraper; the experiments of 1849 made the machine a little better than it was before; in 1849 his experiments were made in Genesee county, at or near Batavia, in the presence of Joseph C. Field, Rufus L. Howard, Judge Soper, and George W. Allen; the machines he used in 1849 were all in his possession; in the harvest of 1849 he did not think the machine a perfect one; these machines all had the scraper attached in 1849; he sold out to Mr. Howard; in August he suggested to him improvements, and since the sale has assisted him with his advice; he sold to him all the improvements he had made or used or might thereafter make; he does not recollect seeing any of the machines in use in the harvest of 1850; he thinks Mr. Harvey Deul used one; he does not know that they were used in that year with the scraper; in 1851 he suggested to Mr. Howard as an improvement the method of bracing the machine from the shoe to the frame with a bar, also a heavy timber parallel with the cutter and above the ground; he thinks there was some improvement made that year in the scraper, but not by witness. It appears that this last improvement in the scraper was made by G. Sheffer. He knew of this. In February, 1852, Sheffer, Green, and McCormick were present, and parties at an examination of improvements, &c. It was a few days before the trial when he first knew of Sheffer's improvement. Some months before the examination he told Howard, when he first showed him Sheffer's improvement, that the principle was the same with his, with the exception of the stick. When he saw the stick operate, he thought it an improvement. That was in the harvest of 1851. He told Sheffer in August or September, 1851, that the board set up on an angle was his. He heard that Sheffer had applied for a patent. He told Howard the same that he had told Sheffer, that Sheffer could not get a patent if he (witness) opposed it. He told Sheffer in February that he was going to apply for a patent for the scraper, but Sheffer still persisted in it. Mr. Howard told him at some time, he does not recollect when, that he was the assignee of Sheffer, and that Sheffer was the inventor, and that he was going to apply for a patent; he did not object to Howard applying for a patent for Sheffer's invention; he knew that he had applied or was going to apply for Sheffer's invention, and he knew the result of Sheffer's application; he knew there was an interference declared, and knew at the time of the examination that the point turned upon the priority of invention between McCormick, Sheffer, and Green; he did not think the invention perfect; the scraper that Howard makes is substantially the same as that of 1846 and 1849; he thought the machines he had sold were perfect, but trial proved them defective; he exhibited the machine with the scraper attached at Rochester in 1851; the same kind of scraper that Howard now makes, or nearly so, he used in the field with the scraper attached, he thinks, in 1847. Witness proceeds to state the dates of his patent, the sale to Howard, and the two assignments; one of July 5th, 1851, the second of February 27th, 1852. The consideration for both assignments referred back to the original $1,000. Up to the time of his sale to Mr. Howard he did not have the machine with the scraper annexed on sale. All his machines which have been built before his sale to Mr. Howard have been built for experiment. The reason why he did not get his improvement patented sooner was because he was not able.

[1] [Francis Colligan: Acquainted with Ketchum, and the mowing machine. That he is a —— and machinist. That he has been in that business for 14 years,—7 for himself. That he made a model of this machine in 1845 at Ketchum's request. That he built one of full size in 1846 (May), according to Ketchum's directions. That according to his orders he made a sheet-iron scraper to the machine similar to the part "b" marked on the diagram. It was set on an angle inside of a right angle. He witnessed an experiment with this machine with the scraper annexed. States the purpose of it, then says it was fastened to the cutter bar or finger board by a piece of sheet iron. It brought in the grass well. The machine otherwise worked well, but was not strong enough. Some part of it broke,—the cutter-bar. They altered the machine several times to suit Ketchum. This was in the fall of 1846,—and so in 1847, and some alterations in the scraper in that year made of board, and covered with sheet iron on the edge in '47, similar to the one of sheet iron: same shape and same angle. He did not see the wood one work. He did nothing at it next year. Then left the shop. The diagram or schedule was shown to the witness, who said he considered the drawing substantially the same as Mr. Ketchum's invention, which he made in '46 and '47 at his re-

[1] [From 2 App. Com'r Pat. 217.]

quest. He says that he witnessed the experiment down by the toll gate. Saw the operation of the scraper. It worked very well. The cutter-bar soon gave out. He did not see the wooden one work. The scraper of 1847 was in all essential respects similar to that of 1846. He has seen Mr. Howard's machine. He had a scraper similar to that in the diagram G. He does not perceive any essential difference in the scraper of 1846 which he made and that of 1852, with the exception of the crooked stick H. In his opinion, as a machinist, the scraper which Mr. Howard now uses is the same in principle as that of Ketchum's which he made in 1846. The cut hereto annexed marked G, representing the scraper as Mr. Howard now builds them, was shown to witness, which he compared with the diagrams "b" and "a." The witness Field says that in July, 1849, he first became acquainted with the device known as a scraper. He saw it tried at Batavia on Russell's farm. The scraper was a board a foot or 18 inches wide and three or three and a half feet long. It was set on an angle. It was attached to the finger bar by a hinge so that it would yield to the surface of the ground. It was made according to the order of Mr. Ketchum. It was fastened to the finger-bar on an angle inside of a right angle; sh—A is a drawing representing it very nearly. It was for the purpose of scraping the cut grass from the standing grass. It answered the purpose very well. X. says he is in the ship chandlery business. That he has never followed the business of a machinist. He says the scraper worked well, as far as the machine went. The team ran away.] [1]

In coming to a decision upon the effect and weight of the testimony, it is proper to state that I think there is much justness and force in the able arguments of the counsel on the part of the appellants in this case in the views they have taken of the circumstances and facts appearing in the case from the proceedings and the testimony of Ketchum relating to the conduct of Howard and Ketchum. The strange inconsistency and contrivance on the part of Howard with respect to the assignments, and the imposition practiced on the government by him, together with the indifference and neglect on the part of Ketchum to apply for a patent, with the knowledge he possessed, that others had been applying for the same invention, and his consent and approbation that Howard should apply under the assignment of Sheffer—his conduct and silence under such circumstances bring him within the reason of the rule that where a man has been silent when in conscience he ought to have spoken he will be debarred from speaking when conscience requires him to be silent. These and other circumstances certainly tend to militate against the practical reality of Ketchum's invention and against the fairness of the claim for a patent on the part of Howard. I do not understand the decision of the commissioner, however, as going to the extent of declaring the appellee to be entitled to a patent. The question of unfairness and imposition is not, therefore, directly before me on this appeal. On the other part of the subject the rule has been correctly stated, that a mere principle or idea, until it becomes properly and practically clothed, is not patentable. And it may also be stated that a long course of mere fruitless experiments to reduce the principle to practice would not be sufficient to prevent a subsequent original inventor, who had perfected his invention without knowledge of the prior invention, from his right to a patent; but, on the other hand, where a prior inventor has been using reasonable diligence to perfect and adapt the invention to practical use, his right will be preserved and protected, although his success may not have been perfect. "The expression in our statute means that the patentee must have been the inventor first in point of time before all others." With these principles to guide me, I feel obliged to come to the same conclusion with the commissioner of patents, that, even putting out of the case Ketchum's testimony (unless I could bring myself to believe the other two witnesses perjured), that Ketchum's invention and McCormick's are substantially the same—I mean the principle is the same, though there is a difference in having the double inclination of the board—and that Ketchum, assignor to Rufus L. Howard, is the prior inventor, and I do so decide, there being also sufficient evidence to show practical use.

The patent was subsequently issued to Rufus L. Howard, assignee of William F. Ketchum, No. 9,737, May 17th, 1853.

[1] [From 2 App. Com'r Pat. 217.]

McCORMICK (HUSSEY v.). See Case No. 6,948.

Case No. 8,720.

McCORMICK v. IVES et al.

[Abb. Adm. 418.] [1]

District Court, S. D. New York. Jan., 1849.

ADMIRALTY—JURISDICTION—INTERSTATE—SEAMEN'S WAGES.

A court of admiralty has not jurisdiction of an action to recover wages for services in a voyage upon a canal not connecting navigable lakes or different states or territories. Nor will the fact that a small portion of the voyage is through public navigable waters, give jurisdiction, if the main end contemplated by the contract was a service upon such canal.

[Cited in Walters v. The Mollie Dozier, 24 Iowa, 198.]

This was a libel in personam for wages, by Edward McCormick against Edwin R. Ives

[1] [Reported by Abbott Brothers.]

and John Chambers. The libel set out a shipping contract, whereby the respondents employed the libellant to perform a voyage in the canal-boat Camden, then in New York, to Buffalo, and back to New York,—principally between Albany and New York,—at $20 a month; and then averred that in pursuance of the agreement, the libellant entered on board the vessel on May 4, 1848, and proceeded therewith to Albany, and thence back to New York; and so continued in the employ of the respondents until about December 1, 1848, when he was discharged. The libel claimed a balance of $102.29.

William Jay Haskett, for libellant.

H. S. Mackay, for respondents.

I. The libellant must succeed on the case stated in his libel, or not at all. That proceeds on a hiring in a canal boat, destined on a voyage "from New York to Buffalo," and avers the services to have been performed "principally between Albany and New York." It avers, also, that the boat "proceeded with the libellant on board to Buffalo and back to New York." The libel, schedule, and proof show, that whatever services the libellant rendered, were in pursuance of an entire and indivisible contract, to serve in a canal boat on a canal route.

II. It follows from the first point, that the libellant could not, at the hearing, as he attempted to do, set up a new or distinct demand, separate and separable in itself, by going for services performed on the river alone, irrespective of the general contract or hiring stated in his libel, and which was also shown by the proof.

III. The case, therefore, presents one of the hiring of a hand to serve on a canal boat on trips from New York to Buffalo, in the doing of which by far the greater portion of the services were rendered on the canal; in which case this court has not jurisdiction.

IV. No decree can be given for that portion of the general services which were performed on the river, (admitting such to be of admiralty cognizance,) 1. Owing to the indivisibility of the claim. 2. The want of allegation to support it in the libel. 3. The oppression and injustice which would result to both parties, by exposing them to two separate suits in two distinct tribunals for one and the same demand.

V. It is not necessary to plead the want of jurisdiction, as neither consent or acquiescence can confer it. Whenever the want of it appears, the court must dismiss the suit. Although here the protestando with which the answer begins and the objection with which it concludes, do distinctly allege and set up the want of jurisdiction. That is in equity, and so here, an answering demurrer.

VI. But there is no jurisdiction in this case on other grounds. 1. A canal boat proper, such as this, belongs, as a machine, to the waters of the canal. It is a fresh-water fish, and when it gets into the sea or its waters, it is out of its element. In other words, what it does on rivers, bays, and creeks on the ebb and flow of the tide is, by the by, and merely temporarily incident to its main and essential object, which is to traverse the surface of the waters of the canal. It has no capacity for or adaptation to any of the purposes of a sea or river craft. It is a log upon the water, without the aid of extrinsic force. On the canal it depends on the power of horses moving on the land for its progress, and on the river on tugs for its headway. It is no more a ship, or craft, that falls within the jurisdiction of admiralty, than a horse-cart or a steam-car that might be launched into a river and buoyed upon its waters; nor do the hands bear any of the merits or characteristics of the sailor, or of persons connected with shipping. 2. The act of congress of 1845 [5 Stat. 726], by declaring that canal boats shall not be proceeded against in admiralty, in rem, not only shows the legislative sense as to their want of nautical character, but also, by denying jurisdiction over the boat, has by necessary implication also taken away jurisdiction over the person for services in any such boat, as if the boat be not a sea craft in respect to which a libel could be filed in rem, jurisdiction of the person, would, for the same reason, fail, for that cannot be a maritime contract in respect to a hulk which is not itself of admiralty cognizance.

BETTS, District Judge. It is unnecessary to consider the matters of defence set forth by the respondents in their answer, as an objection to the recovery is taken which is fatal to the libellant's claim, upon the case as made by himself.

The objection is, that the contract of hiring was one entire contract for the navigation of a boat from New York to Buffalo, and back from Buffalo to New York, each way through the Erie Canal; and that this court cannot take jurisdiction over an agreement of this description.

The averment of two or three trips made between New York and Albany or Troy and back, and the proofs given of these particular services, do not aid the libellant, for they were all under the one employment, the boat failing to run out the whole extent of the voyage contracted, only when freight could be had but for a portion of it.

The court has repeatedly held, upon the principles established in The Thomas Jefferson, 10 Wheat. [23 U. S.] 428, The Phoebus, 11 Pet. [36 U. S.] 175, and in other analogous cases,[2] that this class of contracts are not

[2] The principle determined in the cases cited, was, that the admiralty courts of the United States have no jurisdiction of a contract for services in a voyage substantially to be performed upon a river, and above the ebb and flow of the tide. Since the time when the decision in the text was made, the case of The Thomas Jefferson [supra] has been reversed, in The Gen-

suable in admiralty. The main end contemplated was a service upon the canal, and the contract could not be severed, so as to give a remedy upon one portion of it in a maritime court, leaving the residue to be used upon in a court of common law.

I do not now consider the question, whether the act of congress of July 20, 1846 (9 Stat. 38, c. 60, § 1), in relation to canal boats, which forbids jurisdiction in rem to any United States court over canal boats for the wages of any person or persons who may be employed on board thereof, or in navigating the same, affects also the jurisdiction of the courts against owners in personam, or against that class of vessels when employed on tide-waters; because, upon the allegations of the libel, and the proofs in the cause, I hold that the action cannot be maintained.

The transit of the boat from New York to Buffalo, and reversely from Buffalo to tide-water at Troy or New York, is not an employment of the boat in business of commerce and navigation between ports and places in different states or territories upon the lakes and navigable waters connecting the said lakes, within the provisions of the act of congress, approved February 26, 1845 (5 Stat. 726), which extends the jurisdiction of this court to cases of that character, so that an implication can be raised that this form of action may be sustained upon the instance side of the court upon that description of contract. Libel dismissed, with costs.

Case No. 8,721.

McCORMICK v. JEROME et al.

[3 Blatchf. 486.] [1]

Circuit Court, S. D. New York. July 9, 1856.

INJUNCTION—DELAY IN SERVICE — ATTACHMENT—LACHES—NEW APPLICATION.

1. Where an order granting an injunction was made, and the writ of injunction issued thereon was not tested till more than six weeks afterwards, and was not served till within seven days of one year after the day of its teste: *Held*, that a disobedience of the writ would not be punished by attachment.

2. After such a lapse of time, the plaintiff should, before using the writ, apply to the court for authority to do so.

This was an order to show cause why a writ of attachment should not issue against the defendants [Edward T. Jerome and Moses Jerome] for disobeying a writ of injunction [by Cyrus H. McCormick] issued and served in this cause.

Edward N. Dickerson, for plaintiff.
William A. Hardenbrook, for defendants.

BETTS, District Judge. The objections set up by the defendants go rather to show, that the plaintiff has no right to the injunction, than to deny its violation or to excuse the disobedience. But there is a question touching the regularity of the plaintiff's proceedings, which the court cannot overlook, and which will avoid his right to the attachment prayed for.

The order granting the injunction was made April 28th, 1855. The writ issued thereon was tested June 11th, 1855, but was not served on the defendants until June 4th, 1856; nor is it made to appear whether the writ was taken out at the time of its teste, or was obtained at the time of its service, and ante-tested, so as to appear to have been issued during the term at which it was awarded.

Either mode of practice would, in my judgment, be unwarrantable and irreguiar. The writ emanated as the mandate of the court in relation to facts then in its view, staying them as unlawful, and interdicting their continuance or subsequent repetition. It was authorized on the assumption that its corrective power was then required, and would be immediately exercised, although, after it should once be served, it would unedly continue its action until withdrawn by order of the court. But it would be manifestly against the nature of the relief, for the court to place a process of that high character in the hands of a party to be used at his discretion, whenever he may determine that a new act committed by the defendant violates the order of the court.

If it be compatible with the nature of the remedy to issue the writ on any condition subsequently to occur, that condition should be incorporated in the order, or appear upon the face of the process, and could never be left at the option and control of the party obtaining the order.

The plaintiff, if he found no necessity for the aid of the court when the writ was awarded, but supposed, a year subsequently, that one has arisen, should have applied to the court on the new facts, and have procured an authorization to use the process under such change of circumstances. None such was given to him by the court.

Nor does the process import such authority from the mere seal upon the writ. Although not technically made returnable in court, yet the nature of all intermediary or final process of the court requires that it shall be served or put in execution before a stated term of the court intervenes after its award. The teste, which verifies its authority, ceases

esee Chief v. Fitzhugh, 12 How. [53 U. S.] 443, where it is held, that the admiralty jurisdiction of the district courts of the United States extends to the navigable lakes and rivers of the United States without regard to the ebb and flow of the tides of the ocean. The reasoning of this case does not apply, however, to canals, and the decision does not impair the authority of the case given above.

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

to give it the character of a mandate of the court, for any primary action thereon, when the term during which the power was granted has terminated.

In my opinion, therefore, the plaintiff was bound to procure the direction of the court, after such a lapse of time, before he could take out the writ of injunction, or use it if previously in his hands, and the neglect of the defendants to obey it, on the existing state of facts, cannot be punished by attachment.

The motion is accordingly denied.

Case No. 8,722.

McCORMICK v. KETCHUM.

[See Case No. 8,719.]

Case No. 8,723.

McCORMICK v. MAGRUDER.

[2 Cranch, C. C. 227.] [1]

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

MISTAKE—FAILURE OF CLERK TO ENTER APPEARANCE—EJECTMENT—HABERE FACIAS—MOTION TO QUASH.

In ejectment, if the clerk by mistake omit to enter the tenant's appearance at the first term, and judgment be entered against the casual ejector, and a habere facias be issued, the court will, at a subsequent term, upon affidavits, quash the habere facias, and rescind the judgment, and permit the tenant to appear, upon entering into the common rule.

[Cited in Reiling v. Bolier, Case No. 11,671. Cited in brief in Blagden v. Broadrup, App. Fed. Cas.]

In ejectment there had been judgment at December term, 1819, against the casual ejector by default, and a habere facias issued returnable to this term.

Mr. Taney, for the tenant, moved the court to quash the execution, and rescind the judgment, and permit the tenant to appear, upon entering into the common rule.

This motion was founded upon affidavits that Mr. Marbury ordered the clerk to enter his appearance for the tenant before the judgment was entered, but the clerk, by mistake, entered it in another case.

Mr. Wallach and Mr. Jones, for plaintiff, mentioned the case of Baker v. Glover [Case No. 769]. And see, also, Sherburne v. King [Id. 12,759], at June term, 1820, and Jones v. Llwellyn [Id. 7,477], at March term, 1820, and December term, 1819.

THE COURT, upon the affidavits and motion, quashed the habere facias, rescinded the judgment, and permitted the tenant to appear.

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

Case No. 8,724.

McCORMICK v. MANNY et al.

[6 McLean, 539; [1] 4 Am. Law Reg. 277; 61 Jour. Fr. Inst. 176.]

Circuit Court, N. D. Illinois. Jan. 16, 1856. [2]

PATENTS—REAPING MACHINE—EXPIRATION — DISTINCT PARTS — COMBINATIONS — IMPROVEMENT—MECHANICAL EQUIVALENT.

1. The plaintiff's first patent for a reaping machine being dated in 1834 has expired, and whatever invention it contained now belongs to the public.

2. Improvements were made by McCormick, for which, in 1845, he obtained a patent, and in 1847 a patent for a further improvement, which last patent was surrendered and re-issued in 1853.

3. A machine may consist of distinct parts, and some or all these parts may be claimed as combinations. In such an invention, no part of it is infringed, unless the entire combination or the part claimed shall have been pirated.

[Cited in Silsby v. Foote, 20 How. (61 U. S.) 392.]

4. In his patent of 1845, for improvements in the reaping machine, the plaintiff claimed the combination of the bow L, and dividing iron M, for separating the wheat to be cut from that which is left standing, and to press the grain on the cutting sickles and the reel. The defendant's wooden divider does not infringe that claim of complainant's patent which embraces the combination of the bow and the dividing iron, as he does not use the iron divider which the plaintiff combined with the wooden.

5. Where the plaintiff's patent calls for a reel post, set nine inches behind the cutters, which is extended forward, and connected with the tongue of the machine to which the horses are geared, it is not infringed by a reel bearer extending from the hind part of the machine and sustained by one or more braces. The only thing common to both devices is supporting the end of the reel nearest to the standing grain. In their combinations and connections, and in everything else the devices are different.

6. Where reaping machines, prior to the plaintiff's invention, had a grain divider or reel post similar to the plaintiff's, the defendants may use the same without infringing the plaintiff's patent.

7. The invention embraced in plaintiff's patents of 1847 and 1853, was not a raker's seat, but it was the improvement of his machine, by which it was balanced, and the shortening of the reel so that room was made for the raker's seat on the extended finger-bar. This being his invention and claim, to this his exclusive right is limited. Had he claimed generally a seat for the raker, the claim would have been invalid, by reason of the prior knowledge and use of raker's seats in reaping machines. McCormick's raker's seat was new in its connection with his machine; but his invention did not extend to a raker's seat differently arranged.

8. A mechanical equivalent is limited to the principle called for in the patent, including colorable alterations, or such as are merely changes as to form.

9. Manny's reaping machine does not infringe either of McCormick's patents. The divider and reel bearer used in Manny's machine being different in form and principle, do not infringe McCormick's patent of 1845. [2]

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

[2] [Affirmed in 20 How. (61 U. S.) 402.]

10. The stand or position for the forker, invented and patented by John H. Manny, is a new and useful improvement, and different in form and principle from McCormick's patents of 1847 and 1853.

[Cited in Hoffheins v. Brandt, Case No. 6,575.]

This was a bill in chancery filed in the circuit court of the United States for the northern district of Illinois, by Cyrus H. McCormick against John H. Manny and others, charging them with infringement of his patents for improvements in the reaping machine, dated January 31st, 1845 [No. 3,895], October 23d, 1848 [No. 5,335], re-issued May 24, 1853 [No. 239]. The defendants filed their answer, setting up various grounds of defence, but relying chiefly on the defence that the reaping machines manufactured and sold by them at Rockford, Illinois, under the name of Manny's Reaper, differ in form and principle from the improvements patented by McCormick, and that the raker's stand or position was an improvement invented and patented by John H. Manny. Issue being joined, a large volume of testimony was taken, showing the state of the art of making reaping machines before and after the date of McCormick's patents. The cause standing for hearing on the bill, answer, exhibits and testimony, it was by agreement of counsel heard at Cincinnati, in September 1855, before the Honorable John McLean, circuit judge, and the Honorable Thomas Drummond, district judge of the United States for the Northern district of Illinois.

Reverdy Johnson and E. N. Dickerson, for complainant.

Edwin M. Stanton and George Harding, for defendants.

On behalf of the complainant it was submitted that letters patent had been granted to the complainant January 31st, 1845, for improvements in reaping machines. In this patent, among other things, there was described and claimed a device for dividing and separating the grain to be cut, from that which was to be left standing, as the machine passed around the grain field. And also a device to suppport the end of the reel on the side nearest to the standing grain, so that the cut grain could be brought freely on the platform of the machine. Another patent was granted to the complainant, October 23d, 1847, and re-issued to him, on an amended specification, May 24th, 1853. This patent specified and claimed an improvement for supporting the raker's body on the machine, while he raked off the cut grain and deposited it in gavels on the ground at the side of the machine. It was contended that the defendants had made and sold for the harvest of 1854, eleven hundred reaping machines, and for the harvest of 1855, three thousand reaping machines, in all of which there were devices for dividing and separating the grain, for bearing up the reel and devices for supporting the raker, substantially the same as were specified and claimed by the complainant. A decree of a perpetual injunction and an account of profits were asked for.

On behalf of the defendants it was submitted, that prior to the date of complainant's inventions and patents, various devices for dividing and separating grain had been described, patented, or used, and on this point especial reference was made to the machines of Dubbs, Cummings, Bell, Phillips, Duncan, Randall, Schnebly, Hussey, Ambler, and others. That anterior to the same date, reaping machines, containing devices for bearing up the reel out of the way of the cut grain, had been described, patented or used, by Cummings, Bell, Ten Eyck, Phillips, Duncan, Schnebly, and Randall. And that prior to McCormick's invention, devices for supporting the raker's body had been used in the machines of Hussey, Randall, Schnebly, Woodward, Nicholson and Hite. Defendants' counsel contended that McCormick's patents of 1845, 1847, and 1853, on their face, purport to be for special improvements in the machine patented by him in 1834, and not for the discovery of any new principle, method, or combination for reaping, in general. His exclusive right is, therefore, limited to the specific improvements he invented, described, and claimed in his patent. The patents for these improvements are to be construed in reference to the general state of the art, to McCormick's prior inventions, and to the particular description of his improvements, and the specification of his claim. And so that, while securing him the exclusive right contemplated by law, at the same time to guard against his withdrawing from the public anything before discovered, known, or used by others, or that was contained in his original patent. For a patentee has no right to extend the term of his monopoly over anything embraced in his original invention, under color of some improvement on it. The claims for the seat, the reel post, and the divider, are efforts to acquire a monopoly of the reaping machine, by enlarging, modifying and changing the description and specification of particular improvements, and expanding them so as to cover principles, methods and results, in violation of the principles and avowed policy of the patent laws. And the result aimed at by the complainant would withdraw from the public the contribution of many minds, and subject an instrument of great public utility to a private monopoly, without even a decent color of right. The merit claimed for McCormick, of being the the first man who brought the reaping machine into successful use, was wholly aside from the present question. For, even if that merit justly belonged to McCormick, it is not the ground on which the patent law confers an exclusive right to the machine. And, besides, it could only extend to his own improvements; whereas, to the principal parts constituting the machine, he has not the shadow of any claim, as inventor.

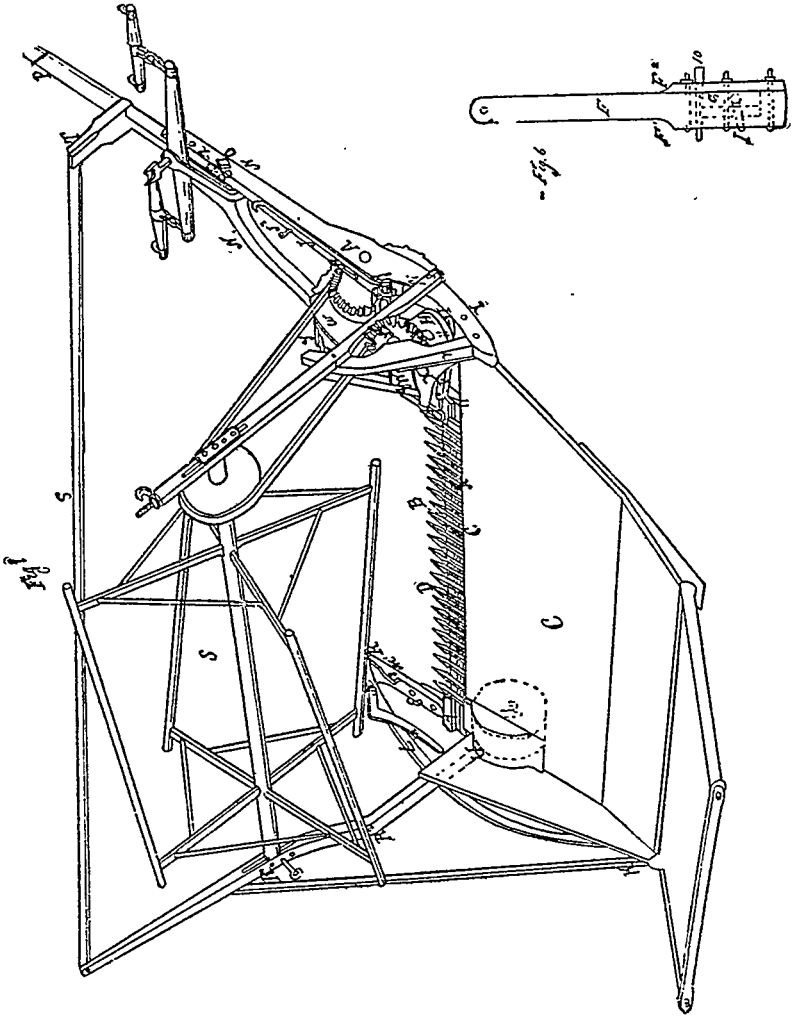
The opinion of the court was delivered at Washington, on the 16th of January, by Mr. Justice McLEAN, as follows:

McLEAN, Circuit Justice. This is a bill to restrain an alleged infringement of the plaintiff's patent, by the defendants, and for an account. By consent of the parties, the case was adjourned from Chicago to Cincinnati, at which place it was argued on both sides with surpassing ability and clearness of demonstration. The art involved in the inquiry was traced in a lucid manner, and shown by models and drawings, from its origin to its present state of perfection. And if, in the examination of the cause, the entire scope of the argument shall not be embraced, no inference should be drawn that the court was not deeply impressed with the artistical researches and ingenuity of the counsel.

It is proper that I should say here, that after the close of the argument at Cincinnati, no time was afforded for consultation with my brother judge. At my request he has lately transmitted to me his opinion on the points ruled, without any interchange of views between us, and there is an entire concurrence on every point. Cyrus H. McCormick, a citizen of Virginia, represented to the patent office, that he had "invented a new and useful improvement in the machine for reaping all kinds of small grain," which improvement was not known or used before his application, on which he obtained a patent, dated 21st of June, 1834. As that patent has expired, and whatever of invention it contained now belongs to the public, no further notice of it in this place is necessary. The same individual, in representing to the patent office, that he had invented certain new and useful improvements on the above machine, obtained a patent for those improvements, dated the 31st of January, 1845.

After describing certain improvements in

[Drawings of patent No. 3,895, granted January 31, 1845, to C. H. McCormick, published from the records of the United States patent office.]



the cutting apparatus, the divider, and the reel post, he makes the following claim: (1) The curved (or angled downward, for the purpose described,) bearer for supporting the blade in the manner described. (2) The reversed angle of the teeth of the blade, in the manner described. (3) The arrangement and construction of the fingers (or teeth for supporting the grain) so as to form the angular spaces in front of the blade, for the purpose designed. (4) I claim the combination of the bow L and dividing iron M, for separating the wheat in the way described. (5) Setting the lower end of the reel post (R) behind the blade, curving it at R^2, and leaning it forward at the top, thereby favoring the cutting, and enabling him to brace it at the top by the front brace (S,) as described, which he claims in combination with the post. And afterwards, McCormick applied for another patent, for improvements made on his reaping machine patented in 1845, and it was issued to him the 23d of October, 1847.

This patent was inoperative, as the patentee afterwards alleged, by reason of a defective specification; and he surrendered it, and obtained a corrected patent the 24th of May, 1853. In his specifications of this patent, he says, "the reaping machines heretofore made may be divided into two classes. The first class having a seat for a raker, who, with a hand rake equal in length to the width of the swath cut, performs the double office of gathering the grain to the cutting apparatus and on to the platform, and then of discharging it from the platform on the ground behind the machine." The defects of the first class were remedied, he says, by the second class, in which a reel was employed to gather the grain to the cutting apparatus, and deposit it on a platform, from whence it is raked off by an attendant, who deposits the grain on the ground by the side of the machine, where it can lay as long as desired; the whole width of the swath being left unencumbered for the passage of the horses on the return of the machine to cut another swath. And he states that the length of the reel leaves no seat for the raker, who has to walk on the ground at the side of the machine and rake the grain from the platform, and, he says, the weight of the machine is too great, back of the driving wheel. For these defects he has provided a remedy by his improvements, which places the driving wheel back of the gearing that gives motion to the sickle, which is placed in a line behind the axis of the driving wheel and the cog-gearing, which moves the crank forward of the driving wheel, so as to balance the frame of the machine with the raker on it. And also in combining with the reel, which deposits the grain on the platform, a seat, or position for the raker to sit or stand, so that he may rake off the grain, thrown upon the platform by the reel, on the side of the machine farthest from the standing grain.

And in conclusion he says: "What I claim as my invention, and desire to secure by letters patent, as improvements on the reaping machines secured to me by letters patent dated the 24th of June, 1834, and the 31st of January, 1845, is placing the gearing and crank forward of the driving wheel for protection from dirt, &c., and thus carrying the driving wheel further back than heretofore, and sufficiently so to balance the rear part of the frame, with the raker thereon; and this position of the parts is combined with the sickle back of the axis of motion of the driving wheel, by means of the vibrating lever, substantially, as herein described." And he claims "the combination of the reel for gathering the grain to the cutting apparatus, and depositing it on the platform, with the seat or position for the raker, arranged and located as described, or the equivalent thereof, to enable the raker to rake the grain from the platform, and lay it on the ground, at the side of the machine." The defendants in their answers, deny the validity of the plaintiff's patent for want of novelty, and on other grounds; but in their argument they disclaim any such purpose; and place their defence on a denial of the infringement charged. The infringement of the plaintiff's patent is alleged to consist in his divided reel-post, and its connections, and the raker's seat.

The fourth claim in the plaintiff's patent of 1845, is "the combination of the bow L and dividing iron M, for separating the wheat in the way described." He describes the divider "as the extension of the frame on the left side of the platform, three feet before the blade, for the purpose of separating the wheat to be cut, from that to be left standing, and that whether tangled or not." This divider gradually rises from the forward point, with an outward curve or bow, so as to throw off the grain to the left, and thus separate it from the grain to be cut. And this is combined with a dividing iron rod or bar, made fast by a bolt to the timber extended, as a divider, which bolt also fastens the bow. From this bolt the iron rises towards the reel at an angle of thirty degrees, until it approaches near to it, when it is curved to suit the circle of the reel. This iron is adjustable to suit the lowering or elevation of the reel, by a bolt and slot in the lower end. By its gradual rise, this iron divider elevates the tangled grain, and presses it against the cutting sickles of the machine.

There can be no doubt that this combination of the bow and iron divider, as claimed, is new, it not having constituted a part of any reaping machine prior to the complainant's.

In the specifications of the defendant's patent, he says, "the divider F. projects on the left side of the machine in advance of the guard fingers, and divides the grain to be cut from that which is to be left standing, &c.,

and the machine constructed under his patent has a wooden projection, somewhat in the form of a wedge, extended beyond the cutting sickles some three feet; and which, from the point in front, rises as it approaches the cutting apparatus, with a small curve, so as to raise the leaning grain and bring it within the reel on the inner side of the divider, and on the outer side by the projection, to disentangle the heads and stalks, so as to leave them with the standing grain." This is not dissimilar in principle from the wooden divider of the plaintiff's machine; the curve outward may be less, and the elevation from the point which enters the grain may also be less than McCormick's, but it performs the same office, and in principle they may be considered the same, and the question necessarily arises, whether in this respect, this divider is not an infringement of the plaintiff's patent. A satisfactory answer to this inquiry, is not difficult. The plaintiff claims that his wooden divider is in combination with the iron rod on the inner side, which rises from its fastening at an angle of thirty degrees. The adjustability of this iron, by giving it a lower or higher elevation, is also important, and would of itself be a sufficient ground for a patent. But in this inquiry, the adjustability of the iron divider is not important, as it may be considered stationary. A patent, which claims mechanical powers or things in combination, is not infringed by using a part of the combination. To this rule there is no exception. If, therefore, the wooden divider of the defendant's machine, be similar to that of the plaintiff's, there is no infringement; as the combination is not violated in whole but in part. But there is another, and an equally conclusive answer, to the objection. The plaintiff's wooden divider was not new, and therefore, could be claimed only in combination. The English patent of Dobbs in 1814, had dividers of wood or metal. The outer diverging rod of Dobbs' divider rises as it extends back, and at the same time, diverging laterally from the point of the divider, acts the same as the McCormick divider of 1845, to raise stalks of grain inclining inwards, and to turn them off from other parts of the machine.

The English patent of Charles Phillips, in 1841, had a dividing apparatus, consisting of a pointed wedge-formed instrument, which extended same distance in advance of the cutting apparatus and reel; its diverging inner side, like the corresponding side of McCormick's divider of 1845, bears inward upright grain within the range of the reel and cutting knives; while at the same time, its outer diverging edge, like the outer edge of McCormick's divider, bears off standing grain without the range of the reel. And there is an inclined bar, which, being attached by its front to the lower piece, extends backwards and upwards, until it meets the frame of the machine, at a point above and behind the cutting apparatus. Ambler's machine had aslo a divider, not dissimilar to the defendant's. Bell's machine, made in 1825, had dividers on it to press the grain away from the machine on the outer side, and on the inner side to press it to the cutters. Hussey's machine, too, had a point which projected into the grain, and divided it before the cutting knives; the inside to be cut, the outside to remain with the standing grain. In Schnebly's machine, the grain to be cut was separated from that which was left standing, by a divider projecting on the side of the machine. In the plaintiff's patent of 1834, he says, on the left end of the platform is a wheel of about fifteen inches diameter, set obliquely, bending under the platform to avoid breaking down the stalks, on an angle that may be raised or lowered by two moveable bolts, as the cutting may require, corresponding with the opposite sides. The projection of the frame at this end is made sufficient to bear off the grain from the wheel, and he claims "the method of dividing and keeping separate the grain to be cut from that to be left standing." This patent having expired, whatever of invention it contained, now belongs to the public, and may be used by any one. The inner line of the projecting divider of the defendant's machine, it is contended, has a gradual rise from the point; which answers the purpose of the iron divider of Mr. McCormick's to crowd the grain on the reel and cutters; but, in this respect, the wooden divider of the defendant's is not materially different from those above referred to, and others in use, before the plaintiff's patent of 1845.

In regard to the divider in the defendant's machine, it is clear, that it cannot be considered as an infringement of the plaintiff's patent. The reel-post, as claimed, with its connections, by the plaintiff, seems not to have been infringed by the defendant. In defendant's machine the end of the reel, next the standing grain, is supported by an adjustable arm, which is nearly level, slightly inclined upwards, and supported by a standard towards the rear of the machine. In McCormick's patent of 1845, the reel-post is set back of the cutter, some nine inches at its foot, rising upwards and projecting forwards, and supported at its top by a brace running to and connected with a standard on the tongue of the machine. The reel-post of the defendant is substantially like the one in Bell's reaping machine, and also the patent granted to James Ten Eyck, in 1825. The reel-support or beam of the latter has not the features of vertical and horizontal adjustability contained in the reel-beam of the defendant's; but it is attached to the machine behind the platform on which the cut grain is received, and it extends forward to hold the reel, and to leave the space beneath it unobstructed.

In his patent of 1834, McCormick placed his reel-post before the cutting apparatus,

standing perpendicularly, and being braced as described. But in the patent of 1845, that post was set nine inches behind the sickles, leaning forward so as to bring the part of it which supported the reel to its former perpendicular, the post still extending forward so as to admit of being braced directly to the tongue of the machine to which the horses are harnessed. This was rendered necessary, as the first post being in advance of the cutter, encountered the fallen grain, which adhered to it, and clogged the machine. The reel-post, so called, in both these machines, were alike, only as bearers of the end of the reel next to the standing grain; but their structures in every other respect are different. McCormick's reel-post served as a brace to the machine, its foot being mortised into the left sill of the machine, nine inches behind the cutting sickles; its top, leaning forward, was braced to the tongue of the machine. The defendant's reel-post, like that of Bell's, was connected with the hindmost post of the machine, and was sustained by braces, as the reel bearer. In giving strength to the machine it was unlike the plaintiff's, and if this were not so, the defendant's is sustained by similar reel-posts in other machines, prior to McCormick's.

But in addition to these considerations, the plaintiff claims his reel-post in combination with the tongue of the machine, as described. There is no pretence that this combination has been infringed. From the structure of McCormick's reaper, it was impossible to find a seat for the raker, without an adjustment of the machine which should balance it with the weight of the raker behind the driving wheel. For this purpose the gearing and crank were placed further forward, the finger piece was extended, and the reel shortened, so as to make room for the raker, and enable him to discharge the grain at the side of the machine, opposite to the standing grain. This improvement was claimed as a combination of the reel with the seat of the raker.

In his specifications to the patent of 1853, McCormick describes two classes of machines, the first class having a seat for a raker, who, with a hand-rake, having a head equal in length to the width of the swath cut, performs the double purpose of gathering the grain to the cutting apparatus and on to the platform, and then of discharging it from the platform behind the machine. This was defective, principally, he says, because the grain was discharged behind, in the wake of the machine, rendering it necessary to remove the grain before the return of the machine, and he alleges these defects are obviated by his improvement. In the specifications to John H. Manny's patent, of the 6th of March, 1855, he says, after referring to McCormick's, Schnebly's, Woodward's and Hite's machines, in regard to the seats of the rakers, "the improvement of mine consists, in combining with the reel, which gathers the grain to the cutting apparatus, and deposits it on the platform, a seat or position arranged between the inner end of the platform and the end of the machine next the standing grain, for an attendant to sit or stand on, and which gives due support to him while operating a fork to push the cut grain towards the outer end of the platform, where the grain is first compressed against the wing or guard provided for the purpose, and then by a lateral movement of the fork discharged properly on the ground behind the platform, in gavels, ready to be bound into sheaves." And in the summing up, the defendant, Manny, says: "What I claim is the combination of the reel for gathering the grain to the cutting apparatus and depositing it on the platform, with the stand or position of the forker, arranged and located as described, or the equivalent thereof, to enable the forker to fork the grain from the platform, and deliver and lay it on the ground at the rear of the machine, as described."

With a few verbal alterations, this claim is the same as made by the plaintiff, with the exception of the seat of the raker, and the place of deposit for the grain. It must be admitted that the combination of the raker's seat with the reel, as claimed by the plaintiff, was new. And a very important question arises, how far this claim extends. Is it limited to the mode of organization specified, or may it be considered as covering the entire platform of the machine, and all combinations of the seat and reel? The reel was not new, nor was a seat on the platform, or connected with the platform, for the raker, new; but the position for the raker, as described by McCormick, was new. Mr. Justice Nelson, in the case of McCormick v. Seymour [Case No. 8,726] in his charge to the jury said, "the seat was the object and result he was seeking to attain, by the improvement which he supposed he had brought out. What he invented was the arrangement and combination of machinery which he has described, by which he obtained his seat. That, and not the seat itself, constituted the essence and merit, if any, of the invention." The reel was advanced in front of the cutters, and shortened, and the driving wheel was put back and the gearing forward, so as to balance the machine with the weight of the raker on the extended finger piece. In this peculiar organization, the improvement of McCormick consisted. It was adapted to no other part of the machine. To place the raker on any other part of the platform or machine of McCormick, than on the extended finger board, would derange its balance, which was so well adjusted by the improvements described. No such change can be made without experiment and invention; consequently, the improvement of the plaintiff, in this respect, is limited to his specification.

In 1844, Hite made a new and useful im-

provement on McCormick's reaping machine, patented in 1834, by attaching thereto a seat mounted on wheels for a raker to occupy when raking the grain from the platform, on which it is deposited by the reel. And a patent was issued in 1855, for this improvement, although from the evidence, the presumption was that the improvement had gone into public use more than ten years before. William Schnebly at Hagerstown, from 1825 to 1837, constructed reaping machines. At first a revolving apron was used, but this was discontinued, and after the grain had been thrown on the platform by the reel and the proper motion of the machine, he says he sat upon the machine in rear of the platform, sometimes upon the guard board, and sometimes astride a cap or cross beam, suitable for that purpose, and raked off the grain with a three or four pronged fork, from the platform, and deposited it on the ground at the side of the machine. In the specifications of Woodward's machine, patented in 1845, he says, the raker stands upon the platform L, and as the grain is cut and falls upon the platform, he with a fork or rake conveys it to the hinged box, and when a quantity is accumulated therein sufficient, the rear end of the box falls and deposits the wheat on the ground in the form of a gavel. This box was often dispensed with. The raker rode on the machine. In 1844, Nicholson represented that he had made an improvement on a machine for cutting grain, &c., and he says, "the machine is provided with a pair of shafts, L, for the animal to draw by, and a place, A, for the driver to sit on, and a suitable stand for a raker's seat. And as a part of his improvement he claims a mode of depositing the grain in a line out of the track of the horse, as described. In 1855 a patent was issued for this improvement, to the administrator of Nicholson. In Abraham Randall's patent, dated in 1833, the grain was raked off the machine by a raker, who had a seat on the platform. This part of the machine succeeded well. When a sufficient amount of grain was collected on the platform, to make a sheaf, it was raked off the side. The machine was in use several years. The platform of the defendant's machine, is different from that of the plaintiff's. The latter is constructed so that the side next to the reel and the cutting knives, is parallel with them, while Manny's platform is so constructed as to extend back from the cutters in a diagonal form, which brings its hindmost part, through which the grain is discharged, to the right of the swath cut. This leaves the way open for the machine in cutting the next swath. The raker, in this machine, occupies a place behind the running ground wheel at the rear of the divider, with his face quartering to the horses. Whether we look at the structure of the platforms, or the position of the rakers, no two things could be more unlike than the two machines of the plaintiff and defendant. Do they differ in principle, as well as in form? To provide for McCormick's raker the structure of the machine had to be altered materially, by changing the heavy machinery so as to balance it with the weight of the raker on the extended finger board. The reel had also to be shortened. On Manny's machine the raker occupies a place diagonal to that of McCormick's, and at the farthest part of the platform next to the standing grain. He stands not upon the extended finger board, but on the platform, requiring no shortening of the reel, nor balancing of the machine.

From the patents above referred to, it appears that before the last improvement of McCormick, rakers had been placed upon the machine, intended to perform the same office as McCormick's raker. It is no answer to this fact to show that some of these plans were abandoned or superseded by the progress of improvement. They were embodied in patents, and were not only publicly constructed and used, but the models of the machines were deposited in the patent office, and the patents, with their specifications and drawings, were matters of public record.

Now if these various plans of seating a raker on the machine, as called for in other patents prior to that of McCormick's, did not affect the validity of his subsequent patent, it could hardly be contended that his patent excludes all subsequent improvements for a raker's seat. In the case of McCormick v. Seymour [supra], Mr. Justice Nelson argues very properly in saying, "it is insisted on the part of the learned counsel for defendants, that there is nothing new in this, because there is in the machine of Hussey a seat, or what is equivalent, a position for the raker, in which he may stand and rake off the grain. The seat, that is the position on the platform, is, in one sense, undoubtedly common to both. But Hussey's machine has no reel to interfere with the raking, and the grain, instead of being raked from the platform, is pushed from the back part of it. The question is, whether the arrangement of the seat, the combination by which the patentee obtains and can use the seat or position, is similar to or substantially like the contrivance in Hussey's machine. That is the point. The mere fact that a seat was used in previous reapers, does not embrace the idea contained in this patent. That view could only be material under the assumed construction given by the learned counsel for the defendants to the patent, that it is for a seat. If that were the thing invented and claimed by the patentee, then the seat of Hussey would be an answer to the claim." "There is also another point," says the learned judge, "to which it is proper to call your attention in this connection, and which has been the subject of discussion by the counsel, and that is, that Hussey, in the con-

struction of his machine in Ohio, at a very early day used a reel in connection with his cutter and raker. It is insisted that this use of the reel in connection with a raker, in Hussey's machine, before the discovery of the plaintiff, destroys his claim to originality. In answer to this, it is claimed, on the part of the counsel for this plaintiff, that the contrivance of Hussey into which the reel was introduced, was substantially different from the plaintiff's contrivance. It appears that Hussey's reel, like the reel of the plaintiff, when his first seat was put on in 1845, interfered with the raker, so as to prevent his raking the grain the whole length of the platform. Hence Hussey had an endless apron, by which the grain, when cut, was deposited at the feet of the raker, so that he could shove it off with his rake."

I have cited largely from the learned judge, not only because the opinion was greatly relied on by the plaintiff's counsel in the argument of this case, but for the reason that the opinion is sound. The reel, it seems, interfered with Hussey's plan, which was obviated by an endless apron. McCormick dispensed with the apron by putting back the driving wheel and placing forward the gearing, &c., so as to balance the machine, which, with the shortening of the reel, completed his improvement. Now if a raker be seated on a different part of the machine, and where he can rake without balancing the machine, and without interruption from the reel, it is a contrivance and an invention substantially different from McCormick's. To seat the raker on Manny's machines does not require the same elements of combination that were essential in McCormick's invention. His invention in procuring a seat for the raker, being new and useful, was unaffected by those which preceded it. But Manny's contrivance required no such modification and combination of the machinery for a raker's seat, as McCormick's; it is substantially different from his. The seat was not the thing invented, but the change of the machinery, to make a place for it. And where the seat may be placed on the platform, or on any part of the machine, which does not require substantially the same invention and improvement as McCormick's, there can be no infringement of his right. In McCormick's claim for the improvements which gave him a seat for the raker, arranged and located as described, he adds, "or the equivalent therefor." The words of this claim, "or the equivalent therefor," can not maintain the claim to any other invention, equivalent or equal to the one described. This would be to include all improvements or modifications of the machine, which would make it equal to McCormick's. This part of the claim can not be construed to extend to any improvements which are not substantially the same as those described, and which do not involve the same principle. It embraces all alterations which are merely colorable. Such alterations in a machine afford no ground for a patent.

As stated by Mr. Justice Nelson, the improvement of McCormick consisted, not in the seat for the raker, but in the modification and new combination of parts of his machine, so as to secure a place for a seat. Had a construction of the seat merely, been the invention, that learned judge admitted the prior seat for the raker on Hussey's machine would have nullified the claim.

Having arrived at the result, that there is no infringement of the plaintiff's patent by the defendant, as charged in the bill, it is announced with greater satisfaction, as it in no respect impairs the right of the plaintiff. He is left in full possession of his invention, which has so justly secured to him, at home and in foreign countries, a renown honorable to him and to his country—a renown which can never fade from the memory, so long as the harvest home shall be gathered.

The bill is dismissed at the cost of the complainant.

[NOTE. This cause was taken on appeal by the complainants to the supreme court, where the decree of the circuit court was affirmed, with costs, by Mr. Justice Grier. A dissenting opinion was filed by Mr. Justice Daniel. 20 How. (61 U. S.) 402.

[For another case involving this patent, see note to McCormick v. Seymour, Case No. 8,726.]

Case No. 8,725.

McCORMICK v. SEYMOUR.

PATENTS—ABANDONMENT — FORFEITURE — INVENTION—UNSUCCESSFUL EXPERIMENTS — NEW COMBINATION—REAPING MACHINE.

1. Those who rely upon the ground that a party has forfeited a legal right, secured to him in due form of law, for the purpose of defeating his enjoyment of that right, must make out the point clearly and satisfactorily, beyond any reasonable doubt or hesitation, because the law does not favor an abandonment, and throws upon a party who seeks to obtain the benefit of a forfeiture the burden of proving it beyond all reasonable question.

2. In order to entitle a person to the character of an inventor, and his invention to become the subject of a patent, he must not stop at unsuccessful experiments, but continue until he has brought out a machine producing a useful result; and without this his invention will be worthless to the community, and undeserving the protection of the law.

3. Invention, as it respects machines is any new arrangement or combination, whether of old or new parts or materials, producing in its arrangement and combination a useful result.

4. The improvement was not simply putting a seat on a machine for the raker, but was the arrangement and combination of the parts of the machine so that the patentee was enabled to obtain room on the machine for the raker, and that he might have the free use of his body and limbs in raking off the grain, avoiding the labor and fatigue and inconvenience of walking. The seat or position of the raker on the machine was the object had in view, and was the result of his new

arrangement and combination of the different parts of the machine.

[Cited in Law's Dig. 301, 314, 426, 443, 472, 544, to the points stated above. Nowhere reported; opinion not now accessible.]

Case No. 8,726.

McCORMICK v. SEYMOUR et al.

[2 Blatchf. 240.] [1]

Circuit Court, N. D. New York. June, 1851; Oct. Term, 1851.[2]

PATENTS—SIMPLICITY — NEW OPERATION AND EFFECT—REAPING MACHINE—TIME WITHIN WHICH TO APPLY.

1. In an action for the infringement of a patent, it being objected, that the arrangement of machinery claimed in the patent was so simple and obvious as not to be the subject of a patent: *Held*, that novelty and utility in an improvement are the only conditions requisite to the granting of a patent.

[Cited in Whitney v. Mowry, Case No. 17,592; Tuck v. Bramhill, Id. 14,213; Celluloid Manuf'g Co. v. Comstock & Cheney Co., 27 Fed. 360. Criticised in Simmonds v. Morrison, 44 Fed. 760.]

2. On a question of the novelty of an improvement in a reaping machine, the inquiry for the jury is, whether the alleged prior invention is identical with the plaintiff's, or whether his involves a new operation and produces a new effect on the standing or tangled grain, in the use of the machine.

[Approved in McCormick v. Manny, Case No. 8,724.]

3. On the point of infringement, the inquiry is, whether the defendant's machine involves, in its construction, some new idea not to be found in the plaintiff's, or whether the plan of the former is in substance the same as that of the latter, the differences introduced in the former being merely differences in things not material or important.

[Cited in Simmonds v. Morrison, 44 Fed. 760.]

4. If the defendant has taken the same general plan and applied it for the same purpose, though he may have varied the mode of construction, he will only have introduced mechanical equivalents, and it will still be, substantially, and in the eye of the patent law, the same thing.

[Cited in Simmonds v. Morrison, 44 Fed. 760.]

5. In McCormick's patent of October 23d, 1847, for improvements in reaping machines, the claim of "the arrangement of the seat of the raker over the end of the finger-piece, which projects beyond the range of fingers, and just back of the driving-wheel, as described, in combination with and placed at the end of the reel," is not a claim for the seat, as a seat, or for its particular mode and form of construction, but is a claim to the arrangement and combination of machinery described, by which the benefit of a seat or position for the raker on the machine is obtained.

[Approved in McCormick v. Manny, Case No. 8,724.]

6. Since the act of March 3, 1839 (5 Stat. 353), a patentee may make and vend or use his invention within two entire years before the time when he applies for a patent, without forfeiting or necessarily abandoning his right to a patent; but, if he either sells a machine, or uses one, or puts one into public use, at any time more than two years before his application, it works a forfeiture of his right.

[Cited in Toppan v. National Bank-Note Co., Case No. 14,100.]

7. The act virtually extends the patentee's privilege to sixteen years instead of fourteen.

8. The mere fact that an inventor makes and sells an invention, or puts it into public use, at any time within two years before he applies for a patent, is not, of itself, an abandonment, of the invention to the public.

[Cited in Bevin v. East Hampton Bell Co., Case No. 1,379; Andrews v. Hovey, 124 U. S. 705, 8 Sup. Ct. 678.]

9. Something more must be done within the two years—there must be some acts of the inventor, indicating an intention on his part to devote his improvement to the public in general—in order to authorize a jury to come to the conclusion that he has so abandoned it.

10. Those who rely upon the ground that a party has forfeited a legal right secured to him in due form of law, for the purpose of defeating his enjoyment of that right, must make out the point clearly and satisfactorily, beyond any reasonable doubt or hesitation; because, the law does not favor an abandonment, and throws upon the party who seeks to obtain the benefit of a forfeiture the burden of proving it beyond all reasonable question.

[Cited in Jones v. Sewall, Case No. 7,495.]

11. The general rule as to damages in patent suits is, that the plaintiff is entitled to the actual damages he has sustained by reason of the infringement; and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendant had not interfered with his rights—upon the principle that, if the defendant had not so interfered, all persons who bought his machine would necessarily have purchased the patentee's.

12. There is no distinction, in regard to the rule of damages, between an infringement of an entire machine and an infringement of a mere improvement on a machine, and the damages, in the latter case, are not to be limited in proportion to the value of the improvement.

13. The inventor of an improvement on an old machine, who has a right to use the old machine, is entitled, under a patent for his improvement, to the benefit of the operation of the machine under all circumstances, with the improvement engrafted upon it, to the same degree in which the original patentee was entitled to the old machine.

14. In order to ascertain the nett profits on the making and selling of machines, the jury must take into account, as making up the cost and to be deducted from the sale price, the cost of materials and labor, the interest on capital used, the expense of putting the machines into market, such as agencies and transportation and insurance; and, where the article is sold on credit, a deduction must be made for bad debts.

15. When the actual damages are ascertained, the plaintiff is entitled to interest on them from the commencement of his suit.

16. The jury may also allow to the plaintiff the damages which he has sustained beyond those arising from the actual interference of the defendant in making and putting into market machines which infringe the patent—such as damages from publications by the defendant, disparaging the plaintiff's improvement, while engaged in violating the patent.

This was an action on the case [by Cyrus H. McCormick against William H. Seymour and Dayton S. Morgan] for the infringement of two several letters patent granted to the

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

[2] [Reversed in part in 16 How. (57 U. S.) 480.]

plaintiff, one on the 31st of January, 1845 [No. 3,895], and the other on the 23d of October, 1847 [No. 5,335, reissued May 24, 1853, No. 239], for improvements in reaping machines.

Samuel Stevens, Charles M. Keller, Edwin W. Stoughton, and Samuel Blatchford, for plaintiff.

Ransom H. Gillet and Henry R. Selden, for defendants.

NELSON, Circuit Justice (charging jury). The first patent in this case, which is in question between the parties, was granted to the plaintiff on the 31st of January, 1845, in general terms, for "a new and useful improvement in the reaping machine." The only improvements claimed in this patent, which it is insisted have been infringed by the defendants, are two.

The first is the arrangement and combination of the bow and dividing iron, for separating the wheat and straw, in the process of reaping or cutting, in the manner described. In speaking of this improvement, the patentee says, that he has a piece of scantling some three feet long and three inches square, made fast to a projection of the platform by screw-bolts; to the point of this piece of scantling is made fast, by a screw-bolt, a bow of tough wood, the other end of which is made fast at the back part of the platform, and is so bent as to be about two and a half feet high at the left reel post, and about nine inches out from it, with a regular curve. Then there is a description of the dividing iron, which is an iron rod of a peculiar shape, made fast to the point of the scantling before described, by the same screw-bolt that holds the end of the bow. From this bolt the iron rises towards the reel at an angle of thirty degrees, until it reaches it, that is, until it extends to the reel; then it is bent, so as to pass under the reel, as far back as the blade or cutter, and to fit the curve of the reel. Then there is a contrivance described to adjust this iron to the reel as it is elevated or depressed, which is not material in this case. "By means of the bow," says the specification, "to bear off the standing wheat, and the iron to throw the wheat to be cut within the power of the reel," so that the wheat may be caught and brought to the cutter and upon the platform, "the required separation is made complete.' The invention, as claimed in the patent, is substantially this—the arrangement and combination of the bow and the dividing-iron, for separating the wheat, in the manner described.

On the part of the defendants it is insisted, first, that this arrangement and combination is so simple and obvious, that the claim, even admitting it to have been new and not before in use, is not the subject of a patent; secondly, that if it may be the subject of a patent, yet there was nothing new in it, but, on the contrary, it had before been known and in public use; and thirdly, that admitting both its patentability and novelty, still the contrivance used by the defendants for separating the wheat, in the process of cutting and reaping, is substantially different from the contrivance of the plaintiff.

As to the first point—whether the claim in question constitutes the subject-matter of a patent—the sixth section of the patent act of July 4, 1836 (5 Stat. 119), provides, in substance, that any person, having discovered or invented any new or useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter, not known or used by others before his discovery or invention, and not, at the time of his application for a patent, in public use or on sale with his consent, may make application to the commissioner and is entitled to a patent. This is the authority conferred on the patent-office for the granting of patents to inventors, and the act defines with great particularity and clearness what constitutes a patentable subject, at the same time declaring what persons are entitled to a patent. Such being the definition of a patentable subject, declared by the act of congress itself, you see from it that the improvement upon a machine, which is the kind of invention in question here, must be new, not known or in use before, and must be useful, that is, the person claiming the patent must have found out, created and constructed an improvement which had not before been found out, created or constructed by any other person, and it must be beneficial to the public, or to those persons who may see fit to use it. Novelty and utility in the improvement seem to be all that the statute requires as a condition to the granting of a patent. If these are made out to the satisfaction of a jury, then the subject is patentable, and the inventor is entitled to the protection and benefit of the statute. Otherwise, he is not. This is, perhaps, the only general definition that can be given of the subject of a patent, and it is the only one that the law has given for our guide. The two questions, then, on this branch of the case, are—was this contrivance, as constructed by the patentee, new and not before known?—and, if so, is it useful? Both these questions being answered in the affirmative, the case comes directly within the definition of the statute.

As to the first question—whetner this contrivance for dividing the grain in the process of cutting it was new, or whether it had been before known and in public use. This is very much a question of fact, depending upon the evidence produced in the course of the trial, in connection with the illustrations afforded by the models and drawings and the original machines.

It is claimed by the defendants, that this divider of the plaintiff is to be found in Hussey's machine, patented as early as 1833.

A small model of that has been produced; and, although Hussey, in his deposition, gives the entire form and structure of his divider, yet it requires some particular examination to ascertain its precise character. It will be found, however, to be simple and very readily comprehended, and the jury are in full possession of all the facts that are material and important for the purpose of determining whether or not the divider of Hussey affords reasonable evidence that there is nothing new in the contrivance of the plaintiff. Hussey, in his deposition, gives a brief description of his separator. He says that he projects the outer point, to separate the standing wheat, to any given length, and that he also uses an upright board, on a line with the outside of the frame of the machine, to prevent the wheat from rolling or falling off from the cutters.

Then, there is the machine of Mr. Moore, of which you have a model, and which you will consider in connection with his evidence. He states that he constructs his separator with two horizontal lines, being a part of the frame of the machine, converging to a point, and projecting some two feet beyond the fingers; and that, on the machine he built in 1836, he raised a third on the centre line, corresponding, in that respect, with the board used by Hussey in 1833.

You will examine these separators of Hussey and Moore, in connection with the evidence, and look at the particular operation of each in the process of cutting, and ascertain, to your own satisfaction, whether those contrivances are identical with the plaintiff's, or whether he has made one different from either, involving a new operation, and producing a new effect on the standing or tangled grain, in the use of the machine.

The next objection taken by the defendants is that, assuming the divider of the plaintiff to be new and useful and patentable, and that he is entitled to the enjoyment of it free from any interference, still he is not entitled to recover, because the defendants have not used his separator, but have used a different contrivance. This presents another question for you to determine, on an examination of the two separators.

In order to take the separator of the defendants out of the charge of infringement, it is necessary that they should satisfy you that it is substantially and materially different from the plaintiff's; in other words, that it involves some new idea in its construction not to be found in the plaintiff's. If it is found there, of course it is an appropriation of his invention. If not, then it is an independent improvement and no violation of the plaintiff's right.

It is proper to observe, in respect to this particular question, that whether the separator of the defendants be or be not an interference with that of the patentee, will depend upon this—whether the plan which the defendants have employed, in constructing their separator and in dividing the grain, is or is not in substance the same as the plaintiff's, and whether or not the differences that have been introduced by the defendants in their form of construction, and in accomplishing the design which all these separators seek to accomplish, are merely differences in things not material or important; in other words, whether their plan is, in substance and effect, a colorable evasion of the plaintiff's contrivance, or whether it is new and substantially a different thing. If the defendants have taken the same general plan and applied it for the same purpose, although they may have varied the mode of construction, it will still be, substantially and in the eye of the patent law, the same thing. Otherwise, it will not.

Subject to these observations, tending to advise you, as far as is practicable, on so nice and somewhat metaphysical a subject, as to the rules of law and general principles that should govern on a question of this kind, I shall leave it to you to determine, on the evidence and on an inspection of the models, whether the separator of the defendants is substantially different, in its operation and effect, from that of the plaintiff, or whether it is, in construction and operation, to all substantial and real purposes, the same. If it is, then, if you are with the plaintiff on the two previous questions, you will find for him on this branch of the case. Otherwise, you will not.

The second claim, which also arises under the patent of 1845, is for setting the lower end of the reel-post behind the blade or cutter, curving it and leaning it forward at the top, for the purpose of relieving the cutting, which was before embarrassed by the upright post in front of the cutter, by which means, also, the top of the post can be braced to the tongue.

The description in the patent is substantially this—that the reel-post on the left side of the machine, instead of being placed before the blade, standing perpendicularly and braced as before, is set, say nine inches, behind the blade, and so leaned forward as to bring the middle of it, or point at which the end of the reel is supported, to its former perpendicular position, the top of the post being thereby so put forward as to admit of its being braced directly to the tongue; by which arrangement the patentee is enabled to brace the post firmly, and, the lower end of the post being behind the blade and crooked out, and the end of the dividing-iron being also bent inward, all tendency of straws to hang upon the post and interfere with the cutting is removed.

The object of this change was to get rid of the post in front of the cutter, which prevented the separation of the straw, and also prevented the grain that was cut from falling on the platform, the tendency being to become entangled around the post. This was

the purpose, as declared by the patentee, of the arrangement by which the post is carried behind the cutter, and yet the place of sustaining the end of the reel is preserved.

It is insisted by the defendants that this arrangement is not the subject of a patent, but is a very common device, involving no skill or ingenuity beyond that of the clever mechanic; that it would have suggested itself to any one using the machine; and that it embodies no inventive mind. It is also insisted, by the defendants, that their arrangement for supporting the end of the reel is not substantially the same with the plaintiff's, but is a new arrangement, not suggested by the plaintiff's improvement of setting the post back of the cutter and bending it outward and leaning it forward, and that it does not embrace the principle or idea found in the contrivance of the patentee.

I have already called your attention to the definition of a patentable improvement, as given by the act of congress itself. It must possess novelty and utility. It will be for you, bearing in mind that definition, to examine whether or not the plaintiff's arrangement in regard to the reel-post is a patentable improvement.

You will also examine the models of the respective machines, and recur to the testimony of the experts, and determine whether the change made by the defendants in the mode of supporting the end of the reel, and of getting rid of the upright post in front of the cutter, is a new contrivance, not only in form but in substance, and is not a change suggested naturally from the contrivance of the plaintiff. If it is new, then it is no infringement. But, if it embodies the same idea and its arrangement carries out the same idea—for, this is the true view of the question involved—then undoubtedly it is an infringement.

The general principle which I before stated in respect to the dividing apparatus is equally applicable to the second claim. If the defendants have taken the same plan and applied it to the same purpose, it is in substance the same thing, although they may have varied the mode of construction. It is then only what is called a mechanical equivalent, another way of doing the same thing, by means of mechanical skill, which, however meritorious and creditable to the mechanic, is not an invention.

This brings me to the third and last claim, and probably the most important one in this controversy. It arises under the patent of October 23d, 1847. It is for an arrangement of the seat of the raker over the end of the finger-piece which projects beyond the range of fingers, and just back of the driving-wheel, in combination with and placed at the end of the reel, whereby the raker can sit with his back towards the team, and thus have free access to the cut grain laid on the platform and back of the reel, and rake it from thence on to the ground by a natural sweep of his body, and lay it in a range at right angles with the swath, thereby avoiding unevenness and scattering in the discharge of the wheat, and accomplishing the same with a great saving of labor. This improvement is particularly described by the patentee, and it is undoubtedly important that the jury should look into the description which the plaintiff has given of this improvement, and ascertain particularly what he claims he has invented, in order to be able to determine whether the improvement had or had not been before discovered or brought into public use, and, if new, whether it has or has not been infringed by the defendants.

The driving-wheel, says the specification, is placed further back than before, and back of the gearing which operates the cutter—the gearing which operates the crank being placed forward of the driving-wheel—thus balancing the frame of the machine with the raker on it, and making room for him to sit or stand on the frame, back of the driving-wheel with his back to the horses. The patentee then places the reel further forward towards the horses than before, and makes it shorter—it having before projected out over the fingers. He thus makes room for the raker to use his rake freely. The effect of advancing the reel forward is to open to the action of the rake the platform on which the grain falls, and, by shortening the reel, room is afforded for the operations of the raker himself. In consequence of the reel being shorter than before, a wheel-board is introduced, one end of which is fastened to the inside hound, and it is so curved as to force the grain upon the edge of the swath inward, so as to be caught by the reel in its revolutions. The wheel-board also prevents the grain from getting under the frame and being entangled in the gearing of the machine. It is important that you should bear in mind this description given by the patentee of his improvement, and carry it with you when you are comparing his arrangement with previous improvements, with a view of determining whether it is the same thing with them or substantially different.

It has been made a point, in the course of the trial, that the seat of the raker is the improvement and the novelty claimed by the patentee; that not only the seat on the frame, but the mode and form of its construction is also part and parcel of the invention; that, in this respect, there is a difference between sitting and raking, and standing and raking; and that the one does not necessarily involve the other. I have looked particularly into this branch of the case, because I have felt that it was the most important question involved, and that the claim in respect to it was the most meritorious one on the part of the plaintiff—more meritorious than either of the other contrivances—if he be entitled to any merit for his improvements.

Now, in order to ascertain, with reasonable certainty, what the patentee really be-

lieved he had invented, and for what he sought and obtained a patent, we must look into the description of the thing which he himself has given to the public, because there we must find his title, and there the public must look, after his term expires, to obtain the benefit of the use of his machine. From the description I have already given you, you see that the seat is not the thing which he claims in his description to have invented. The seat was the object and result he was seeking to attain, by the improvement which he supposed he had brought out. What he invented was, the arrangement and combination of machinery which he has described, by which he obtained his seat. That, and not the seat itself, constituted the essence and merit, if any, of the invention. What, then, was necessary, in order to obtain the benefit of this position for the raker? The difficulty before was, that the axle or shaft of the reel was perpendicular over the cutter, and the reel was thrown back very much over the platform. It was also extended on a line with the cutter, close up to the gearing, so that the end of the reel, extending to the side of the machine, interfered with a person placed behind the horses for the purpose of raking, and the reel, being too far back, interfered with the rake in its use. Thus, it appears that a seat was put on for the harvest of 1845, and some two hundred machines were made at Cincinnati for that harvest. That seat was put on without any change in the structure of the machine, except to fasten on the seat, extending from the front to the back. Those seats were put upon all the machines that were made for the harvest of 1845, but all agree that they went out of use generally, so great was the interference with the rake and raker, and it was that difficulty and obstruction that led to the subsequent modification of the machine. The reel was advanced in front of the cutters and shortened, and the driving-wheel was put back and the gearing forward, so as to balance the machinery with the weight of the raker on the end of the finger-piece.

It has also been supposed, that there was something in the idea that the patentee in his claim says: "I also claim, as my invention, the arrangement of the seat of the raker over the end of the finger-piece which projects beyond the range of fingers, and just back of the driving-wheel, as described, in combination with and placed at the end of the reel." He here claims the seat "as described;" but, on recurring to the description, we find the patentee saying that the driving-wheel is placed further back, and other changes are introduced, thus making room for the raker to sit or stand on the frame. It is this seat, as thus described, by which the raker may sit or stand on the frame and rake the wheat from the platform with convenience, that is claimed in the specification.

It is insisted, on the part of the defendants, that there is nothing new in this, because there is, in the machine of Hussey, a seat, or, what is equivalent, a position for the raker, in which he may stand and rake off the grain. The seat, that is, the position on the platform, is, in one sense, undoubtedly common to both. But, Hussey's machine has no reel to interfere with the raking, and the grain, instead of being raked from the platform, is pushed from the back part of it. The question is, whether the arrangement of the seat—the combination by which the patentee obtains and can use the seat or position—is similar to or substantially like the contrivance in Hussey's machine. That is the point. The mere fact that a seat was used in previous reapers, does not embrace the idea contained in this patent. That view could only be material under the assumed construction given by the counsel for the defendants to the patent, that it is for a seat. If that were the thing invented and claimed by the patentee, then the seat of Hussey would be an answer to the claim.

There is also another point to which it is proper to call your attention in this connection, and which has been the subject of discussion by the counsel, and that is, that Hussey, in the construction of his machine in Ohio, at a very early day, used a reel in connection with his cutter and a raker. It is insisted, that this use of the reel, in connection with a raker, in Hussey's machine, before the discovery of the plaintiff, destroys his claim to originality. In answer to this, it is claimed, on the part of the plaintiff, that the contrivance of Hussey into which the reel was introduced, was substantially different from the plaintiff's contrivance. It seems that Hussey's reel, like the reel of the plaintiff when his first seat was put on in 1845, interfered with the raker, so as to prevent his raking the grain the whole length of the platform. Hence, Hussey had an endless apron, by which the grain, when cut, was deposited at the feet of the raker, so that he could shove it off with his rake. Such was Hussey's contrivance for avoiding the difficulty that existed in the interference of the reel with the operations of the raker, by bringing the grain to the raker upon an apron, so that he should not be obliged to extend his rake in front of the reel. The next ground urged by the counsel for the plaintiff, in answer to this evidence to destroy the novelty of his patent, is, that Hussey abandoned and gave up that arrangement of his, as an unsuccessful experiment, and that, therefore, the idea which may have been and probably was in his mind, when he attempted to get up this contrivance for the benefit of the raker, was never completed or carried into practical effect, and that other contrivances were resorted to by him, in place of the reel, which he threw away and has not used since. It is not important, however, to take up your time with this last sug-

gestion, because it is clear that the arrangement of Hussey, when he used the reel in connection with his endless apron, did not touch or reach at all the modifications and alterations subsequently made by the plaintiff to accomplish the same end, but was altogether different in its operation. Hussey used the endless apron to get rid of the difficulty which the plaintiff avoids by putting his reel further forward, cutting off the end of it and introducing a wheel-board.

The next material question is, whether or not the defendants' arrangement of the seat or position for the raker is like that of the plaintiff, and whether or not the construction and use of it by them are an appropriation of his contrivance and an infringement of his machine. Now, I lay aside the mode of constructing these respective seats. I mean their form, whether they are constructed with the seat extending between the legs of the raker, with a front piece to support him, or with no seat between his legs and only a support around his body. I lay all that out of view, because I do not think the form of the seat is embraced in the plaintiff's invention. It may be of one form or of another, and it is very likely that the practical use of the machine by the raker is the only true test for determining what form of seat would be most advantageous and least injurious. The raker would work out the best form of seat, by actual trial. He might cushion the seat or make it of any form he pleased, but that would not enter into the invention or have anything to do with its merits. The invention is, the arrangement by which the raker can be placed where he is placed, standing or sitting, and do his work. You will then take up the defendants' machines, laying the seat out of view, and see whether their construction, arrangement and combination, for the purpose of obtaining a position for the raker on the machine, involves the combination of the plaintiff. If it does, then it is an infringement. If it does not, then it is an independent contrivance, and they are entitled to its enjoyment.

It is further claimed, on the part of the defendants, that, assuming all the positions taken by the plaintiff to be true, and that he is entitled to protection in the enjoyment of this improvement, as being its first and original inventor, yet he has forfeited it to the public, or has, at least, abandoned it to the benefit of the public, by his acts and conduct. Now, as there is no disagreement between the counsel upon the law applicable to this branch of the case, I will not take up your time by expounding the act of congress at large, but will assume the law to be as it has been laid down by the court in this circuit. Since the act of March 3, 1839 (5 Stat. 353), a patentee may make and vend or use his improvement or invention within two entire years before the time when he makes his application for a patent, without forfeiting or necessarily abandoning his right to a patent. As I understand this statute, and as, I believe, it has been generally construed and applied thus far in the several circuits, it virtually extends the patentee's privilege to sixteen years instead of fourteen; that is, he may use his improvement, by making and using his machines, and by vending and taking pay for them, for two years previous to his application for a patent, without forfeiting the benefits conferred upon him by his patent. But, if he either sells a machine or uses one, or puts one into public use, at any time more than two years before his application, it works a forfeiture of his right.

It is claimed by the defendants, first, that the plaintiff has forfeited his right in this case; and secondly, that he has abandoned it.

The plaintiff's application for the patent which was issued on the 23d of October, 1847, was made on the 3d of April, 1847. Any sale, therefore, or any use of the improvement, subsequent to the 3d of April, 1845, is protected by the statute of 1839, and cannot be relied upon as working a forfeiture. It is necessary, therefore, that the defendants should show a sale or putting into public use of the patented improvement prior to the 3d of April, 1845. That involves a question of fact. I have had some difficulty, on looking through the testimony, in ascertaining the precise time when the improvement embodied in the patent was made by the plaintiff. The exact time has not been shown, but it appears in evidence, and I have looked into this with great care, that this patented improvement in regard to the seat, as claimed by the plaintiff, was not in the machines constructed for the harvest of 1845. Those machines were made by Brown, by Magnes and by Zink. They had a board seat put upon them, without any change being made in the arrangement of the machine or of the reel, and had no wheel-board. That seat went out of use and was a failure. Of course, none of the machines with that seat, although used with the assent of the plaintiff, come within the rule of law in relation to the question of forfeiture, because they do not embody the improvement claimed in the patent, and it is that which must be put in use more than two years prior to the application, in order to work a forfeiture of the right. There was one machine made for the harvest of 1845, the one of which Chappell and Barnet gave an account, that was carried to Geneseo and Mount Morris in July, 1845, and operated there. It was the one which had a box upon it, and it also had a seat with a front-piece, there having been no piece in front of the raker in the other machines made for the harvest of 1845. But, although the Mount Morris machine had the seat thus arranged, it did not embrace the arrangement subsequently made, and de-

scribed in the patent of 1847. It was merely one of the old machines with the form of the seat changed; and, so far as I can gather the date, from my examination of the testimony, no machine, with the arrangement and combination described in the patent of 1847, was put into use or on sale until the harvest of 1846.

The next question is that of abandonment. The mere fact of making and selling an improvement or invention, or of putting it into public use, at any time within two years before the application for a patent, is not, of itself, an abandonment of the invention to the public. The right thus to use his invention before the granting of a patent, is a right conferred on the inventor by the act of 1839. Something more must be done within the two years—there must be some acts of the inventor, indicating an intention on his part to devote his improvement to the public in general, in order to authorize the jury to come to the conclusion that he has so abandoned it. It is for them to say whether the acts of the plaintiff within the two years, satisfy them that it was his design and intention to devote the invention to the public at large, as a gratuity, and without receiving a consideration for its bestowal.

It is proper for me to say, also, that those who rely upon the ground that a party has forfeited a legal right secured to him in due form of law, for the purpose of defeating his enjoyment of that right, must make out the point clearly and satisfactorily, beyond any reasonable doubt or hesitation; because, the law does not favor an abandonment, and throws upon the party who seeks to obtain the benefit of a forfeiture the burden of proving it beyond all reasonable question.

I have thus gone through with the three claims, the divider and the reel-post in the patent of 1845, and the raker's seat in the patent of 1847. If you are with the plaintiff on either one of these claims, he is entitled to your verdict. You will take them up, one by one, and decide whether or not the plaintiff has made out his title to them as inventions, and also, whether or not the defendants have violated his rights. If you find for the plaintiff on any one of the claims, he is entitled to your verdict; and, if you find for the defendants on all of them, your verdict will be for the defendants.

The only remaining question is that of damages. The rule of law on this subject is a very simple one. The only difficulty that can exist, is in the application of it to the evidence in the case. The general rule is, that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement; and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendant had not interfered with his rights. That view proceeds upon the principle, that if the defendant had not interfered with the patentee, all persons who bought the defendant's machine would necessarily have been obliged to go to the patentee and purchase his machine. And the profits that the patentee might have made out of the machines thus unlawfully constructed, present, therefore, a ground that may properly aid the jury in arriving at the damages which the patentee has sustained.

It has been suggested by the counsel for the defendants that, inasmuch as the claims of the plaintiff in question here are simply for improvements upon his old reaping machine, the patent for which expired on the 21st of June, 1848, and not for an entire machine and every part of it, the damages should be limited in proportion to the value of the improvements thus made; and that, therefore, a distinction exists, in regard to the rule of damages, between an infringement of an entire machine and an infringement of a mere improvement on a machine. I do not assent to this distinction. On the contrary, according to my view of the law regulating the measure of damages in cases of this kind, the rule which is to govern is the same whether the patent covers an entire machine or an improvement on a machine. Those who choose to use the old machine in this case, have a right to use it without incurring any responsibility. But if they engraft on it an improvement secured by a patent, and use the machine with that improvement, they have deprived the patentee of the fruits of his invention, the same as if he had invented the entire machine; because, it is his improvement that gives value to the machine, on account of the public demand for it. The old instrument is abandoned, and the public call for the improved instrument, and the whole instrument, with the improvement upon it, belongs to the patentee. Any person has a right to use the old machine, but, if an inventor engrafts upon the old machine which he has a right to use, an improvement that makes it superior to anything of the kind for the accomplishment of its purposes, he is entitled, under a patent for the improvement, to the benefit of the operation of the machine under all circumstances, with the improvement engrafted upon it, to the same degree in which the original patentee was entitled to the old machine.

There are some data furnished by the counsel on both sides, which it is proper the jury should take into view, in ascertaining the damages, provided they arrive at this question in the case. It is conceded that just three hundred machines have been made by the defendants, of the description to which I have called your attenton, and testimony has been gone into on both sides, for the purpose of showing the cost of the machines, and the prices at which they sold. In

order to ascertain the profits accruing to the party who makes machines of this description, you must first ascertain the cost of the materials and labor, and the interest on the capital used in the manufacture of the machines. You must also take into account the expense to which the manufacturer is subjected in putting them into market, such as that of agencies and transportation and insurance; and, where the article is sold on credit, a deduction must also be made for bad debts. All these things must be taken into account, in order to bring into the cost every element that properly goes to constitute it in the hands of the manufacturer. When you have ascertained the aggregate sum of the cost, deduct it from the price paid by the purchaser, and you have the nett profit on each machine. By this process you are enabled to approximate to something like the actual loss that the patentee sustains, in a case where his right has been violated by persons interfering with him and putting into market his improvement. There is considerable difference between the witnesses for the respective parties, in their testimony as to the cost of constructing the machine. I believe that the witnesses on the part of the plaintiff brought down the cost to thirty-seven dollars on each machine, and stated the nett profit on each to be, on an average, over sixty dollars; while the witnesses on the part of the defendants put the cost at some sixty-seven dollars, including work, labor and expenses, and some made it even higher than that, including the expense of collecting debts and of agencies. It appears that the machines have been sold at prices varying from one hundred dollars, for cash, up to one hundred and twenty dollars and one hundred and twenty-five dollars, on credit, depending somewhat upon the place to which they have been sent. Many have gone to a considerable distance into various states, and there is a difference in the price of the machines, whether they are bought at the factory or at distant points.

The question of damages will depend upon the good sense and sound judgment of the jury, upon the facts which have been introduced to show the loss which has been sustained by the patentee, or, in other words, the profits he would have made if the infringement had not occurred. The plaintiff will be entitled, provided, on an accurate estimate, you can arrive at the actual damages, to interest on them from the commencement of the suit in August, 1850; and, in addition to all this, if the jury are satisfied that the plaintiff has sustained damages beyond those arising from the actual interference of the defendants in making and putting into market similar machines, they will be justified in allowing them. I allude now to the publications by the defendants, disparaging and denouncing the improvement of the plaintiff, in connection with their infringement by making and vending the article, and while they were thus engaged in the violation of the patent. This question of damage is very much at large, and rests in the sound discretion of the jury. It is always much easier to calculate large profits upon paper than it is to realize them by practical experience in the business of mankind. The question, therefore, is one which the jury must decide with caution, care and prudence, and they must confine the measure of damages to the fair and actual loss which the patentee has, in their judgment, sustained, on account of the infringement by the defendants.

The jury failed to agree upon a verdict.

At the October term, 1851, at Albany, before Mr. Justice NELSON, the case came on again for trial, when the defendants moved its postponement on account of the absence of a material witness in regard to the patent of 1845. The court holding that sufficient cause for a postponement had been shown, the plaintiff waived all claim to recover in the suit upon the patent of 1845, and the court directed the trial to proceed upon the patent of 1847 alone. The evidence given on both sides, as to the latter patent, was very much the same as on the previous trial, and the charge of the court was substantially the same. The jury found a verdict for the plaintiff, for $17,306 66.

NOTE. Judgment having been entered on this verdict, the defendants carried the case by writ of error to the supreme court, where it is reported as Seymour v. McCormick, 16 How. [57 U. S.] 480. That court reversed the judgment, on the ground of misdirection by the court below, in its charge as to the rule of damages, but sustained its other rulings.

[This cause again came before the court solely on the patent of January 31, 1845, Case No. 8,727. For other cases involving this patent, see McCormick v. Seymour, Case No. 8,727; McCormick v. Manny, Id. 8,724; McCormick v. Talcott, 20 How. (61 U. S.) 402; Seymour v. McCormick, 19 How. (60 U. S.) 96.]

Case No. 8,727.

McCORMICK v. SEYMOUR et al.

[3 Blatchf. 209; Merw. Pat. Inv. 657.] [1]

Circuit Court, N. D. New York. Oct., 1854.[2]

PATENTS — REAPING MACHINE — IMPROVEMENT — NOVELTY — UNFOUNDED CLAIM — MEASURE OF DAMAGES — INFRINGEMENT.

1. The history of McCormick's improvements in reaping machines, set forth.

2. The difficulties under which the inventors of improvements in reaping machines labor in making experiments, considered.

3. An improvement upon a machine, to constitute it an invention, within the meaning of the 6th section of the act of July 4, 1836 (5 Stat. 119), must be new and useful.

4. What is novelty in an invention, defined.

5. The case of Russell v. Cowley, 1 Webst. Pat. Cas. 467, cited and approved. Considera-

[1] [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Merw. Pat. Inv. 657, contains only a partial report.]

[2] [Affirmed in part in 19 How. (60 U. S.) 96.]

tions stated, bearing upon the question of the novelty of the inventions of the divider, and the arrangement of the reel-post, claimed in McCormick's patent of January 31st, 1845, for improvements in reaping machines.

6. The means stated for determining whether those claims of that patent are infringed.

7. If a patentee makes an unfounded claim, in the same patent with other claims which are well founded, he may disclaim, within a reasonable time, what he had no right to claim, and then his patent will be as good for the residue, as if it had originally issued only for the valid claims.

8. If he omits to disclaim, and it appears, on the trial of a suit brought by him on his patent, that he is entitled to be protected as to a part of his claims, but not as to another part, he is still entitled to damages for the violation of the valid part of his claims, but he recovers no costs.

[Cited in Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 136.]

9. If, however, the jury are satisfied that there has been unreasonable negligence and delay, on his part, in disclaiming the invalid part of his patent, then the whole patent is inoperative.

10. The second claim in McCormick's patent of 1845, construed.

11. Where a patentee is accustomed to sell rights under his patent, his customary charge for the right is the measure of the damages he is entitled to recover for an infringement, with interest from the time of infringement.

[Cited in Graham v. Plano Manuf'g Co., 35 Fed. 598.]

[Cited in Dean v. Charlton, 23 Wis. 612.]

12. But, where a patentee does not sell rights under his patent, but uses his invention exclusively himself, and furnishes the community with articles of his own manufacture, made under his patent, the measure of damages is different.

13. In the latter case, if the patent is for an entire machine, the measure of damages is the profits the patentee could have made in constructing and vending the machine, over and above the mere profits of its mechanical construction. The profits that grow out of the exclusive right to manufacture the invention under the patent, belong to the patentee; while the mere mechanical profits are to be excluded from the damages.

14. If, in the latter case, the invention is of an improvement on a machine, the patentee is entitled, as a measure of damages, to all the advantages of the use of the improvement, excluding the profits of the manufacture, and excluding, also, the value, if any, of the use of the old machine.

15. Under the 14th section of the act of July 4th, 1836, the jury are limited to the actual damages sustained by the plaintiff.

This was an action in the case, for the infringement of letters patent. The declaration was founded on two letters patent granted to the plaintiff—one on the 31st of January, 1845 [No. 3,895], and the other on the 23d of October, 1847 [No. 5,335, re-issued May 24, 1853, No. 239]. It was tried on both of the patents in June, 1851, when the jury failed to agree on a verdict. It was again tried in October, 1851, only on the patent of October 23d, 1847, when a verdict was found for the plaintiff [Cyrus H. McCormick], for $17,306 66. Those trials are reported [Case No. 8,726]. The defendants [William H. Seymour and Dayton S. Morgan], after judgment, sued out a writ of error to the supreme court, which reversed the judgment, and awarded a venire facias de novo, for an error in the charge of this court as to the rule of damages. See Seymour v. McCormick, 16 How. [57 U. S.] 480. The case now came on for trial, solely on the patent of January 31st, 1845.

William H. Seward, Charles M. Keller, and Samuel Blatchford, for plaintiff.

Nicholas Hill, Jr., Henry R. Selden, and John K. Porter, for defendants.

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

NELSON, Circuit Justice (charging jury). The patent upon which this action is founded, was issued to the plaintiff on the 31st of January, 1845, for an improvement in reaping machines. The history of the improvements made by the plaintiff in reaping machines, has been developed by the evidence in the progress of the trial. It seems that his experiments began as early as 1830 or 1831, and continued from year to year, down to 1834, when he first obtained a patent for his machine. This machine, however, was not a successful one, and but comparatively few were either manufactured or sold. It was found by the farmers who tried them, that they would not work successfully or profitably; and this seems to have been the fate of the experiments made with the machines down to 1845, when a second patent was taken out for improvements upon the first one. And even then, although the machine, as thus improved, was regarded by the farming interest as more valuable than the original one, yet in consequence of the difficulties in raking the cut grain from the platform, the machine did not go into general or successful operation until after the arrangement of the seat for the raker upon it, which was patented in 1847. Then the machine became eminently successful, and has since gone into very general use. According to the evidence on this trial, only seven machines of the construction as patented in 1834 were sold, down to 1842. Some twenty-nine were sold for the harvest of 1843, the patentee warranting the successful operation of the machine. Some fifty were sold for the harvest of 1844, and from one hundred to two hundred for the harvest of 1845.

The inventors of improvements upon reaping machines labor under disadvantages and embarrassments that are not common to inventors generally; and this for the reason that experiments with, and trials of reaping machines, can be made only during harvest time. When the harvest is over, the opportunity for experiment and trial has passed away, and the inventor is obliged to wait until the succeeding harvest in the next year, to test any improvements that may have been suggested. Not so with other inventors. They can test their improvements or discoveries from day to day continuously, until they have perfected them. This suggestion

no doubt accounts for the series of years occupied by the plaintiff in seeking to perfect his improvements on the reaping machine.

The improvements which were patented in 1845, and which are claimed by the plaintiff to have perfected his machine of 1834, so far as it respects cutting the grain and laying it on the platform, are two, the divider, and the re-arrangement of the reel-post. Now, it is said that neither of these improvements, assuming that the plaintiff was the author of them, is of a description entitling it to be regarded as the subject of a patent under our patent law—in other words, that there is nothing of invention to be found in these improvements, nothing of intellect, or of mind, or of thought, that is new or useful—and that therefore they are not the subjects of protection under the law. We desire to call your attention for a few moments to this branch of the case, because the objection just alluded to has been made one of the strong grounds of objection to the right of the plaintiff to recover, and has been elaborately discussed by the learned counsel for the defendants. This case has, as you have learned, been heretofore before this court; and we shall, for brevity, refer to the remarks submitted by us to a former jury upon this branch of the case. The 6th section of the patent act of July 4, 1836, provides, in substance, that any person having discovered or invented any new or useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his discovery or invention, and not, at the time of his application for a patent, in public use or on sale with his consent, may make application to the commissioner of patents, and shall be entitled to a patent. An improvement upon a machine, to constitute it an invention, within the meaning of the law, must be new, not known or in use before; and it must also be useful. In other words, and in perhaps clearer terms, the person claiming the improvement, must have found out himself, and created and constructed, an improvement which had not before been found out or produced by any person, and which is beneficial to the public. There must be novelty in the arrangement of the improved machinery—novelty created by the mind of the person claiming to be the inventor; and, in connection with that species of novelty, there must be utility. This novelty, worked out by the mind of the inventor, connected with utility, constitutes the essence of a patentable subject under the law.

It is exceedingly difficult to draw a line between what may be regarded by the eye as a small improvement or invention, and one of magnitude. Oftentimes, improvements and discoveries the most important in their consequences, and in their beneficial effects on the business interests of the community, are among the simplest ideas of the mind. Again, you will find improvements of less magnitude in their consequences and in their beneficial effects, indicating a most laborious and complex exertion of the mind of the inventor. As an illustration of this subject, and one from which you may be enabled to arrive at a proper view of this branch of the case, we refer to an improvement that has been tried in a court of law, and sustained. We allude to the case of Russell v. Cowley, 1 Webst. Pat. Cas. 467, where it was held to be a patentable improvement, to weld iron tubes by means of grooved rollers without a mandrel, such tubes having previously been welded by grooved rollers upon a mandrel. Now, to the eye, the change in the instance referred to was exceedingly simple. Previously to the improvement, the two edges of the iron cylinder which was to form the tube, were brought together and heated, and then the cylinder was drawn through rollers having a circular aperture smaller than the exterior circumference to be given to the tube, the cylinder being all the while supported on the inside by a mandrel. The edges were thus welded as effectually as by the hammer and anvil, and more accurately. But the mandrel was an embarrassment, because it had to be used in the bore of each tube while it was being drawn through the aperture in the rollers. And the idea occurred to the patentee, (Whitehouse), that the edges could be welded as well in the absence of a mandrel as with it. He, therefore, conceived the idea of throwing away the mandrel, and welding the tube without it, and succeeded, thereby getting rid of the trouble of inserting it in welding every tube. This was held to be a patentable discovery. The getting rid of the mandrel from the bore of the tube, in the operation of welding, it, was so useful an idea, that it was held to constitute a patentable subject under the English law, which is no broader than our own statute, and, indeed, scarcely as broad.

If you should come to the conclusion that the improvements by the plaintiff in the divider, and in the arrangement of the reel-post, are properly the subjects of a patent, then it is said by the learned counsel for the defendants, that there was nothing new in them, that they were before discovered and used, and that the plaintiff has simply appropriated the ideas and skill of others in the arrangement of these improvements, and is therefore not entitled to be regarded as their inventor or discoverer. Upon this point of the case you have been referred to the patent and machine of Schenebley, in 1833; to the patent of Hussey, also in 1833; to the patent and machine of Moore and Hascall, in 1836; to the patents and machines of Reed, in 1842, and of Woodward, in 1845; and to the Bell machine—six machines in all. The patents of all these machines, except Bell's, and the description of that machine, as contained in Loudon's Encyclopedia, have been read in the course of the trial. The position taken by the learned counsel for the defendants is, that these improvements in the divider

and in the arrangement of the reel-post are to be found in some one or all of these several machines, and that, therefore, there was nothing new in these improvements on the part of the patentee in this case.

There are one or two general observations on this part of the subject which we think it proper to submit to you. With the exception of the patent and machine of Hussey, for aught that appears before us on this trial, not one of the machines referred to ever went into general or successful operation. Why they failed we do not know. What was the secret of their failure we are not informed. What were the defects in their arrangement or construction we are not told. All we know is that, from the evidence in the case, every one of them turned out, in the end, to be an unsuccessful experiment in the way of the construction of a mechanical reaper. It has been supposed that Bell's machine was an exception. But, upon looking into the evidence bearing upon this machine, we scarcely think it an exception to the other machines that turned out to be failures. Bell, it seems, constructed his machine as early as 1828 or 1829. The last account given of it in Loudon's work was in 1829. From that work it appears that, at that time, it succeeded in cutting some one or two acres or more of grain. But, from 1829 down to 1853, at which latter date the witness Hussey testifies to its operation, we have no account whatever of this machine. We have no evidence here showing that during that interval the machine was in operation at all; and, in the absence of such proof, it seems to us that no other inference can be drawn, than that there must have been some defects in the arrangement and construction of that machine. It is true, as testified to by Hussey, that in 1853, on a trial which took place in Scotland or the north of England between Bell's and Hussey's and McCormick's machines, Bell's proved the most successful in cutting and laying the grain; and, from that testimony, it would seem to have become a practical machine. But this was in the harvest of 1853, two years after the exhibition in the Crystal Palace, where Hussey's and McCormick's machines were exhibited. During the harvest of 1851, those two machines were repeatedly tried in the neighborhood of the Crystal Palace, and they were again tried in the harvest of 1852. Bell's machine was not on exhibition in the Crystal Palace, for aught that appears. We hear nothing of it there, and it was not a competitor with either Hussey's or McCormick's machine during the harvest of 1851. Nor do we hear of it in 1852, in any trial with the other machines. And it is not till the harvest of 1853 that we hear of the Bell machine coming into competition with the two American machines, as a successful reaping machine. In point of fact, therefore, it would seem, for aught that appears from the testimony in this case, that notwithstanding there have been seven attempts, and six of those American, to construct a successful reaping machine, but two out of the seven have ultimately become beneficial and useful instruments for the purposes for which they were constructed—that is, the machine of Hussey and the machine of McCormick. It appears, from the evidence in the case, that Hussey and McCormick turned their attention to the construction of a reaping machine very nearly at the same period—McCormick two or three years the earlier. They have persevered from that time down to the present, and they have each of them, it is conceded, brought out a successful reaping machine. All the others failed, failed early, gave up the pursuit, and abandoned their machines.

Between Hussey's and McCormick's machines, there seems to have been no conflict, except as their inventors were competitors for the reputation and profit of bringing out a successful machine. They do not appear to have been rivals, as regards any portion of the arrangement of their respective machines. And, indeed, on comparing them, it will be seen that they are materially different, and, in many parts, dependent on different principles and operations, for the purpose of producing the one common result.

It is said that, notwithstanding the several machines to which we have referred turned out to be unsuccessful and were abandoned, yet there existed in some of them the divider and the arrangement of the reel-post claimed by the plaintiff; and that, admitting that the machines failed as reaping machines, yet, if the arrangements of the divider and of the reel-post, claimed by the plaintiff, are found to have existed in those machines anterior to the invention of these improvements by the plaintiff, that is sufficient to show that the plaintiff was not the first inventor or discoverer of these improvements. And no doubt the position is well-founded, provided the fact has been established.

Without calling your attention minutely to the identity of arrangement claimed by the defendants to exist, in regard to the two improvements in controversy, between the plaintiff's machine and those prior to his, it is sufficient to state, that the horizontal-wedge-divider, which several of these machines used, is alleged by the defendants to embody all the elements and produce all the results to be found in the divider of the plaintiff. Now, it seems to be conceded that the plaintiff himself had, in his machine of 1834, the horizontal-wedge-divider. But that machine, like the machines that were brought into existence by the other persons who had turned their attention to the subject, failed in its operation; and, as is claimed by the plaintiff, it failed partially, if not wholly, in consequence of the difficulty in dividing the cut from the uncut grain. The machine would divide the grain when it was standing, without much difficulty; but it would not divide it successfully when tangled, broken down, and lodged; and therefore it failed to cut grain success-

fully. You will find, on looking at the plaintiff's specification, that this was the difficulty which he was seeking to overcome. He says: "The divider, K, is an extension of the frame on the left side of the platform, say three feet before the blade, for the purpose and so constructed as to effect a separation of the wheat to be cut from that to be left standing, and that whether tangled or not." Again he says: "By means of the bow to bear off the standing wheat, and the iron" (that is, the inside iron) "to throw the wheat to be cut within the powers of the reel, the required separation is made complete," whether the grain is tangled or not. The plaintiff was seeking to obtain a divider that would not only divide the standing grain, but one that could be successfully used for dividing grain whether standing, or tangled, or lodged, or broken. It is for you to say, from the evidence, whether he has been successful; and whether he has constructed an improvement in reaping machines that will not only accomplish reasonably the purpose aimed at, but one that was never before made by any other person. It is for you to say whether it is an answer to the novelty of the plaintiff's arrangement, that the horizontal wedge-divider was before in use, and whether that divider contains all the elements, and produces all the effects in its operation, that are contained in and produced by the divider of the plaintiff. It seems, from the testimony of all the witnesses, that there is no great difficulty in dividing the grain, in the operation of reaping, where it stands erect. They say that the reel is of no great utility where the grain is not tangled or leaning; that the operation of Hussey's machine, without the reel, is as successful as that of any other, in cutting standing grain; that the difficulty commences in tangled grain; and that, as great portions of the grain during the harvest, portions perhaps of every field, are in that condition, a machine would be comparatively useless that could operate only on standing grain, leaving that which is tangled to be cut by some other instrument.

These observations are also applicable to the other branch of the case. The reel-post in the original machine was, as you will recollect, an upright post, standing in advance of the cutters and sustaining the reel. The foot of that post was then removed back; but, inasmuch as, if the post were to be perpendicular, from the new position of its foot, there would be no sufficient support for the reel, the post was bent, so as to bring its top very nearly to the same position it occupied when the post was upright. This arrangement became necessary for the purpose of removing an impediment in the way of the construction of the plaintiff's divider, and it was also necessary in order to avoid the difficulty occasioned by the straw clogging upon the foot of the post.

It has been argued, with great confidence, by the learned counsel for the defendants, that this re-arrangement of the reel-post did not require invention, but only the skill of the mechanic; that it did not require learning, or thought, or intellect, in order to bring about this re-arrangement, and have the reel-post accomplish the object for which it was originally constructed. We have called your attention to what are patentable subjects, and we refer you to the illustration we have already given, to aid you in arriving at the conclusion, whether this re-arrangement of the reel-post is or is not a discovery, within the meaning of the patent law. This is a question of fact, for you to determine.

It is then said, on the part of the counsel for the defendants, that, assuming the plaintiff to be the inventor of the divider, and of the arrangement of the reel-post, and that they were the subjects of invention, so as to entitle the first discoverer of them to a patent, and that the plaintiff is entitled to be protected in the exclusive enjoyment of these improvements, yet he has no right of action against the defendants, on the ground that their divider and their arrangement of the reel-post are substantially different from those of the plaintiff. It will be necessary for you to turn your attention to this question, and to pass upon it. In order to ascertain whether the arrangement of the defendants' divider is substantially the same with, or substantially different from, the arrangement of the plaintiff's, it will be necessary for you to examine the divider of the defendants, to see whether or not they have availed themselves of the construction, and operation upon tangled and beaten grain, to be found in that devised by the plaintiff. In other words, you are to see whether the arrangement and practical operation of the defendants' divider, in dividing the cut from the uncut grain, are substantially similar; whether it involves, in its construction and operation, the same principles and ideas to be found embodied in the divider of the plaintiff.

It is claimed, on the part of the plaintiff, that, by the peculiar arrangement of his divider, it enters the grain near to the ground, and that then, owing to the construction of the outer bow and of the inner iron, the divider, instead of operating like a wedge which is merely horizontal, rises upon the grain, as the machine advances, crowding on the outside the uncut grain away from the machine, and untangling the tangled straw, and at the same time turning it inward, so that it may come within reach of the reel, and within the action of the cutting instrument. This is the beneficial operation claimed for the plaintiff's divider. Now, if the plaintiff has succeeded in satisfying you that this divider is a contrivance of his, and that it produces the useful effect that is claimed, then, any arrangement of machinery embracing substantially the same operation in the division of the grain, by entering it near the ground, and the rising and spreading, untangling and dividing as it rises, is an infringement, within

the meaning of the patent law. It will be for you to examine the arrangement of the defendants and the arrangement of the plaintiff, and, with this guide, to determine whether or not the defendants' arrangement embodies the same practical construction and operation, in the division of tangled wheat, found in the plaintiff's. The same remarks are applicable to the reel-post. We have stated the principles of law which are to govern your investigation; and you will take up the facts, and determine whether the arrangements of the defendants, in both respects, are or are not substantially the same as the plaintiff's. If they are, then the defendants have appropriated the ideas of the plaintiff. If they are not, then they are independent arrangements, and do not interfere with the plaintiff's.

It is perhaps proper to say, in this connection, that the defendants in this case do not belong to the class who had turned their attention to the construction of a successful reaping machine. It seems that their first connection with these machines was in 1845, when they were employed by McCormick to manufacture his reapers in the Western part of this state. They were also employed to construct machines for him for the harvest of 1846, and also for the harvest of 1847, containing the improvements in controversy. This seems to have been their first connection either with a reaper or with McCormick's machine. Having been employed to construct his machine containing this divider and this arrangement of the reel-post, they had the best opportunity to learn the principles on which McCormick had arranged those parts of his machine by means of which he was then about to succeed in making it a useful machine, and one that would go into general use among the farmers of the country. It is, therefore, your duty to look well into this branch of the case, and see whether the defendants have done any thing more than appropriate the ideas of the plaintiff which they found embodied in those parts of his machine, or whether they have made use of an independent arrangement. If the latter, then they are not infringers. If otherwise, then they are.

This is all that we deem it necessary to say to you on what may be regarded as the merits of this case. There are one or two other points, however, to which it is proper we should briefly call your attention. One of these turns upon the construction to be given to a claim in the patent. It is said by the learned counsel for the defendants, that there is a claim in the patent, outside of the two claims that are in controversy, which is void, because McCormick appears, from the evidence, not to have been its original and first inventor; and that, inasmuch as he has made one void claim, his patent is void as it respects all the other claims, although the evidence may show that he was the original and first inventor of all those other claims. As regards the law applicable to this point, the learned counsel is not strictly correct. The law is this: If a patentee makes a claim which is not well founded, in the same patent with other claims which are well founded, he may disclaim, within a reasonable time, that which he had no right to claim, and then his patent will be good as to the residue —as good as if it had originally issued only for the claims which are valid. If he omits to make a disclaimer, but brings a suit for the violation of his patent, and it satisfactorily appears, upon the trial, that he is entitled to be protected in a portion of the claims set up in his patent, but that he is not entitled to be protected in respect to another portion, he is still entitled to damages for the violation of the valid portion of his claims, the same as if all the claims were valid, so far as regards the mere right of recovery; but he gets no costs. That is the law. It has this qualification: If the jury are satisfied that there has been unreasonable negligence and delay on the part of the patentee, in making a disclaimer as respects the invalid part of his patent, then the whole patent is inoperative, and the verdict must be for the defendants. As in this case. The claim on which the question arises is as follows: "I claim the reversed angle of the teeth of the blade, in manner described." It is said by the defendants, that the plaintiff was not the first inventor of that arrangement, but that Moore was. Assuming that the position of the learned counsel for the defendants is right, that the plaintiff was not the first inventor of what is claimed in that claim, if you believe that he was the first inventor of the divider and of the arrangement of the reel-post, he may still be entitled to recover damages, unless he has unreasonably neglected and delayed to enter a disclaimer for what is covered by the claim in regard to the reversed angle of the teeth.

The claim in question is founded upon two parts of the patent. As the construction of that claim is a question of law, we shall construe it for your guidance. In the first part of the patent, we have a description of the blade and of the blade-case and of the cutter, and of the mode of fastening the blade and the blade-case and the cutter, and of the machinery by which the arrangement is made for the cutter to work. We have also a description of the spear-shaped fingers, and of the mode by which the cutter acts in connection with those fingers. Then, among the claims, are these: "2. I claim the reversed angle of the teeth of the blade, in manner described. 3. I claim the arrangement of the construction of the fingers, (or teeth for supporting the grain), so as to form the angular spaces in front of the blade, as and for the purpose described." Now, it is insisted on the part of the learned counsel for the defendants, that this second claim is one simply for the reversed angles of the sickle-teeth of the blade. These teeth are common sickle-teeth, with their angles al-

ternately reversed, in spaces of an inch and a quarter, more or less. The defendants insist that the second claim is merely for the reversed teeth on the edge of the cutter, and that the reversing of the teeth of the common sickle, as a cutter in a reaping machine, was not new with the plaintiff; and that, if it was new with him, he had discovered it and used it long before his patent of 1845. The defendants claim that Moore had discovered it as early as 1837 or 1838; and it would also seem, that the plaintiff had devised and used it at a very early day after his patent of 1834—that is, the mere reversing of the teeth. But, on looking into the plaintiff's patent more critically, we are inclined to think that, when the plaintiff says, in his second claim, "I claim the reversed angle of the teeth of the blade, in manner described," he means to claim the reversing of the angles of the teeth in the manner previously described in his patent. You will recollect that it has been shown, in the course of the trial, that, in the operation of the machine, the straw comes into the acute-angled spaces on each side of the spear-shaped fingers, and that the angles of the fingers operate to hold the straws, while the sickle-teeth, being reversed, cut in both directions, as the blade vibrates. The reversed teeth thus enable the patentee to avail himself of the angles on both sides of the spear-shaped fingers; whereas, if the sickle-teeth were not reversed in sections, but all ran in one direction, like the teeth of the common sickle, he could use the acute angles upon only one side of the fingers, because the cutter could cut in only one direction. We are, therefore, inclined to think, that the patentee intended to claim, by his second claim, the angles thus formed by the peculiar shape of the fingers, in connection with the cutter having the angles of its teeth reversed. And, as it is not pretended that any person invented that improvement prior to the plaintiff, the point relied on in this respect by the learned counsel for the defendants fails.

We have now said all that we intend to trouble you with, except a few words on the subject of damages. This case has already been before this court, and went up from here to the supreme court, and was there reversed upon the point of damages. The supreme court held, that the principles laid down by this court, upon the former trial, to govern the jury in regard to the measure of damages, were erroneous, and, for that reason, granted a new trial. We have, therefore, some light, upon this question of damages, which we did not possess at the former trial. And we shall, on this occasion, follow the principles laid down by the supreme court for our guidance. As we understand the opinion of the court, it lays down these principles: In cases where a patentee avails himself of his invention, and of his exclusive right to the enjoyment of its profits, by putting it into market, and selling rights under it, as is most usually the case with inventors—that is, rights for states, or counties, or smaller districts, or portions of the invention itself—in such cases, the customary charge for the right to use the patented invention is the measure of the damages which the patentee is entitled to recover, in case of an infringement, with interest upon the same from the time of infringement. In other words, if he is accustomed to sell a single right for the manufacture of a machine for twenty, thirty, forty, fifty, or one hundred dollars, and if that is his usual price for the right throughout the country, that fee, with interest from the time of the particular infringement, is the measure of damages for each infringement. But, if the patentee comes to the conclusion not to vend to others his rights under the patent, and not to avail himself of the proceeds of sales of his mere patent right, but to use the patented invention exclusively himself, and to furnish the products to the community himself, out of his own manufactory or establishment—in such cases, a different measure of damages is to be adopted by the jury. And that is this: If the patent is for a machine, an entire machine, the patentee is entitled, as damages in case of infringement, to the profits he could have made in constructing and vending his machine, over and above the mere profits arising out of its manufacture. By that we mean, the mere profits of its mechanical construction, and not the profits that grow out of the exclusive right to manufacture the invention under the patent. The latter belong to the patentee, while the former, the mere mechanical profits, are excluded from the damages. And, if the case is one of an improvement on a machine, then he is entitled, as a measure of damages, to all the advantages of the use of his patented improvement, excluding the profits of the manufacture, and excluding also the value, if any, of the use of the old machine. Now, so far as respects the benefits and advantages that a patentee would derive from an improvement on a machine, you see, at once, that they would depend very much, if not altogether, upon the usefulness of the machine with that improvement, compared with its usefulness without that improvement. Hence, you have found, in the course of the trial, that witnesses have been introduced for the purpose of ascertaining the relative value of the plaintiff's machine with the improvements in controversy, and of the same machine without those improvements. If the machine, stripped of those improvements, would be a useless article in the market, and if no person would buy it unless those improvements were annexed to it, then its value, so far as its utility is concerned, depends on those improvements; because they give it vitality and usefulness in the eye of the business community. Hence, it is proper to

make this discrimination, in canvassing the facts bearing upon the proper measure of damages. We think, therefore, upon the evidence in this case, that, if the plaintiff had adopted the policy, which it was his right to do, of being his own manufacturer, and of supplying the country himself with the products of his invention, he is entitled to the measure of damages which we have stated to be applicable to a case of that kind.

It is for you to say what damages the plaintiff has sustained at the hands of the defendants, as respects the three hundred machines complained of as infringements. The statute rule on this subject is a very simple one, and is really the only general guide to be observed. It is the 14th section of the act of July 4, 1836, and is as follows: "Whenever, in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by any patent heretofore granted, or by any patent which may hereafter be granted, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment for any sum above the amount found by such verdict as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case." That is, the power is given to the court to treble the damages, in aggravated cases, but the jury are limited to the actual damages which the plaintiff has sustained. Therefore, looking at all the evidence in the case in respect to the three hundred machines, if they were made in violation of the patent, it is a question of fact for you to determine what are the actual damages which the plaintiff has sustained.

After the close of the charge, the defendants' counsel requested the court to charge the jury, that whether the adjustability of the inner iron of the plaintiff's divider was a necessary ingredient of his claim to the divider, was a question of fact for the jury to determine; and that, if it was such necessary ingredient, and if the defendants did not use it, they did not infringe that claim.

Upon this request the court charged the jury as follows: The inside iron in the plaintiff's divider is adjustable, so that it can be raised or lowered at pleasure. In heavy grain, that stands high and may be cut high from the ground, it is desirable to raise the reel sometimes, and then this inside iron can be raised also, to ensure the division of the grain, and to cause the reel to overlap and carry all the grain to the cutter. It is claimed by the plaintiff that, although the defendants use no inside iron, yet they attain the same result by the shape of the inside of their divider, which thus answers to the inside edge of the plaintiff's divider. The defendants insist that, assuming this to be true, their divider has no such adjustability as the plaintiff's, and is therefore distinguishable from it. The answer to that position is this: The adjustability does not vary the principle of operation of the divider. It enlarges its capacity, so that it may be the better worked in heavy grain. But the principle and mode of operation of the divider are the same, whether the inner iron be adjustable or not.

The jury found a verdict for the plaintiff for $7,750.

NOTE. Judgment having been entered on this verdict, the defendants carried the case, by writ of error, to the supreme court, where it is reported as Seymour v. McCormick, 19 How. [60 U. S.] 96. That court differed with the court below only as to one point—the construction of the second claim of the patent—and sustained its other rulings, and affirmed the judgment, except as to the costs in the court below.

[For other cases involving this patent, see note to McCormick v. Seymour, Case No. 8,726.]

McCORMICK (U. S. v.). See Cases Nos. 15,662 and 15,663.

Case No. 8,728.

McCORMICK v. WALKER.

[1 Hayw. & H. 86.] [1]

Circuit Court, District of Columbia. May 28, 1842.

INFANCY—PROMISE TO PAY AFTER OF AGE — DURESS—PAY WHEN ABLE—KNOWLEDGE OF DISCHARGE ON ACCOUNT OF MINORITY.

1. A promise made to pay a note at a time when the defendant was of full age, was made under duress, if made under a threat that if he did not pay he would be sued.

2. Upon a promise of the defendant to pay when able, the plaintiff must prove the ability of the defendant to pay.

3. An acknowledgment made after the maturity of a debt contracted while the defendant was a minor, and a promise to pay, would not be sufficient unless the defendant was aware at the time of the promise that he was discharged of the debt by reason of his minority.

Action was brought [against Henry Walker] on the following promissory note: "$4,200. Washington, Sept. 21, 1839. Twelve months after date, I promise to pay to the order of Colburn & Tufts, for value received, at the Bank of Metropolis, forty-two hundred dollars. Jno. Walker." Endorsed by Colburn & Tufts, Lewis Walker, Henry Walker and Charles McCormick. The plea was infancy. On the trial the defendant offered the deposition of Dorcas Walker, mother of the defendant, in which she deposes that the defendant is her son, and that he was born October 1st, 1819. The verdict was for the defendant.

H. M. Morfit, for plaintiff.

Brent & Brent, for defendant.

The plaintiff, through his counsel, moved for a new trial: Because THE COURT ex-

[1] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

pressed an opinion that a promise made by the defendant to pay the note at a time when he was of full age, was made under duress because the witness told him if he did not pay he would be sued, which opinion the plaintiff, by his counsel contends is erroneous at law. Because THE COURT said in the progress of the trial, that upon a promise of defendant to pay when able, the plaintiff was bound to prove that the defendant was able to pay before action brought. Because THE COURT said, that an acknowledgment made after maturity of a debt contracted while defendant was a minor, and a promise to pay would not be sufficient unless the defendant was aware at the time of the promise that he was discharged of the debt by reason of his minority; all of which expressions of opinion influenced the jury in their verdict, and were, as the plaintiff contends, erroneous in law.

The motion was overruled.

McCORMICK (WHEELER v.). See Cases Nos. 17,498 and 17,499.

McCORMICK (WILDER v.). See Case No. 17,650.

Case No. 8,729.

M'COUN et al. v. LAY.

[5 Cranch, C. C. 548.] [1]

Circuit Court, District of Columbia. March Term, 1839.

WILLS—DEVISE—CONDITIONS—INTENTION.

The testatrix, having expressed an intention "to dispose of her worldly estate," and having two grandsons, devised one half of a lot of land to one of them and his heirs forever, and devised the other part of the lot, of the same size, to the other grandson, upon certain conditions, which he complied with. *Held*, that he took an estate in fee.

[This was a bill in equity by Rebecca M'Coun and others against Richard Lay.]

This cause was submitted to the court upon a case stated. The question was whether, under the will of Susanna Fowler, her grandson Thomas John Fowler, under whom the defendant claimed, took an estate in fee, or for life. The testatrix having two grandsons, and by her will expressing an intention to dispose of her "worldly estate," devised one half of a lot of land to her grandson Elisha Fowler and his heirs forever, and then says: "The other part of this lot, of the same size, I give and bequeath to Thomas John Fowler, my grandson, on these conditions, to wit, that he shall marry, or proceed as his father shall think proper, or else he never shall inherit that which is described to him above; if he proceeds as above desired by me, Susanna Fowler, his father's order shall empower him to recover the same of the executor." This devisee complied with the conditions required, and the executor delivered to him possession of the premises. If he took only a life estate, the judgment was to be rendered for the demandants. If an estate in fee, then for the defendant.

THE COURT (MORSELL, Circuit Judge, absent) was of opinion that Thomas John Fowler took an estate in fee. Judgment for the defendant.

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

McCOY (CRANE v.). See Case No. 3,354.

Case No. 8,730.

McCOY et al. v. The CURRITUCK et al.

[2 Hughes, 91.] [1]

District Court, E. D. Virginia. Feb. 25, 1875.

COLLISION — RULE ON ENTERING CHANNEL—CUSTOM ON CHESAPEAKE AND ALBEMARLE.

1. The statutory rule that "when two boats are about to enter a narrow channel at the same time, the ascending boat shall be stopped below such channel until the descending boat shall have passed through it," though valid as a statutory rule only on Western rivers, may be valid also on Eastern waters by custom and usage.

2. *Held*, that this being a customary rule on the waters of the Chesapeake and Albemarle navigation, a vessel was in fault for disregarding it, and was responsible for the damage of a collision resulting from her action.

[This was a libel by Charles McCoy and others, owners of the schooner Pennsylvania, against the owners of the steamer Currituck.]

The case is that of a collision between the barge Dispatch, in tow of the Currituck, and the schooner Pennsylvania, in tow of the Molyneux. On the 12th October, 1874, the Dispatch ran into the Pennsylvania and sunk her, at the east end of the Dutch Gap Cut, on the Elizabeth river, a few miles from Norfolk. The Elizabeth river makes a bend west, and one east, of the cut called the "Dutch Gap," on each side, about 250 yards from the cut. There is a buoy about 70 yards east of the cut. The cut itself is about 110 yards long, about 65 feet wide on the surface of the water, and seven to nine feet deep. The distances are derived from the diagram of the Gap and the waters approaching it, which was prepared by a United States engineer, and is filed in the papers. On the morning of October 12th, 1874, at about nine o'clock, as the steam-tug Molyneux (16 tons), towing the schooner Pennsylvania (both light), moving with the tide and wind, from the west towards the cut, turned the bend, she saw the steamer Currituck (93 tons), having in tow the barge Dispatch, turning the bend on the east of and moving towards the cut. The usual signal of vessels about to meet was given, which was one whistle, meaning, keep to the right. The signal was promptly answered by the

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

Currituck. The tow-line of the Pennsylvania was forty fathoms long, that of the Dispatch ten fathoms. The statement of Captain Phillips, master of the Currituck, that the Pennsylvania's tow-line was seventy-five fathoms, is contradicted, and is, besides, incredible. Tall vessels moving in open waters may use a hawser of that length, but a small steam-tug drawing a schooner could not keep it out of water, or move with it at all, in bending, narrow channels.

W. H. C. Ellis, for libellants.
Baker & Walke, for respondents.

HUGHES, District Judge. From a comparison of all the evidence, I conclude the facts of the case, concerning the meeting of these approaching vessels and the collision that occurred, to be as follows: Both of the steamers slowed down their engines, but both kept on in their courses. The Molyneux, which was moving with the tide and the wind, entered the cut first, passed through it, and had passed out of it, as the Currituck was about to enter it on the east end. Captain Phillips says the Molyneux passed him between the end of the cut and the buoy. The Currituck, still moving on, had got her bow about twenty feet into the mouth of the cut, when the Pennsylvania met her in coming out of it. The Pennsylvania being 17½ feet wide, and the Currituck the same width, there was but little space to spare for the passage of each other, and, the channel being narrow, the port stern quarter of the Pennsylvania struck heavily some projecting lumber on the Currituck. This collision probably rendered the Pennsylvania more or less unmanageable by her helm as she went out of the cut, and, after passing out, she was struck in her port bow by the Dispatch, and sunk in half an hour. The hawser of the Dispatch was slack when she ran into the Pennsylvania. As the Currituck had just moved on from where she passed the Molyneux to a point twenty feet in the cut and stopped, I infer that it was the headway of the Dispatch which had slackened her hawser at the time of her running into the Pennsylvania. The evidence of the men on the Molyneux and Pennsylvania is, that the current caught the Dispatch after turning the buoy, and threw her across against the Pennsylvania. I think this must have been true to some extent. The owners of the Pennsylvania now libel the owners of the Currituck and Dispatch for the damage they have sustained from this collision, amounting to about $600.

There can be no denial of the fact that the Molyneux and her tow moved on after discovering the approach of the Currituck and her tow; that the Molyneux had just passed through the cut when she met the Currituck; that she was moving with tide and wind, while the Currituck was moving against both; and that, by the aid of tide and wind, she had made only about the length of the cut more distance than the Currituck had made, when they passed each other, although the Currituck had been moving against tide and wind. All the evidence seems to concur in stating that when the steamers first saw each other they were about equally distant from the cut. The inference, therefore, is irresistible, whatever may be the conflicting statements of witnesses, that the Currituck did keep moving on after answering the signal of the Molyneux. There can be no reasonable doubt that the master of the Currituck, Captain Phillips, acted on the idea which he insisted upon in his evidence—that he was not bound to stop his vessel, that it was practicable for vessels to pass each other in this cut, that he had frequently done so, and that there would have been no collision in the cut if the Pennsylvania had kept to the right.

I conceive that there is but one question in the case, and that is: whether the Currituck, running in this narrow stream, against wind and tide, and therefore more manageable, was not bound to stop on discovering the Molyneux and her tow meeting her, she being driven on by wind and tide, obliged to keep out of the way of her tow, and thus comparatively unmanageable? Was not the Currituck bound to stop east of the buoy, as Mr. Marshall Parks thinks, until the Molyneux and her tow had passed through the cut?

There are very few cases of collision in which there is on either side intentional fault or malfeasance. They are generally the result of negligence, surprise, ignorance of duty, misjudgment, or mistake. In ascertaining who is liable for a collision, the courts do not seek for bad motives in the persons connected with the accident, but apply certain rules of navigation to ascertain who has been at fault in not strictly complying with those rules. The parties to the accident are generally unanimous on each side in ascribing the blame to the other. They are generally sincere in doing so, neither party having intended the injury. The courts are therefore obliged very much to disregard the conflicting testimony of the witnesses on either side as to motive, negligence, and blame; and to consider the testimony chiefly with reference to those rules of navigation which usually supply an unfailing test as to where the fault has been, that fault being generally unintentional, and legal fault rather than moral.

The only question in the present case, I conceive, is whether the Currituck was not bound to stop until the Molyneux had passed out of the cut. She did not stop after being signalled by the Molyneux. She kept on. She made nearly as much distance against tide as the Molyneux made with tide. She persisted in entering the narrow canal before the Pennsylvania had passed out of it, although the captain charges that the

schooner was badly managed with too long a hawser. There can be no doubt that, by putting the Currituck twenty feet into the cut and thereby bringing the Dispatch up within thirty yards of her stern, the collision of the Pennsylvania, first with the Currituck and then with the Dispatch, was caused.

There is no statutory rule of navigation prescribed for vessels meeting each other in narrow channels and streams, except upon the waters of the Western rivers of the United States. Under the act of congress of February 28th, 1871 [16 Stat. 440], and the action of the supervising inspectors taken in pursuance of that act on the 12th of June, 1871, a rule was made statutory which had long before been a custom of those rivers in the navigation of steamboats. That rule is in these words: "When two boats are about to enter a narrow channel at the same time, the ascending boat shall be stopped below such channel until the descending boat shall have passed through it," etc., etc. Although this rule did not attain to the form of a statutory enactment until 1871, it had for many years before been the law of navigation on our Western rivers by the custom of navigators. A similar rule had frequently been recognized and enforced by the supreme court of the United States; as, for instance, see Williamson v. Barrett, 13 How. [54 U. S.] 101; and Goslee v. Shute, 18 How. [59 U. S.] 463. See, also, The America [Case No. 280], where the admiralty court enforced a rule of this class which had been enacted for the navigation of the Hudson river by the legislature of New York. If, therefore, there was a rule of navigation recognized by those who were running boats on the Elizabeth river and the line of navigation of which it is part, similar to the one which has been made a statutory provision as to our Western waters, then the Currituck was bound to observe that rule. The masters of the Molyneux and Pennsylvania and other witnesses for the libellants testify to the existence of such a rule. Marshall Parks, Esq., president of the Albemarle and Chesapeake Navigation, whose authority I accept as conclusive on the subject, testifies to the existence and universal recognition of this rule. In fact, it is a rule of navigation for those waters. The Molyneux did not violate, but observed it. It is not pretended that she departed from the rule; and "a very clear case of departure from a rule of navigation must be made out before a vessel can be pronounced in fault for adhering to it." See The Clement [Id. 2,879]. This collision happened from fault somewhere. If the Currituck had observed the rule of navigation requiring the vessel moving against the current to stop, in approaching a narrow channel, until a vessel meeting her passes through it, this collision could not have happened. She was in fault in not stopping; is therefore responsible for the accident; and I must accordingly decree against her.

NOTE. I have treated the rule of navigation referred to as a single general rule. In respect to this particular channel, called the "Dutch Gap Cut," the evidence in the case proves the existence, not only of the general rule, but also a special rule observed by vessels, not to meet in this cut.

Case No. 8,730a.

McCOY v. LEMONS.

[Hempst. 216.] [1]

Superior Court, Territory of Arkansas. Jan., 1833.

ADMINISTRATORS—APPEARANCE—VOLUNTARY—PROCESS.

1. The want of ten days' notice to an administrator, of the presentation of a claim to the probate court, cannot be made a ground of objection where the administrator voluntarily appears.

2. Appearances cures all defects and irregularities in process and the want of service, and dispenses with the necessity of process.

Appeal from Conway circuit court.

Before ESKRIDGE, CROSS, and CLAYTON, JJ.

OPINION OF THE COURT. McCoy, as administrator of Carlisle, made his motion before the county court of Conway county, for an allowance against Lemons, administrator of McElmurry. After a hearing of the parties, the county court sustained his motion, and allowed him five hundred dollars, with interest at the rate of six per cent. per annum, from the 29th day of October, 1825, from which Lemons appealed to the circuit court; but the appeal was dismissed on the motion of Lemons, on the ground that ten days' notice had not been given to him, according to the directions of the statute of 1825, and from which latter decision McCoy has appealed to this court.

It appears from an examination of the proceedings before the county court, that the defendant was present at the trial in that court, which, in our opinion, superceded the necessity of notice. The notice prescribed by the act of 1825, can only be considered in the light of process to bring the party into court, and of course his voluntary appearance supersedes the necessity of it. Acts Fla. 1825, p. 66. There is no principle of law better established than that the appearance of the defendant cures all defects and irregularities in process. It cures the want of service. Caswall v. Martin, 2 Strange, 1072; Wood v. Lide, 4 Cranch [8 U. S.] 180; Knox v. Summers, 6 Cranch [7 U. S.] 498. Judgment reversed.

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

Case No. 8,730b.

McCOY v. MARIETTA & C. R. CO.

[7 Cin. Law Bul. 93; 28 Int. Rev. Rec. 81.]

Circuit Court, S. D. Ohio. Feb., 1882.

RAILROAD RECEIVERS — ILLEGAL DISCRIMINATIONS — FEDERAL COURTS ENJOINING STATE COURT RECEIVERS.

[1. It is a breach of public trust for receivers of a railroad company to agree to deliver all stock coming within their control at the stock yards owned by a particular company, to the exclusion of yards owned by others, in the same city, and equally well situated.]

[2. A federal court will refuse, in the exercise of its discretion in relation to granting injunctions, to enjoin railroad receivers appointed by a state court from making illegal discriminations between parties entitled to the road's services as a carrier. The proper remedy is to apply to the appointing court, and thus avoid the danger of conflict of jurisdiction.]

Application for an injunction to compel the receivers of the Marietta and Cincinnati Railroad Company to receive consignments of stock and deliver the same to the Cincinnati Stockyards, of which McCoy is the lessee. The petition states that plaintiff is a citizen of Kentucky, and has leased the Cincinnati Stockyards at $15,000 per annum for three years. That the Cincinnati Stockyards cover about twelve acres of land in Cincinnati, adjoining the United Railroads Stockyards, and are fully equipped for business, having cost $300,000. That the Marietta and Cincinnati Railroad affords the only access to either stockyards, and that the business can only be done over that road. That the railroad company has entered into a contract with the United Railroads Company for exclusive deliveries of stock to that company, and that the receivers refuse to deliver stock to the Cincinnati yards, and have instructed their agents to refuse to receive shipments of stock consigned to the Cincinnati yards. The bill prays an injunction to compel defendants to receive, transport, and deliver all stocks consigned to complainant according to consignment.

The paragraph from the contract which is claimed to be illegal is as follows: "That they (the railroad companies) will make the grounds of said stockyards company, purchased or to be purchased as aforesaid, their stock depots, respectively, for the city of Cincinnati, and, so far as they lawfully may, they will receive and deliver stock controlled by them or their officers or agents, respectively, only at said stock depot."

The court said that, while it seemed to him that the defendants were bound to treat all stockyards alike, yet the defendants were receivers appointed by a state court, and that he ought not to interfere by injunction, as it would be an interference by one court with the orders of another. The receivers are officers of that court, and the court by which they were appointed, subject to its orders. The complainant claims that while it is an undoubted general rule that one court will not entertain jurisdiction against a receiver appointed by another, yet this rule had been changed by statute in Ohio, referring to sections 3415 and 3416, Rev. St. The complainants say that they had the fullest confidence in the judge of the common pleas court of Ross county; that they knew him personally, and that he was a judge of high character and capacity; but that the receivers had filed a petition in that court, asking instructions upon the matter in question, and urging the court to refuse the complainant's request. Being officers of that court, it would be but natural that the judge would give great consideration to their views and representations.

A. F. Perry, Jordan & Jordan, Williams & Ramsey, and Matthews & Matthews, for complainant.

W. T. McClintock, Stallo, Kittridge, Shoemaker, and Paxton & Warrington, for defendants.

BAXTER, Circuit Judge. It is clear in my mind that the receivers are in sympathy with the United Railroads Company and against the Cincinnati Company. It is also clear to my mind that if the facts stated in the bill of complaint be true, there is, upon the part of these receivers, a breach of public trust. Railroads are authorized to be built and used for the public good. Railroad managers are bound to deal impartially between all the persons and companies requiring their services. If they may enter into arrangements of the character here presented they may soon control the entire business of the country. They may decree that one iron furnace shall run, and that another shall stop; they may take a personal interest in a rolling mill, an elevator or a coal mine, and by discrimination in the transportation of freight crush all competition. This cannot be permitted. The courts and legislatures of the country will not and should not permit it. There is as yet no adequate remedy for it in all cases, but it will be provided, and the only safety of railroad companies will be found by them in the faithful and impartial performance of their public duties. If this action were against a railroad company, and the allegations of the bill were sustained by proof, I should not hesitate to employ all the power of the court in the enforcement of what seems to me to be the plain duty of the receivers in the present instance. But this is an action against receivers. They are the officers of the common pleas court of Ross county. That court has the custody and control of the railroad, and has full power to enforce all proper orders for the operation of the road. I have no reason to doubt that that court will do its duty. Indeed, I am bound to presume, and do presume, that it will do so.

Whether the statute of Ohio authorizing

suits against receivers would sustain the jurisdiction of this court in the present action is a question which I do not now decide. In the exercise of that discretion with which the court is invested with reference to cases of injunction or other extraordinary remedies, I deem it my duty, in view of the difficulties, inconveniences and dangers which might arise from the exercise of such jurisdiction in cases like the present, to refuse to interfere by injunction. The complainant can make his application to the Ross county common pleas court, where, I have no doubt, full justice will be done to all concerned.

Case No. 8,731.

McCOY v. WASHINGTON COUNTY.

[3 Wall. Jr. 381;[1] 7 Am. Law Reg. 193; 3 Phila. 290: 15 Leg. Int. 388.]

Circuit Court, W. D. Pennsylvania. April Term, 1862.

MUNICIPAL RAILROAD BONDS AND COUPONS — COURTS—SUIT AGAINST COUNTY—VALIDITY OF ACT EMPOWERING COUNTY.

1. A county may be sued in the United States courts.

[Cited in Vincent v. Lincoln Co., 30 Fed. 750.]

2. Where bonds issued by a county in order to aid the construction of a railroad, covenant to pay to the holder thereof, the county is liable directly to the holder, who may sue in his own name, notwithstanding as between the railroad company and the county it is agreed that the company shall pay the bond.

3. So, too, the holder, if otherwise entitled to sue in the circuit court may sue there, although the bonds were issued to a railroad in the same state as the county was, and which, therefore, could not have sued in the circuit court. The plaintiff claims as holder, not as assignee.

4. The act of the Pennsylvania legislature, of 12th April, 1851, authorizing Washington county to subscribe to railroads, having been declared constitutional by the supreme court of that state, is to be regarded in the federal courts as constitutional, and the action of the county commissioners in conformity therewith is binding on the county.

5. The constitution of the United States does not forbid states or counties from borrowing money and giving proper securities therefor, and such securities are not bills of credit within the meaning of the constitution.

6. Nor is a law authorizing them, a law impairing the obligation of a contract, or one violating the fundamental principles of "republican government" within the meaning of that instrument.

7. Nor is the bill which finally becomes such a law, "a money or revenue bill" within the meaning of the constitution of Pennsylvania, which requires such bills to originate in the house of representatives.

8. The coupons to coupon bonds payable to bearer are to be taken in connection with the bonds to which they are annexed, and though, not themselves, in the form of instruments negotiable by the law merchant, nor payable to any particular person, on his order, or even to bearer, they yet partake of the instrument to which they are attached, and when it is negotiable they too pass by delivery and become, from established usage, sufficient to establish the indebtedness of the county to the holder.

[Cited in Aurora v. West, 7 Wall. (74 U. S.) 105.]

[Cited in Smith v. Clark Co., 54 Mo. 66; Evertson v. National Bank of Newport, 66 N. Y. 21; Goodwin v. Bath, 77 Me. 462, 1 Atl. 245.]

9. The possession of the coupons of coupon bonds, is prima facie evidence that the holder of them is holder of the bond, or at least was so when they were cut off, and as such entitled to receive the interest; and they may be declared on without in any way declaring on the bond from which they have been cut.

[Cited in Chicago B. & Q. R. Co. v. Otoe Co., Case No. 2,667; Kennard v. Cass Co., Id. 7,697.]

[Cited in Deming v. Houlton, 64 Me. 262; Evertson v. National Bank of Newport, 66 N. Y. 21; Goodwin v. Bath, 77 Me. 462, 1 Atl. 246.]

10. The effect of the bond cannot be varied by parol testimony.

11. Nor is it necessary in a suit on bonds, authorized by statute to be issued by a county subscribing to railroad stock, to show an actual subscription in the manner prescribed by the statute, or that a certificate of railroad stock issued. It is enough if the bond have been delivered in payment of a subscription authorized, and when the bond recites that it issued in such payment, the presumption is that it did so, and that the county got, or can get, a certificate. A county cannot plead negligence of its own agents, in the management of its own business to avoid payment of its obligations.

This was an action of debt for interest due on certain "coupon bonds," issued by the commissioners of Washington county, Pennsylvania. The declaration set forth, that the defendants "made certain coupon warrants, or promises to pay, in writing," in the form following: "Washington County Bonds—Warrants for thirty dollars interest on bond No. 108, payable in the city of New York, on the 15th of May, 1857. For the commissioners, A. Silvy, Clerk." Sixty of these coupons, for $30 each, payable at different dates, were asserted to be due and owing to the plaintiff as lawful holder. The defendants pleaded they did not assume, and were not so indebted. To support the issue, the plaintiff has given in evidence—

1. An act of assembly passed on the 12th of April, 1851 [Laws Pa. 1851, p. 470], which, in sections 7, 8, 9 and 10, authorized the citizens of Washington, at the next, or some subsequent general election, to decide by ballot whether or not the commissioners of said county should subscribe, in its behalf, 4,000 shares in the capital stock of the Hempfield Railroad Company, the returns of this election to be certified to the court of quarter sessions, and if the judges thereof ascertained that there was a majority in favor of such subscriptions, they should make an order on the commissioners to make the subscription. The commissioners were authorized to borrow money to pay the subscription, and to execute bonds or promissory notes in the name of the county, transferable on the books of the commissioners, these bonds to

[1] [Reported by John William Wallace, Esq., and here reprinted by permission.]

bear an interest of six per cent., payable semi-annually, and to be received as cash by the Hempfield Railroad Company, in payment of instalments. No bond or note was to be for a less sum than $100. The plaintiff gave in evidence, also, a certificate from the court of quarter sessions, showing that such election was held, and that the citizens of Washington had decided, by a large majority of votes, in favor of making such subscription. The will of the people of Washington county being thus ascertained, another act of assembly was passed on the 12th of February, 1852, authorizing the commissioners to subscribe 4,000 shares to the capital stock of the company; to borrow money in behalf of the county, and to make provision for the payment of the principal and interest of the money so borrowed, as in other cases of loans to corporations. The commissioners were authorized also to issue certificates of loan or bonds in the name of the county, bearing an interest of six per cent., payable semi-annually, and transferable as might be directed by the commissioners. The railroad company were to receive these bonds as cash in payment of the stock subscribed; "and the said company are also to pay or provide for the payment of the interest accruing upon said certificates of loan or bonds, until the said railroad shall be completed." The railroad company was moreover authorized to guarantee the payment of the principal and interest of the bonds. In pursuance of this authority the commissioners executed and delivered to the railroad company 200 bonds of $1000 each, and fifty of $500 each, payable to bearer, with guarantee of the railroad company, with interest coupons annexed, in the form above given. The bonds stipulated for the payment of the interest semi-annually on presentation of the coupons. The plaintiff produced the bonds to which the coupons were attached with the exception of seventeen. Their execution was proved and admitted, and that they were delivered to the railroad company in payment for stock and to be used by them to raise money for the construction of the road. There was no allegation, or proof of any fraud practiced by the parties in the transaction. The liability of Washington county on the coupons, was elaborately argued by counsel, and numerous requests for particular instructions asked in behalf of the county.

Geo. P. Hamilton, for plaintiffs.

Messrs. Thomas Williams, Braden, and Hopkins, for defendants.

GRIER, Circuit Justice (charging jury). These bonds, to give them more value in the market, are made payable to the holder, and thus by contract made negotiable by delivery. If the commissioners had power to bind the county for the payment of the principal and interest of a bond, transferable by delivery, the coupons which are appended to them, are the appointed evidence, by the agreement of the parties to show who is entitled as holder of the bond to receive the interest due at a particular date. They are attached to the bonds for the convenience of the officers of the county, and to facilitate their negotiation, and thereby add to their commercial value. The obligation to pay the interest is to be found in the bond, not in the coupon. They are not in words an instrument in writing of a commercial nature, and having their negotiability by virtue of the law merchant. In terms these warrants are not made payable to any particular person or his order, or even to bearer. They partake of the nature of the peculiar instrument to which they are attached. They are intended by the parties to be evidence of debt in the hands of the holder, and proof of payment when in possession of the debtor. They pass by delivery, and by the contract of the parties and the usage of the country are sufficient evidence of a debt to the holder as against the obligors in the bond. They are of modern invention, and should have the effect intended by the parties and be governed by the usage of the country, and not by sharp rules of law applicable to instruments of a different nature. The possession of them is therefore primâ facie evidence, that the holder of them is holder of the bond (or was so at least, when they were cut off), and as such entitled to receive the interest. [The plaintiff has produced the bonds to which the coupons were attached, with the exception of seventeen. Their execution is proved and admitted, and that they were delivered to the railroad company in payment for stock and to be used by them to raise money for the construction of the road. There is no allegation, or proof of any fraud practiced by the parties in the transaction.][2] State v. Commissioners of Clinton Co., 6 Ohio St. 280. The plaintiff has shown a primâ facie title to recover, which will entitle him to your verdict, unless the defendant has established some sufficient defence, which we will now consider.

It is contended:

1st. "That the county of Washington being merely a subordinate political division of the state of Pennsylvania, is not a citizen of this state, within the meaning of the constitution or the act of congress, and therefore not suable in this court." To this we answer, that though the metaphysical entity called a corporation, may not be physically a citizen, yet the law is well settled, that it may sue and be sued in the courts of the United States, because it is but the name under which a number of persons, corporators and citizens may sue and be sued. In deciding the question of jurisdiction, the court look behind the name to find who are the parties really in interest. In this case, the parties to be affected by the judgment, are the peo-

2 [From 7 Am. Law Reg. 193.]

ple of Washington county. That the defendant is a municipal corporation and not a private one, furnishes a stronger reason why a citizen of another state should have his remedy in this court, and not in a county where the parties against whom the remedy is sought, would compose the court and jury to decide their own case. This point is therefore overruled.

2d. It is objected, moreover, to the jurisdiction of the court—"That the present plaintiff being in the position of a mere assignee of the chose in action sued upon, and the same being a case wherein a suit could not have been prosecuted in this court to recover on the contract if no assignment had been made thereof, this court has, under the act of congress, no cognizance of a suit for the recovery thereof."

This would be a valid objection if the plaintiff claimed as endorsee of a citizen of the state of Pennsylvania. But he does not claim title through any such assignment, but as holder of the bond to whom the defendants have directly covenanted to pay the bond and interest. The indebtedness declared on, results from the peculiar nature of the security. The defendants have agreed to pay the interest to the holder of the bond, as well as the principal, and having not done so, they are directly indebted to such holder for refusing to pay according to contract.

The next defence is presented in the three following points:

3d. "That the county of Washington being a public corporation, erected for purposes of local government alone, and standing upon no contract between the legislature and the citizen—and the said Hempfield Railroad Company being a private corporation merely, organized for purposes of trade and commerce, and as a common carrier of merchandise and passengers beyond the limits of said county, the commissioners thereof were not, therefore, authorized to embark either the credit or property of the people of said county in the hazards of such an enterprise without their unanimous consent.

4th. "That if the same was done under the authority of an act of the legislature, and without such consent, the county commissioners were pro hac vice the agents of the legislature only, and the contract so made was not the contract of the people of the said county.

5th. "That as an exercise of mere power on the part of the legislature, in thus practically compelling the people of one county to build railroads in another, and taking the freehold of the citizen without his consent for such a purpose, by authorizing a heavy incumbrance thereupon, the said act of assembly was not a legitimate exercise of the taxing or of any legislative power, inconsistent with the principles of natural justice, with the rights of property, and the fundamental law of every free government, and at war with the great principles enunciated in our declaration of rights, and equally at war with the spirit and letter of the constitution of the United States."

These three points may be said to contain a condensed argument against the constitutional power of the legislature to authorize the commissioners to bind the people of the county to pay debts incurred in these disastrous speculations.

This is the great question in the case, and if it were a new one which this court were compelled to decide without the light of precedents, we should feel oppressed with its magnitude and importance. But, happily, we are relieved from this responsibility. The supreme court of your state, the tribunal to whom alone is committed the high function of declaring the constitutional powers of the legislature, have decided this question, and, to that decision, this court, and all the good citizens of the commonwealth, are bound to submit, as the declared law of the land. Although, in the course of this trial, I may have expressed opinions which I possibly might have entertained, had I been compelled to meet this as a new question; as a member of this court, I must instruct you that the law in question is constitutional, and that the commissioners of the county had power and authority to bind the county in conformity with the provisions of the acts already referred to; and if the bonds have been so issued and put in circulation, the county is bound by law, as well as by every principle of moral rectitude, to pay them to the bona fide and honest holders. Without further enlarging on this subject, let me refer all who feel desirous to have correct opinions on this subject, in a moral point of view, to an opinion lately delivered by the learned and able chief justice of your state, in Com. v. Commissioners of Allegheny Co. (Lowry, C. J.) 8 Casey [32 Pa. St.] 218. Additional points made are these:

6th. "That if the instruments sued on here, or the bonds with which they are connected, were intended for circulation from hand to hand as a marketable commodity, they are bills of credit within the meaning of the prohibition contained in the first clause of the tenth section of the first article of the constitution of the United States.

7th. "That the act of assembly of February 14th, 1852, authorizing the subscription by the commissioners of Washington county, to the capital stock of the Hempfield Railroad Company, if the same amounted in effect to a lien upon the freehold of the citizen who holds under a patent from the commonwealth, it is a law impairing the obligation of the contract between the state and the citizen, and is therefore in conflict with the first clause of the tenth section of the first article of the constitution of the United States.

8th. "That the said recited act of assembly, in assuming the power to take the

property of the citizen, without his consent, for a merely private purpose, is equally a violation of the fundamental principles of republican government, and is therefore in conflict with the fourth section of the fourth article of the constitution of the United States."

1. In answer to the first of these propositions, I instruct you that the constitution of the United States does not forbid states or corporations from borrowing money and giving proper securities therefor, and that such securities are not bills of credit, within the meaning of the constitution.

2. Nor does a law authorizing a county to borrow money to make a railroad on the credit of the county, and to be paid by the imposition of a tax on the citizens thereof, infringe that article of the constitution of the United States which forbids a state to make any "law impairing the obligation of contracts."

3. Nor is the act of assembly in question in violation of "the fundamental principles of republican government, and therefore not in conflict with any article of the constitution of the United States."

9th. The ninth proposition of the defendants is: "That if the act, under the authority of which this subscription is asserted to have been made, originated in the senate, then, upon the principles on which such legislation has been sustained in this state, the act itself, as a money or revenue bill, would be unconstitutional under the twenty-first section of the first article of the constitution of this state." To this I answer, that there is no evidence that said act originated in the senate; and if it did, it is not unconstitutional for that reason. It is not a bill to "raise revenue" for the state.

10th. The tenth instruction prayed for, is as follows: "That the instruments declared on, import no contract, in their terms, with the holder thereof by the defendant in this suit to pay the moneys referred to therein, and are not so executed as to charge the defendants under the laws of this state."

The coupons per se, "do not import a contract in their terms with the holder," but taken in connection with the bond to which they were attached, they do; and from the established usage and contract of the parties, they constitute the proper evidence of indebtedness to charge the defendants.

11th. Another instruction asked is this: "That if the papers in question were originally a part of a bond, or bonds, containing a stipulation for the payment of the interest referred to therein to the holder of the said bond, the remedy, if any, would be upon the bond itself, and the plaintiff must have set out and shown his ownership, and alleged an agreement on the part of the defendants to pay the same, in order to entitle him to recover."

This proposition is answered in the negative for reasons already stated. By the contract of the parties, these coupons are made evidence that the amount of interest stated is due from the county to the holder thereof.

12th. The twelfth instruction asked is: "That the bonds issued by the defendants in payment of their supposed subscription to the capital stock of the Hempfield Railroad, are to be construed in accordance with the terms of the act of assembly under which the same were issued, and that, under the said act, the defendants would not be liable for the payment of interest until the completion of said road."

To this we say: The commissioners had their authority from the act, and that act authorizes them to borrow money to pay for the stock to make provision for the payment of principal and interest, and to issue bonds in the name of said county, bearing an interest of six per cent., payable semi-annually. The provision that the railroad company should bind themselves to guarantee the principal and interest, and should pay it till the road is completed, does not annul the obligation of the bond; as between the county and the corporation, the county had a right to call on them to pay the interest. But as between it and the bondholders, the contract of the county is to pay both principal and interest. The guaranty of the railroad company adds to the security, but cannot detract from it. The commissioners have not misconstrued the act, or abused their powers in binding the county for the payment of the interest, but pursued its true meaning and intent.

13th. The thirteenth proposition of the defendants is: "That if the said bonds were issued upon an agreement by the company from which they have been purchased, that the defendants should not be called upon to pay the interest thereon, but that the same was to be paid by the company itself until the road was completed, it was an agreement, in effect, that the bonds should bear no interest so far as the defendants are concerned; and the same not being negotiable securities within the law merchant, are subject to all the equities which existed between the original parties, and the holder was bound to inquire before purchasing, and is affected with notice of the said agreement."

The written instruments show the contract of the parties—the parol testimony admitted cannot affect it. What answer would it be, to an action on a note or bond, for the defendant to plead, that when he signed it his co-obligor agreed to lift it, and that he should never be troubled about it? We proceed to the consideration of the fourteenth and the several subsequent propositions:

14th. "That to entitle the plaintiff to recover in this case, he must first have shown an actual subscription in the manner prescribed by the act incorporating the said company, or at least an actual subscription of some sort by the commissioners; and that in the

absence of any subscription, or of the issue and delivery of any certificate of stock by the said company, the issue of the bonds was without authority of law, and the defendants are not liable in this suit."

This proposition cannot be admitted. The bond recites that it was for subscription to the stock. The witness has proved that they were delivered in such payment. Whether there was literally a subscription, or written promise to pay, is of little importance, if it was paid; also whether the county has got a certificate of stock, was a matter with which the holder of the bond had no concern, and is not bound to prove. If the county has no certificate, it can obtain it by suit, if refused. It cannot now plead the negligence of its own agents in the management of its business, to avoid payment of its obligations. For anything that appears, they have it, or can get it, and in absence of proof, the presumption is that they have it.

15th. "That if no subscription was actually made by the commissioners in the manner indicated by the law, no subsequent vote of theirs by proxy, supposing the same to have been duly proved, could cure the infirmity, or operate as an estoppel against the defendants." This has been sufficiently answered in our remarks on the fourteenth proposition. If the bonds were delivered in payment for the stock, there is no infirmity to be cured.

16th. "That taking the papers sued on to be warrants, or certificates of loan, under the act of assembly, it was essential to their validity, as such, that they should be signed by the commissioners themselves, or a majority of them, and attested in the former case by their clerk, and authenticated in the latter by the seal of the county."

To this we answer, that the obligation of the defendant to pay both principal and interest, is to be found in the bonds (as already explained), which are properly executed by the commissioners, and bind the defendants to pay the interest as well as the principal.

17th. "That there is nothing in the act authorizing the said subscriptions to warrant the issue of any other securities than the bonds or certificates of the county therefor, in sums not less than one hundred dollars each, but that, on the contrary, assuming the instruments sued on to be promises or certificates of debt or loan, and to have been otherwise well executed, they are in direct violation of the provision which forbids the issue of any certificates for a less amount than one hundred dollars, and are, therefore, not obligatory on the defendants."

The answer to this proposition is, that the commissioners have issued no other securities than the bonds, and, as already stated, the coupons are made for the convenience of the officers, and as evidence that the holder is the person entitled to receive the interest due on the bond described therein.

This ends the catechism, and, as a result of the whole, the court instruct you, that if you believe the testimony submitted to you by the plaintiff, he is entitled to your verdict, notwithstanding any testimony produced by defendant, and the many legal objections so ingeniously and ably argued.

The jury found a verdict for the full amount of the plaintiff's claim, $1910.70 [which being under $2000, prevents an appeal to the supreme court of the United States].[3]

McCRAKEN (BROOKE v.). See Case No. 1,932.

McCRAKEN (UNITED STATES v.). See Case No. 15,664.

McCREA (BANK OF ALEXANDRIA v.). See Case No. 849.

Case No. 8,732.

Ex parte McCREADY.

[1 Hughes, 598.][1]

Circuit Court, E. D. Virginia. Oct. 10, 1874.

CONSTITUTIONAL LAW—OYSTERS—PROHIBITION TO CITIZENS OF ANOTHER STATE—HABEAS CORPUS.

1. The Virginia act of assembly (section 22, c. 214, Acts 1874), prohibiting persons, other than citizens of Virginia, from taking or planting oysters in the waters of the commonwealth, and subjecting offenders to forfeiture and indictment, fastens the disability of alienage upon non-residents, and places them on a different footing from residents in respect to the privileges denied, and is therefore unconstitutional.

2. A person indicted and imprisoned under this act of assembly is deprived of his liberty in violation of the constitution of the United States, and therefore if in prison under state prosecution, may be released on habeas corpus by a judge of a court of the United States, under the act of congress of February 5, 1867 [14 Stat. 385]; Rev. St. U. S. § 753.

[Cited in Ex parte Davis, 21 Fed. 396.]

On writ of habeas corpus.

BOND, Circuit Judge. James W. McCready, a citizen of the state of Maryland, is held to answer in the county court of Gloucester county, in this district, upon an indictment found by the grand jury of that county in the words following: (Here follows the indictment.) This indictment is founded upon section 22 of chapter 214 of the acts of assembly, 1874, p. 243, entitled "An act for the preservation of oysters, and to obtain revenue for the privilege of taking them within the waters of the commonwealth," which is as follows: "If any person other than a citizen of this state shall take or catch oysters or other shellfish in any manner, or plant oysters in the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit five hundred dollars, and the

[3] [From 15 Leg. Int. 388.]

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

vessel, tackle, and appurtenances; and any non-resident shall be deemed to have violated this section who shall allow oysters purchased by him for sale, and laid out as purchased, to remain so laid down more than sixty days." To obtain his release, McCready has petitioned this court for the writ of habeas corpus, which was granted him, and he now claims his discharge because, as he alleges, his arrest is in violation of the fourth article of the constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

It is urged on the part of the attorney-general that the right to catch or plant oysters is neither a privilege nor an immunity within the meaning of the constitution of the United States; and that even if it were, the petitioner must seek his redress in the state court, where, if this point be decided against him, he may have an appeal to the supreme court, and that this court has no jurisdiction on habeas corpus to release him. That to catch and plant oysters is the privilege of the citizens of the state of Virginia is manifest from the first section of chapter 214, which declares and provides: "All the beds of the bays, rivers, and creeks, and the shores of the sea within the jurisdiction of this commonwealth, shall continue and remain the property of the commonwealth, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking and catching oysters," etc. The state of Virginia, after declaring the beds of the bays and rivers her property, might have prohibited her citizens from taking and catching oysters, and it would not have been lawful so to do. When, having that property, she declares that all her people may take them under prescribed conditions, she grants them a right and the privilege of so doing. That such was the understanding of the general assembly is manifest from the title of the act which calls it a privilege, and from the caption of section 6, which determines what residents shall pay for the "privilege." From this privilege, common to all citizens of Virginia, all non-residents are excluded. No provision is made for their payment of the tax demanded of the citizens of Virginia, nor of a higher rate. They are denied the privilege entirely.

In the case of Paul v. Virginia, 8 Wall. [75 U. S.] 168, in commenting on this clause of the fourth article of the constitution of the United States, Mr. Justice Field says: "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disability of alienage in other states." If this were the object of the clause, as it undoubtedly was, the act of assembly of Virginia under consideration has an entirely different and contrary object, for it fastens the disability of alienage upon non-residents, and places them on a different footing entirely from the citizens of Virginia.

The act is manifestly unconstitutional so far as it concerns non-residents; and it only remains to inquire whether or not the petitioner is entitled in this court to the writ of habeas corpus.

By the act approved February 5th, 1867, authority is given to the several courts and justices of the United States to grant writs of habeas corpus in all cases where any person is restrained of his liberty in violation of the constitution of the United States. Having found that the act of assembly of Virginia, by virtue of which the petitioner is detained in custody, is in violation of the clause of the fourth article, above quoted, it remains only for the court to give him the benefit of the writ and to order his discharge; which is accordingly done.

[NOTE. McCready was again indicted by the county court of Gloucester county at the November term, 1874. He was served with summons, but made no appearance. After several continuances, at the July term, 1875, the court directed that a plea of not guilty be entered, and that the case be tried. McCready was convicted, and a fine assessed against him. This judgment was affirmed by the circuit court of Gloucester county, and by the supreme court of appeals of Virginia. 27 Grat. 985. From this last court a writ of error was sued out to the supreme court, where the judgment was likewise affirmed. 94 U. S. 391.]

McCREADY (AMERICAN COTTON TIE SUPPLY CO. v.). See Case No. 295.

Case No. 8,732a.

McCREADY et al. v. The BROTHER JONATHAN.

[Betts, Scr. Bk. 489.]

District Court, S. D. New York. 1853.

ADMIRALTY—COLLISION—AMENDMENT—AMOUNT CLAIMED—UNDERTAKING OF STIPULATORS.

[1. An amendment will be allowed in an action of tort in admiralty increasing the ad damnum allegations, the recovery not being restricted to the amount claimed.]

[2. The undertaking of stipulators on a libel in rem for the loss of a vessel and cargo by collision is for their value, and they are not entitled to interfere in questions relating to the equity of parties to amend the form of their pleadings so as to bring within the action all the rights which may be legally determined by it.]

The libel in this case originally was by the owners of the vessel lost by collision with the steamship, for her loss, and also for the loss of the libellants' cargo on board. On the trial, evidence was offered of a cargo on board belonging to other persons not named in the libel. This evidence was excluded by the court; and on a motion to amend, the libellants [Nathaniel L. McCready and others] were granted liberty to amend so as to

show that they were entitled to demand, in their own names, the value of lost property, with the restriction that the suit should be carried on upon their own rights, as they existed when it was instituted. Under that permission, amendments were put in, which the claimants moved to expunge, on the ground that they introduced new parties to the action, and also enhanced the damages demanded and the liability of the stipulators. The libellants insist, that the amendments do not go beyond the restriction of the order.

Mr. Lord, for libellants.
Mr. Sherwood, for defendants.

Before BETTS, District Judge.

Held, that the amendments, though not entirely clear of ambiguity, plainly authorize proofs to the extent contemplated by the order for amendment, and it is not necessary for the protection of the claimants against evidence exceeding that limit, that the pleadings should be more precise or limited than to give them fair notice of the extent of the libellants' demands, in their own right, or in the rights of others whose authority to sue they had when the action was commenced. That the increase of the ad damnum allegations is mere matter of form; that, in an action of tort in admiralty, the court is not bound to restrict the recovery of the libellant to the amount claimed in the summation of damages, but an amendment would be allowed, of course, enlarging that claim. That the undertaking of the stipulators is for the value of the libellants' vessel and cargo, and they are not entitled to interfere in questions relating to the equity of parties to amend the form of their pleadings so as to bring within the action all the rights which may be legally determined by it.

Case No. 8,733.

McCREADY et al. v. HOLMES.

[6 Am. Law Reg. 229.]

District Court, E. D. South Carolina. Oct., 1857.

CARRIERS — QUANTITY OF GOODS SHIPPED — BILL OF LADING—RECEIPT OF CONSIGNEE—BURDEN OF PROOF.

Though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt in his bill of lading, as to the quantity or amount of the goods shipped; yet, in an action for the freight, where the consignee has received the goods, at the wharf, without qualification or reservation of the right to inspect, weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to establish that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.

[Cited in Robinson v. Memphis & C. R. Co., 9 Fed. 139.]

Libel in admiralty, in personam [by McCready, Motte & Co. against R. L. and W. E. Holmes].

Edward McCready, for libellants.
C. H. Simonton, for respondents.

MAGRATH, District Judge. The libel in this case, is filed to recover a balance of freight, for the transportation of one hundred tons of coal from Philadelphia to Charleston. The vessel arrived at Charleston, and the coal was delivered to the respondents, the consignees: who with their carts carried it to the office of the public weigher; and by his weight, it appeared there was a deficiency of several tons. The respondents claim a deduction from the freight, of so much as is alleged to be the value of the coal which has been lost. It is conceded that a certain percentage (2½) of loss, is usually allowed. The libellants concede this allowance, and charge freight for 97½ tons; but insist that no other deduction should be made. The cartmen employed by the respondents depose that they carted to the public weigher all the coal they received: and the libellants prove that all the coal received in Philadelphia was brought to Charleston, and delivered to the respondents. A carrier is responsible to the consignee for the safe delivery of property committed to his care. Ordinarily, the bill of lading determines the nature of his liability. When by the execution of that paper he has admitted his possession of the property of another, it is conclusive against him, unless upon proof of inadvertence, mistake, or deceit. That the carrier did not supervise the process by which the weight was ascertained; or that he signed a bill of lading upon a representation which he did not verify, are suggestions to which I would reluctantly listen, if offered to qualify a liability plainly expressed in the bill of lading. No sufficient reason in this case is presented to me for doubting the correctness of the weight as ascertained in Philadelphia, and I hold the libellants concluded by it. The libellants being thus liable for the safe delivery of the property subject to such exceptions, as by custom or contract qualify that liability, can discharge themselves by showing a performance of their undertaking. This they do, by proof that all the coal received at Philadelphia was duly cared for while being laden; that all precautions were taken to secure it from loss by theft or otherwise; and that all the coal in the vessel was delivered to the respondents.

The undertaking of a carrier is affected by the nature of the property he may have in his custody. If its value is determined by measure, weight, or any other test, his liability depends upon the result of an application of that test, at the port of delivery, under such circumstances as I shall notice. But the consignee may not require the test.

He may be satisfied, and willing to receive his consignment without the delay, trouble, and expense of ascertaining whether it corresponds with fractional accuracy to that specified in the bill of lading. A delivery and acceptance of this kind would not conclude the consignee in case of loss or damage subsequently ascertained; but it would increase the difficulty of making a carrier liable for loss or damage, (as in this case by a diminution in quantity) ascertained after the carrier had parted with his possession; and by an examination made without his knowledge or presence. And if it should be, that after the carrier had parted with his possession of the property, it has been in the possession and control of other agents of the consignee; the reason for exonerating the carrier increases in proportion to the number of such agents, the length of time for which they were in possession; and the opportunities they enjoyed to diminish the quantity for which the carrier was liable. In this case, the carrier received one hundred tons of coal, and became bound for its delivery. That delivery must be so made as to admit an ascertainment by the consignee, of the fidelity with which the contract of the carrier has been performed. It is not the duty of the carrier to weigh, measure, or inspect property, before he delivers it to the consignee; but it is a right in the consignee to ascertain whether the quantity or quality of the property, which the carrier has had in his charge, has been lessened or impaired, while it was in the possession of the carrier, and by causes for which he is liable. The consignee may therefore qualify his acceptance, by notice to the carrier that he intends to weigh, measure, or by any other appropriate test, ascertain if what he has received, is that which the carrier admitted that he had received, and agreed to deliver. And such notice would bind the carrier so that he would be concluded by the examination made in pursuance of it, unless he was able to show its insufficiency. If upon that examination, it appeared that there was a deficiency in quantity or diminution in value, which would have justified the consignee in refusing to receive the property, if known to him before he had received it, he still would have that right. And if the carrier acquiesced in the examination, he would have a right to supervise the transportation to the place of, and to be present at the examination; and there to enforce his lien as perfectly as he could have done, while the property was in the hold of his vessel. In such a case, the delivery on the one side, and the acceptance on the other, would be qualified, operating as a special agreement, under which the lien of the carrier may be preserved, and all the rights of both parties secured. No wrongful act of the consignee or owner can divest the lien of the carrier. Mont. 40; 3 McCord, 120. In England, if the goods are not to be landed at a particular wharf, the carrier may send them to a public wharf, and the possession of the wharfinger will support the lien of the carrier. Indeed, the corresponding rights of the carrier to his freight, secured by a lien on the cargo, and of the consignee to an inspection or examination of the property, have been understood and provided for, even in the earliest times. The Laws of Wisbuy, the Ordinance of Rotterdam, the Consolato del Mare, with some variations in the details, but an uniform recognition of the principle, make it the duty of the master not to detain the goods in the vessel, where they cannot be inspected, but to have them in some place where they may be examined. In England, it is said to be the practice, in cases where goods should be landed and warehoused, that the master may secure his lien by entering them in his own name. And the dock act of 39 Geo. III. c. 69, and 45 Geo. III. c. 58, expressly reserve the lien of the master. Chit. Carr. 312, and note. It may not be uninstructive, at least in this court, that we should bear in mind that here, the lien of the carrier is not only referred to the common law, by the strict rule of which, possession must accompany the lien; but it is also, that hypothecation implied in maritime contracts, and to the enforcement of which possession is not essential.

As the carrier has no right which is affected by the right of the consignee to this examination or inspection, of course he cannot refuse the consignee the full benefit of it. He has no right to insist that the consignee shall receive his property in any manner by which his claim for loss or damage may be made more difficult or embarrassing. He cannot enforce a delivery of property at improper times, or in bad weather, if the property cannot be secured by the consignee, or is exposed to damage during its transfer to the store. The consignee is entitled to reasonable notice, if he is known, of the arrival of the property, and to a fair opportunity of providing suitable means to carry it away safely. Story, Bailm. § 509; The Grafton [Case No. 5,656.] But the consignee has not the right to accept a delivery of the goods, commit them to his agents, examine them without notice to the carrier, and charge the carrier with a loss alleged to have been thus subsequently ascertained, upon such proof as excludes all reasonable probability of the loss having happened except in the hands of the carrier. By the French law, upon a delivery to the consignee, he must give a discharge to the carrier. 2 Boul. P. 318. If he refuses to receive the goods, or receives them and refuses to give a discharge, he renders himself liable in damages. If his refusal to receive the goods is upon the ground of damage, or other sufficient reason, by his application to the proper officer, qualified persons are named, who determine the suffi-

ciency of the cause alleged for the refusal to receive. Code de Commerce, art. 106; 2 Boul. P. 318. The depot and the transportation of the property are also ordered, and a sale, if necessary, to the amount of the freight due to the carrier. The right of the consignee to an examination before he accepts the property, is necessary, because acceptance and payment of freight extinguish all claim against the carrier. Code de Commerce, art. 105.

I have considered this question without reference to such modifications of the general principle as arise from general custom, local usage, or special contract. They afford the rule in all cases in which they occur. I have not any evidence of either of these existing here, and the rule, as I have stated it, is the general law, unaffected by such qualifications as exist in certain places or in certain cases. Supposing, then, that the quantity of coal was correctly ascertained at Philadelphia, there is a deficiency as it is now in the hands of the consignee. But the evidence shows that the loss cannot be attributed to want of care, theft, or any other cause operating while in the vessel to diminish the quantity. There was some evidence of loss happening by the transfer of coal from the vessel to the wharf, but it was too indefinite to be the basis of any conclusion; nor, indeed, was it made to bear directly upon this case. It rather seemed to furnish the explanation of the usual allowance of 2½ per cent. loss. But the loss may have happened after the delivery to the consignee. The coal was carted, after it was landed, to some distance, and then weighed. The carts were under the control of the agents of the consignee. It is quite as reasonable to infer that the loss happened while the coal was under the care of the agents of the consignee, as while it was under the charge of the carrier. If the consignee had notified the carrier of his intention to have the coal weighed by a public weigher, it would have been proper in the carrier, affected as he would have been by all that was done under such a notice, to watch the transportation of the coal, and to be present when it was weighed. But, without such notice, the carrier had no reason to suppose that the coal was to be reweighed to decide his liability, particularly when, according to the evidence of the public weigher, there is no uniformity in the practice, and that coal is often received by the consignees without this test.

The postponement of the ascertainment of the liability of the carrier, without prejudice to the consignee; and the preservation also of the rights of the carrier, are embraced in the rule that, "if a person is apprehensive of losing a right by any event, it may be advisable and necessary for him to protect himself, either by protesting against a prejudicial interpretation of the event, or by reserving his rights." Lindl. Jur. 142. And although not strictly analogous, yet the principle which by the custom of London applies to the vessel at quarantine, illustrates the preservation of the mutual rights of the carrier and consignee, although the carrier has parted with the property, and it is in the possession of the consignee. In the case of a vessel at quarantine at London, the consignee, at his own expense and risk, sends for the goods; and the packing and care of the goods in the transit to the wharf devolve upon the consignee. Chit. Carr. 265. The delivery does not determine the liability of the carrier altogether, nor will it divest his lien. But in the transportation from the only place where a delivery can be made, to the place in which an examination can be had, the risk of loss or damage is with the consignee. So in this case, the carrier has landed the coal; and at the wharf, made delivery of it to the consignee. The consignee intending to cart it elsewhere, and to weigh it, must do so at his own expense and risk. If loss or damage occurs in that transportation, the consignee must bear it.

I have sufficiently expressed the opinion, that although the mere transit was ended by delivery at the wharf, yet that acceptance there did not necessarily extinguish the liability of the carrier. The delivery must be such as enables the consignee to ascertain, if he desires, how far the contract of the carrier has been performed; it must be such as allows the consignee safely to receive and properly to examine what has been delivered. If the consignee, without notice or qualifying his acceptance, receive, as in this case, coal; commits it to his agents, in whose charge it may be lost, as well at least as while it was in the charge of the carrier; and rests the proof of loss by the carrier upon evidence which does not render it more probable that the loss was chargeable to the carrier, than to his own agents,—a case is presented in which I am not at liberty to make the carrier liable.

The decree will be entered in favor of the libellants for the freight unpaid, and the costs.

Case No. 8,734.

McCREADY v. The ROBERT I. POULSON.

[3 Hughes, 494.] [1]

Circuit Court, D. Maryland. July 5, 1879.

COLLISION—FAILURE TO SHOW LIGHTS—FAULT.

Where a vessel sailing without a light collides with another properly navigated and equipped, the fault is hers, and she must bear the loss.

[This was a libel in admiralty by James W. McCready against the schooner Robert I. Poulson.]

BOND, Circuit Judge. This cause having been heard and considered, the court doth

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

find the facts to be, that the libellant was the owner, on the 4th day of January, 1878, of the sloop Sirocco, which at that time was sailing up the Chesapeake Bay, from Mob Jack Bay to Baltimore, with a cargo of oysters. At about 2 a. m. of that day she saw approaching her the schooner Robert I. Poulson, with which she collided, and was a total loss. And the court finds that the schooner Robert I. Poulson was properly navigated and equipped, and that the sloop had no light, and that the collision was caused by that fact. And it finds the conclusion of law to be that where a collision occurs by the fault of one vessel only, it must pay all damages and bear all the loss. And it will be so decreed.

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